



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

**Not Reportable**

Case No: 1120/2020

In the matter between:

**THEMBINKOSI MEKUTO**

**APPLICANT**

and

**THE STATE**

**RESPONDENT**

**Neutral Citation:** *Thembinkosi Mekuto v The State* (1120/2020) [2022] ZASCA 86 (08 June 2022)

**Coram:** MOLEMELA, GORVEN and HUGHES JJA and TSOKA and MUSI AJJA

**Heard:** This matter was finalised without oral argument in terms of s 19(a) of the Superior Courts Act 10 of 2013

**Delivered:** 08 June 2022

**Summary:** Criminal law and procedure – reconsideration of an order refusing leave by two judges of the SCA – whether the court below and the two SCA judges, ought to have granted leave or not – applicant showed special circumstances only in respect of the attempted murder charge – sentence of 15 years’ imprisonment imposed for attempted murder set aside and replaced with 10 years’ imprisonment.

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**ORDER**

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**On appeal from:** Western Cape Division of the High Court, Cape Town (Davis, Goliath and Henney JJ, sitting as court of appeal):

1. The application for condonation of the late filing of the application for reconsideration in terms of s 17(2)(f) of the Superior Courts Act is granted.
2. The application for reconsideration is granted in respect of the sentence imposed on count 3, and the order of the two judges of the SCA refusing leave to appeal is varied and replaced with one granting the applicant leave to appeal on that aspect.
3. Save for paragraph 2 hereof, the application for reconsideration is dismissed.
4. The appeal in respect of the sentence imposed on count 3 is upheld and the order of the full court is set aside and replaced with the following:

(a) The appeal against the sentence imposed in respect of count three, attempted murder, is upheld.

(b) The sentence imposed by the trial court in respect of count three, attempted murder, is set aside and replaced with the following:

'The accused is sentenced to 10 years' imprisonment; this sentence is antedated to 15 December 2010.'

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## JUDGMENT

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### **Molemela JA (Gorven and Hughes JJA and Tsoka and Musi AJJA concurring)**

[1] Mr Thembinkosi Mekuto (the applicant) and four other persons were arraigned in the Western Cape Division of the High Court, Cape Town (the trial court). The applicant was accused no 2 in the trial court. The facts that led to the applicant's conviction by the trial court are undisputed. On the morning of 18 December 2007, two security officers deployed to transport money from Pick n Pay Supermarket to Absa Bank in Hermanus came under fire from a group of armed robbers. The robbers ordered them to drop the money bags on the floor. The security guards duly dropped the money bags. Despite complying with the orders of the robbers, the robbers shot at the security guards at close range. One of the security officers, Mr Norawuzana (the deceased), was fatally injured. He died on the scene. The other security guard, Mr Mabhikwana, was apparently saved by the metal plate of his bulletproof vest. This enabled him to run away and seek cover in one of the shops.

[2] The robbers took the money bags and drove off in a getaway motor vehicle. Their motor vehicle collided with a kerb a few kilometres from the crime scene. The motor vehicle was abandoned by the robbers, who fled on foot in different directions. As they fled from the crashed motor vehicle, they were spotted and pursued by civilians who kept them in sight and communicated their movements to the police. Four of the robbers, including the applicant, were arrested in the immediate vicinity of the abandoned motor vehicle. The bags containing the money and the firearms were recovered. Another suspect subsequently handed himself over to the police. All five suspects were charged with robbery with aggravating circumstances (count one), murder (count two), attempted murder (count three), possession of unlicensed firearms (count four) and illegal possession of ammunition (count five). Two of them were also charged with car theft. The applicant was not indicted on that charge. All the accused persons were legally represented.

