THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 434/2020

In the matter between:

RAPHOLO EDWIN MANYAKA **APPLICANT/APPELLANT**

and

THE STATE **RESPONDENT**

Neutral citation: *Rapholo Edwin Manyaka v The State* (434/2020) [2022] ZASCA 21 (23 February 2022)

Coram: MOCUMIE, SCHIPPERS, CARELSE and MABINDLA-BOQWANA JJA and PHATSHOANE AJA

Heard: 14 September 2021

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 of the judgment is deemed to be 09h45 on 23 February 2022.

Summary: Criminal law and procedure – condonation – special leave to appeal in terms of s 16(1)*(b)* of the Superior Courts Act 10 of 2013 – court of appeal entitled to consider new evidence in exceptional cases where circumstances have changed after conviction and sentence in terms of s 316(5) of the Criminal Procedure Act 51 of 1977.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Southwood J and Goodey AJ sitting as a court of appeal):

1 The application for condonation is granted.

2 The application for special leave to appeal is granted.

3 The application to lead further evidence is granted.

4 The appeal on sentence in respect of counts 1 and 2 is upheld.

5 The order of the Gauteng Division of the High Court, Pretoria is set aside on counts 1 and 2.

6 The matter is remitted to the magistrate to impose sentence afresh, in respect of those counts, after due compliance with the provisions of s 276A(1)*(a)* of the Criminal Procedure Act 51 of 1977.

7 A report of a probation officer and/or a correctional official, must be obtained within six weeks of delivery of this judgment.

JUDGMENT

Carelse JA (Mocumie and Mabindla-Boqwana JJA concurring):

[1] This is an application for special leave to appeal that came before this Court, some 15 years after the incident, some 13 years after the applicant was convicted and sentenced by the Pretoria Magistrate's Court, and some 11 years after his appeal against sentence was heard by the Gauteng Division of the High Court, Pretoria (full bench). This application was referred for oral argument in terms of s 17(2)*(d)* of the Superior Courts Act 10 of 2013 and, if granted, the determination of the appeal itself. A

party seeking special leave must show that special circumstances exist to warrant a further appeal.

[2] There are two further applications before this Court – an application for condonation for the long delay in bringing this application and an application to lead further evidence on appeal in terms of s 316(5) of the Criminal Procedure Act 51 of 1977 (CPA).[1] The organs of the State involved with this applicant have not filed any answering affidavits. There are accordingly no disputes of fact.

[3] The incident giving rise to the criminal charges against the applicant arise out of a motor vehicle collision that occurred on the night of 30 June 2006 on Garsfontein Road, Pretoria, when the motor vehicle driven by the applicant, who was attempting to overtake a motor vehicle, collided with a motor vehicle being driven in the opposite direction, killing its two occupants. At the time of the collision and according to the post-mortem report, the two occupants of the other motor vehicle involved in the collision were both under the influence of alcohol. At his trial the applicant faced three charges. Counts 1 and 2 were culpable homicide arising out of the death of the two occupants of the other motor vehicle that was involved in the collision. Count 3 was that of negligent or reckless driving in terms

[1] Section 316(5) of the Criminal Procedure Act 51 of 1977 (CPA) provides:
'*(a)* An application for leave to appeal under subsection (1) may be accompanied by an application to adduce further evidence (hereafter in this section referred to as an application for further evidence) relating to the prospective appeal.
(b) An application for further evidence must be supported by an affidavit stating that –
(i) further evidence which would presumably be accepted as true, is available;
(ii) if accepted the evidence could reasonably lead to a different verdict or sentence; and
(iii) there is a reasonably acceptable explanation for the failure to produce the evidence before the close of the trial.
(c) The court granting an application for further evidence must –
(i) receive that evidence and further evidence rendered necessary thereby, including evidence in rebuttal called by the prosecutor and evidence called by the court; and
(ii) record its findings or views with regard to that evidence, including the cogency and the sufficiency of the evidence, and the demeanour and credibility of any witness.'

of s 63(1) of the National Road Traffic Act 99 of 1996 (the RTA) in that the applicant had driven through a ‘red robot, overtook on solid line’. The applicant was found guilty on counts 1 and 2. On count 3 the magistrate found that the traffic light was red and that in ‘driving over a red robot (the applicant) was reckless and he is found guilty of reckless driving’.

[4] The evidence on count 3 included that of Sergeant Bekker who was on the scene. He said that the traffic light in question was 1.7 kilometres from the accident scene. Jacobus van der Walt, who also gave evidence on this issue, said that there was a set of traffic lights at the intersection of Garsfontein Road and De Villebois Road. He was travelling from west to east on Garsfontein Road. He was stationary at the traffic light which was red for him. He saw the applicant’s vehicle turning right from De Villebois Road into Garsfontein Road where he skipped the red robot just before the light became green ‘for me to drive on’. From there he drove behind the applicant from which vantage point he witnessed the accident some 80 metres further.

[5] Before sentencing the applicant, the magistrate was told of a letter written by the applicant to the parents of the deceased, in which he had expressed his remorse to them and in which he sought their forgiveness. He repeated these sentiments in evidence. The magistrate also took into account that the applicant was 20 years old when the accident happened and that he was in the second year of his tertiary education and, at the time of sentencing, the applicant had completed his tertiary education.

[6] On count 1, the applicant was sentenced to three years' imprisonment in terms of s 276(1)*(i)* of the CPA.[2] This meant that the applicant had to serve a minimum of one sixth of the sentence imposed on him before he could be considered for correctional supervision. On count 2, he was sentenced to three years' imprisonment, wholly suspended for five years on condition that he was not convicted of culpable homicide involving the driving of a motor vehicle. On count 3, he was sentenced to a fine of R20 000 – or eighteen months' imprisonment, wholly suspended for five years on condition he was not over the period, convicted of a contravention of s 63(1) of the RTA. His license was suspended for five years. And lastly, he was declared unfit to possess a firearm in terms of the Firearms Control Act 60 of 2000.

