CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 1/01

BUZANI DODO Applicant

versus

THE STATE Respondent

Heard on : 22 March 2001

Decided on : 5 April 2001

JUDGMENT

ACKERMANN J:

Introduction

[1] This case concerns the constitutional validity of the provisions of section 51(1) of the Criminal Law Amendment Act, 105 of 1997 (the Act). This section in effect makes it obligatory for a High Court to sentence an accused, convicted of offences specified in the Act, to imprisonment for life unless, under section 51(3)(a), the court is satisfied that "substantial and compelling circumstances" exist which justify the imposition of a lesser sentence.

[2] The Eastern Cape High Court (the High Court) declared the section in question to be constitutionally invalid, because it was inconsistent with section 35(3)(c) of the Constitution, which guarantees to every accused person "a public trial before an ordinary court" and was also

inconsistent with the separation of powers required by the Constitution. This order serves before this Court for confirmation under the provisions of section 172(2) of the Constitution. The applicant, who had been convicted in the High Court of murder, under circumstances which made the provisions of section 51(1) of the Act applicable to him, supports confirmation. The State, through the office of the National Director of Public Prosecutions, opposes confirmation.

[3] Section 51(1) of the Act provides that –

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

Subsection 3(a) provides that –

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

Under subsection 5 the operation of a sentence imposed in terms of the section may not be suspended as contemplated in section 297(4) of the Criminal Procedure Act 51 of 1977 (the CPA). Subsections 3(b) and 6 are not presently relevant. One of the offences referred to in Part I of Schedule 2 to the Act is:

> "Murder, when –
>
> (a) it was planned or premeditated;
>
> (b) the victim was –

(i) a law enforcement officer performing his or her functions as such, whether on duty or not; or

(ii) a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act, 1977 (Act 51 of 1977), at criminal proceedings in any court;

(c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:

(i) Rape; or

(ii) robbery with aggravating circumstances; or

(d) the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy."

The High Court Judgment

[4] Smuts AJ, in the course of his careful judgment in the High Court, came to the conclusion that he was obliged to consider the constitutionality of section 51(1) because -

4.1 the offence of murder, being one of the offences of which he had convicted the applicant, had been committed under circumstances which brought it within the provisions of Part I of Schedule 2, namely murder committed under the circumstances detailed in paragraph (c)(i) thereof;

4.2 if he were not bound by the provisions of section 51(1) he would have imposed a sentence other than life imprisonment;

4.3 on his construction of the phrase "substantial and compelling circumstances" –

"the discretion to depart from the imposition of a mandatory life sentence arises

> when such sentence would occasion a shocking injustice ... would be 'grossly disproportionate' to the crime committed or 'startlingly inappropriate' or the Court forms the view that such sentence is 'offensive to its sense of justice' ... or when such sentence is 'disturbingly inappropriate'" (citations omitted);

4.4 if he were bound by the provisions he "would be obliged to impose a sentence of life imprisonment", it being implicit in the phrase quoted, and expressly stated elsewhere in the judgment that he did not consider the circumstances relating to the murder count on which the applicant had been convicted to be "substantial and compelling" so as, on his construction of section 51(3)(a), to warrant the imposition of a lesser punishment.

[5] The finding referred to in paragraph 4.1 above was not challenged or questioned in this Court and for purposes of the present judgment it must be accepted as correct. There is a close link between the judge a quo's reasons for finding that the section is inconsistent with the constitutional separation of powers and his finding that it constitutes an unjustifiable limitation of section 35(3)(c) of the Constitution.

[6] Dealing with the latter provision of the Constitution he observed, in the course of his judgment, that "[s]entencing is pre-eminently the prerogative of the courts", that the section of the Act in question "constitutes an invasion of the domain of the Judiciary not by the Executive, but by the Legislature", and that a criminal trial before an ordinary court requires, among other things, "an independent court which is empowered ... in the event of a conviction, to weigh and balance all factors relevant to the crime, the accused and the interests of society before the

imposition of sentence." What was new about the "trial envisaged by s 51(1) of the Act," Smuts AJ held, is that "an accused convicted of a serious charge before the High Court, unless the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, faces a life sentence which was decided upon before the commencement of the trial, not by the Court itself, but by the Legislature." This, the learned judge further found, in truth directs the High Court "to consider principles more relevant to the functions of a court of appeal when dealing with the issue of sentence." He concluded that this –

> "... is not a trial before an ordinary court ... [but] ... a trial before a court in which, at the imposition of the prescribed sentence, the robes are the robes of the judge, but the voice is the voice of the Legislature."

The judge consequently found that "[s]uch a trial ... constitutes a limitation of ... [t]he fair trial envisaged in section 35(3)(c) of the Constitution" which could not be justified under section 36 thereof.

[7] In dealing with the separation of powers, the High Court reviewed the major judgments of this Court on the issue and referred to the *First Certification Judgment*,[1] and the judgments in *Bernstein*,[2] *De Lange v Smuts*,[3] and *Heath,*[4] relying upon the following passages from the last-

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1 *In re: Certification of the Constitution of the Republic of South Africa, 1996* 1996 (10) BCLR 1253 (CC); 1996 (4) SA 744 (CC) paras 106-13 and 123.

2 *Bernstein and Others v Bester NO and Others* 1996 (4) BCLR 449 (CC); 1996 (2) SA 751 (CC) para 105.

3 *De Lange v Smuts NO and Others* 1998 (7) BCLR 779 (CC); 1998 (3) SA 785 (CC) paras 60-1.