[3] The applicant and his co-accused were all convicted as charged. The trial court found no substantial and compelling circumstances that warranted a deviation from the minimum sentences prescribed in terms of the Criminal Law Amendment Act 105 of 1997 (CLAA) in respect of counts one, two and four. It accordingly sentenced all the accused persons to 15 years' imprisonment in respect of robbery with aggravating circumstances, life imprisonment in respect of the murder charge, and 15 years' imprisonment on the counts relating to the unlawful possession of firearms and ammunition, which were taken together for purposes of sentence. A sentence of 15 years' imprisonment was imposed in respect of the attempted murder charge.

[4] Aggrieved by this result, the applicant and his co-accused applied for leave to appeal against all of his convictions and sentences to the full court. The trial court granted the erstwhile accused no 1 (first appellant) leave to appeal against convictions and sentences, while the applicant and his other co-accused persons were granted leave to appeal against sentences only. The first appellant's appeal was upheld and the convictions and sentences were set aside. The appeals of the applicant and the other co-accused persons were unsuccessful. The applicant then applied to this Court for special leave to appeal and also applied for the late filing of his application to be condoned. Although this Court granted him condonation, his application for leave to appeal was dismissed on 12 November 2020.

[5] It appears that when the applicant learned that his erstwhile co-accused, Mr Sibongile Lumphumlo Mpuqe (Mr Mpuqe) had been granted special leave to appeal against his sentences to this Court, he decided to bring an application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013 (s 17(2)(f) application) for the reconsideration and, if necessary, variation of the decision of the two judges who dismissed his application for special leave to appeal. The basis of his application was that there was disparity in the manner in which his and Mr Mpuqe's applications for special leave to appeal were dealt with by this Court. On 31 March 2021, the decision to dismiss the applicant's application for leave to appeal was referred to this Court for reconsideration, and if necessary, variation as envisaged in s 17(2)(f). In the same order, his application for special leave to appeal and condonation were referred for oral submissions in terms of 17(2)(d) of the Superior Courts Act. The order required

the parties to be prepared to argue the merits of the appeal is special leave was granted.

[6] In the intervening period, Mr Mpuqe's appeal against sentence succeeded in respect of the attempted murder charge. In the judgment *Mpuqe v S (Mpuqe)*,<sup>1</sup> this Court set aside the order of the full court and replaced the sentence imposed by the trial court on that count with a sentence of 10 years' imprisonment. An important aspect to bear in mind is that in *Mpuqe*, leave to appeal against the sentences had already been granted by this Court. In this matter, what is before us for adjudication is whether to reconsider and, if necessary, vary the decision to refuse to grant special leave to appeal, and to consider the application for special leave to appeal. Both parties agreed that this Court may dispose of the matter without oral argument within the contemplation of s 19(a) of the Superior Courts Act.

[7] A preliminary issue before us is whether to condone the delay in bringing the s 17(2)(f) application. The State did not oppose this application. Having considered the circumstances that led to the application being brought at a late stage, it is in the interests of justice to grant it. What remains as an issue before us for adjudication is the reconsideration and, if necessary, variation of the decision of the two judges who dismissed the application for special leave. In essence, this Court has to decide whether or not the two judges of the SCA ought to have found that there were reasonable prospects of success and exceptional circumstances warranting the granting of special leave to appeal against the sentences imposed on the applicant.<sup>2</sup>

[8] The applicant conceded that both the statutory requirements of 'special leave' and justification for reconsideration of a prior order of the SCA refusing leave entail the applicant showing the existence of grounds that are out of the ordinary.<sup>3</sup> This

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<sup>1</sup> *Mpuqe v S* (53/2021) [2022] ZASCA 37 (4 April 2022).

<sup>2</sup> *Notshokovu v The State* [2016] ZACSA 112 para 2.

<sup>3</sup> In *Smith v S* [2011] ZASCA 15, the test for the granting of special leave to appeal was formulated as follows: 'What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law, that a court of appeal could reasonably arrive at a conclusion different to that of the trial court.<sup>3</sup> In order to succeed, therefore, the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding.'

concession was correctly made.<sup>4</sup> Of significance is that what is before us is not an appeal on the merits against the sentences but a reconsideration of the decision refusing special leave to appeal.<sup>5</sup> It is to that issue that I now turn.