[7] The magistrate granted the applicant leave to appeal on the sentence he imposed. On 8 March 2010, the full bench, in the exercise of its powers of review, set aside the conviction and sentence on count 3 on the ground that 'there is no evidence of any reckless or negligent driving. There is no evidence that anybody's life, or property were in danger, related to the applicant '"skipping" the robot'. In other words, the applicant's act did not result in any *dolus directus* or *dolus eventualis,* meaning the skipping of the red traffic light did not endanger anyone's life or property. There was no appeal by the State against this order, as questionable as it may be. On counts 1 and 2 the full bench found that there was a misdirection in that the two counts should have been taken as one for the purpose of sentence and that there was only one incident that resulted in two deaths. In the result,

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[2] Section 276 (1)*(i)* of the CPA provides:
'(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely –
(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'

the full bench set aside the two sentences and replaced them with a sentence of four years' imprisonment in terms of s 276(1)*(b)* of the CPA, of which one year was suspended for five years on condition that during the period of suspension the applicant was not convicted of culpable homicide involving the driving of a motor vehicle. The net result of the appeal was that, instead of the applicant serving a possible one sixth of his sentence in prison, he would have to serve a three year period in prison, this being done without notice to the applicant of the full bench's intention to increase the sentence imposed. From a reading of the whole judgment, it appears that the increase in sentence was erroneous and not that which may have been intended by the court.

[8] In his affidavit in support of his applications (for condonation, to lead further evidence on appeal and special leave to appeal), the applicant stated that after the full bench delivered its judgment on 8 March 2010, he complied with a directive to hand himself over to the Voortrekker Correctional Centre (the Correctional Centre) within 48 hours. Accompanied by his brother in law, he presented himself at the Correctional Centre and was informed by an official that they were not in possession of his court records and could therefore not detain him. He was told to go home and once they were in possession of his records, they would arrange to have him transported to the correctional centre. The applicant provided his home address to the officials in this regard. The applicant stated that he remained at this address. In the six and a half years that followed this encounter, the applicant got married and at the time of the urgent application, his wife was expecting their third child. He is gainfully employed. None of this evidence is disputed.

[9] On 7 September 2016, some six and a half years later, a warrant was issued for the applicant's arrest. The State, and the relevant organs it controls has failed to explain this extraordinary delay. On 22 September 2016, having been served with the warrant, the applicant brought an urgent application in the Gauteng Division of the High Court, Pretoria (the high court) to stay the warrant pending an application to reconsider the sentence imposed by the full bench. Neukircher AJ who heard the urgent application, and on 27 September 2016 made the following order:

'34.1 The applicant is to deliver his application for reconsideration of the appeal under case number A576/2009 (or whatever process he be so advised) *within 15 days of date hereof to whoever person or court he is so advised.*

34.2 Pending finalisation of the proceedings set out in 34.1 (supra) the warrant of arrest issued by Magistrate Mncube on 7 September 2016 authorising the arrest of the applicant is stayed.

34.3. Pending finalisation of the proceedings set out in 34.1 (supra) the respondents are hereby interdicted and restrained from arresting the applicant and handing him over for the purpose of serving his sentence.

34.4 Should the provisions of paragraph 34.1 (supra) not be carried out within 15 days of date hereof; this order will lapse immediately.

34.5 Each party shall pay their own costs of this application.' (Emphasis added.)

[10] Pursuant to this order the applicant brought an application to this Court for special leave to appeal the judgment and order of the full bench. The applicant did not comply with paragraph 34.1 of Neukircher AJ's order of 27 September 2016. It is unnecessary to detail the explanation particularly because the State conceded that the applicant has good prospects of success in his appeal against the order of the full bench based on the irregularity committed by the full bench which was to increase the sentence without giving notice. For these reasons the condonation application ought to be granted.

[11] The reasons set out in paras 8 and 9 above, amount to exceptional circumstances. Accordingly, the application to lead further evidence should be granted, as well as the application for special leave to appeal to this Court.

[12] It is not disputed that the full bench misdirected itself materially by increasing the applicant's prison sentence without notice to him. (See *S v Bogaards*).[3] As a result of that, the sentence in respect of counts 1 and 2 cannot stand. For different reasons set out below, the magistrate's order on sentence in respect of these counts cannot be reinstated, as was submitted on behalf of the State.

[13] In *Jaftha v S*[4] , this Court held:

'. . . that new evidence ought to be admitted to show that the sentence imposed ten years previously is now inappropriate. Ordinarily, of course, only facts known to the court at the time of sentencing should be taken into account but the rule is not invariable. Where there are exceptional or peculiar circumstances that occur after sentence is imposed it is possible to take these factors and for a court on appeal to alter the sentence imposed originally where this is justified.'[5] (Footnotes omitted.)

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3. In *S v Bogaards* [2012] ZACC 23; 2013 (1) SACR 1 (CC), Khampepe J acknowledged that a court of appeal is empowered to set aside a sentence and impose a more severe one. She said that at common law there was no formal requirement for an appeal court to give an accused person notice when that court was considering an increased sentence on appeal. The Constitutional Court held that it was necessary to develop the common law so as to require notice to an applicant where an increase in the sentence is being contemplated by the court of its own accord. Khampepe J said the following at para 72:
'It is worth emphasising that requiring the appellate court to give the accused person notice that it is considering an increase in sentence or imposing a higher sentence upon conviction for a substituted offence, does not fetter that court's discretion to increase the sentence or to impose a substituted conviction with a higher sentence. The court may clearly do so in terms of s 22(b) of the Supreme Court Act and s 322 of the CPA. Elevating the notice practice to a requirement merely sets out the correct procedure according to which the court must ultimately exercise that discretion. The notice requirement is merely a prerequisite to the appellate court's exercise of its discretion. After notice has been given and the accused person has had an opportunity to give pointed submissions on the potential increase or the imposition of a higher sentence upon conviction of another offence, the appellate court is entitled to increase the sentence or impose a higher sentence if it determines that this is what justice requires.'
See also *S v De Beer* [2017] ZASCA 183; 2018 (1) SACR 229 (SCA).
4 *Jaftha v S* [2009] ZASCA 117; 2010 (1) SACR 136 (SCA) (*Jaftha*) para 15.
5 *S v Karolia* [2004] ZASCA 49; 2006 (2) SACR 75 (SCA) para 36.