4 *South African Association of Personal Injury Lawyers v Heath and Others* 2001 (1) BCLR 77 (CC); 2001 (1) SA 883 (CC) paras 23-6.

mentioned case:

> "[23] [... T]here is a clear though not absolute separation between the legislature and the executive on the one hand, and the courts on the other ... .
>
> [25] [...] Parliament and the provincial legislatures make the laws but do not implement them. The national and provincial executives prepare and initiate laws to be placed before the legislatures, implement the laws thus made, but have no law-making power other than that vested in them by the legislatures. [...] Under our Constitution it is the duty of the courts to ensure that the limits to the exercise of public power are not transgressed. Crucial to the discharge of this duty is that the courts be and be seen to be independent.
>
> [26] The separation required by the Constitution between the legislature and executive on the one hand, and the courts on the other, must be upheld otherwise the role of the courts as an independent arbiter of issues involving the division of powers between the various spheres of government, and the legality of legislative and executive action measured against the Bill of Rights, and other provisions of the Constitution, will be undermined. The Constitution recognises this and imposes a positive obligation on the State to ensure that this is done. It provides that courts are independent and subject only to the Constitution and the law which they must apply impartially without fear, favour or prejudice. No organ of State or other person may interfere with the functioning of the courts, and all organs of State, through legislative and other measures, must assist and protect the courts to ensure their independence, impartiality, dignity, accessibility and effectiveness." (footnotes omitted)

[8] The High Court's reasons for coming to the conclusion that the provisions of section 51(1) of the Act "undermine the doctrine of separation of powers and the independence of the judiciary" and are inconsistent therewith are summarised in the judgment, borrowing the

terminology used in *De Lange v Smuts*,[5] as follows:

> "A sentence of imprisonment for life, irrespective of the policies and procedures to which such sentence may be subjected by the Department of Correctional Services, must be regarded by the Court imposing it as having the potential consequence, at the very least, that the accused so sentenced will indeed be incarcerated until his death. It is an extreme sentence. It is the most severe sentence which may lawfully be imposed on an accused such as the one now before Court. It is a sentence which, in the ordinary course, requires a meticulous weighing of all relevant factors before a decision to impose it can be justified. [... W]hatever the boundaries of separation of powers are eventually determined to be, the imposition of the most severe penalty open to the High Court must fall within the exclusive prerogative and discretion of that Court. It falls within the heartland of the judicial power, and is not to be usurped by the Legislature."

[9] Although expressly limiting the grounds for the High Court's declaration of invalidity to the two referred to in paragraph 2 above, the learned judge made certain comments concerning the inconsistency of the section with the right to dignity, guaranteed by section 10 of the Constitution, to the effect that the operation of the section was "inimical to a society in which human dignity is cherished" and "constitutes an affront to the human dignity not only of those who may suffer because of its application ... [but also] ... to the dignity of those in whose name this procedure is sanctioned." I will revert to the matter of dignity later in this judgment.

The construction of section 51(1) read with section 51(3)(a) of the Act

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5 Above n 3 para 61.

[10] The construction of the phrase "substantial and compelling circumstances" in section 51(3)(a) goes to the heart of these issues. The existence of these circumstances permits the imposition of a lesser sentence than the one prescribed. Establishing its true meaning has proved to be intractably difficult and has led to a series of widely divergent constructions in the High Courts. Some have severely limited the sentencing discretion to "unusual and exceptional" factors,[6] others to cases of "gross disproportionality"[7] while others have left the normal

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6 For example, *S v Mofokeng and Another* 1999 (1) SACR 502 (W) 522i-523c; *S v Segole and Another* 1999 (2) SACR 115 (W) 122h-123h; *S v Zitha and Others* 1999 (2) SACR 404 (W) 407i-411h; *S v Budaza* 1999 (2) SACR 491 (E) 503g-504e; *S v Boer en Andere* 2000 (2) SACR 114 (NC) 121d-122a.

7 For example, *S v Shongwe* 1999 (2) SACR 220 (O) 223a-224c; *S v Blaauw* 1999 (2) SACR 295 (W) 311e-312h; *S v Dithotze* 1999 (2) SACR 314 (W) 317h-318h; *S v Homareda* 1999 (2) SACR 319 (W) 325g-326d; *S v Khanjwayo*; *S v Mihlali* 1999 (2) SACR 651 (O) 656f-659c; *S v Montgomery* 2000 (2) SACR 318 (N) 324c-e; *S v Madondo* (NPD) Case No: CC 22/99, 30 March 1999, unreported, 8 of the typescript judgment; *S v Ngubane* (NPD) Case No: CC 31/99, 30 March 1999, unreported, 3-4 of the typescript

sentencing discretion virtually unaffected.[8]

judgment.

8 For example, *S v Majalefa* (WLD) Case No: 365/98, 22 October 1998, unreported 6 of the typescript judgment; *S v Mangesi* 1999 (2) SACR 570 (E) 586d.

[11] In the light of the recent judgment of the Supreme Court of Appeal in *S v Malgas*[9] it is unnecessary to review these decisions. In *Malgas* the words "substantial and compelling circumstances" in section 51(3)(a) were interpreted by, amongst other things, detailing a step-by-step procedure to be followed in applying the test to the actual sentencing situation. This operational construction is summarised in the judgment[10] as follows:

> "A Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
>
> B Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
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> C Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.
>
> D The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
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> E The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed

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9 (SCA) Case No: 117/2000, 19 March 2001, unreported.

10 Id para 25 of the typescript judgment.

sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ("substantial and compelling") and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

H In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

I If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

J In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the legislature has provided."

This interpretation, as an overarching guideline, is one that this Court endorses as a practical method to be employed by all judicial officers faced with the application of section 51. It will no doubt be refined and particularised on a case by case basis, as the need arises. It steers an appropriate path, which the legislature doubtless intended, respecting the legislature's decision to ensure that consistently heavier sentences are imposed in relation to the serious crimes covered by section 51 and at the same time

promoting "the spirit, purport and objects of the Bill of Rights."[11]

Separation of Powers

[12] I deal with the separation of powers issue first. Closely linked to this issue, as I hope presently to demonstrate, is the right of an accused under section 12(1)(e) of the Constitution "not to be ... punished in a cruel, inhuman or degrading way." This right did not form the basis of attack in the High Court. Although alluded to in passing, it was not further dealt with in the High Court judgment. It is impossible to address the separation of powers issue meaningfully without dealing with this right.

