IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NO: CAF 4/2016

In the matter between:

MABITLE TIDIMALO **APPELLANT**

And

THE STATE **RESPONDENT**

LANDMAN J; GUTTA J & DJAJE AJ

JUDGMENT

Landman J:

[1] Tidimalo Mabitle, the appellant, appeals with leave granted by another Judge of this Court against the sentence of life imprisonment imposed upon him

by Friedman JP on 1 September 2001 following his conviction for the murder of Mr Andrew Maphatchwane.

[2] It is common cause that the indictment did not refer to the Criminal Law Amendment Act 105 of 1997. However, at the sentencing stage, the court *a quo* required the appellant to show that there were substantial and compelling circumstances present which would obviate the imposition of life imprisonment. The absence of any forewarning, at the commencement of the trial, that the minimum sentence dispensation was applicable means that the court *a quo* was not entitled to impose sentence in terms of that law. See **S v Ndlovu** 2003 (1) SACR 331 (SCA). It follows that the sentence imposed by the court *a quo* should be set aside and this court is at liberty to impose sentence afresh.

[3] In his heads of argument (which are exactly the same heads that served before the court that herd the application for leave to appeal) Mr Shapiro invites us to take account of the character of the appellant and his behaviour and conduct during his incarceration. Mr Shapiro also seeks to place facts before us relating to the family circumstances of the appellant as they now stand.

[4] It may, depending on the facts and the circumstances of a case, be permissible to take into account facts which were not present at the time and appellant was sentenced. See **Mulula v The State** (074/14) [2014] ZASC 103 (29 August 2014) where Brand JA said at para 11

'In addition, the general rule is that an appeal court will decide whether the judgment appealed from is right or wrong according to the facts in existence at the time it was given, not in accordance with new facts or circumstances subsequently coming into existence. Nonetheless, this court has previously indicated that the rule is not written in stone. Evidence of facts subsequently arising will be allowed in circumstances that can be described as exceptional and peculiar (see eg ***S v EB*** *2010 (2) SACR 524 (SCA) para 5). Whether or not this test is met, I venture to suggest, will be dictated by what the interests of justice demand in a particular case.'*

[5] Section 309(3) and section 304(2) of the Criminal Procedure Act 51 of 1977 and section 19 of the Superior Courts Act 10 of 2013 permit this Court, sitting as a Court of Appeal, to receive further evidence, or remit the case to the court of first instance, or to the court whose decision is the subject of the appeal, for further hearing, with such instructions as regards the taking of further evidence. Whether further evidence will be received or not depends upon whether the further evidence tendered meets the requirements listed in **S v De Jager** 1965 (2) SA 612 (A) at 613A-B), namely:

'(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.
(b) There should be a prima facie likelihood of the truth of the

evidence.

(c) The evidence should be materially relevant to the outcome of the trial.'

[6] However, for this to be done the appellant must apply for leave to adduce additional evidence. No such applications serves before us. The result is that we cannot take these facts into account.

[7] The personal circumstances of the appellant are the following:

- He was born on 10 March 1980 and was therefore 20 years old at the time the crime was committed.
- He was the second born child of his parents.
- His father was engaged in gardening services, and his mother was a cleaner.
- He was a first year student at a Technikon studying Architecture.
- His parents had paid for his first year of studies, but he did not have sufficient money for his second year.
- He lost all his belongings when he was pushed off a train.
- He expressed regret for the crime that he had committed.
- He made a confession to Magistrate.
- He pleaded guilty.
- He was a first offender.
- He had been in custody for nine months awaiting trial.

[8] In his plea statement the appellant told the court that the wife of the deceased had contracted him to kill her husband. She promised to pay him R50 000 for the job. He accepted the task because he was in need of money having lost all his belongings while travelling to Cape Town. His father could not help him as he had been retrenched and was unable to find other employment. His mother was employed as a cleaner and her wages were only enough to provide food. He killed the deceased by shooting at him four times. Three bullets struck the deceased. When he saw that the accused was still alive after the shooting, he took out a knife and cut the deceased's throat. He ended his plea statement by saying: "I plead for mercy. It is poverty that made me kill the deceased. In fact I wanted money to go back to school."

[9] Contract killings or assassination contracts are regarded by our society as particularly heinous. Friedman JP said in **S v Kgafela** 2001 (2) SACR 227 at para 81 that:

> *'Society has not, will not and cannot tolerate murder attendant on an 'assassination contract'. This has been designated as a heinous crime by our courts, and which inspires a sense of revulsion and horror, and strikes at the very root of the social order. To consider that gratuitously, or for payment, a person may be hired to take the life of another is a chilling thought, whatever the circumstances.'*

These sentiments are still applicable today.

[10] The mitigating circumstances more especially, the youth of the appellant and the need to secure the rehabilitation of the appellant are weighty factors that must be considered in the context of a heinous crime. Moreover, the injunction to be merciful may not be overlooked.

[11] Ms Rasakanya, who appeared for the State, has submitted that a sentence of 25 years imprisonment would be appropriate. I agree.

Order

[12] In the premises I make the following order:

1. The appeal against sentence is upheld.
2. The sentence of life imprisonments is set aside and replaced by a sentence of 25 years imprisonment.
3. The sentence is antedated to 1 September 2001.

AA Landman

Judge of the High Court

I agree

N Gutta

Judge of the High Court

I agree

T J Djaje

Acting judge of the High Court

Appearances

Date of hearing:	27 May 2016
Date of Judgment:	30 May 2016
For the Appellant:	Adv Shapiro instructed by Maree & Maree Attorneys
For the Respondent:	Adv Rasakanya instructed by The Director of Public Prosecutions, Mafikeng