The new evidence that the applicant requests this Court to consider is not disputed.

[14] In what follows, I will have regard to the material facts known to the trial court when sentence was imposed on 2 December 2008 and the undisputed additional facts that the applicant has placed before this Court some 13 years later. On 30 June 2006 when the applicant negligently caused the deaths of the deceased, he was 20 years old, which is relatively young. He had no previous convictions and was in his second year of his tertiary education. Prior to him being sentenced, he had written to the families of the deceased to express his remorse and to seek their forgiveness for what had happened.

[15] The applicant is not the cause of the inordinate delay that followed since the collision on the night of 30 June 2006. Over the intervening 15 years, the applicant who is now a 35 year old adult, has married. In September 2016 his wife was expecting their third child. He is currently gainfully employed. There is nothing to rebut the fact that over the 15 years the applicant has led a socially responsible and crime free life. As a licensed driver there is nothing to suggest that some 15 years on in his life, his driver's license should be suspended. However, this remains a serious offence. It is without doubt that the applicant cannot go unpunished. I agree with the magistrate that direct imprisonment was the appropriate sentence at the time, but due to the special circumstances of this case, which I have outlined above, I am of the view that correctional supervision will be most appropriate.

[16] Correctional supervision takes into account the seriousness of the offence committed, the interests of society, particularly those of the two families as part of society at large. It incorporates principles of restorative justice which are based on the rehabilitation of an offender outside of prison. This is to ameliorate the harshness of direct imprisonment in circumstances presented to this Court, after a very long delay in implementing the order of committal. The delay cannot be attributed to the conduct of the applicant but to the relevant government department officials. It takes into account the personal circumstances of the applicant which came into existence after this long delay.

[17] It has been stated over and over again in a number of cases[6] that sentences of correctional supervision in terms of s 276(1)*(h)* of the CPA[7] are not foreign to the offence of culpable homicide committed while driving a motor vehicle, that led to devastating consequences. ***S v Naicker***[8], a case of culpable homicide involved a 30 year old appellant who was a first offender and in regular employment at the time of the commission of the offence, and whose parents depended on him for support; in this case it was found that the circumstances were appropriate for a fresh sentence of correctional supervision to be considered. Referring to the decision of *R v Swanepoel*,[9] the Court held:

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[6] *S v Naicker* [1996] ZASCA 138; [1997] 1 All SA 5 (A)*; S v Omar* 1993(2) SACR 5 (C). *R v Swanepoel* 1945 AD 444 at 448. *S v R* 1993 (1) SA 476 (A) at 480F-J. See also *S v Kruger* 1995 (1) SACR 27 (A) at 31b-f.

[7] Section 276(1) of the Criminal Procedure Act 51 of 1977 provides that: (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed on a person convicted of an offence namely

(a) . . .

. . .

(h) correctional supervision;

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.'

[8] Footnote 7 paras 3 -14.

[9] Footnote 7 para 15.

'In reaching the conclusion that the appellant's conduct did not warrant a sentence of imprisonment I have not overlooked the fact that a death and serious injury resulted from the appellant's negligence.'

[18] In the present case it is the changed circumstances that warrant a reconsideration of the sentence imposed. Reference to case law is simply to illustrate a point that the imposition of correctional supervision has been considered in cases of culpable homicide, where appropriate. The advantages of correctional supervision have been mentioned in a number of cases, in particular *S v R*[10] where the court stated:

'. . . As to the suitability of a sentence of correctional supervision: Professor Louis P Carney (Adjunct Professor of Sociology, Chapman College, Orange County, California) writes as follows:

"No one can dispute the need for strict justice, nor can anyone with a modicum of reason challenge the premise the society must show its disapproval of criminal behaviour by criminal sanction. But when punishment is taken to an inflexible extreme, or when a reconstructive purpose is denied because of the punishment philosophy, then criticism is warranted. Criminal justice thinking has been distressingly preoccupied with the belief that treatment and punishment are polar opposites, and never the twain shall meet. They are, on the contrary, inseparable. The necessity of punishment equally affirms the necessity of redemption. We punish for several different reasons, but essentially to impel an offender towards a more appropriate norm of behaviour. Inflexibly brutal punishment is not consonant with restoration of the individual. A balanced correctional philosophy recognises that some criminal behaviour is so outrageous or so persistent as to be beyond positive influence at a given time. Protracted incarceration of this type of offender may be in order. But most offenders should be quickly decarcerated to offset the inimical prison experience and dealt with in the community".'

[19] Correctional supervision can be imposed with appropriate conditions to constitute a suitably severe sentence.[11] It allows a person to serve a non-custodial sentence, promotes the integration of a person back

[10] Footnote 7.
[11] *S v Ingram* 1995 (1) SACR 1 (A) at 9E-F.

into the community and has rehabilitative benefits.[12] The exceptional circumstances of this case and the favourable personable circumstances of the applicant would render correctional supervision appropriate, if the applicant is found to be a suitable candidate. And albeit distinguishable from *Jaftha*, it falls within that category of exceptional circumstances envisaged in s 316(5) of the CPA and in a long line of cases that followed *Jaftha*, namely that new circumstances that were presented long after the imposition of sentence, were considered by this Court and a different sentence to that imposed by the court of first instance, and the full court was imposed.

[20] Section 276(1)*(i)* of the CPA[13] is also an alternative sentencing option which must also be weighed. A sentence of direct imprisonment under s 276(1)*(i)* of the CPA (in the discretion of the Commissioner of Correctional Services) may have been appropriate 13 years ago when the applicant was initially sentenced. A sentence of direct imprisonment under s 276(1)*(i)* (in the discretion of the Commissioner of Correctional Services) would mean that the applicant would have to serve a term of direct imprisonment when other appropriate sentences are available for his peculiar circumstances. Suffice to state that to imprison the applicant at this stage, even for a sixth of the three years' imprisonment, as Schippers JA proposes, will not (after this long delay) be in the interests of justice.

