
PRIMUS

VOL 1

No 1

JUNE /JULY 2006

PRIMUS IS THE OFFICIAL DIGITAL LAW JOURNAL OF THE ASSOCIATION OF REGIONAL MAGISTRATES OF SOUTHERN AFRICA

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ARMSA DIGITAL PRESS

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FOREWORD:

It is with great joy and pride to introduce the first edition of the electronic law journal of the Association of Regional Magistrates of Southern Africa.

We wish to thank everyone who has contributed to making this edition possible, especially those of you who have allowed us to publish your work. It is an honour for us to do so and we hope that the readers will benefit and learn from it.

A special word of thanks to our Webmaster and Secretary, Mr Louis Claassen, for his tireless effort in designing the excellent and unique layout of the publication. Also to Jakkie Wessels, Chairperson of the Judicial Education Committee, for her efforts in collecting and promoting contributions for the journal.

Mr Allan Cowan and Mrs Lynn Pillay, Regional Magistrates Pretoria are thanked for their diligence in editing the journal.

This is a modest beginning for a journal we hope will only grow and prosper. We again wish to invite you to submit contributions. One of our aims with this journal is to share knowledge and enhance our members' knowledge of the law and its application. We also hope to publish some editions focussing on a specific theme. In the meantime, thank you for your support, enjoy this publication and remember the closing date for contributions for our next publication is on or before 30 September 2006.

A handwritten signature in black ink, which appears to read 'A Bekker'. The signature is fluid and cursive.

PRESIDENT: ARMSA
ADRIAAN BEKKER
PRETORIA

1 AUGUST 2006

SENTENCING: IS IT NECESSARILY AND EXCLUSIVELY A JUDICIAL FUNCTION?

D. Allers¹

Introduction

Munro², subsequent to discussions of decisions in Australia, the United States of America (USA) and the United Kingdom (UK), concludes, “.....the judicial function is perceived as that of finding the facts and applying the relevant law in a triangular setting.”³ In respect of sentencing, he remarks: “[h]owever, in selecting a sentence for an offender, judges are not finding facts or applying rules, but are engaged in a different kind of exercise.”⁴

In the UK, and for the better part of the twentieth century, a wide judicial discretion reigned in respect of the sentencing process, without a proper system in place and consisted mostly of sentencing powers dedicated to the courts (by the legislatures) to exercise within specific parameters --- appellate review, however, resulted in some principles being established through precedent.⁵

In the USA, sentencing standards were non-existent, there was no requirement of supplying reasons for a particular sentence and there was no protection from inconsistent/ill-founded decisions through a process of appeal. These, and other factors such as indeterminate sentences (where a parole board would effectively decide the duration of a custodial sentence, resulting in “retaliatory” measures by the judiciary with longer margins of sentences), contributed to widespread dissatisfaction and disillusionment with the system(s).

¹ Regional Magistrate Eastern Cape

² Munro C “Judicial independence and judicial functions” in Munro C & Wasik M (eds) *Sentencing, judicial discretion and training* (1992).

³ *supra* p 25

⁴ *supra* p 26

⁵ Von Hirsch A and Ashworth A (eds) *Principled Sentencing* 2 ed (1998) p 212 & further

The South African development shows remarkably similar trends regarding sentencing practices (as mentioned above regarding the position in the UK). Fagan CJ⁶ remarks, with regard to a suggestion by the court *a quo* that (sentencing) principles for guidance should be laid down for future reference that “rules that bind the Court would be out of place”⁷. He quotes from *R v Mapumulo*⁸ the following passage of Innes, CJ: “The infliction of punishment is pre-eminently a matter for the discretion of the trial Court”⁹. He amplifies (in par G): “I think it equally undesirable that in the matter of a trial Judge’s power to impose punishment this Court should attempt to lay down principles which may be construed as in any way fettering his discretion. Trial Judges have to bear in mind that the responsibility for determining the punishment lies squarely on their shoulders, and that their decisions in this regard are not subject to review by this Court except within the limited compass that I have indicated; while similarly it would be erroneous for the executive authorities to suppose that our refusal to interfere with a sentence is by itself an indication of our agreement with it...”¹⁰

Smalberger JA¹¹ reiterates the abovementioned principle (in *R v Mapumulo*) and adds: “That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition.” Also, “The second, and somewhat related principle, is that of individualization of punishment, which requires consideration of the individual circumstances of each accused person.” With regards to legislative interventions that embark on judicial discretion (and with specific reference to mandatory sentences), he remarks¹²: “Courts will not be astute to find that a mandatory sentence has been prescribed. This, however, does not mean that they will disregard relevant principles of statutory interpretation.”