**Should leave to appeal against the sentences imposed on the applicant have been granted?**

**Robbery with aggravating circumstances (count one)**

[9] There was no direct attack aimed at the sentence imposed in respect of the charge of robbery with aggravating circumstances. Thus, no specific submissions were made regarding why there were any prospects of success in respect of the sentence imposed on the applicant on this charge. It was not disputed that the indictment correctly categorised the offence of robbery with aggravating circumstances as one falling within the purview of s 51(2) of the CLAA, in respect of which the sentence of 15 years' imprisonment is the prescribed sentence for a first offender. Significantly, it was conceded that the indictment gave an 'extensive description' of the circumstances giving rise to the robbery charge. An appeal court is only at large to interfere with a sentence imposed by a trial court if there has been a material misdirection or the sentence is so grossly disproportionate as to induce a sense of shock.<sup>6</sup> Unless submissions are made which raise these features, it cannot be said that leave to appeal should have been granted on this count. Since no such submissions were made on count 1, nothing more need be said on this count.

[10] In any event, I have not detected any misdirection committed by the trial court in respect of the minimum sentence imposed on the applicant. In my view, there are no substantial and compelling circumstances that warrant deviating from the applicable minimum sentence of 15 years' imprisonment imposed on the applicant. The full court justifiably dismissed the appeal directed at this sentence. It follows that the two judges who considered the applicant's application for special leave to appeal against this sentence correctly dismissed the application in relation to count 1.

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<sup>4</sup> *Notshokovu v The State* fn 2 above para 9.

<sup>5</sup> *Ibid* para 2.

<sup>6</sup> *S v Sadler* [2000] ZASCA 13; [2000] 2 All SA 121 (A) para 8.

**Murder (count two)**

[11] In respect of the murder conviction, the applicant was sentenced to life imprisonment as envisaged in s 51(1) of the CLAA. However, the indictment described the murder as one envisaged in s 51(2) of the CLAA. In dismissing the applicant's appeal in respect of this count, the full court found that despite the indictment categorising the murder as one envisaged in s 51(2) of the CLAA, the applicant's right to a fair trial was not compromised by the fact that the trial court imposed a sentence considered to be a minimum sentence within the contemplation of s 51(1) of CLAA, namely life imprisonment. It had, inter alia, noted that at the time when the first appellant before it was required to record his plea in respect of the different counts, the trial court had asked his counsel whether he (the first appellant) understood the law relating to minimum sentences. When the first appellant answered in the negative, the trial court had then afforded his counsel an opportunity to explain what the law pertaining to minimum sentences entailed.

[12] The full court accepted that at that stage, the legal representatives representing the rest of the accused persons would in all probability have taken advantage of that opportunity to individually explain to their own clients about the applicable minimum sentences. It considered that opinion to be bolstered by the absence of any objection from any of the appellants' counsel regarding the applicability of life imprisonment as a minimum sentence.

[13] In *S v Legoa*,<sup>7</sup> the following was stated:

'The matter is, however, one of substance and not form, and I would be reluctant to lay down a general rule that the charge must in every case recite either the specific form of the scheduled offence with which the accused is charged, or the facts the State intends to prove to establish it. ... The accused might in any event acquire the requisite knowledge from particulars furnished to the charge or, in a superior court, from the summary of substantial facts the State is obliged to furnish. Whether the accused's substantive fair trial right, including his ability to answer the charge, has been impaired, will therefore depend on a *vigilant examination of the relevant circumstances*.' (Own emphasis).

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<sup>7</sup> *S v Legoa* 2003 (1) SACR 13 (SCA) para 21.

[14] In *Kolea v S*,<sup>8</sup> this Court emphatically stated that the CLAA does not create new offences. It held that a formal application to amend the charge is not always required. The test is whether the accused suffered any prejudice which impacted this or her right to a fair trial.

