THE SUPREME COURT OF APPEAL

OF SOUTH AFRICA

CASE NO. 337/2003

In the matter between

THE STATE **Accused**
(Respondent in cross-appeal)

and

E Y B KAROLIA **Respondent**
(Accused in cross-appeal)

CORAM: ZULMAN, HEHER JJA and PATEL AJA
HEARD: 3 MAY 2004
DELIVERED: 28 MAY 2004

Appeal against sentence by the state in terms of s 316 B of the Criminal Procedure Act, 51 of 1977, (the Act) tests for a special entry by an accused in terms of s 317 of the Act; compulsory sentences prescribed by s 51 of the Criminal Law Amendment Act, 105 of 1977 and the existence of 'substantial and compelling circumstances'. A sentence of correctional supervision in terms of s 276(1)(i) of the Act and the payment of R250 000,00 set aside and replaced by a suspended sentence of imprisonment and a payment of R250 000,00

JUDGMENT

ZULMAN JA

A. INTRODUCTION

[1] This appeal with the leave of the court *a quo* concerns:

1.1 An appeal by the accused (the State) in terms of s 316 B of the Criminal Procedure Act, 51 of 1977 (the Act) against a sentence imposed on the respondent (the accused).

1.2 A cross appeal by the accused against his conviction.

1.3 A special entry of an alleged irregularity in terms of s 317 of the Act.

[2] The accused was charged with and convicted in the High Court (Witwatersrand Local Division) on 6 November 2001 of the following crimes:

2.1 Attempted murder, it being alleged that he unlawfully and intentionally attempted to kill Hermanus Johannes Lotz (Lotz) (the accused having with him at the time a firearm used in the commission of the offence).

2.2 Murder, (not premeditated or planned) it being alleged that he unlawfully and intentionally killed Ntsoeke David Mofokeng (the deceased); and

2.3 Assault with intent to do grievous bodily harm, it being alleged that he unlawfully assaulted Lotz by hitting him with a firearm on his face and head with intention of causing him grievous bodily harm (but where it

could not be found that the accused intended to use the firearm as such in the commission of the offence).

[3] It will be convenient to first consider the cross appeal on the merits of the conviction together with the question of the special entry and then to consider the appeal against sentence.

B. THE CROSS APPEAL AND THE SPECIAL ENTRY

[4] The accused pleaded not guilty to all three charges. His plea was based on a defence of self defence in that the deceased and Lotz had attacked him at his home early on the morning of the alleged offences.

[5] The following facts are not in dispute:

5.1 On 14 April 1998 the accused bought a 333i BMW vehicle from the accused for a purchase price of R65 000,00.

5.2 The price was to be paid by way of a trade in of another BMW vehicle to the value of R35 000,00, payment of R10 000,00 in cash and the balance by the end of April 1998.

5.3 After the transaction was concluded the 333i BMW was returned to the accused and the vehicle traded in returned to the deceased.

5.4 The deceased and Lotz, without any prior warning, arrived at the accused's home early on the morning of 22 June 1998.

5.5 Shortly after entering the accused's home an altercation occurred between the accused and the deceased.

5.6 Two gun shots were fired by the deceased in the direction of Lotz as Lotz was in the process of leaving the home.

5.7 The accused then fired a further three shots at the deceased.

5.8 The deceased sustained several injuries including one wound in the abdomen, one in the chest, and one in the neck.

5.9 These wounds were the cause of the death of the deceased.

5.10 When he arrived the deceased had a firearm on him.

5.11 Shortly after leaving the accused's home Lotz returned to the vicinity of the home in the presence of a Mr Khan.

5.12 Lotz was subsequently removed from the scene by the police. No firearm was found in his possession.

5.13 The deceased's car which was parked in the street in the vicinity of the accused's home was searched by the police. No firearm was found in it.

5.14 The deceased died in the accused's home.

5.15 Lotz is 1,8 metres tall and weighs 80 kilograms. Both the deceased and he were about the same size. The accused was a much smaller man than both of them.

[6] In his evidence the accused stated that he initially did not recognise the deceased. He also gave evidence to the effect that Lotz and the deceased were the aggressors and that he acted in self defence. There was a conflict in the evidence as to precisely what injuries were sustained by Lotz after Lotz left the accused's home.

[7] I interpose to now consider the accused's contentions concerning the special entry, before returning to the cross appeal on his conviction. In essence the accused contends that the court *a quo* erred in calling further witnesses without notice to the parties and after both the state and the defence had completed their arguments on the merits thus warranting a special entry of an irregularity in terms of s 317 of the Act. It was furthermore contended that the only inference to be drawn from the court *a quo* wishing to call the witnesses was that the court attempted to cure deficiencies in the state case. I do not agree. The witnesses sought to be called fell into two categories. Firstly witnesses dealing with the injuries allegedly suffered by Lotz after the initial shooting and secondly a witness concerning the question of the deceased's hairstyle at the relevant time. In this latter regard it was contended, in effect, by the accused that he did not recognise the deceased at the time, inter alia, because of a change in his hairstyle.

[8] Section 186 of the Act provides that:

'The court may at any stage of criminal proceedings subpoena or cause to be subpoenaed any person as a witness at such proceeding and the court shall so subpoena a witness or so cause a witness to be subpoenaed, if the evidence of such witness appears to the court essential to a just decision of the case.' (the emphasis is mine).

[9] The section makes it plain that the court *a quo* was entitled to at any stage of the proceedings which would include a stage even after both the state and the defence had completed their arguments, to cause witnesses to be subpoenaed. (*S*

v Gerbers 1997 (2) SACR 601 (SCA)). There is no requirement that the court give any notice to the parties before deciding to so act. The court has a wide discretion in the matter (see for example *Rex Hepworth* 1928 AD 265 at 277 and *R v Gani* 1958 (1) SA 102 (AD)).

[10] In my view the court *a quo* was perfectly justified in calling the witnesses in question so as to clarify uncertainties regarding the injuries allegedly sustained by Lotz which remained unclear after the state and the defence had closed their respective cases. Secondly the evidence of the deceased's widow, who was one such witness, was also aimed at clarifying the contention advanced by the accused that he did not initially recognise the deceased. Counsel for the accused wisely did not in argument before this court seek to challenge the correctness of the recalling of the last mentioned witness. The court very properly attempted to discover the truth in order to do substantial justice between the accused and the prosecution so as to arrive at 'a just decision of the case'. I accordingly do not believe that in the circumstances the calling of the further witnesses or the recalling of the deceased's widow amounted to an irregularity or that there was any failure of justice in this regard or that the court *a quo* erred in the exercise of its discretion.