11 Section 39(2) of the Constitution.

[13] The statement in the High Court judgment quoted in paragraph 8 above that the imposition of the most severe punishment falls within the "exclusive prerogative and discretion" of a High Court does not, I believe, correctly reflect the law, either as it exists now or as it existed prior to the interim Constitution. The history, for example, of the death penalty for murder up to 1994, makes this plain. Prior to its amendment by section 61 of the General Law Amendment Act, 46 of 1935, section 338 of the Criminal Procedure and Evidence Act, 31 of 1917 prescribed the mandatory imposition of the death penalty for the crime of murder, save in the case where the accused was under sixteen years of age or where the accused had murdered her newly born child. Even after the amendment which permitted the trial court to impose a sentence other than death if there were extenuating circumstances, the trial court did not enjoy an unfettered discretion. On an even more fundamental basis, the nature and range of any punishment, whether determinate or indeterminate, has to be founded in the common or statute law; the principle of legality "nulla poena sine lege" requires this.[12] This principle was in fact endorsed in *Malgas*.[13] Even the exercise of the court's "normative judgment"[14] in determining the nature and severity of the sentence within the options permitted by law has to be judicially exercised; it is not unfettered.[15] This was and is true of all sentencing, not merely in the case of the most severe sentences. Statutes abound which limit court powers, even those of a High

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12 No punishment without a law. Compare Dig. 50.16.131. See also, for example, De Wet en Swanepoel *Die Suid-Afrikaanse Strafreg* 2 ed (Butterworths, Durban 1960) 43-5; Du Toit *Straf in Suid-Afrika* (Juta, Cape Town 1981) xxiv and Burchell et al *South African Criminal Law and Procedures* Volume I: General Principles of Criminal Law 3 ed (Juta, Cape Town 1997) 28-30; Van Zyl Smit "Sentencing and Punishment" in Chaskalson et al (eds) *Constitutional Law of South Africa* (Juta, Cape Town 1996, revision service 2 1998) 28-2.

13 Above n 9 para 2.

14 See *S v Dzukuda and Others; S v Tshilo* 2000(11) BCLR 1252 (CC); 2000 (4) SA 1078 (CC) para 35.

15 Id.

Court, to impose sentences relating to, for example, the extent of the punishment, the circumstances under which it may be imposed or when execution thereof may be suspended.

[14] Constitutional Principle VI, contained in schedule 4 of the interim Constitution, provides that –

> "[t]here shall be a separation of powers between the legislature, executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."

In the *First Certification Judgment* this Court, in dismissing a challenge that the new text of the Constitution (NT) did not comply with this Constitutional Principle (CP), said the following:

> "The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation. In Justice Frankfurter's words, '[t]he areas are partly interacting, not wholly disjointed'.[16]
>
> ....
>
> The model adopted reflects the historical circumstances of our constitutional development. We find in the NT checks and balances that evidence a concern for both the over-concentration of power and the requirement of an energetic and effective, yet answerable, executive. A strict separation of powers has not always been maintained;

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16 Above n 1 para 109, footnotes omitted.

> but there is nothing to suggest that the CPs imposed upon the [Constitutional Assembly] an obligation to adopt a particular form of strict separation, such as that found in the United States of America, France or the Netherlands."[17]

[15] In *De Lange v Smuts*, in a passage[18] subsequently endorsed by a unanimous Court in *Heath,*[19] it was stated that the distinctly South African model of separation of powers to be developed over time by our Courts would reflect –

> "... a delicate balancing, informed both by South Africa's history and its new dispensation, between the need, on the one hand, to control government by separating powers and enforcing checks and balances and, on the other, to avoid diffusing power so completely that the government is unable to take timely measures in the public interest."

[16] This Court has therefore clearly enunciated that the separation of powers under our Constitution –

16.1 although intended as a means of controlling government by separating or diffusing

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17 Id para 112, footnotes omitted.

18 Above n 3 para 60.

19 Above n 4 para 24.

power, is not strict;

16.2 embodies a system of checks and balances designed to prevent an over-concentration of power in any one arm of government; it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another; this engenders interaction, but does so in a way which avoids diffusing power so completely that government is unable to take timely measures in the public interest.

[17] It is salutary to bear in mind the following cautionary remarks of Professor Tribe which, although made in relation to the US Constitution, are of general relevance when considering separation of powers issues:

> "We must therefore seek an understanding of the Constitution's separation of powers not primarily in what the Framers thought, nor in what Enlightenment political philosophers wrote, but in what the Constitution itself says and does. What counts is not any abstract theory of separation of powers, but the actual separation of powers '*operationally defined* by the Constitution.' Therefore, where constitutional text is informative with respect to a separation of powers issue, it is important not to leap over that text in favor of abstract principles that one might wish to see embodied in our regime of separated powers, but that might not in fact have found their way into our Constitution's structure."[20]

> "... [E]ven when a constitution contains a provision explicitly mandating strict separation of powers, it behooves us to read the rest of the document to ascertain what sort of separation that particular charter *actually* imposes."[21]

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20 Tribe *American Constitutional Law* Volume One 3 ed (Foundation Press, New York 2000) 127, footnotes omitted.

21 Id 128 fn 16.

> "At times, text will be sufficient, without necessarily developing an overarching vision of the structure, to decide major cases. ... Sometimes, however, it will be necessary to extrapolate what amounts to a blueprint of organizational relationships from the fundamental structural postulates one sees as informing the Constitution as a whole ...".[22]

[18] Both the judgment of the court a quo and the argument presented in this Court by Mr Eksteen who, together with Mr Boswell, appeared on behalf of the applicant for confirmation at the request of the Court (and to whom we are indebted for their assistance), contended for a virtually exclusive and limitless sentencing discretion of the courts. Considerable reliance was in this regard placed on the following passage from the judgment of the Appellate Division of the Supreme Court in *S v Toms; S v Bruce,* per Smalberger JA:[23]

> "The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (cf *R v Mapumulo and Others* 1920 AD 56 at 57). That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualisation of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law".

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22 Id 130.

23 1990 (2) SA 802 (A) 806H-I (citation omitted).

[19] Three observations are necessary. First, the Appellate Division did not suggest that punishment fell within the exclusive domain of the trial court.

[20] Second, the Court directed its above observations to a mandatory sentence –

> "in the sense of sentence prescribed by the Legislature which leaves the court with no discretion at all – either in respect of the kind of sentence to be imposed or, in the case of imprisonment, the period thereof."[24]

It was such a totally restrictive form of mandatory sentence that the Court criticised in the following terms:

> "It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. ... Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences ... as they are detrimental to the proper administration of justice and the image and standing of the courts."[25]

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24 Id 806J-807A.