[15] In relation to *Mpuqe*, it was evident from the trial court's judgment that Mr Mpuqe had made a confession which was found to be admissible, and that his counsel had, before the closing of the state case, agreed that the evidence led at the trial-within-a-trial be regarded as evidence in the main trial. In considering Mr Mpuqe's appeal in relation to the charge of murder, this Court took into account that the trial court had specified that it was convicting him in circumstances where the murder count was committed by persons acting in furtherance of a common purpose (as contemplated in Part I(d) of Schedule 2), and also that the murder was one incidental to the commission of a robbery (as contemplated in Part I(c)(ii) of Schedule 2). Those aspects brought the murder charge within the provisions of s 51(1) of the CLAA, which stipulates a mandatory sentence of life imprisonment.

[16] Cognisance was also taken of the statements made by Mr Mpuqe's counsel when addressing the court in mitigation of sentence, which acknowledged the applicability of life imprisonment as the minimum sentence. Having considered all the relevant circumstances, and being of the view that life imprisonment sentence was, in any event the only appropriate sentence, this Court concluded that Mr Mpuqe's right to a fair trial had not been infringed by the fact that a life sentence was imposed on him despite the indictment having categorised the murder as one referred to s 51(2) of the CLAA.

[17] In *M T v The State; A S B v The State; Johannes September v The State*,<sup>9</sup> the Constitutional Court stated that although it is desirable that the indictment refer to the relevant penal provision of the CLAA, this should not be understood as an absolute rule. It also reaffirmed the trite principle that each case must be judged on its particular facts.<sup>10</sup>

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<sup>8</sup> *S v Kolea* [2012] ZASCA 199; 2013 (1) SACR 409 (SCA) para 18.

<sup>9</sup> *M T v The State; A S B v The State; Johannes September v The State* [2018] ZACC.

<sup>10</sup> *Ibid* para 40.

[18] In relation to this matter, it is important to note that the applicant faced exactly the same charges as Mr Mpuqe. Section 51(1) read with Part I(c)(ii) of Schedule 2 of the CLAA prescribes the imposition of life imprisonment for a murder committed in the course of committing a robbery with aggravating circumstances. The applicant conceded that, as regards the robbery charge, the indictment gave an extensive description of the circumstances in which the offence was committed. The person named as the deceased in the murder charge was the same person that was mentioned as the victim of the robbery. There could not have been any doubt that the murder described in the indictment fell squarely within the purview of Part I(c)(ii) of Schedule 2 of the CLAA, in respect of which the prescribed minimum sentence is life imprisonment within the contemplation of s 51(1) of the CLAA. Under those circumstances, it is indeed difficult to understand how any of the defence counsel could have laboured under the impression (and consequently informed their client) that the applicable minimum sentence for the murder charge they were facing was 15 years' imprisonment as contemplated in s 51(2) of the CLAA and not life imprisonment contemplated in s 51(1) of the CLAA.

[19] It was contended on behalf of the applicant that there is no factual basis from which the full court could possibly infer that the applicant's own counsel had explained the meaning of the minimum sentence provisions to him. The following statement made by the applicant's counsel in court speaks for itself:

'Then, furthermore, Your Lordship, it is – we have agreed on, *right at the beginning*, that this is, indeed – the minimum sentences are applicable. ... We further submit, M'Lord, that there are sufficient reasons and justification for the Court to deviate from imposing this minimum sentence imposed by the law, and that the Court not impose a minimum sentence, but a much lesser sentence than life imprisonment, M'Lord. That is all, M'Lord.' (Own emphasis).

[20] Notwithstanding the statement in the above passage, I am prepared to accept that there is no clear evidence that the applicant's counsel explained to him that a minimum sentence of life imprisonment would be imposed if he was convicted on this count. In the circumstances, I am constrained to accept that he might not have known of this. Sentencing on the basis of the CLAA would, in those circumstances, amount to a misdirection. In those circumstances, an appeal court would approach sentencing

on the basis of the common law, taking into account the well-known triad of sentence as set out in *S v Zinn*,<sup>11</sup> namely, the nature of the offence, the offender and the interests of society.