[21] The long delay in bringing finality to the matter and not knowing when the officials would come has hung like a sword over the applicant's head. Imprisonment at this time would result only in retribution, which is

[12] Section 50(1)*(a)* of the Correctional Services Act 111 of 1998.
[13] Footnote 8.

not in the interests of justice. In reaching this conclusion, I have not overlooked the fact that two young men have died as a result of the applicant's conduct; it is unfortunate that intervening circumstances which cannot be ignored have arisen in this case, through no fault of the applicant.

[22] In conclusion, the Department of Correctional Services, which is responsible for implementing correctional supervision, did not file a report as required under s 276(1)*(h)* of the CPA which, in my view, is the most appropriate sentence. Without a report from a probation officer or a correctional official, this Court would not be in a position to impose a sentence under section 276(1)(*h*) of the CPA. However, in line with the approach adopted in *S v Ningi*[14] as well as the exceptional circumstances in this case, it is appropriate to remit the matter to the magistrate to obtain a pre-sentence report and consider imposing a sentence afresh, under s 276(1)*(h)* of the CPA.

[23] This approach was recently reaffirmed by this Court in *S v Botha*[15] as follows:

'In *S v Samuels* the following was stated: 'Sentencing courts must differentiate between those offenders who ought to be removed from society and those who, although deserving of punishment, should not be removed. With appropriate conditions, correctional supervision can be made a suitably severe punishment, even for persons convicted of serious offences'. The appellant certainly does not fall within the category of persons who need to be removed from society. . . . I am of the view, in all the circumstances, that consideration should be given to the imposition of a sentence under s 276(1)(*h*). Since the provisions of s 276A(1)(*a*) of the CPA must be complied with

[14] *S v Ningi* 2000 (2) SACR 511 (A) para 9.
[15] *Botha v S* (901/2016) [2017] ZASCA 148 para 46.

before consideration of such a sentence can take place, it is necessary to remit the matter to the court a quo to comply with these provisions and to consider the sentence afresh.'

[24] In the result the following order issues:

1 The application for condonation is granted.

2 The application for special leave to appeal is granted.

3 The application to lead further evidence is granted.

4 The appeal on sentence in respect of counts 1and 2 is upheld.

5 The order of the Gauteng Division of the High Court, Pretoria is set aside on counts 1 and 2.

6 The matter is remitted to the magistrate to impose sentence afresh, in respect of those counts, after due compliance with the provisions of s 276A(1)*(a)* of the Criminal Procedure Act 51 of 1977.

7 A report of a probation officer and/or a correctional official, must be obtained within six weeks of delivery of this judgment.

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JUDGE OF APPEAL

Z CARELSE

Schippers JA (Phatshoane AJA concurring)

[25] I have had the benefit of reading the majority judgment by my colleague, Carelse JA. I am in respectful disagreement with the conclusions reached and the order issued, for the reasons that follow. There are essentially two issues in this application for leave to appeal against sentence only, referred for oral argument before us in terms of s 17(2)*(d)*

of the Superior Courts Act 10 of 2013. The first is whether the applicant has demonstrated the existence of exceptional circumstances justifying the admission in evidence of facts which arose after his conviction and sentence on two counts of culpable homicide. The second is whether the sentence for these crimes imposed by the North Gauteng Division of the High Court, Pretoria (the high court), namely four years' imprisonment of which one year was conditionally suspended for five years, is appropriate in the circumstances.

[26] The facts are uncontroversial. The applicant was tried in the Pretoria Magistrate's Court on two counts of culpable homicide and one count of reckless driving, arising from a collision which occurred on 30 June 2006 in Garsfontein Road, Pretoria. Two State witnesses, Mr and Mrs van der Walt, who were in a vehicle travelling behind a blue Polo vehicle (driven by the applicant) testified that even before the collision occurred, the Polo was being driven recklessly. It had jumped a red traffic light. Mr van der Walt reduced his speed so as to maintain a safe distance behind the Polo. Shortly thereafter the Polo overtook a vehicle in its path, causing a collision with an oncoming Opel Corsa vehicle in the lane in which the Corsa had been travelling. The Corsa landed on its roof, off the road in a veld and its occupants were flung from the vehicle. Both died as a result of the collision.

[27] The applicant's version throughout was that he was not responsible for the collision and that it had occurred in his lane of travel when the driver of the Corsa had overtaken a vehicle in the Corsa's path. This, despite the fact that the applicant had informed a police officer who attended the scene that he had overtaken a vehicle when the collision occurred. The magistrate rejected the applicant's version as 'a blatant lie'. The applicant protested

his innocence till the very end – even after his conviction and during the sentencing phase of the trial.

[28] Ms Vanessa Naidoo, a probation officer called as a witness by the defence, testified about the applicant's refusal to accept responsibility for the collision, and his lack of empathy and remorse. She said:

'Despite the Court's rulings that the accused was found guilty of reckless driving, he continues to dispute this by affirming his innocence. It is difficult therefore to accept that he is truly remorseful for his actions. In the past two years it is shocking that he has not even offered his condolences to the two families. After the accident, he stood aside from the scene with his passenger, and did not even render assistance for his later victims. This again is an indication of his lack of empathy, and compassion. In the last two years he has not even confided in his family about the fatal incident, and this remains an area of concern in the case of the accused. Had he shown remorse and repentance, his family would have been aware of his present circumstances. His family would have undoubtedly supported the deceased's family during their bereavement. The offence of reckless driving is an extremely serious offence, and is even more serious than negligent driving although being a licensed driver his lack of remorse in the present case makes him a further danger on the roads as he has limited insight into the severity of his actions.'

[29] On 2 December 2008 the applicant was sentenced on the first count of culpable homicide to three years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977;[16] and on the second, to three years' imprisonment wholly suspended for a period of five years, on certain conditions. He was also convicted of reckless driving and sentenced to fine of R20 000 or 18 months' imprisonment, conditionally suspended for a

[16] Section 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 provides that the following sentence may be imposed on a person convicted of an offence, namely 'imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board'.

period of five years. He was granted leave to appeal against conviction and sentence.