[11] I now return to a consideration of the accused's defence and his evidence that the deceased and Lotz had attacked him by pointing firearms at him and that he had acted in legitimate self defence.

[12] It is of fundamental importance to a proper evaluation of the accused's defence to have regard to the evidence of Lotz who was the main witness for the state even although he was not an eye witness to the events inside the accused's home after he left it and when the deceased was shot by the accused. Furthermore the uncontradicted evidence of Dr Rowe who conducted a post mortem on the deceased's body and Superintendent Van der Nest called by the state as also the evidence of the other witnesses called is vital in establishing what happened inside the house after Lotz had left it. All of this evidence is to be weighed against the evidence of the accused, due regard being had to the onus which rested on the state in order to establish whether his defence of self defence was not reasonably possibly true. I believe that the court *a quo* competently and correctly went about this task.

[13] Essentially Lotz's evidence was to the following effect:

13.1 He and the deceased arrived at the accused's home on the morning in question. They pushed the front door bell and knocked. The deceased proceeded to the back door as there was no response at the front door. (A witness, Ms Hlasa, an employee of the accused, confirmed that the front door bell was not working on that day). Thereafter the accused opened the front door and security gate to let the deceased and Lotz in. (This would explain why it was possible for Lotz to later run out the front door and security gate. This evidence contradicted what the accused said in this regard.)

13.2 His role was that of a ‘mediator’ in the discussion regarding R10 000,00 which the deceased contended he was entitled to receive from the accused. In my view it is perhaps unrealistic to describe Lotz as a simple impartial mediator. His occupation was that of a food technologist who attended a business course on conflict resolution. In my view he was really there to assist the deceased, who lived near him, to recover what the deceased believed the accused owed him.

13.3 Once he and the deceased were inside the house, Lotz on more than one occasion, told both the accused and the deceased to speak through him and not to each other. The accused however, appeared to be agitated with their presence and the demand for R10 000,00 and called his son to produce a file with receipts as proof that he did not owe the deceased any money. The receipts appeared to Lotz to be of a general nature, so he asked the accused to view the 333i BMW. The accused was not prepared to do this but instead pulled out a firearm and pointed it at Lotz’s face. A shot was fired by the accused at Lotz. Lotz asked the accused what he was doing as he could not believe the bullet did not strike him. When the accused did not reply Lotz ran away. A second shot rang out. It grazed the top of his head and he felt the plaster of the wall next to him falling on his head.

13.4 Once safely outside the accused’s home Lotz went to the office of the principal of a nearby school to report the matter.

13.5 When Lotz saw a police vehicle moving in the direction of the accused's home he decided that it was safe to return.

13.6 Whilst on his way back to the accused's home in the company of Khan, the accused and a number of other people in the street. He was then assaulted by the accused. Khan had to intervene between the accused and Lotz. It seems clear from this that the accused was still angry with Lotz and wanted to give vent to his anger.

[14] It is true that there was a conflict between the evidence of the domestic servant Hlaza and that of Lotz as to whether or not tea was served to Lotz before the shooting took place. The importance of this contradiction should not be over emphasized when considering Lotz's evidence as a whole. I believe that on balance the court *a quo* was correct in preferring the evidence of Lotz on the matter, especially if regard is had to the fact that Hlasa was an employee of the accused who may well have been under some pressure to attempt to assist him.

[15] I similarly believe that the court *a quo* was correct in accepting the evidence of Lotz which was both probable and in most respects corroborated and not contradicted by other evidence. The court *a quo* described Lotz to be a credible and 'impressive witness'.

[16] Lotz's evidence was corroborated by the evidence of Superintendent Van der Nest and Dr Rowe.

The evidence of Van der Nest was to the following effect:

16.1 If blood falls at 90° (straight down), a circular pattern will be formed.

16.2 The more acute the angle (approaching 0°) the more the shape changes and becomes eliptical in nature.

16.3 The blood stain on the wall depicted in Exhibit D appears to be as a result of an artery that was breached causing the blood to strike the wall with force. The donor of this blood was probably in a low body position; either sitting or kneeling as the pattern is ± 75 cm from the floor and not higher.

16.4 Exhibit D also shows larger and smaller blood stains which in all probability were the result of a breached artery or free surface blood which was available when an assault took place. It is, however, certain that the victim must have been under a table depicted in the exhibit in order to cause a circular pattern.

16.5 The DNA isolated from the blood found on a piece of wood shown in Exhibit D, corresponds with that of the deceased.

[17] The relevant corroborative aspects of the evidence of Dr Rowe are:

17.1 During the post mortem examination three separate gunshot wounds were found:

17.1.1 Wound number 1 : in the abdomen; which had a collar of abrasion indicating it to be an entrance wound.

17.1.2 Wound number 2 : on the left side of the chest. The wound had a collar of abrasion indicating it to be an entrance wound. Wound 3 indicating a bullet lodged beneath the skin.

17.1.3 Wounds number 5 and 6 : the left side of the neck. Wound number 5 has a collar of abrasion indicating it to be an entrance wound and wound number 6 is an exit wound below the chin on the right side.

17.2 The wound in the neck would cause a large amount of bleeding as the blood vessels are superficial in this area and if they are breached the blood would spurt out as the heart pulsates.

17.3 Each wound on its own would be fatal, however, the wound in the neck would lead to death most quickly. Once the wound in the neck is inflicted, the deceased would fall down if he was standing and not be able to do much.

17.4 The deceased was still alive when the wound through the lung was inflicted, as there was aspiration of blood.

[18] Although no ballistic evidence was presented I am satisfied that in the light of the above evidence, the probable inferences to be drawn as to what happened in the house after Lotz ran out are the following:

18.1 The deceased was left in the large lower area of the house together with the accused.

18.2 The deceased was first assaulted in the entrance hall. That would explain the following:

18.2.1 the broken overhead light;

18.2.2 the piece of broken wood on which the DNA corresponds with that of the deceased.

18.3 The deceased was already injured as he ran from the entrance hall down the steps as depicted in Exhibit D and pushed between the glass trolley and dining room table. The circular blood stains depicted in Exhibit D confirm this.

18.4 The deceased probably collapsed in a kneeling position at point K depicted in Exhibit D. It was at this point where he was shot for the third time. The third shot was fired from behind into the left side of his neck behind the ear. This would explain the following:

18.4.1 the spurting of the blood as the large blood vessels were breached and caused the blood stain pattern against the wall and under the table;

18.4.2 the track of the wound.

[19] The accused after testifying in his own defence, called one witness, namely Mr A K M Sultan.

19.1 Various contradictions emerge from the accused's evidence regarding the vehicle transaction with the deceased which reflect negatively on the accused's credibility. I however do not believe that any useful purpose would be served in detailing them. Of more obvious importance is a consideration of his evidence concerning the incident at his home and in the street outside on the day of the alleged offences.