25 Id 807A-C (citation omitted).

[21] In the third place it is necessary to see the above dicta within the constitutional context in which they were made, namely, prior to South Africa becoming a constitutional state with a justiciable bill of rights. The doctrine of parliamentary sovereignty was still the guiding constitutional norm as Smalberger JA himself emphasised when he remarked:

> "The Legislature is of course at liberty to subjugate these principles [relating to the infliction of punishment by the courts] to its sovereign will and decree a mandatory sentence which the courts in turn will be obliged to impose. To do so, however, the Legislature must express itself in clear and unmistakable terms. ... Courts will not be astute to find that a mandatory sentence has been prescribed."[26]

[26] Id 807E-F (citation omitted).

Save in the most exceptional circumstances it was difficult, if not impossible, to rely on the separation of powers doctrine.[27] It was quite impossible to invoke a constitutionally entrenched right of an accused not to be punished in a cruel, inhuman or degrading way against legislative incursion into the judicial sentencing function. The courts were restricted to using the fairly limited means at their disposal. In order to do justice under a system of parliamentary sovereignty, where the Court could not review the constitutionality of a parliamentary statutory provision in the absence of a Bill of Rights, it is not surprising that the Court vigorously asserted its sentencing power, even one which, in its extent, might have gone beyond that considered necessary or appropriate under a constitution such as our present one. No disagreement with, or criticism of, *Toms* is implied. I merely stress that the question before this Court is to be decided in a radically different constitutional setting, where proper regard can and must be had to the separation of powers doctrine and, in conjunction therewith, to the accused's right not to be punished in a cruel, inhuman or degrading way. In these circumstances little is to be gained from our pre-1994 jurisprudence.

[22] There is under our Constitution no absolute separation of powers between the judicial function, on the one hand, and the legislative and executive on the other. When the nature and process of punishment is considered in its totality, it is apparent that all three branches of the state play a functional role and must necessarily do so. No judicial punishment can take place

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[27] See, for example, *Minister of the Interior and Another v Harris and Another* 1952 (4) SA 769 (A), the so-called *High Court of Parliament* case.

unless the person to be punished has been convicted of an offence which either under the common law or statute carries with it a punishment. It is pre-eminently the function of the legislature to determine what conduct should be criminalised and punished. Even here the separation is not complete, because this function of the legislature is checked by the Constitution in general and by the Bill of Rights in particular, and such checks are enforced through the courts.

[23] Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature[28] and its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment. The availability and cost of prisons, as well as the views of these arms of government on custodial sentences, legitimately inform policy on alternative forms of non-custodial sentences and the legislative implementation thereof. Examples that come to mind are the conditions on, and maximum periods for which sentences may be postponed or suspended.[29]

[24] The executive and legislative branches of state have a very real interest in the severity of sentences. The executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily

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28 See section 276 of the CPA.

29 See section 297 of the CPA.

integrity and increases with the severity of the crime.

[25] In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society. The legislature's objective of ensuring greater consistency in sentencing is also a legitimate aim and the legislature must have the power to legislate in this area. The legislature's interest in penal sentences is implicitly recognised by the Constitution. Section 35(3)(n) thereof provides:

> "Every accused person has ... the right –
>
> > (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing".

[26] The legislature's powers are decidedly not unlimited. Legislation is by its nature general. It cannot provide for each individually determined case. Accordingly such power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional state. It would a fortiori be so if the legislature obliged the judiciary to pass a sentence which was inconsistent

with the Constitution and in particular with the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's right not to be sentenced to a punishment which was cruel, inhuman or degrading as envisaged by section 12(1)(e) of the Constitution, or to a fair trial under section 35(3).[30]

Foreign jurisprudence

[27] There are many examples of other open and democratic societies which permit the legislature to limit the judiciary's power to impose punishments. The United States of America and Canada are striking instances.

[28] The power of the legislatures in the United States to define crimes and their punishment is not considered to be in breach of the separation of powers principle and the courts will not interfere with the exercise of that power unless it has been exercised in a manner which breaches the Constitution.[31] Full recognition is granted to the –

> "power that the legislature possesses to adapt its penal laws to conditions as they may

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30 Or a provision which was inconsistent with the right under section 12(1)(a) not to be deprived of freedom arbitrarily or without just cause.

31 *Weems v United States* 217 US 349, 378 (1910).

exist and punish the crimes of men according to their forms and frequency."[32]

It is accepted that the separation of powers doctrine imposes on the coordinate branches–

[32] Id 379.

> "... a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which 'would preclude the establishment of a Nation capable of governing itself effectively.'"[33]

Historically, federal sentencing (the function of determining the scope and extent of punishment for crimes with a federal subject matter) –

> "never has been thought to be assigned by the Constitution to the exclusive jurisdiction of any one of the three Branches of Government. Congress, of course, has the power to fix the sentence for a federal crime ... and the scope of judicial discretion with respect to sentence is subject to congressional control."[34]

Indeed, the tripartite division of sentencing responsibility is regarded as an important check-and-balance feature:

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33 *Mistretta v United States* 488 US 361, 381 (1989) per Blackmun J citing *Buckley v Valeo* 424 US 1, 121 (1976).

34 Id 364, internal citations omitted. The historical overview at 364-6, shows that this tripartite division of sentencing responsibility has never been disturbed.

"[I]f a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will".[35]

[35] Id 365, citing from *United States v Brown* 381 US 437, 443 (1965).

[29] The Eighth Amendment of the US Constitution prohibits the infliction of "cruel and unusual punishments." The prohibition is directed not only against a punishment which constitutes torture or is barbaric, but against any punishment which by its excessive length or severity is "grossly out of proportion to the severity of the crime."[36] The Court has also held that federal courts should be deferential in their review of legislatively mandated terms of imprisonment.[37] The case of *Rummel*[38] illustrates how deferential the test is. The petitioner Rummel had on two separate occasions been convicted in Texas state courts and sentenced to imprisonment for relatively minor offences.[39] On conviction of a third fairly minor offence,[40] he received a mandatory life sentence pursuant to the Texas statute. The Supreme Court held that the mandatory life sentence did not constitute cruel and unusual punishment under the Eighth Amendment.