[30] On 8 March 2010 the high court (Southwood J and Goodey AJ) set aside the conviction and sentence on the charge of reckless driving, purportedly in the exercise of its review powers: the judgment erroneously states that what was before it was an appeal against sentence only. Nothing however turns on this, as only the sentence is before us in this application for leave to appeal. The convictions of culpable homicide were taken together for the purpose of sentence and the high court sentenced the applicant to four years' imprisonment of which one year was suspended for a period of five years on condition that he was not convicted of culpable homicide involving the driving of a motor vehicle. The high court increased the sentence without giving notice to the applicant of its intention to do so.

[31] The applicant did not appeal the sentence imposed by the high court. On 10 March 2010 he reported to the Department of Correctional Services (the Department) to serve his sentence. Officials of the Department however informed the applicant that they were not in possession of the documents relating to his sentence and therefore could not detain him. Instead of immediately making the necessary enquiries and taking steps to obtain the documents, they inexplicably told the appellant to return home and advised him that officials of the Department would fetch him when they were in possession of the necessary documents.

[32] What happened next between March 2010 and September 2016 can only be described as a major blunder by the Department. For more than six years it made no attempt to ensure that the sentence imposed on the

applicant was carried out. Worse, there was no explanation by the Department or any government official for the delay. This, despite the fact that the Minister of Justice and Correctional Services as well as the Head of Correctional Services were joined as parties in the proceedings in the high court before Neukircher AJ.

[33] On 7 September 2016 the applicant was instructed to report to the Voortrekker Correctional Centre to serve his sentence. On 27 September 2016 he obtained an order from the high court (Neukircher AJ) staying the warrant issued for his arrest and directing him to 'deliver his application for reconsideration of the appeal' within 15 days of the date of the order, failing which the order would lapse immediately. The applicant failed to take any steps to lodge an application for special leave to appeal and the order lapsed.

[34] Thereafter, the conduct of the applicant and his attorney in launching the application for special leave was characterised by slackness and sloppiness. It is unnecessary to outline the entire chronology. Suffice it to say that there were long periods of delay that were not explained adequately, or at all. It is trite that an applicant must give a full and reasonable explanation for the delay which must cover the entire period of delay.[17] In his heads of argument the applicant submitted that after the judgment by Neukircher AJ he had immediately set in motion an application for special leave to appeal to this Court.

[35] That is not so. It had taken the applicant from 27 September 2016 to 30 May 2018 – a year and eight months – to prepare an application for

[17] *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 22.

leave to appeal. The explanation for this long delay was hopelessly inadequate. Even then, the application was defective and was eventually filed on 6 May 2019 – a year later, with no application for condonation for the late filing of the application for leave to appeal, and no explanation for the further delay. On 3 June 2019 the registrar of this Court had to inform the applicant's attorney to file a condonation application. In effect then, it had taken the applicant from 27 September 2016 to 6 May 2019 – nearly two years and eight months – to file his application for leave to appeal. An application for the late filing of his heads of argument was brought only on 25 January 2021. His application to adduce further evidence on appeal was brought in August 2021.

[36] What all of this shows is that the applicant and his attorneys are solely responsible for any delay after the granting of the order by Neukircher AJ on 27 September 2016 and August 2021 – almost five years. I have no doubt that but for the gross irregularity in increasing the applicant's sentence without notice to him,[18] condonation of the late filing of the application for leave to appeal would have been inappropriate.

[37] The evidence concerning events after the imposition of sentence which the applicant seeks to admit on appeal, which he says, constitute exceptional circumstances, is essentially the following. A period of 11 years has passed since the imposition of his sentence by the high court. In that time, the applicant got married in May 2012. He has two children aged 11 and 8 respectively, and in September 2016 his wife was expecting their third child. He is gainfully employed. The applicant contends that sending him to prison would have no effect on his rehabilitation because the facts

[18] Footnote 3.

show that he has 'rehabilitated himself' and has become a useful member of society. He is not responsible for the six-year delay in not serving his sentence.

[38] Whether facts coming into existence after the conclusion of a trial should be admitted in evidence is governed by principle. In *S v Verster*[19] it was held that when deciding an appeal, a court determines whether the judgment appealed is right or wrong according to the facts in existence at the time it is delivered, and not according to new circumstances which came into existence afterwards. This principle has consistently been followed by this Court.[20] It is however not inflexible: in exceptional circumstances a court will take into account facts which have arisen after the trial to ensure that justice is done.[21]

[39] The courts have been reluctant to lay down a general definition of the phrase 'exceptional circumstances' as each case must be decided on its own facts. What is clear from the cases however is that what is typically contemplated by the words 'exceptional circumstances' is something out of the ordinary, markedly unusual, rare or different, and to which the general rule does not apply.[22]

[40] Applied to the present case, there is nothing extraordinary or markedly unusual about the appellant's personal circumstances. Had he, for example, been called upon to serve his sentence after one or two years of reporting to the Department instead of six years, he could hardly have

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[19] *S v Verster* at 236A-D.
[20] Footnote 6. See in this regard *Karolia* and the authorities cited in para 49.
[21] Ibid paras 50-51, followed in *Jaftha*.
[22] *MV Ais Mamas Seatrans Maritime v Owners MV Ais Mamas and Another* 2002 (6) SA 150 (C) at 156I-157C, affirmed by this Court in *Avnit v First Rand Bank Ltd* [2014] ZASCA 132 para 2 and by the Constitutional Court in *S v Liesching and Others* [2018] ZACC 25; 2019 (1) SACR 178 (CC) para 133.

argued that he should not be sent to prison because in the interim he got married, had children and was gainfully employed. These personal circumstances, which came into existence after he was sentenced, on the facts of this case, are irrelevant – they cannot become relevant by the effluxion of time.

[41] What remains is the long period of delay of some 13 years between the date of the imposition of sentence – December 2008 – and the hearing of the application for special leave to appeal. As already stated, the entire period of delay cannot be laid at the door of the Department. As indicated above, the applicant and his attorneys are solely responsible for any delay after the granting of the order by Neukircher AJ in September 2016 and the date of his application for leave to adduce further evidence on appeal in August 2021 – almost five years.