[21] Bearing in mind that the high court has the inherent jurisdiction to, within its discretion, impose life imprisonment in appropriate circumstances,<sup>12</sup> a sentence of life imprisonment in the circumstances of this case does not engender a sense of shock. A balanced consideration of the triad of sentence leaves me with the impression that life imprisonment was the only appropriate sentence, under the circumstances. The applicant's personal circumstances, which must obviously be taken into account in respect of all the charges, are that at the time of sentencing, he was a 35 year old man, employed as a taxi driver, married with two children aged eight; he was also the father of two other children born from another relationship. I consider next the nature of the offence.

[22] As stated before, the murder was committed by persons acting with a common purpose. It was committed in the course of the commission of robbery with aggravating circumstances. As correctly observed by the trial court, the evidence revealed that the robbery was carefully planned, and its success depended on the killing of the security guards. The callous killing of the deceased was executed in full view of members of the public, with no regard for the sanctity of life. Several fatal shots were directed at the deceased at close range, aimed at parts of the body where death would be instant. These are serious aggravating factors.

[23] Moreover, it is evident that the motivation for this gruesome killing of the deceased was greed. In contrast, the deceased was killed while he was performing his duties. He was the sole breadwinner in his home. His death not only traumatised his wife and children but also caused his family enormous financial hardship, as they had to ask for financial assistance in order to transport his body to his hometown for burial.

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<sup>11</sup> *S v Zinn* 1969 (2) SA 537 (A) at 540G.

<sup>12</sup> *Kekana v The State* [2018] ZASCA 148; 2019 (1) SACR 1 (SCA); [2019] 1 All SA 67 (SCA) para 28.

[24] With regard to the legitimate needs of society, it must be borne in mind that offences of this nature have reached alarming proportions. It is a crying shame that the brutal killing of persons in full view of the public has become common-place. Society is justifiably outraged by this abhorrent crime, which has seriously impacted the enjoyment of the constitutionally protected right to life. While rehabilitation is an important objective of punishment, it is manifest that violent crimes will be stemmed only if the punishment objectives of deterrence and retribution are consistently brought to the fore when imposing sentence.<sup>13</sup> Not only must it be made clear to criminals that crime will not benefit them, but would-be perpetrators, too, must similarly be deterred by the realisation that violent crimes are deservedly visited with severe sentences.

[25] For all the reasons mentioned above, I am satisfied that a balanced consideration of the triad of sentence called for the imposition of a sentence of life imprisonment. This therefore means that in the specific circumstances of this case, a sentence of life imprisonment was the only appropriate sentence for the applicant, regardless of the applicability of the CLAA. In circumstances where a sentence of life imprisonment is considered the only appropriate sentence, granting special leave to appeal against that sentence merely because the indictment stipulated that s 51(2) was applicable would be a text book example of putting form above substance. Of significance is that given all the aggravating factors alluded to, earlier, an appeal court would be unlikely to tamper with the sentence. Thus, the applicant's application for special leave to appeal against the sentence of life imprisonment was justifiably dismissed by the two judges of this Court. It follows that there is no compelling reason why we should reconsider or vary the refusal of leave to appeal against the sentence imposed in respect of count two.

### **Possession of firearms and ammunition without a licence (counts four and five)**

[26] Section 3(1) of the Fire Arms Control Act 60 of 2000 (FCA) provides that:

'No person may possess a firearm unless he or she holds for that firearm –

(a) a licence, permit or authorisation issued in terms of this Act; or

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<sup>13</sup> *S v Mhlakaza and Another* [1997] ZASCA 7; [1997] 2 All SA 185 (A); 1997 (1) SACR 515 (SCA) para 10.

(b) a licence, permit authorisation or registration certificate contemplated in item 1, 2, 3, 4, 4A or 5 of Schedule 1.’