1 Curtailment of judicial discretion

Unlimited and open-ended sentencing discretion is universally unacceptable; a variety of methods have been employed in many countries to curtail this phenomenon, for

6 R v S 1958(3) SA 102 (A) 104

7 p 104D

8 1920 AD 56 (at 57)

9 p 104A

10 p 104

11 S v Toms; S v Bruce 1990(2) SA 802 (A) 806G – 806D

12 p 807F

example: maximum penalties for offences, primary legislation to be developed by the judiciary, guideline sentencing providing for a rule-making commission which has to formulate detailed guidance¹³ and mandatory sentences¹⁴.

1.1 USA experience

In the USA during the early seventies, each state and the federal system had an indeterminate sentencing system. Maximum penalties were set by the respective legislatures and within those clauses, judges had a free discretion to impose sentence. Parole boards determined the duration of the sentences. Virtually no appellate review, of sentences and parole board decisions, existed. Ideals of equity and curtailment of disparity of sentences (and the execution thereof), lack of a proven rehabilitative basis of the indeterminate sentencing systems (and concomitant lack of fairness) and lack of accountability of sentencing officers and parole board decision makers, manifested *inter alia* in the use of guideline sentencing, after sentencing reforms commenced from the mid seventies.

During the early nineteen eighties, the Minnesota Sentencing Guidelines saw the light -- this State's initiative was soon to be followed by other American State legislatures. In essence, most of the guidelines distinguish between two dimensions: that of offence as opposed to offender. Scores are assigned to:

- seriousness of the offence;
- particulars of the offender (e.g.: prior record, etc).

A grid provides for the intersection of these scores, indicating the appropriate sentence.

Important features of these guidelines are:

- (i) they provide decision ranges to cover the majority of cases, but are not meant to have automatic application or usurp the discretion of the sentencing officer by enforced rigid methodology;
- (ii) provision is made for individualization in appropriate circumstances, provided that reasons for the departure are supplied;

13 Von Hirsch A & Ashworth A (eds) *Principled Sentencing* 2 ed (1998) 212 and further

14 Ashworth A "Four techniques for reducing sentencing disparity" in Von Hirsch A & Ashworth A (eds) *Principled sentencing* supra 227 and further

- (iii) regular feedback to judges about the application of the guidelines and concomitant effects are given;
- (iv) they are not meant to be static and revision, reflecting changing realities, is a continuous attribute;
- (v) cognizance of correctional resources and –capacity are also taken into account in developing the guidelines.

Gottfredson MR & Gottfredson DM¹⁵ hails the results of the sentencing guidelines a success in that it "...made policy explicit and reduced inequity."

A stark contrast to the Minnesota guidelines, however, is pictured by Tonry M¹⁶, regarding the Federal Sentencing Guidelines (developed by the U.S. Sentencing Commission), which became operative in November 1987. Apart from severe institutional problems and obstacles, the U.S. Sentencing Commission is criticized for being politicized and its members inept for the (then) task at hand.

The result is an intricate, long-winded and user-*unfriendly* grid, which is the subject of vehement opposition and criticism. Critical issues of concern are:

- Departures from guidelines are very limited, and may only be effected if there is a finding that the specific aggravating/mitigating circumstance was not adequately taken into account by the Sentencing Commission;
- Few approved bases for departures are available, as some distinguishing factors (e.g.: stable work record) are specifically forbidden and some (subsequent to appellate interventions) even amended¹⁷;
- The guideline sentence is not limited to/based on the offence to which the offender pleaded guilty (or for which he was convicted at the trial), but for "actual offence behaviour"/"relevant conduct."¹⁸

15 *supra* p 168

16 Tonry M *Sentencing matters* (1996) 72 and further

17 examples: US v Big Crow, 898 F. 2d 1326 (1990) & US v Lopez, 945 F. 2d 1096 (1991) per Tonry, M supra

18 Tonry M supra p 77

- The commission used an ideological “law-and-order” approach for the setting of the sentencing policy and guidelines, intended to increase the severity of federal sentencing;
- No provision is made for intermediate sanctions (e.g.: fines) and only probation and imprisonment are authorized.