[42] Concerning the delay by the Department in calling upon the applicant to serve his sentence, in my opinion *Malgas v S*,[23] decided by this Court, provides a complete answer. The appellants were found guilty of theft and housebreaking with intent to steal and theft in the regional court, Beaufort West. In March 2003 they were sentenced to lengthy terms of imprisonment. All of them had been granted bail pending the hearing of their appeals against conviction and sentence in the Western Cape High Court, Cape Town (the Cape High Court). The appeals were heard more than eight years later in June 2011. All the appellants' appeals against conviction were dismissed and certain of the appeals against sentence succeeded. Subsequently, they were granted leave to appeal to this Court only against sentence.

[23] *Malgas v S* [2013] ZASCA 90, 2013 (2) SACR 343 (SCA).

[43] It was common cause that there was only one ground to be considered on appeal by this Court: whether the eight-year delay from the imposition of sentence by the magistrate to the hearing of the appeal in the Cape High Court, in and of itself justified a lighter sentence.[24]

[44] I can do no better than quote this Court's conclusions:

'There can be no automatic alleviation of sentence merely because of the long interval of time between the imposition of sentence and the hearing of the appeal for those persons fortunate enough to have been granted bail pending the appeal. . . . Although from time to time the long delay between the passing of a custodial sentence and the hearing of an appeal may justify interference with that sentence, it is only in truly exceptional circumstances that this should occur. Each case must be decided on its own facts.

The appellants have adopted a supine attitude to the hearing of their appeal. Their attitude to this case throughout has been to adopt the attitude of a nightjar in the veld: do as little as possible, hope that nobody will notice and expect that the problem will go away. Fortunately for the administration of justice, the appellants do not enjoy a nightjar's camouflage. They may have been hidden but they have not been invisible.

It will be hard on the appellants and their families that, ten years after their sentencing by the magistrate, they should now have to report to jail to commence serving their sentences. We have anxiously reflected upon the needs of justice in this case, including the requirement that this court should show mercy to and compassion for our fellow human beings. Having done so, the conclusion remains inescapable that, if this court were to regard this case as yet another "exception", it would undermine the administration of justice. The appellants are to blame for the long delay in bringing this matter to finality. The predicament in which the appellants find themselves is largely of their own making.'[25]

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[24] Ibid para 17.
[25] Ibid paras 20-22.

[45] The applicant's position is no different. While the Department is to be blamed for its conduct in the matter, the mere passage of time between the imposition of sentence, the notice to him to start serving his sentence and the hearing of this application – for which the Department and the applicant are both responsible – does not, and cannot, automatically lighten his sentence. Neither does it constitute an exceptional circumstance. At all times the applicant knew that he had been convicted of two counts of culpable homicide and that he had to serve his sentence. He adopted an indifferent and a supine attitude to his conviction and sentence: he did nothing after reporting to serve his sentence for some six years, made no enquiry about it, carried on with his life as if he had never been sentenced, and hoped that the problem would go away.

[46] What is worse, unlike the appellants in *Malgas* whose crimes involved the violation of rights to property, the applicant's crimes had devastating impacts on two families and changed their lives forever. In this regard the evidence before the trial court was the following:

'The deceased, Jakobus Johannes Opperman was the oldest sibling of two younger brothers. He was 24 years old at the time of his death. According to the family, he was completing his internship with a separate company, and was about to enter into a business partnership as financial director of "Danross Highlands", . . . their family business. He, and his friend, Mr Bezuidenhout [were] travelling to a braaivleis when the fatal accident took place. Attempts to reach the Bezuidenhout family have been unsuccessful. It is believed that the mother of the deceased is very ill at this stage, and is a pensioner . . . This is Mrs Opperman's version of her experience.

"She has been on medication since the offence to assist her [to] cope and continues to receive weekly therapy from her counsellor. She has been unable to fulfil her role as educator effectively due to her emotional state, and was booked off for [12] months in the past two years. … She is visibly disturbed by the offence, . . . and she maintains that the hardest part for her to deal with is to face the accused in Court each time for the past two years".'

[47] In this regard, the conclusion by the Constitutional Court in *Mthembu*[26] is apposite:

'A delay in the execution of the sentence not only affects the accused, but also affects the victims of crimes and undermines the credibility of the criminal justice system. It is imperative that once a sentence is imposed it must be executed as soon as reasonably possible and the court order must be complied with promptly.'

[48] The applicant is not unintelligent. At the time of the trial, he was 22 years old and in his final year of university studies. It is beyond question that had he made enquiries or taken any steps to carry out his sentence, there would have been no delay and he would not be in the position in which he now finds himself. It is this apathetic and supine attitude by the applicant that distinguishes his case from *Jaftha*. There, the appellant's explanation for a ten-year period of delay between conviction and sentence and the lodging of his appeal, was that he had moved from his place of residence and had not heard from his attorney after the appeal had been lodged. He assumed that the appeal had succeeded and that he was a free man.[27]

[49] It is clear from *Mthembu* that the applicant was under a duty to make enquiries at the Department in order to serve his sentence after he had been sent home and told that the Department would contact him. Mr Mthembu was sentenced to 15 years' imprisonment for armed robbery and illegal possession of fire arms and ammunition. Whilst out on bail in 2003, he petitioned this Court for leave to appeal against his conviction and sentence. It was refused. He was then required to report to the clerk of the court in Vereeniging to serve his sentence. He failed to do so. He was

[26] *Mthembu v S* [2010] ZACC 8; 2010 (1) SACR 619 (CC) para 8.
[27] Footnote 4 para 17.

apprehended at his home six years later in 2009 and only then started serving his sentence. Mr Mthembu applied for leave to appeal to the Constitutional Court, alleging that his arrest after more than six years infringed his right to freedom and security of the person under the Constitution. He contended that he could not at the age of 60 be expected to serve his sentence and that he should receive a wholly suspended or non-custodial sentence.