[20] The court *a* quo rejected the accused's version in respect of the incident at his home as being not reasonably possibly true and highly improbable. I believe that it was correct in doing so, inter alia, for the following reasons:

20.1 The accused testified that when Lotz and the deceased entered through the kitchen, he could not see the deceased as he stood behind Lotz. However during cross-examination he stated that he saw the deceased's face for the first time when Lotz approached his sons and the deceased was pointing the firearm at him. He stated that he could see the deceased's face clearly but yet did not recognize him. Later the accused contradicted himself when he said he did not see the deceased's face. When pressed on this point he said that he saw the deceased's face but not clearly. I agree with the court *a quo's* finding that the accused's evidence that he initially did not recognise the deceased because of a change in hairstyle to be both improbable and untrue.

20.2 The accused testified during cross-examination that it is his habit to carry his firearm on his person. He testified that Lotz pulled out a firearm and hit him on the left ear which caused him to fall down. During cross-examination the accused explained how he fell flat on his back and how Lotz put his foot on his stomach. He stated that he was pulled and shoved and that he tried to pull Lotz's hand free from the grip he had on his collar. Lotz denied all of this. It is highly improbable that the accused could, at this stage, not get his hands free in order to get hold of his own

firearm. The accused's attempt to explain this failure by saying he was lying on his hand, is not convincing and I believe untrue.

20.3 The accused testified that the first two shots he fired were respectively a warning shot and a shot in the direction of Lotz. This is highly improbable especially in the light of the fact that the deceased was the closest to him and an immediate threat to his life as he was allegedly pointing a firearm at the accused. There appears to be no good reason why if this was true, the deceased would not have fired a shot at the accused during this time. It is far -fetched to suggest that because the deceased's firearm was not later tested that it could have been faulty.

20.4 During cross-examination the accused stated that the deceased never spoke to him but that Lotz demanded R50 000,00 from him. It is again highly improbable that the deceased would not speak to the accused at all especially in the light of the fact that the deceased wanted the money that he claimed was owed to him. Furthermore during cross-examination the accused stated that he only spoke to Lotz and the deceased saying they must stop hitting him. It is highly improbable that the accused would not offer to pay at least some of the money but instead involve his family and himself in a dangerous life threatening situation.

20.5 The accused testified that Lotz kicked and hit his adult sons Shaheen and Sufyan causing both of them to fall down. During cross-examination of Lotz it was, however put to Lotz that the accused did not see Lotz hitting

Sufyan on his face. When the accused was cross-examined on this point he contradicted himself by saying he later established that Lotz had hit Sufyan. He states that he only saw his son's hands moving and heard what they said. If the accused's sons were indeed assaulted by Lotz, in the manner described by the accused it is highly unlikely that they would only have sustained the injuries depicted in Exhibits G and J. It is also highly improbable that Lotz would attack the sons and that they would both get a chance to escape his attack and run away but not return to the scene after Lotz had left to assist their father in dealing with the deceased.

20.6 Although there was no onus upon the accused I find it strange that he did not call either of his adult sons or his wife all of whom were in the house at the time to corroborate his version. It is not unfair to infer from this that they were in fact not able to corroborate what the accused said especially as to the role of his sons in the matter. This is of some importance as the stick was not brought on to the scene by the deceased or Lotz and the accused was in possession of a firearm and had no cause to resort to using a stick. The strong likelihood is that the stick was the weapon of a third person who came to the assistance of the accused.

20.7 The accused testified that after he fired two shots at Lotz, he turned and fired a third and fourth shot at the deceased who was still advancing towards him after he fired the fourth shot. Thereafter the deceased allegedly grabbed him from behind. He explained how the deceased put

both his arms around the accused's arms. During cross-examination the accused contradicted himself as to how exactly the deceased would have grabbed him by stating the deceased put his right arm under his right arm and that he does not know what the deceased did with his left arm. This seems absurd to me.

20.8 The accused testified that the deceased fell on top of him and at that stage he fired the fifth shot at the deceased while they were wrestling on the floor. During cross-examination he contradicted himself by saying that in the struggle he fired the fifth shot. The accused's description of how, while lying on his stomach with the deceased on top of him, he fired the shot which struck the deceased from behind, beggars belief.

20.9 It is highly improbable that the deceased would only have lifted his firearm and not fired any shots at the accused during the time when the accused presented a threat to him.

20.10 The accused testified that when he ran outside a number of people were approaching his home. When he returned to his home he saw people assaulting the deceased. It was put to Lotz during cross-examination that these people were construction workers who assaulted the deceased with wooden weapons or sticks. During cross-examination the accused, however stated that only some of the people in his home were construction workers; others were people from the community. It is highly improbable that any people would come into the accused's home

to assault the deceased. Especially since the accused stated that he did not know any of the workers at the construction site and the fact that the accused said that as he ran out of the house he did not tell anyone he had been robbed but asked about a white man.

20.11 During cross-examination it was put to Lotz that it was possible that he injured his head when he bumped the light while on his way out of the accused's house. When the accused testified he said that he did not see how the light got broken, but Lotz hit it with his head or someone else did as they ran into the house. It is highly improbable that Lotz damaged the light with his head as it is only the top part of the light that was damaged.

[21] The finding of the court *a quo* that Lotz sustained injuries in the first shooting and in the course of the later assault by the accused on him with a firearm which the accused had with him are completely consistent with the evidence and probabilities and cannot be faulted.

[22] In the result therefore I do not believe that any good reason exists to disturb the credibility findings of the court *a quo* concerning Lotz and the rejection of the evidence of the accused as being untruthful, improbable and not reasonably possibly true. Accordingly the cross appeal of the accused must fail.

C THE APPEAL AGAINST SENTENCE

[23] The court *a quo* took all three charges as one for the purpose of sentence. On 18 June 2002 the following sentence was imposed:

23.1 Five years imprisonment in terms of s 276 (1) (i) of the Act being

imprisonment in terms of which the accused was to be placed under correctional supervision in the discretion of the Commissioner of Correctional Services.

23.2 One year of the aforesaid five years was suspended for five years on the following conditions:

23.2.1 That the accused is not convicted of an offence committed during the period of suspension in which violence is an element.

23.2.2 That the accused makes payment of the sum of R250 000,00 as compensation in favour of the three minor children of the deceased, which sum is to be paid in four instalments the first of R100 000,00 on or before 18 June 2002; the second of R50 000,00 on or before 18 August 2002; the third of R50 000,00 before 18 September 2002; and the fourth of R50 000,00 on or before 18 October 2002.