In similar vein, s 90 of the FCA prohibits possession of ammunition without a licence.

[27] The indictment in relation to the unlawful possession of the firearms pertinently described the firearms possessed by the applicant and his co-accused as semi-automatic and mentioned the applicability of s 51(2) of the CLAA. Section 51(2)(a) of Part 2 of Schedule 2 provides as follows:

‘Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in —

(a) Part II of Schedule 2, in the case of—

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

(ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years.’<sup>14</sup>

[28] It was contended on behalf of the applicant that the sentence of 15 years’ imprisonment imposed by the trial court should have been regarded as a maximum sentence in accordance with the provisions of s 3 of the Firearms Control Act 60 of 2000 (the FCA). It was also contended that the aforementioned provision appears to be at odds with the provisions of s 51(2)(a) of the CLAA, set out above, which prescribe the same period of imprisonment as a minimum sentence.

[29] The court in *Swartz v S*<sup>15</sup> held that when s 51 of the CLAA was substituted in terms of s 1 of the Criminal Law (Sentencing) Amendment Act 38 of 2007, the legislature’s use of the phrase ‘notwithstanding any other law’ meant that the minimum sentences were intended to supersede the general penalty provisions of the FCA. This finding found this Court’s approval in *S v Thembaletu*,<sup>16</sup> where it was held that the phrase ‘notwithstanding any other law’ words in s 51(2) meant that the sentencing

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<sup>14</sup> Although this is not the only offence covered there, part II of Schedule 2 of the CLAA refers to any offence relating to possession of an automatic or semi-automatic firearms which is dealt with in this case.

<sup>15</sup> *Swartz v S* [2014] ZAWCHC 113; 2016 (2) SACR 268 (WCC) para 8.

<sup>16</sup> *S v Thembaletu* 2009 (1) SACR 50 (SCA) para 6.

regime in the CLAA took precedence over that laid down in the Arms and Ammunition Act 75 of 1969. This Court also held that:

'In my view once it is proved in a trial that an accused is guilty of an offence in terms of which he or she unlawfully possessed a firearm . . . and it is proved or admitted that the firearm was "semi-automatic" the application of its provisions relating to sentencing is triggered. . . .'<sup>17</sup>

It being undisputed that the weapons used in the robbery were semi-automatic firearms, the finding made in the passage above puts paid to the applicant's submissions regarding the perceived conflict between the sentencing regime envisaged in the FCA and the CLAA.

[30] In this matter, the trial court found that there were no substantial and compelling circumstances justifying the imposition of a lesser sentence than the applicable minimum sentence of 15 years' imprisonment in respect of the charge of unlawful possession of firearms. Many horrific offences are committed with the aid of unlicensed firearms and ammunition. A major consideration in this matter is that the semi-automatic firearms and ammunition were not merely possessed, they were actually used in the commission of a cold-blooded murder and attempted murder without any consideration for the safety of members of the public. Some of the shots aimed at the fleeing security guard hit a parked vehicle. That more casualties were not claimed in the incident can only be attributed to sheer luck.

[31] As stated before, the applicable minimum sentence for the unlawful possession of semi-automatic firearms is 15 years' imprisonment. Bearing all material considerations in mind, I am not persuaded that there was any error or misdirection on the part of the trial court in imposing the 15 years' imprisonment on counts four and five. The fact that both counts were taken together for purposes of sentence is a clear sign that the trial court tempered with what could otherwise have been perceived as a harsh sentence. The full court correctly refused to interfere with the sentence imposed by the trial court in counts four and five. It follows that the two judges of this Court correctly refused the applicant's application for leave to appeal against the sentence imposed in respect of this charge. Consequently, there is no valid reason why their

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<sup>17</sup> *S v Thembaletu* fn 16 para 7.

decision to refuse leave in respect of counts four and five should be reconsidered or varied.