[50] The Constitutional Court rejected this contention. It refused leave to appeal and said:

'Convicted persons out on bail pending appeal or application for leave to appeal are under an obligation to ascertain the outcome of the appeal processes and to present themselves to serve their sentences if the appeal processes fail. This obligation in fact formed part of the applicant's bail conditions. The applicant was legally represented throughout those processes. He is an educated person who held a senior position as a director of a prominent football club. His allegation that for six years he was unaware of the outcome of the application for leave to appeal, despite repeated efforts to ascertain the outcome cannot be accepted.'[28]

[51] For these reasons, the applicant has simply not made out a case of exceptional circumstances for the admission of the further evidence on appeal. It is not in the interests of justice that it be admitted.

[52] I come now to the sentence. The applicant was not given an opportunity to make submissions concerning the increase of his sentence and the high court's order must be set aside. Before us, counsel on both sides agreed that the matter should not be remitted to the high court and that this Court should determine an appropriate sentence.

[28] Footnote 27 para 4.

[53] Senior counsel representing the applicant made the following submissions. The finding by Neukircher AJ that the delay in the applicant serving his sentence was not as a result of his actions but those of the State, 'should receive this Court's imprimatur'. The constitutional right to a fair trial which includes the right to have a trial begin and conclude without unreasonable delay, should be interpreted as encompassing a right 'that the applicant serves his sentence as soon as possible'. A sentence of incarceration is inappropriate because the applicant has rehabilitated himself and become a useful member of society.

[54] These submissions can be dealt with shortly. They have no merit. To uphold the finding by Neukircher AJ would be inconsistent with the principles laid down in *Mthembu* and *Malgas*. The right to a fair trial enshrined in s 35(3)*(d)* of the Constitution does not include any right that an accused person must serve his sentence as soon as possible.[29] If the applicant truly has become a useful or responsible member of society, he would have taken steps to serve his sentence.

[55] The truth, as Ms Naidoo testified at the trial, is that the applicant has not accepted responsibility for the collision. He has shown no remorse. He lacks empathy and compassion, and has limited insight into the severity of his actions. On the facts, the inference is inescapable that this attitude on the part of the applicant has not changed. His focus is solely on himself, his family and his future: the interests of society and the plight of his victims do not matter. It is disturbing that in all his affidavits filed in this Court, there is not a single reference to the nature and seriousness of the

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[29] Section 35(3)*(d)* of the Constitution provides:
'Every accused person has a right to a fair trial, which includes the right –
. . .
(d) to have their trial begin and conclude without unreasonable delay.'

crimes of which he has been convicted, let alone an appreciation by the applicant of their gravity. Likewise, there is nothing in the affidavits showing that he has accepted responsibility for his crimes, and no hint of any acknowledgment by the applicant of the trauma and pain caused to the families of the victims. He addressed a letter of apology to them only two years after the incident, and then during the sentencing phase of the proceedings.

[56] In these circumstances the submission that the applicant has rehabilitated himself, rings hollow. The cases make it clear that an accused must take the court fully into his confidence in order for the court to assess the sincerity of his penitence and remorse.[30] Genuine contrition comes only from an appreciation and acknowledgement of the extent of one's error.[31]

[57] It is trite that sentencing is pre-eminently a matter for the discretion of the trial court and that an appellate court should only alter a sentence if that discretion has not been judicially and properly exercised, namely where the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate.[32]

[58] As this Court said in *S v Holder*,[33] an appropriate sentence is one based on a balanced consideration of the factors which a court is required to take into account in the imposition of sentence. A sentence which is too light is as wrong as one that is too severe.[34] The balancing exercise carried out by the trial court in relation to the seriousness of the crime, the interests

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[30] *S v Seegers* 1970 (2) SA 506 (A) at 512G-H; *S v Morris* 1972 (2) SA 617 (A) at 620H-621A.
[31] *S v Matyityi* [2010] ZASCA 127; 2011 (1) SACR 40 (SCA) para 13.
[32] *S v Rabie* 1975 (4) SA 855 (A) at 857 D-E; *Moswathupa v S* [2011] ZASCA 172; 2012 (1) SACR 259 (SCA) para 4.
[33] *S v Holder* 1979 (2) SA 70 (A) at 75A.
[34] Ibid 32 at 80D-E.

of society and the applicant's personal circumstances, as well as its consideration of various sentencing options, cannot be faulted.

[59] In the light of the above I would make the following order:

1 The application for condonation is granted.

2 The application for special leave to appeal is granted.

3 The application to adduce further evidence on appeal is dismissed.

4 The order of the Gauteng Division of the High Court, Pretoria, is set aside and replaced by the following:

'1 The appeal is dismissed.

2 The registrar of this Court is directed to forward a copy of this judgment to the Head of the Department of Justice and the Head of the Department of Correctional Services, Pretoria, for their investigation as to why it took six years for an instruction to be given to the appellant to report to the relevant authority in order to serve his sentence.'

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A SCHIPPERS

JUDGE OF APPEAL

Mocumie JA (Mabindla-Boqwana JA concurring)

[60] I have read both judgments of my colleagues Carelse and Schippers JJA. There are a few aspects which need clarification if not amplification. In para 36 of Schippers JA's judgment he notes that: '[w]hat all of this shows is that the applicant and his attorneys are solely responsible for any delay after the granting of the order by Neukircher AJ on 27 September 2016 and August 2021 – almost five years.' This is factually incorrect. As

the record reflects, there was a long delay in trying to acquire the judgment of the full bench - those facts are in the file. That is why, before this Court, the State accepted that the applicant filed an application for rescission against the full bench's judgment and order some 16 days later, instead of 15 days. Thus, in truth, as the State correctly accepted, the applicant was late by one day.

[61] Under para 42 Schippers JA notes furthermore that '[c]oncerning the delay by the Department in calling upon the applicant to serve his sentence, in my opinion *Malgas v S*, decided by this Court, provides a complete answer…' This judgment although correct in principle is not the answer to the issue before this Court but an answer to the general principle on sentencing. In *Malgas* as Schippers JA correctly summarises, it is clear that those facts were based on a totally different offence but serious on its own ie breaking into a police station. On those facts, a concession was made by the defence that the accused adopted a supine attitude to prosecute the appeal. The accused was a police officer. There was no application to adduce further evidence. The only submission made in respect of a lighter sentence in *Malgas* was the long delay. On the other hand, in the present matter, there were substantial facts. The fact that for the past fifteen years the applicant committed no other offence, is pivotal. That he was a young university student who caused an accident by his negligent driving is also a factor to be considered.