[30] It is implicit in the jurisprudence of the Supreme Court of Canada that mandatory minimum sentences are not regarded as being inconsistent with any separation of powers doctrine.[41] In *R v Latimer* it was stated:[42]

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36 *O'Neil v Vermont* 144 US 323 (1892) as quoted with approval in *Weems* above n 31, 371. See also *Robinson v California* 370 US 660, 676 (1962) Douglas J concurring; *Coker v Georgia* 433 US 584, 592 (1977); *Rummel v Estelle* 445 US 263, 271-2, 290 (1980); *Solem v Helm* 463 US 277, 288 (1983); and *Harmelin v Michigan* 501 US 957, 996-8, 1009-21 (1991).

37 *Rummel* above n 36, 274; *Hutto v Davis* 454 US 370, 374, 383 (1982).

38 Above n 36.

39 Fraudulent use of a credit card to obtain $80 worth of goods and services, and passing a forged cheque in the amount of $28.36, respectively.

40 Obtaining $120.75 by false pretences.

41 See *R v Smith* (1987) 34 CCC (3d) 97 and *R v Latimer* 2001 SCC 1. File No.: 26980, 18 January 2001, unreported.

"It is not for the court to pass on the wisdom of Parliament with respect to the gravity of various offences and the range of penalties which may be imposed upon those found guilty of committing the offences. Parliament has broad discretion in proscribing conduct as criminal and in determining proper punishment."

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[42] Id para 77, quoting *R v Guiller* (1985) 48 CR (3d) 226, 238 (Ontario Dist Ct).

In Canada the issue is dealt with on the basis of whether the statutory provision enacting the mandatory minimum sentence unjustifiably infringes the right guaranteed by section 12 of the Canadian Charter of Rights and Freedoms "not to be subjected to any cruel and unusual treatment or punishment."[43] The criterion which is applied to determine whether a mandatory minimum punishment is cruel and unusual is "whether the punishment prescribed is so excessive as to outrage standards of decency;" the "effect of that punishment must not be grossly disproportionate to what would have been appropriate."[44]

[31] The nature and elements of the gross disproportionality analysis under section 12 of the Charter have been formulated as follows:

> "[T]he court must first consider the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case in order to determine what range of sentences would have been appropriate to punish, rehabilitate or deter this particular offender ... . The other purposes which may be pursued by the imposition of punishment, in particular the deterrence of other potential offenders, are thus not relevant at this stage of the inquiry. This does not mean that the judge or the legislator can no longer consider general deterrence or other penological purposes that go beyond the particular offender in determining a sentence, but only that the resulting sentence must not be grossly disproportionate to what the offender deserves."[45]

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43 *Smith* above n 41 144-6 and *Latimer* id paras 73-4.

44 *Latimer* id para 73 (citations omitted).

45 *Smith* above n 41 139 as confirmed in *Latimer* id para 73-6.

In *R v Smith* the Court pointed out that gross disproportionality is aimed at punishments that are more than merely excessive and correctly warned that one –

> "Should be careful not to stigmatize every disproportionate or excessive sentence as being a constitutional violation, and should leave to the usual sentencing appeal process the task of reviewing the fitness of a sentence."[46]

In *Latimer* the Supreme Court also observed that the test for determining whether a sentence is disproportionately long is "*very properly stringent and demanding* ... [for] ... [a] lesser test would tend to trivialize the *Charter*"(emphasis in the original).[47] In this case the accused was convicted of second degree murder after killing his severely disabled 12-year-old daughter. The Canadian Criminal Code, in the case of second degree murder, provides for the mandatory imposition of a life sentence with no chance of parole for ten years. The Supreme Court found that the mandatory minimum sentence was not grossly disproportionate in the case at hand and that there was no violation of Mr

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46 *Smith* id 139.

47 *Latimer* above n 41 para 76, quoting *Steele v Mountain Institution* (1990) 2 SCR 1385, 1417.

Latimer's section 12 right.

[32] Other democratic countries such as Australia,[48] Germany,[49] India,[50] New Zealand[51] and

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48 Under Australian law, no violation of the separation of powers doctrine occurs when compulsory minimum sentences are set by the legislature leaving little or no discretion to the sentencing judge. In the leading case, *Palling v Corfield* (1970) 123 CLR 52, 58-9, it is made clear that prescribing penalties is solely in the prerogative of the legislature, and no judicial discretion need be given. See also *Leask v Commonwealth of Australia* (1996) 140 ALR 1, 15. In *Wynbyne v Marshall* (1997) 117 NTR 11, 26 (Sup Ct of the Northern Territory) it was assumed that there was a restriction on the ability of the Legislative Assembly to pass laws which require courts to impose punishments which are cruel or unusual, but that there was nothing cruel or unusual in the requirement, imposed by the legislature, to record a conviction upon a finding of guilt and impose a mandatory minimum sentence of the nature dealt with in that case.

49 In Germany the independence of the judiciary and its separation from the other branches is well established under articles 92 and 97 of the German Basic Law and includes the principle that "judicial power may be exercised only by judges." See Currie "Separation of Powers in the Federal Republic of Germany" in (1993) 41 *The American Journal of Comparative Law* 201, 249. Article 104(2) of the Basic Law further states that "only a judge may decide on the admissibility or continuation of detention". Sentencing authority is thus central to the judicial function. At the same time, the "Special Part" of the Strafgesetzbuch (StGB) contains fairly detailed maximum and minimum sentences for various offences. Thus the crimes of murder (as defined in article 211) and genocide (as defined in article 220a) carry mandatory life sentences. In the case of manslaughter, which does not constitute murder, article 212 prescribes a mandatory minimum sentence of five years imprisonment. Similar mandatory minimum sentences are prescribed, for example, in certain circumstances for theft (article 242), fraud (article 263) and receiving stolen property (article 259).