The payments referred were to be paid to the Master of the Supreme Court Pretoria for payment by him into the Guardians Fund pursuant to the relevant provisions of the Administration of Estates' Act 66 of 1955 for the benefit of the children with the authority of the Master in terms of the said Act to make advances to the minor children from the monies standing to their credit in the Guardians Fund and pursuant to the needs of the children as provided for in the said Act.

[24] Immediately after the sentence was imposed the accused's bail was withdrawn and he commenced serving his sentence. The state is unable to

dispute that the accused made payment of the sum of R250 000,00 on the dates required and that withdrawals have been made against this money on behalf of the minor children of the deceased. Furthermore the accused has now served the term of imprisonment that was required of him (8 months in all). (He was released from prison in accordance with the powers vested in the Commissioner of Correctional Services in February 2003).

[25] Having correctly found the accused guilty, of murder which it found was not planned or premeditated, the accused being a first offender, the court *a quo* would have been obliged to impose a sentence of not less than 15 years imprisonment, that of murder, in terms of s 51(2)(a)(i) of the Criminal Law Amendment Act 105 of 1997 (the Amendment Act) read with part II of schedule 2 thereto (murder, other than murder referred to in Part I para (a) of the schedule the latter paragraph dealing with a murder which is planned or premeditated). It was not so obliged if the court was satisfied in terms of s 51(3)(a) of the Act that 'substantial and compelling circumstances' existed which justified 'the imposition of a lesser sentence than the sentence prescribed in ss 51(2)(a)(i)'. Section 51(3)(a) furthermore specifically provides that if the court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than that prescribed, 'it shall enter those circumstance on the record of the proceedings and may thereupon impose such lesser sentence'.

[26] Similarly having correctly found the accused guilty of attempted murder

with a firearm which the accused had with him at the time which was intended for use as such in the commission of the said offence, the court would have been obliged to impose a minimum sentence of not less than 5 years in respect of such offence in terms of s 51(2)(c)(i) of the Amendment Act read with part IV of schedule 2 to the said Act. Again the court *a quo* was not obliged to impose such minimum sentence if it was satisfied that 'substantial and compelling circumstances' existed which 'justified' the imposition of a lesser sentence than that prescribed in s 51(2)(c)(i). As was the case in the murder conviction the court was required, in terms of s 51(3)(a) to 'enter those circumstances on the record of the proceedings' before it was entitled to impose any lesser sentence. Section 51(6) of the Amendment Act provides that the operation of any sentence imposed in terms of s 51 'shall not be suspended as contemplated in s 297(4) of the Criminal Procedure ct, 1977 (Act No 51 of 1997)'.

[27] Unlike the position in regard to civil appeals to this court which are governed by rule 7 the parties in a criminal appeal or cross-appeal are not required to lodge notices of appeal stating inter alia 'the particular respect in which the variation of the judgment or order is sought' (Rule 7 (3)). There is no requirement that a notice be served in a criminal appeal on this court requiring the accused to set out the grounds of appeal relied upon. Accordingly it would be useful in this case to look at the grounds

advanced by the state in its application for leave to appeal and in the written and oral arguments that it presented.

[28] On 24 June 2002 Mr A P de Vries the then director of Public Prosecutions, Witwatersrand Local Division, of the High Court deposed to in an affidavit in support of an application by the state for leave to appeal in terms of s 316B of the Act against the sentence imposed by the court *a* quo. In the affidavit he stated inter alia that:

'The grounds upon which this application is brought are the following:

5.1 It is submitted that the sentence imposed upon the Respondent is inappropriately lenient and induces a sense of shock.

5.2 The learned Judge erred in attaching insufficient weight to the seriousness of the crimes in general and insufficient weight particularly to the following factors:

5.1.1 The 'cruel and merciless' attack on the deceased and the witness by the Respondent.

5.1.2 The arrogant and aggressive manner in which the Respondent acted when he was confronted by the deceased and the witness.

5.1.3 The fact that the deceased was brutally attacked after he was disarmed.

5.1.4 The fact that the assault on the deceased continued as he lay dead or dying.

5.1.5 The callous attack by the Respondent when he fired shots at the witness instilling intense fear in the witness.

5.1.6 The fact that the Respondent fired a shot at the witness while he was escaping to safety.

5.1.7 The fact that the second assault on the witness in the street was completely unprovoked and contained racial slurs, in full view of bystanders.

5.2 The learned Judge erred in attaching insufficient weight to the interests of society in general and insufficient weight to particularly the following factors:

5.2.1 The fact that the deceased's wife was pregnant at the time of the incident.

5.2.2 The fact that the deceased's wife has been left without companionship and support of her husband.

5.2.3 The fact that two very young children have cruelly been deprived of the love and support of their father.

5.2.4 the fact that the deceased's youngest child will grow up not knowing her father.

5.3 The learned judge erred in over-emphasising the personal circumstances of the respondent in general.

5.4 The learned judge erred in referring to the State versus Eadie 2002(1) SACR 633 SCA in the light of the fact that the respondent did not advance a defence of temporary non-patrological [pathological] criminal incapacity.

5.5 The learned judge erred in finding that imprisonment in terms of Section 51(2) of Act 105/1997 was not an appropriate sentence despite:

5.5.1 having difficulty in finding mitigating features in the circumstances under which the crimes were committed, and

5.5.2 finding this matter to be a 'borderline' case.

5.6 The learned Judge erred in finding that imprisonment in terms of Section 276(1)(i) of Act 51/1977 is an appropriate sentence. It is submitted that such a sentence, under the circumstances, is inappropriate and contrary to the interests of justice.

6. I therefore respectfully request that leave to appeal against the sentence be granted to the Supreme Court of Appeal.'

[28] It is of some significance that the state did not seek to raise the question of any irregularity on the part of the court *a quo* in regard to the appropriateness

or otherwise of s 51(3)(a) either in support of its application for leave to appeal which I have quoted above, nor did it seek to do so in its heads of argument or in oral argument by its counsel in support of its appeal.

[29] Similarly the accused did not address this question in his cross-appeal or in answer to the appeal by the state. The question was raised *mero motu* by this court. Although the question of s 51(2) of the Amendment Act was specifically raised by counsel for the state during argument on sentence the judgment of the court *a quo* does not contain a specific entry by it, on the record of the proceedings or of its reasons for its decision not to impose the mandatory minimum sentences but to impose the lesser sentences that it did. Furthermore a reading of the judgment on sentence does not reveal that the learned judge, in express terms, directed his mind to imposing a separate sentence on the murder and attempted murder offences and to record the existence of substantial and compelling circumstances in regard to each. However, in my view a fair reading of the judgments of the court *a quo* not only in regard to sentence, but also in regard to the merits of the conviction and the granting of leave to appeal, enables one to infer that the court *a quo* was indeed satisfied that substantial and compelling circumstances existed in regard to the two offences justifying the imposition of a lesser sentence. I say this if regard is had firstly to the following passage in the judgment on the convictions:

‘We find that the accused, in a state of anger, lost control of himself, became outraged, and then proceeded in the manner that he did. The clear conclusion to which we arrived at is that

he acted in anger and rage, whether it be because of the arrival of deceased and Lotz so early in the morning; whether it be that the deceased had the audacity to challenge him regarding a refund; whether it be that he was enraged by being called a liar. Matters then took the course they did.' (Judgment vol 12 p 1069 lines 19 to 26).