[32] The upshot of the preceding paragraphs is that in relation to count one, two, four and five, the applicant has failed to demonstrate any special circumstances which merit a further appeal to this Court. This means that special leave to appeal to this Court was correctly refused in relation to those specific counts. The charge of attempted murder is, however, on a different footing.

### **Attempted murder (count three)**

[33] It is convenient to now turn my attention to the charge of attempted murder. Attempted murder is a common-law offence in respect of which the trial court was at large to impose a sentence it considered appropriate. It is a trite principle of our law that the imposition of sentence is pre-eminently the prerogative of the trial court. To justify interference on appeal, the appellate court must be satisfied that the trial court committed a misdirection of such a nature, degree and seriousness that shows that it did not exercise its sentencing discretion at all or exercised it improperly or unreasonably when imposing it. Interference is justified only where there exists a 'striking' or 'startling' or 'disturbing' disparity between the trial court's sentence and that which the appellate court would have imposed.

[34] It was contended on behalf of the applicant that an important consideration is that in respect of this count, the sentence imposed on Mr Mpuqe was set aside and replaced with a sentence of 10 years' imprisonment. This, in my view, does not detract from the trite principle that each case must be decided on its merits. An examination of the circumstances relevant to this specific charge is necessary. The triad of sentence, namely, the nature of the offence, the offender and the interests of society will therefore be taken into account.<sup>18</sup>

[35] I have noted that the circumstances under which the applicant committed this offence are identical to those of Mr Mpuqe. It has not been shown that the applicant's

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<sup>18</sup> *S v Zinn* fn 11 above.

level of participation in relation to the commission of attempted robbery was more culpable than that of Mr Mpuqe. Furthermore, the personal circumstances of the applicant are not much different from those of Mr Mpuqe. Thus, there is no reason why the applicant's sentence ought to be more severe than that of Mr Mpuqe. There are therefore special circumstances that impel this Court to reconsider and vary the decision to refuse leave to appeal in respect of count three. In my view, a proper case has been made for the granting of special leave in respect of the sentence imposed for the attempted murder charge. As special leave could only have been granted to this Court, we are therefore at large to consider the sentence in respect of count three afresh.

[36] An important consideration in this matter is that the complainant in this charge, Mr Mabhikwana, did not sustain any injuries, thanks to the metal plate underneath the bullet-proof vest that he was wearing. It is quite striking that the sentence imposed on this charge is the prescribed minimum sentence for an actual murder falling within the purview of s 51(2) of the CLAA. The applicant's personal circumstances have already been alluded to. The offence committed by the applicant remains a serious offence that involves violence. What is more aggravating is that several shots were fired at the complainant despite the fact that he offered no resistance to his assailants. As stated before, some of the shots directed at the security guard who survived the ordeal missed him and hit a parked motor vehicle. These aggravating factors have a bearing on the sentence that is considered appropriate for attempted murder.

[37] I am of the view that the sentence that is warranted is one that reflects society's revulsion at the prevalence of violent crimes committed in such a brazen fashion. In my view, an appropriate sentence for the applicant in relation to the attempted murder is 10 years' imprisonment.

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

1. The application for condonation of the late filing of the application for reconsideration in terms of s 17(2)(f) of the Superior Courts Act is granted.
2. The application for reconsideration is granted in respect of the sentence imposed on count 3, and the order of the two judges of the SCA refusing leave

to appeal is varied and replaced with one granting the applicant leave to appeal on that aspect.

3. Save for paragraph 2 hereof, the application for reconsideration is dismissed.
4. The appeal in respect of the sentence imposed on count 3 is upheld and the order of the full court is set aside and replaced with the following:
  - '(a) The appeal against the sentence imposed in respect of count three, attempted murder, is upheld.
  - (b) The sentence imposed by the trial court in respect of count three, attempted murder, is set aside and replaced with the following:  
'The accused is sentenced to 10 years' imprisonment; this sentence is antedated to 15 December 2010.'

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M B MOLEMELA  
JUDGE OF APPEAL

Appearances:

For Applicant:                      None

For Respondent:                      None