50 Although Indian courts generally enjoy a wide discretion in imposing sentence, this is "canalised and guided by law". See Kelkar *Criminal Procedure* 3 ed (Eastern Book Company, Lucknow 1993, with supplement), 430. The permissible range of sentence may be very narrow. For instance, section 302 of the *Penal Code* provides a minimum of a life sentence and the maximum of the death penalty in cases of murder. In *Jagmohan Singh v State of Utar Pradesh* (1973) 1 SCC 20 and *Bachan Singh v State of Punjab* (1980) 2 SCC 684, it was argued, inter alia, that the lack of legislative guidelines to direct courts in choosing between the two alternative punishments in section 302 amounted to an unlawful delegation of a legislative function to the judiciary. While this argument was rejected in both cases, all the justices in the *Bachan Singh* case agreed that the imposition of standards tailoring the judicial discretion as to sentence was a legitimate legislative function. See paras 74-5 and para 77 of Bhagwati J's dissent (separately reported at (1982) 3 SCC 24).

51 In New Zealand, "[t]he general discretion of the court in regard to imprisonment is limited somewhat by various statutory provisions". See Hodge *Doyle and Hodge's Criminal Procedure in New Zealand* 3 ed (The Law Book Company Limited, Sydney 1991) 183. Most notably, the Criminal Justice Act 1985 contains a set of comprehensive principles that "govern[ ] sentencing practice in New Zealand." See Casey "Sentencing" in Thorndon et al (eds) *The Laws of New Zealand* Volume 25 (Butterworths, Wellington 1999), para 1. In essence, these principles emphasise the imposition of custodial sentences for violent crimes, while favouring alternative punishments for non-violent crimes. See Doyle and Hodge 187.

the United Kingdom,[52] have sentencing statutes which mandate minimum sentences under circumstances that are, in certain instances, more intrusive of the judicial sentencing function than section 51(1) in the present case. The Namibian High Court has also used the "grossly disproportionate test" for determining whether a mandatory minimum sentence constitutes "cruel, inhuman or degrading treatment or punishment" under article 8(2)(b) of the Namibian Constitution.[53] It has never, so far as I have been able to determine, been decided in any of these jurisdictions that mere involvement by the legislature in the sentencing field conflicts with the separation of powers principle.

[33] On this part of the case I accordingly conclude as follows:

33.1 While our Constitution recognises a separation of powers between the different branches

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Furthermore, statutes creating other offences always specify the maximum sentence and may also contain other legislative guidelines. Section 172 of the Crimes Act 1961 prescribes a mandatory life sentence for murder.

52 The Criminal Justice Act 1991 (as amended by the Criminal Justice Act 1993) contains the most comprehensive attempt to influence judicial sentencing policy. The Act steers clear of imposing strict guidelines, but attempts to introduce broad principles to influence courts' choices of sentence. See Henham *Criminal Justice and Sentencing Policy* (Dartmouth, Aldershot 1996) 9-10 and 131. Sections 109-11 of the Powers of Criminal Courts (Sentencing) Act 2000 contains more specific provisions.

> "Section 109 of the Act requires a court to pass a life sentence on an offender who meets the conditions set out in section 109(1). These are that he was 18 years or older when he committed the offence for which he is to be sentenced, that this offence is a 'serious offence' as defined in subsection (5) committed after September 30, 1997, and that he had been convicted of a 'serious offence' before he committed the offence for which he is to be sentenced."

See Archbold *Criminal Pleading, Evidence and Practice 2001,* (Sweet & Maxwell, London 2001) 586. Under section 109(2) the court is relieved from passing the mandatory life sentence only where it "is of the opinion that there are *exceptional circumstances* relating to either of the offences or to the offender which justify its not doing so." (emphasis supplied) Section 110 obliges a court sentencing an offender for a class A drug trafficking offence to pass a minimum sentence of seven years if the offender is aged 18 or over and has been convicted on at least two separate occasions of such an offence. Section 111 mandates a minimum sentence of three years for a third domestic burglary conviction. Under sections 110 and 111 the mandatory sentence can only be avoided where the court is of the opinion that there are "particular circumstances which – (a) relate to any of the offences or to the offender; and (b) *would make it unjust to do so* in all the circumstances." (emphasis supplied)

53 *S v Vries* 1996 (12) BCLR 1666 (Nm) 1676G and 1702J-1703A.

of the state and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons.

33.2 Both the legislature and the executive have a legitimate interest, role and duty, in regard to the imposition and subsequent administration of penal sentences.

33.3 The concomitant authority of the other branches in the field of sentencing must not, however, infringe the authority of the courts in this regard.

33.4 It is neither possible nor, in any event, desirable to attempt a comprehensive delineation of the legitimate authority of the courts in this regard.

33.5 For purposes of this case it is sufficient to hold that the legislature is not empowered to compel any court to pass a sentence which is inconsistent with the Constitution.

[34] Accordingly the only relevant inquiry in this regard is whether section 51(1) read with section 51(3)(a) of the Act compels the High Court to pass a sentence which is inconsistent with the accused's right under section 12(1)(e) of the Constitution "not to be ... punished in a cruel, inhuman or degrading way." I deal later with the High Court's finding in regard to section 35(3)(c) of the Constitution.

The construction of section 12(1)(e) of the Constitution

[35] Section 12(1)(e) provides:

> "(1) Everyone has the right to freedom and security of the person, which includes the right –

....

(e) not to be treated or punished in a cruel, inhuman or degrading way."

I propose saying no more on the ambit of this right than is required for the resolution of the issue in the present case. In the phrase "cruel, inhuman or degrading" the three adjectival concepts are employed disjunctively and it follows that a limitation of the right occurs if a punishment has any one of these three characteristics. This imports notions of human dignity as was correctly recognised, although in another context, by the High Court in this case. The human dignity of all persons is independently recognised as both an attribute and a right in section 10 of the Constitution, which proclaims that "[e]veryone has inherent dignity and the right to have their dignity respected and protected." It is also one of the foundational values of the Constitution[54] and is woven, in a variety of other ways, into the fabric of our Bill of Rights.[55] While it is not easy to distinguish between the three concepts "cruel", "inhuman" and "degrading", the impairment of human dignity, in some form and to some degree, must be involved in all three. One should not lose sight

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54 See, for example, sections 1(a) and 74(1) of the Constitution and Chaskalson "Human Dignity as a Foundational Value of our Constitutional Order" (2000) 16 *SA Journal of Human Rights* 193.