This passage is expressly repeated by the learned judge in his judgment on sentence in which he stated that it was a 'significant' finding by him. In addition he stated the following in his judgment granting leave to appeal:

'It is clear that in addition to other considerations, in arriving at the sentence considerable reliance was placed by me on the finding in the judgment (page 83) when convicting the accused and as also appears at page 9-10 of the sentence judgment, that the respondent "acted in anger and rage".

[30] Secondly in the course of his judgment on sentence the learned judge referred with approval to the case of *S v Eadie* (2) 2001 (1) SACR 185 (C) and to the fact that in that case at pp 188J to 189A the court was content, that if substantial and compelling circumstances were present, a lesser sentence than the prescribed minimum would be justified. Those circumstances were a combination of severe emotional stress, provocation and a measure of intoxication. *Eadie* dealt with what is commonly referred to as 'road rage' where the offence is committed in a state of extreme anger or rage. The court, however, concluded that in all the circumstances of that case it did not see its way to impose less than the prescribed minimum sentence of 15 years imprisonment. As correctly pointed out by the court *a quo* the judgment and

sentence in *Eadie* was confirmed on appeal to this court (*S v Eadie* 2002 (1) SACR 663 (SCA)). The court *a* quo distinguished Eadie's case on the facts and therefore, impliedly considered that there were indeed substantial and compelling circumstances in the case before it. The reference to *Eadie* and the discussion of the proper approach to substantial and compelling circumstances referred to in s 51(3)(a) of the Amended Act which are dealt with in the case, indicate to me that the learned judge *a quo* was alive to the section and its consequences and considered them when imposing a lesser sentence. It is of course trite that

'An appellate court should not seek anxiously to discover reasons adverse to the conclusions of the trial Judge. No judgment can ever be perfect and all-embracing, and it does not necessarily follow that, because something has not been mentioned, therefore it has not been considered.'

(per Davis AJA in *R v Dhlumayo* 1948 (2) SA 677 (A) at 706)

In his judgement granting leave to appeal the learned judge *a quo* again referred to *Eadie* with approval. It is true that he did not refer to *S v Malgas* 2001(2) SA 1222 (SCA) (approved of by the Constitutional Court in *S v Dodo* 2001 (1) SACR 594 para [11] pp 602/603 and para [40] pp 615/6) where the requirements of s 51 of the Amendment Act relating to the imposition of minimum sentences prescribed by the legislation, were fully considered. In that case this court held that the imposition of the prescribed sentence need not amount to a shocking injustice before a departure from it is justified. That such

a sentence would be an injustice is enough (para [23]). The suggestion that for circumstances to qualify as substantial and compelling they must be exceptional was also rejected. (paras [10], [30] and [31]). The court made it plain that the Amendment Act prescribing the minimum sentences, which came into force on 1 May 1998 and was operative at the time that sentence was passed in this matter, that High Courts were no longer free in the exercise of their discretion, to impose sentences which they considered appropriate and that it was no longer to be 'business as usual' when sentencing for the commission of specified crimes (*Malgas* (supra) para [7] p 1230 A-E). Marais JA delivering the judgment of the court put the matter as follows in para [8]:

'First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead it was required to approach that question conscious of the fact that the Legislature had ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring severe, standardised, and consistent response from the courts to the commission of such crimes unless there were and could be seen to be, truly convincing reasons for a different response. When considering sentence the emphasis was to be shifted to the objective gravity of the type of crime and the public's need for effective sanctions against it.' Nevertheless in summarising his conclusion on the matter Marais JA said, inter alia, 'All factors (other than those set out in D above) [i.e.

‘speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficiency of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation...’] 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.’ (para [25] F p 1236 A-B). Plainly the personal circumstances of the particular accused are ‘traditionally taken into account.’ It is clear that the court *a quo* took the personal circumstances of the accused which it listed in detail, into account in sentencing the accused.

[31] Finally one may reasonably conclude that the following passage in the judgment leads one to find that the learned judge considered that there were substantial and compelling circumstances present which entitled him to depart from the minimum sentences provided for in the Amendment Act:

‘The case of Mr Karolia is indeed a very borderline case where it could perhaps be contended that a period of direct imprisonment is the only appropriate sentence, as has indeed been submitted by Ms Spies for the State. However, bearing in mind (1) the circumstances and particularly that the accused acted in a state of anger and lost control of himself and became outraged (2) that there are <u>compelling personal considerations which are relevant to the accused</u>. I have reached the conclusion that this is not a case where direct imprisonment is the <u>only</u> sentence that should be imposed.’ (my emphasis)

[32] On balance, therefore, and not without some hesitation, I am persuaded that the court *a quo* was indeed alive to the fact that unless there were substantial and compelling circumstances present it was obliged to impose the minimum periods of imprisonment prescribed in the Amendment Act. Again, not without some hesitation, I believe one is entitled to infer that in its judgments on the conviction, sentence and leave to appeal it found such substantial and compelling circumstances to exist. Regrettably the court *a quo* failed to formally record those circumstances in specific terms. Such a failure to record at worst amounted, in my view to a mere procedural irregularity and not a misdirection warranting interference on that ground alone by this court. I also believe that one is able to fairly infer that the murder and attempted murder offences were considered separately for the purpose of sentence by the learned judge and that he decided, in the exercise of his discretion, having found substantial and compelling circumstances to exist in regard to each of them, to order all three sentences (including the sentence relating to the offence off assault to do grievous bodily harm) to be considered as one.

[33] I am furthermore satisfied that the above factors constituted substantial and compelling circumstances which entitled the court *a* quo to depart from the compulsory minimum sentence prescribed in the Amendment Act.