[62] In para 47 Schippers JA makes reference to *S v Mthembu*. The facts between that case and the present one are also not the same. As he correctly notes, the offences committed in *Mthembu* were armed robbery and illegal possession of firearms. There, the applicant was convicted and out on bail pending appeal; he was under an obligation to ascertain the outcome of the

appeal. The facts before this Court are different. The applicant presented himself to the correctional centre immediately after the order of the full bench. In that sense, he complied with the court order. The State, namely the National Prosecuting Authority and Correctional Services, have provided no explanation for this 'blunder'. A blunder by government officials without any attempt to investigate such and to then accuse the applicant of deliberately trying to avoid prison is clearly unfair.

[63] In para 48 Schippers JA states that '[i]t is this apathetic and supine attitude by the applicant that distinguishes his case from *Jaftha*. There, the applicant's explanation for a ten-year period of delay between conviction and sentence and the lodging of his appeal, was that he had moved from his place of residence and had not heard from his attorney after the appeal had been lodged. He assumed that the appeal had succeeded and that he was a free man.' As it is clear from the facts before this Court, the applicant did not move houses. He stayed in the same house with the same address he had provided to the officials at the correctional centre. That must count in his favour. It cannot be described, with the wisdom of hindsight as exhibiting a 'supine attitude.' The worst description can be that he trusted that government officials will do as they undertook to do.

[64] In para 51 Schippers JA comes to the conclusion that 'the applicant has simply not made out a case of exceptional circumstances for the admission of the further evidence on appeal. It is not in the interests of justice that it be admitted'. However, immediately thereafter the very evidence that is found wanting is considered. In my view, the approach is erroneous. Once the conclusion is reached that the evidence does not amount to exceptional circumstances, as a matter of principle that should

be the end of the enquiry. The application for leave to appeal should and ought to be dismissed on that basis.

[65] There is no doubt that there is a need to reflect on the concerns of the community about the rate of fatal collisions on the roads, including undue leniency in punishing drivers who are negligent or reckless in whatever sentence a court deems appropriate, particularly in aggravating circumstances. In *S v Nyathi*[35] this Court emphasised that, before a court can find an accused has been guilty of such a high degree of negligence as to merit imprisonment, it must first carefully assess the evidence and arrive at an accurate conclusion as to what occurred. *Coopers Motor Law: Hoctor, Juta*[36] states that, for an accused to be under the influence of intoxicating liquor at the time of the collision is regarded by the courts as an aggravating circumstance. However, there must be proof of impairment before intoxication is regarded as a factor causing death. On the facts before us, there was no such evidence.

[66] On the gravity of the problem of death arising out of serious misconduct on the roads, this Court, in *Nyathi* after careful discussion of the case law, provided a useful indication of the pertinent sentencing factors which apply to the situation before us and similar cases. It held that although a court imposing sentence in cases of culpable homicide must emphasise the sanctity of human life, it must remember that the magnitude of the tragedy resulting from negligence should never be allowed to obscure the true nature of the accused's crime or culpability.

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[35] *S v Nyathi* 2005 (2) SACR 273 (SCA) paras 14-22.
[36] *Coopers Motor Law: Hoctor, Juta* at C1-12.

[67] The sentence of correctional supervision in terms of s 276(1)(*h*) of the CPA is the most appropriate in the prevailing circumstances. As Carelse JA holds, to imprison the applicant at this stage even for a sixth of the three years' imprisonment which Schippers JA proposes will not (after this long delay) be in the interest of justice, given the peculiar circumstances of this case. This is so because, despite the probation officer, Ms Naidoo's reservations about the applicant's rehabilitation chances and the applicant's refusal to accept his guilt at pre-trial proceedings, she states in her report referred to by Schippers JA, that 'direct imprisonment is viewed as too punitive and it will be as overemphasizing the needs of society and the nature of the offence at the expense of the accused's personal circumstances.'

[68] She said 'restorative justice framework encompasses all the elements of correctional supervision: rehabilitation, prevention, retribution and deterrence.' She accepted that the applicant was sorry for what he had done. This is contrary to her final view that he showed no remorse and was (without any substantiation) manipulative. She also accepted that he was a first offender, at a tertiary institution, about to complete his degree and as a young person at that stage, correctional supervision may serve the desired effect as it is punitive. This, notwithstanding Ms Naidoo's perception that the applicant did not accept responsibility for his actions, and that the parents of the deceased wanted him to go to prison for what he had done. Her report is contradicted by the gesture shown by the applicant when he wrote letters to the families of the deceased that Carelse JA referred to in her judgment. It must also be remembered that the report was compiled prior to sentencing by the trial court some 13 years ago and does not contain the prevailing circumstances that necessitated the special

application for leave to appeal. The value given to it must be seen in that context.

[69] In conclusion, the Constitutional Court re-affirmed the suitability of correctional supervision as an appropriate sentencing option in *S v M*[37] as follows:

'Correctional supervision is a multifaceted approach to sentencing comprising elements of rehabilitation, reparation and restorative justice. The South African Law Commission (SALC) has underlined the importance of correctional supervision, observing:

"There is increasing recognition that community sentences, of which reparation and service to others are prominent components, form part of an African tradition [('Ubuntu')] and can be invoked in a unique modern form to deal with many crimes that are currently sanctioned by expensive and unproductive terms of imprisonment."' (Footnotes omitted.)

This unique modern form is encompassed in restorative justice which is premised on correctional supervision.

[70] For these additional reasons, I would agree with the order proposed by Carelse JA.

BC MOCUMIE
JUDGE OF APPEAL

[37] *S v M* [2007] ZACC 18; 2008 (3) SA 232 (CC) para 59.

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