55 See, for example, sections 7(1), 36(1), 37(5)(c) and 39(1)(a) of the Constitution.

of the fact that the right relates, in part at least, to freedom.

[36] It should also be emphasised, as was pointed out by the Canadian Supreme Court in *Smith*,[56] that the *effect* of a sentence imposed must be measured and that such effect is often a composite of many factors; it is not limited to the length of the sentence but includes its nature and the conditions under which it is served. In the instant case, however, one is concerned chiefly with the effect of the *duration* of a sentence of life imprisonment. Consequently the freedom aspect of the right in question and its relation to human dignity looms large.

[37] The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman or degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognised in *S v Makwanyane*.[57] Section 12(1)(a) guarantees, amongst others, the right "not to be deprived of freedom ... without just cause". The "cause" justifying penal incarceration and thus the deprivation of the offender's freedom, is the offence committed. 'Offence', as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably

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56 Above n 41 139-40 per Lamer J.

57 *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC); 1995 (3) SA 391 (CC) paras 94, 197 and 352-6.

necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.

[38] To attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity. Human beings are not commodities to which a price can be attached; they are creatures with inherent and infinite worth;[58] they ought to be treated as ends in themselves, never merely as means to an end. Where the length of a sentence, which has been imposed because of its general deterrent effect on others, bears no relation to the gravity of the offence (in the sense defined in paragraph 37 above) the offender is being used essentially as a means to another end and the offender's dignity assailed. So too where the reformative effect of the punishment is predominant and the offender sentenced to lengthy imprisonment, principally because he cannot be reformed in a shorter period, but the length of imprisonment bears no relationship to what the committed offence merits. Even in the absence of such features, mere disproportionality between the offence and the period of imprisonment would also tend to treat the offender as a means to an end, thereby denying the offender's humanity.

[39] In my view the gross proportionality approach adopted by the US and Canadian Supreme Courts is compatible with and supportive of the above analysis, can properly be employed and

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58 See *Prinsloo v Van der Linde and Another* 1997 (6) BCLR 759 (CC); 1997 (3) SA 1012 (CC) para 31.

should be employed under our Constitution. For the reasons advanced in the Canadian cases, it would not be *mere* disproportionality between the sentence legislated and the sentence merited by the offence which would lead to a limitation of the section 12(1)(e) right, but only *gross* disproportionality. I wish pertinently to stress, however, that it is not to be inferred from the reference in this judgment to any foreign decision, that agreement is being expressed with the *application* of the gross disproportionality test to the legislation or facts in such decision.

[40] On the construction that *Malgas* places on the concept "substantial and compelling circumstances" in section 51(3)(a), which is undoubtedly correct, section 51(1) does not require the High Court to impose a sentence of life imprisonment in circumstances where it would be inconsistent with the offender's right guaranteed by section 12(1)(e) of the Constitution. The whole approach enunciated in *Malgas,* and in particular the determinative test articulated in paragraph I of the summary,[59] namely:

> "If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence",

makes plain that the power of the court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and

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[59] Above n 9 para 25.

the nature of the offence becomes so great that it can be typified as gross. Thus the sentencing court is not obliged to impose a sentence which would limit the offender's section 12(1)(e) right. Accordingly section 51(1) does not compel the court to act inconsistently with the Constitution. It is necessary to emphasise the difference between the two tests, because they serve different purposes. The test in *Malgas* must be employed in order to determine when section 51(3)(a) can legitimately be invoked by a sentencing court to pass a lesser sentence than that prescribed by section 51(1) or (2). The test of gross disproportionality, on the other hand, must be applied in order to determine whether a sentence mandated by law is inconsistent with the offender's section 12(1)(e) right. It has not been suggested that section 51(1) compels the sentencing court to act inconsistently with the Constitution in any other way.

[41] Checks and balances constitute an integral part of the separation of powers principle; they prevent one separate arm of the state from becoming too powerful in the exercise of the powers allocated to it. In modern constitutionalism a most important check on the legislature in this regard is an entrenched bill of rights enforceable through an independent judiciary. A bill of rights protects individual rights by limiting the power of the legislature. Once it has been held, as this judgment does, that legislation in the field of penal sentencing does not, per se, infringe the separation of powers principle as between the legislature and the judiciary, section 51(1) read with section 51(3)(a) does not, on its proper construction, transgress the Bill of Rights check on the legislature and therefore does not infringe the separation of powers principle either.

Section 35(3)(c) of the Constitution

[42] It is now convenient to deal with the argument that section 51(1), read with section 51(3)(a) of the Act, is inconsistent with section 35(3)(c) of the Constitution, which guarantees to every accused person the right "to a public trial before an ordinary court", because a court, bound by section 51(1), is no longer an "ordinary" court. Mr Eksteen correctly appreciated that a consequence of the construction which the judgment in *Malgas* had placed on section 51(1) read with section 51(3)(a) of the Act, namely that it did not oblige a High Court to impose a penal sentence on a convicted person that was inconsistent with the Constitution, destroyed the basis of the argument founded on the infringement of the separation of powers principle. He accordingly limited, very properly, his oral argument before us to the attack based on section 35(3)(c) of the Constitution.

[43] In the view I take of the matter, the failure of the separation of powers argument and the conclusion that section 51(1) is not inconsistent with the Constitution for any other reason, also has fatal consequences for this argument. Under section 165 of the Constitution, the judicial authority of the Republic is vested in "the courts"[60] and their independence is both established[61] and expressly protected.[62] What such judicial independence comprises was considered in *De*

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60 Section 165(1) of the Constitution.

61 By section 165(2) of the Constitution, which declares them to be "independent and subject only to the Constitution and the law".

62 By subsections (3) and (4) of section 165 of the Constitution which state:

> "(3) No person or organ of state may interfere with the functioning of the courts.
> (4) Organs of state, through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

Lange v Smuts[63] and need not be repeated here. The High Courts constitute one such category of courts for purposes of section 165(1) of the Constitution.[64] Counsel did not suggest, nor could it properly have been suggested, that the High Courts, as actually established and functioning under the Constitution, in any way lack the independence or any other attribute required by the Constitution. A High Court is therefore self-evidently an "ordinary court" for purposes of section 35(3)(c) of the Constitution.