[34] The matter does not end here however since even if the court *a quo* was not obliged to impose the prescribed minimum sentences it is nevertheless necessary to consider whether a sentence of correctional supervision together

with the required payment of R250 000,00 was appropriate in the circumstances. There are undoubtedly a number of mitigating circumstances flowing from the personal circumstances of the accused which are fully set out in the judgment on sentence and which were established in a very competent report by Dr I L Labuschagne a forensic criminologist called by the defence in mitigation of sentence. Amongst these factors are:

34.1 The accused is a first offender.

34.2 He was 49 years of age at the time of his conviction.

34.3 He suffers from a heart condition requiring chronic medication.

34.4 There are no indications of any deviant or criminal behaviour such as drug or alcohol abuse or the like.

34.5 He is in regular and steady self employment.

34.6 From an early age whilst in high school the accused cared deeply for the underprivileged in his community, instigating numerous fund raising events. He is apparently still involved in many such activities and is a valuable member of society.

34.7 He is actively involved with an orphanage in Mayfair, Johannesburg and also works for a home for the aged and is actively concerned in fund raising for both Muslim Mosques and Christian Churches.

Notwithstanding all of the aforegoing mitigating factors it is undoubtedly so that the crimes with which the accused was found guilty more particularly the cruel and merciless attack on the deceased and Lotz were most serious. The

accused deliberately shot the deceased three times at close range and fired shots at Lotz while Lotz was escaping. These are serious aggravating features which must be taken into account when determining an appropriate sentence.

[35] Taking a balanced view of all of the circumstances of this matter a sentence of correctional supervision is startlingly inappropriate and grossly lenient. A sentence of imprisonment is plainly warranted. There is however a peculiar fundamental difficulty in this particular case.

[36] The general rule is that an appeal court must decide the question of sentence according to the facts in existence at the time when the sentence was imposed and not according to new circumstances which came into existence afterwards (*R v Verster* 1952 (2) SA 231 (A) at 236 A-C and *R v Hobson* 1953 (4) SA 464 (A) at 466A). However the general rule is not necessarily invariable (*S v Immelman* 1978 (3) SA 726 (A) at 730 H, *S v V* 1989 (1) SA 532 (A) at 544 H – 545 C, *Thomson v S* [1997] 2 All SA 127 (A) at 138 a-c and *Attorney, Free State v Ramakhosi* 1999(3) SA 588 (SCA) para [8] 593 D-F). Schreiner JA put the matter as follows in *Goodrich v Botha* 1954 (2) SA 540 (A) 546 A-D:

'In general there is no doubt that this Court in deciding an appeal decides whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given and not according to new circumstances which came into existence afterwards. It was so stated in *Rex v Verster*, 1952 (2) S.A. 231 (A.D.), and in *R v Hobson* 1953 (4) S.A. 464 (A.D.). Those cases dealt with appeals against the severity of a sentence; it was sought, in each case unsuccessfully, to prove subsequent happenings to support the contention that the sentence should be reduced. But the language used in the judgments appears to be

general. In the absence of express provision, therefore, it is very doubtful, to put it no higher, whether this Court could in any circumstances admit evidence of events subsequent to the judgment under appeal, in order to decide the appeal.

It is however, unnecessary to exclude the possibility that in an exceptional case this Court might be able to take cognisance of such subsequent events, where, for example, their existence was unquestionable or the parties consented to the evidence being so used. For here the foundations for any such exceptional exercise of jurisdiction were clearly wanting. The respondents did not consent to the use of the second report and, if its terms were to be taken into account, it would clearly have been necessary to provide an opportunity for the respondents to lead any rebutting or explanatory evidence that they might wish to. The proceedings have already been very lengthy and no consideration of convenience supports their further prolongation.'

(This is also true where sentence is concerned)

In my view there are indeed exceptional and peculiar special circumstances which occurred in this case subsequent to the imposition of sentence which it would be proper and just for this court to take into account when considering an appropriate sentence. These circumstances are the fact that the accused has by now served the sentence imposed upon him by a court *a quo*, the proceedings have been lengthy and more importantly has paid the sum of R250 000,00 which has been distributed to the minor children of the deceased and is probably irrecoverable. The state did not dispute these facts which are 'unquestionable' nor did it seek to object to this court taking them into account. Indeed the state conceded, in my view, very properly, that it would be unduly harsh to substitute

a substantial custodial sentence at this stage, coupled in effect, with the payment of R250 000,00.

[37] This case is plainly distinguishable on its facts from *S v Salzwedel and Others* 2000(1) SA 786 (SCA) referred to by the state. In that case a sentence of three years correctional supervision which had been imposed by a lower court in a racially motivated murder was set aside on appeal and substituted with a sentence of 12 years imprisonment, two years of the sentence being suspended on certain conditions, namely that the accused pay into the Guardian's Fund a sum of R3 000,00 for the benefit of the minor children of the deceased. There was no question there of any amount having been ordered to be paid by the lower court which had been paid. The court on appeal took into account, in suspending portion of an increased sentence, the fact that for at least two years the accused had suffered some punishment by being under house arrest and by having to perform community service without any remuneration. The court furthermore made the sentence imposed subject to an appropriate condition that the accused continue to pay into the Guardian's Fund the instalments which the court *a quo* had directed to be paid for the benefit of the minor children of the deceased. No such considerations apply in this case. In any event it may well be that before setting aside the payment of R250 000,00 and requiring repayment of the amount it would be necessary to join not only the Master of the Supreme Court but also the guardian of the deceased's minor children. All of these persons have a real and substantial interest in the matter. None of them have

been joined. A case in which circumstances not dissimilar to those prevailing in this case is *S v Mushonga* 1975(1) SA 247 (RAD). Here the accused had already served his sentence and been released. A magistrate had convicted the accused of public violence and sentenced him to 6 months imprisonment half of which was suspended for three years. In an appeal by the Attorney General the sentence was set aside and a sentence of two years imprisonment imposed, because the accused had already served three months of his sentence and had been released, the court suspended one year and nine months of the sentence for three years subject to certain conditions. This left an effective sentence of the three months imprisonment already served. Lewis JA delivering the judgment of the court commented as follows in regard to the matter of the accused having served his sentence and having been released:

'However, if what I would regard as the appropriate sentence in the ordinary way were substituted in the instant case, it would mean the respondent would have to be re-arrested, after having served the sentence imposed on him by the magistrate and after being at liberty for six weeks, and brought back to goal to serve a further nine months imprisonment with all the consequent disruption of his life which that entails. This Court has always been opposed to the making of any order which would result in that situation. While, therefore as I have said, the appropriate sentence would have been one of two years' imprisonment with labour with half suspended, in the special circumstances of this case it will be necessary to substitute a sentence with a longer period suspended to take account of the fact that the respondent has already served three months in gaol and has been duly released.'

(at 249 F-H)

[38] The following remarks of Marais JA in *S v Roberts* 2000 (2) SACR 522 (SCA) at 529 para [22] p 529 c-d are apposite. (The court was there considering the question of an appropriate period of imprisonment where the state had appealed against a sentence imposed by a lower court):

'[22] In answering that question [what length of imprisonment is appropriate] it would be callous to leave out of account the mental anguish which the respondent must have endured pending the hearing of the appeal. For some three months after the sentence had been imposed by the trial Court he was lulled into the belief that the law had taken its course and, fortunate though he may have considered himself to be, he was free to pick up the scattered threads of his life. That belief was shattered when the Director of Public Prosecutions set in motion an appeal against the sentence. He has had to live in suspense since then. I consider that a significant reduction of the notional period of imprisonment that would have been appropriate at the date when he was sentenced in May 1998 is warranted.'

In the instant case and as previously stated the accused was sentenced on 18 June 2002. It was only some three months later that the Director of Public Prosecution set in motion an application for leave to appeal. The appeal was eventually heard by this court in May 2004. The accused as I have previously stated has served a period of eight months imprisonment, has paid R250 000,00 and has, it would seem, resumed a normal life. Were the accused now to be re-arrested and required to serve a lengthy prison sentence this would to my mind be callous in the extreme. Equally pertinent is the following statement of

Rosenberg JA in the Canadian case of *The Queen v C.N.H.* (Court of Appeal for Ontario 19 December 2002 paras [53] and [54]):

'[53] Taking all of those factors into account (principally the personal circumstances of the respondent) it is my view that the objective gravity of the offence still required that the respondent be sentenced to the penitentiary. In my view, an appropriate sentence would have been three years imprisonment. The one-year sentence imposed by the trial judge was manifestly inadequate.

[54] Notwithstanding the trial judge's error, I would dismiss the Crown appeal. The respondent has now served the custodial part of his sentence and was released from prison on October 28, 2002. This court is always hesitant to return a respondent to prison.'

I stress again that in the case before this court there is a further complicating factor. The accused has paid R250 000,00 which has been distributed and is probably irrecoverable.

[39] Having regard to all of the above circumstances justice would best be served if a period of imprisonment were imposed which was suspended so as to take into account the period of imprisonment already served by the accused and to leave undisturbed the payment by him of R250 000,00 and now distributed.

[40] In the result the following order is made:

40.1 The appeal against sentence succeeds.

40.2 The sentence imposed by the court *a quo* is set aside and replaced with the following sentence:

(a) The accused is sentenced to 10 years imprisonment on the charge of murder, 4 years imprisonment on the charge of attempted murder and 1 years imprisonment on the charge of assault with intent to do grievous bodily harm.

(b) All of the aforesaid sentences are to run concurrently.

(c) All of the sentences, save for eight months thereof, are suspended for 5 years on condition that the accused is not convicted of an offence committed during the period of suspension in which violence is an element.

(d) The accused is ordered to make payment of the sum of R250 000,00 as compensation in favour of the three children of the deceased.

(e) It is recorded that the accused has already served the said period of eight months imprisonment and that he has paid the said sum of R250 000,00 as compensation in favour of the three children of the deceased.

40.3 The cross appeal is dismissed.

40.4 The appeal against the special entry made by the court *a quo* is dismissed.

R H ZULMAN

JUDGE OF APPEAL

PATEL AJA) CONCUR

HEHER JA:

[41] I have read the judgment prepared by my brother Zulman. I agree that the appeal against the conviction must fail for the reasons which he sets out, although I would wish to emphasise my perception of the crime as set out in para [43] below. I am, regretfully, unable to find much common ground between us in respect of the appeal against sentence.

[42] With considerable hesitation I am prepared to agree that Shakenovsky AJ did apply his mind to the prescriptions of s 51 of the Criminal Procedure Amendment Act 1997, and that he found substantial and compelling circumstances to exist in relation to the convictions for murder and attempted murder.

[43] The learned Judge carefully extracted all facts and circumstances, personal to the accused and related to the crimes, which could weigh in his favour. These are referred to in the main judgment and it is unnecessary to repeat them here. That the accused was apparently moved by strong anger to

behave as he did was regarded by the trial Judge as an important mitigating factor. I accept (as Lotz testified) that the deceased twice called him a liar during the discussion which preceded the shooting and that he took grave offence. That too must be factored in. Against that there is the description which Shakenovsky AJ applied to the accused as having 'cruelly and mercilessly and without justification killed the deceased'. The only reasonable inference to be drawn from the evidence is that after the accused had disabled and mortally wounded the unarmed deceased by firing two shots into his body (assisted by an unidentified third person who struck the deceased so hard over the head as to break a sturdy piece of wood) and while the deceased, helpless, crouched or lay under a table, the accused deliberately shot him in the back of the head. That was an act of execution rather than the impulsive reaction of a man beside himself with rage. In all the circumstances I would have regarded a sentence of 15 years imprisonment in respect of the conviction for murder as the appropriate sentence. As that term is the equivalent of the prescribed minimum sentence no question of substantial and compelling circumstances within the context of s 51(3)(a) would have arisen.

[44] As to the attempted murder of Lotz, the act of shooting at a fleeing man, no threat being presented to the accused by him or the deceased, in such a manner as to furrow the top of his scalp, seems to me to amount to recklessness of a high degree. Evaluating once again all the factors for and against the accused, I would have imposed 5 years imprisonment as the fitting sentence.

Here too, for the same reason, an enquiry into the presence of substantial and compelling circumstances would be superfluous.

[45] The sentence imposed by the trial court (which included sentence for the assault with intent on Lotz) manifests a startling and disturbing divergence from the sentences I have identified as appropriate to the circumstances of the case. I agree with Zulman JA that justice demands our intervention.

[46] The case is complicated by what has occurred since the trial: the accused paid R250 000 into the Guardian's Fund for the credit of the minor children of the deceased in fulfilment of a condition of his sentence which suspended one year of the five year sentence imposed by the trial Court; he also served 8 months of the unsuspended portion of his sentence before being released by the Commissioner in terms of s 276(1)(i).

[47] The period already served can be accommodated by including an appropriate caveat in the order. The payment provides more difficulty. Since some (and perhaps, by now, all) of the funds have been released for the benefit of the deceased's children, at least a part of the accused's performance is irreversible. The question is whether we are entitled to take that into account at this stage for the purpose of reassessing the sentence.

[48] In *R v Verster* 1952 (2) SA 231 (A) at 236A-C the Court held that

''n Uitspraak is reg of verkeerd volgens die feite wat ten tyde van die uitspraak bestaan, nie volgens nuwe omstandighede wat later ontstaan nie. Indien sulke latere omstandighede 'n vonnis wat in 'n strafsaak opgelê is, onuitvoerbaar maak, of die uitvoering daarvan onwenslik

maak, is dit ‘n saak vir voorlegging aan, en oorweging deur, die uitvoerende gesag van die Staat-die Gevangenisraad, of die Minister van Justisie, of die Goewerneur-generaal; en ‘n appèl is nie die gepaste manier om hierin ‘n remedie te soek nie.’