[44] The argument is, however, that the provisions of section 51(1) of the Act have the effect of depriving the High Courts of their sentencing powers in such a manner and to such a degree, that they can no longer rightly be classified as "ordinary" courts. This could only be so if section 51(1) has some material effect on their independence or if it deprives them of some judicial function of such a nature that they could no longer properly be classified as ordinary courts.

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63 Above n 3 paras 69-73.

64 Section 166(c) of the Constitution.

[45] I have great difficulty in conceiving how this could be so. We were, however, pressed in argument on this score with the judgment of the House of Lords in *R v Secretary of State for the Home Department, Ex Parte Venables*[65] and the judgment of the European Court of Human Rights in *T v United Kingdom*,[66] which followed on the *Venables* judgment. Both cases are concerned with clearly distinguishable issues. In *Venables* it was decided that in fixing a detention tariff, the Secretary of State was carrying out, contrary to the constitutional principle of separation of powers, a classic judicial function and that, in doing so he ought, like a sentencing judge, not to act contrary to the fundamental principles governing the administration of justice. On the facts it was held that the Secretary of State had acted contrary to such principles and his determination was accordingly set aside.[67] In *T v UK*[68] the European Court of Human Rights held that the Home Secretary, who set the applicant's detention tariff, was clearly not independent of the Executive, and that there had accordingly been a violation of article 6(1) of the European Convention for the protection of Human Rights and Fundamental Freedoms 1953[69], which in relevant part states:

> "In the determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

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65 [1998] AC 407 (HL).

66 (2000) 7 BHRC 659.

67 Above n 65 at 526.

68 Above n 66.

69 Id at paras 108 and 113.

[46] It was also contended that section 51(1) was, notwithstanding the provisions of section 51(3)(a), in conflict with article 14 of the International Covenant on Civil and Political Rights 1966 (ICCPR) and principle 3 of the United Nations Basic Principles on the Independence of the Judiciary (UN Basic Principles).[70]

[47] There is no merit in counsel's submissions. The only part of article 14 of the ICCPR with any conceivable relevance to the present issue is the provision in article 14.1 to the effect that –

> "... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law."

There is simply no warrant for reading article 14 of the ICCPR in such a way that any legislative provision on sentence, regardless of its nature and extent, would render the trial envisaged by the article unfair or subvert the independent nature of the tribunal contemplated.

[48] For present purposes, the only relevant principles of the UN Basic Principles are 2 to 4 which provide:

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70 Basic Principles on the Independence of the Judiciary, Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Milan, 26 August to 6 September 1985, U.N. Doc. A/CONF.121/22/Rev.1 at 59 (1985).

> "2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.
>
> 3. The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.
>
> 4. There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law."

The purpose and effect of these Basic Principles are to be gathered from the last paragraph of the introductory preamble where it is stated that the principles have been formulated –

> "to assist Member States in their task of securing and promoting the independence of the judiciary [and] should be *taken into account and respected* by Governments *within the framework of their national legislation and practice* ...". (emphasis supplied)

The Basic Principles are nothing more than guidelines relating, amongst other things, to the independence of judges. They are intended to assist member states in securing and promoting such independence. Such assistance is to take place within the framework of a state's national legislation and law. They must be construed within the universally recognised separation of powers principles and its concomitant check-and-balance procedures.

[49] Both the impartiality of the judiciary and its independence are fully and properly recognised and protected in the Constitution by section 165(2), (3) and (4) of the Constitution.[71] Principle 2 relates to the impartiality of the judiciary and enumerates conduct which might impinge on such impartiality. Principle 4 deals with inappropriate or unwarranted interference with the judicial process. It is has not been suggested that the Constitution in any way permits any conduct which would be inconsistent with Principles 2 or 4. Section 51(1) has in this judgment been found to be consistent with the separation of powers principle and an offender's fair trial rights. Nothing in its provisions detracts in any way from judicial impartiality or constitutes inappropriate or unwarranted interference with the judicial process under our Constitution, in a way which could, on any reasonable construction of their provisions, be incompatible with Principles 2 or 4. Nor does section 51 in any way deprive any court contemplated by the Constitution of its exclusive authority (as against the legislature or the executive) to decide whether an issue submitted for its decision is within "its competence as

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[71] The subsections provide:

> "(2) The courts are independent and subject only to the Constitution and the law, which they must apply impartially and without fear favour or prejudice.
>
> (3) No person or organ of state may interfere with the functioning of the courts.
>
> (4) Organs of state through legislative and other measures, must assist and protect the courts to ensure the independence, impartiality, dignity, accessibility and effectiveness of the courts."

defined by law".

[50] No other authority is invoked for the submission that section 51(1) "impinge[s] upon international standards of judicial independence". None has been cited to this Court and I know of none. On the contrary, the conclusion reached above that section 51(1) does not trespass on the separation of powers principle, nor in any way limits an offender's fair trial right, is in accord with the jurisprudence of leading democracies in the world. There is no other basis for finding that the application of section 51(1) in any way alters the character of the High Court or in any way detracts from it being an "ordinary" court as contemplated by section 35(3)(c) of the Constitution.

[51] I accordingly hold that section 51(1) of the Act is not inconsistent with –

51.1 the right of an offender under section 12(1)(e) of the Constitution not to be "punished in a cruel, inhuman or degrading way", or,

51.2 the separation of powers principle under the Constitution, or,

51.3 the right of an accused under section 35(3)(c) "to a public trial before an ordinary court".

The Order

[52] The following order is made:

1. The Court declines to confirm the order made by the Eastern Cape High Court declaring section 51(1) of the Criminal Law Amendment Act, 105 of 1997 to be constitutionally invalid.
2. The case is referred back to the Eastern Cape High Court to be dealt with in

accordance with this judgment.

Chaskalson P, Goldstone J, Kriegler J, Madala J, Mokgoro J, Ngcobo J, Sachs J, Yacoob J, Madlanga AJ and Somyalo AJ concur in the judgment of Ackermann J.

For the applicant : JW Eksteen SC and BL Boswell, at the request of the Court.

For the respondent : JA van S d'Oliveira SC, J Engelbrecht and T Matzke on behalf of the National Director of Public Prosecutions.