The Court accordingly refused to take account of a delay in the hearing of an appeal as a reason for amending the sentence imposed at the trial.

[49] The principle enunciated in *Verster*’s case has been consistently followed in this Court: see *R v Hobson* 1953 4 SA 464 (A) *S v Revill* 1974 (1) SA 743 (A); *S v Sterrenberg* 1980 (2) SA 888 (A); *Thomson v S* [1997] 2 All SA 127 (SCA). In *Attorney-General, Free State v Ramokhosi* 1999 (3) SA 588 (SCA) the Court reaffirmed the principle ‘as a general rule’. Holding that the point argued did not bear on the correctness of the judgment in the court *a quo* it treated the appeal before it as a ‘special case’ and held that intervening circumstances including a considerable delay in the hearing of the appeal, entitled it to consider facts that had arisen since the release of the respondent on bail for the purpose of deciding whether the appeal would have any ‘practical effect or result’.

[50] In *S v Drummond* 1979 (1) SA 564 (RAD) the Court held, in relation to an appeal against sentence that it was not precluded from considering material evidence of what had transpired since the sentence was passed. The Court said (at 569D-G):

‘An appeal Court for obvious reasons is most reluctant in deciding on sentence to take into account facts that have only come into existence since the conclusion of the trial. Generally

speaking, it is for the executive in the exercise of the prerogative of mercy to give effect to any such facts. The rule, however, is not inflexible. See *S v Watungwa* 1976 (2) RLR 158 and *S v Seedat* 1977 (2) SA 686 (RA); 1977 (1) RLR 102. This Court will in exceptional circumstances take into account facts which have arisen since the trial. The fact that an appeal Court is at large on the question of sentence for other reasons is not in itself to be regarded as an exceptional circumstance justifying the departure from the general rule. But the fact that it is at large and must in any event reconsider the question of sentence will make it more receptive of an argument that, in reconsidering sentence, facts which have come into existence since the trial should also be taken into account. Since this is the position of this Court in this appeal, the matters which have arisen since the trial should in my view be regarded as constituting "exceptional circumstances" as envisaged in the cases mentioned above. There is no compelling reason in the particular circumstances of this case why this Court should pass responsibility for the ultimate decision to the executive.'

[51] The Rhodesian approach undoubtedly provides a degree of flexibility necessary in exceptional cases to ensure that justice is done. The present case is in my view exceptional. More particularly, the weight to be attached to the payment is not a matter which can properly be left to the executive. It is also required of this Court to determine whether the payment is a matter bearing on the existence of substantial and compelling circumstances which may in consequence justify a departure from the prescribed minimum sentence. That too is beyond the competence of the executive. The possibility of neither of these distinguishing features can have been present to the minds of the members of the Court which decided *Verster*'s case. We are at large as to the reassessment of sentence and justice requires that the said features be weighed in doing so.

[52] The first question then is the weight which should accorded to the payment. The learned Judge *a quo* matched R250 000,00 with the suspension of one year of imprisonment. I think that was insufficient and that three years would be more appropriate. That conclusion has the result that the sentence of 15 years which I would otherwise have regard as proper must be reduced in order to take account of the payment.

[53] That however can only be done if this Court is entitled to treat the payment as a substantial and compelling circumstance ie one which renders the ultimate cumulative impact of the mitigating factors such as to justify a departure from the prescribed minimum sentence: *S v Malgas* 2001 (1) SACR 469 (SCA) at 477g.

[54] I have no doubt that it has precisely that effect. The result is that the minimum sentence legislation is not applicable to the sentence which I shall propose for the murder. I should add that I also consider it fair to the accused to allow him a reduction for the inconvenience, aggravation, disruption and anxiety caused by the necessity of being returned to prison so long after he had been released in the Commissioner's discretion.

[55] Taking the aforementioned factors into account I consider that the sentence appropriate to the finding of substantial and compelling circumstances is 10 years imprisonment in respect of the murder count.

[56] Of course, the circumstances such as those in point here cannot again be regarded as substantial and compelling when an accused person convicted of

several crimes has once received the benefit of them. There being no other such circumstances available to be taken into account in respect of the conviction for attempted murder, the minimum sentence of 5 years imprisonment must stand.

[57] The assault with intent to commit grievous bodily harm consisted of a vicious blow to the face of a defenceless man, close enough to the eye to be dangerous, with a firearm, causing a wound which bled freely. That assault took place at a time when such anger as may earlier have influenced the accused must largely have abated. In my view the proper sentence would be 6 months imprisonment.

[58] Zulman JA finds that, in the circumstances of this case, an order having the effect of returning the accused to prison would be callous. I cannot agree. No doubt such an order is made with reluctance and only with due regard to the proper demands of justice. When the crime is of such a, relatively-speaking, non-serious nature that such additional imprisonment as is imposed may be suspended without evoking a feeling of disquiet, the accused should receive the benefit of what is, in effect, a valid alternative sentence. However, the present case does not fall into that category. The sentence imposed by the trial court took no proper account of the law and I do not regard it as in the public interest (which is that sentences properly imposed should be served out according to law) that the accused should be allowed to snatch at the bargain which the mistake of the trial court offered him. Even the portion of the sentence which he did serve was founded on the misapprehension of that court that the minimum

sentence legislation did not apply to him. There is a substantial discrepancy between the sentence imposed by the trial court and that which I consider appropriate. The increased sentence serves a valid penal purpose and ought therefore to be given proper effect.

[59] No particular circumstances which bear upon or derive from the delay between the passing of the original sentence and the hearing of this appeal have been drawn to our attention. The delay has been purely systemic and certainly not undue. The State had every right to appeal against the sentence. It did so timeously. (Although the State's application was only heard in September 2002, its notice had been prepared and served within two weeks of the judgment.) It too is entitled to fair treatment.

[60] I would order that the three sentences run concurrently. (Only the good fortune that Lotz suffered no serious injury persuades me that the accused should receive this indulgence in relation to count 2.) In my view this Court should make the following order:

1. The appeal of the State against sentence is upheld.
2. The sentence imposed by the trial Court is set aside and replaced by the following sentences:

   Count 1 (Attempted murder) – 5 years imprisonment;

   Count 2 (Murder) – 10 years imprisonment;

   Count 3 (Assault with intent to commit grievous bodily harm) – 6 months imprisonment.

3. The sentences are to run concurrently. It is recorded that the accused has already served 8 months in prison.

4. The appeal by the accused is dismissed.

J A HEHER

JUDGE OF APPEAL