[Recently, however, sentencing guidelines appear to have come under heavy constitutional scrutiny, leaving great uncertainty as to the way forward]¹⁹.

1.2 *South African experience*

South Africa is no exception with regards to some of the abovementioned measurements²⁰. The most recent and serious measure (Act 105 of 1997²¹) taken by the legislature, has undoubtedly caused quite a stir in the (criminal) legal fraternity and given rise to an expected flurry of case law, indicative of a huge divergence of opinion and interpretation.

In what appears to be a radical departure from the approach in *S v Toms; S v Bruce*²², the Constitutional Court²³ (CC) places the decision in *Toms* in its proper perspective, indicating that that decision was made in a totally different constitutional setting (namely that of political sovereignty), in respect of a totally restrictive form of mandatory sentence, and that the Appellate Division did not suggest that punishment fell within the exclusive domain of the trial court. The CC further makes it clear that that in the present constitutional context, there is “no absolute separation of powers between the judicial function, on the hand, and the legislative and the executive on the other”²⁴. It specifies: “[w]hen the nature and process of punishment is considered in its totality, it is

19 see www.vera.org for discussions of the decisions in *Blakely v Washington* (2004) & *United States v Booker* (2005)

20 Report of the Commission of Inquiry into the Penal System of the Republic of South Africa (1976) RP 78/76 par 5.1.4.1. and further, AND

South African Law Commission Sentencing: A new sentencing framework (2000) Project 82 Discussion Paper 91

21 Criminal Law Amendment Act

22 supra

23 *S v Dodo* 2001(1) SACR 594 (CC)

24 par [21] supra

apparent that all three branches of the state play a fundamental role and must necessarily do so.”²⁵

In respect of sentence, the CC disagreed with the court *a quo* where the latter remarked that imposition of the most severe punishment (life imprisonment) falls within the exclusive prerogative and discretion of a High Court, as not reflecting the law (either pre- or post the constitutional dispensation)²⁶. It adds²⁷ “[o]n 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.....[e]ven the exercise of the court’s ‘normative judgment’ in determining the nature and severity of the sentence within the options permitted by law has to be judicially exercised; it is not unfettered. This was and is true of all sentencing, not merely in the case of the most severe sentences.”

In paragraph 22²⁸, the CC clearly finds that in the present constitutional dispensation there is no absolute separation of powers between the judicial function, as opposed to the legislative and executive functions. It specifically acknowledges that all three branches/sections of the state play a functional role, when the nature and process of punishment is considered in its totality: “Both the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity.”

2 Sentencing tensions

The issues referred to above, are indicative of the tension between the judiciary/sentencing officers and other factors having an impact on the ultimate sentence. Gottfredson²⁹ distinguishes between three components that make up any decision:

- the goal that the decision maker would like to achieve;
- that alternatives are available to the decision maker, and

25 par [22] *supra*

26 par [13] *supra*

27 par [13] *supra*

28 *supra*

29 Gottfredson MR & Gottfredson DM *Decision making in criminal justice* 2ed (1988)

- the information at the disposal of the decision maker to determine the ultimate choice among the available alternatives.

Attention is drawn to the position in the US (which is not totally dissimilar to the SA position) that “[t]he sentencing decision is at present guided unsystematically by goals of retribution, rehabilitation, community protection, deterrence and equitable treatment. It is a decision that must be made within constraints imposed by law and by resources (that is, alternatives).”³⁰

It is also argued that this sentencing decision is typically exercised in the absence of information, provided systematically to assist the judge/decision maker in making equitable sentencing decisions to ensure even sentencing treatment for similarly situated offenders. Furthermore “...it is a decision that must be made with little systematic knowledge of the consequences of previous decisions in similar cases.”³¹

Terblanche succinctly narrows the contents of the abovementioned to: “[t]he mere fact that the decision is left to discretion presupposes that no single correct answer exists.”³² Although Terblanche points out that an apparent legal basis (for the notion that sentencing is a judicial function) is lacking³³, it stands to reason that whatever the basis is/may be, somebody has to perform this function.

The sentencing discretion encompasses a huge variety of considerations, decisions and choices before an appropriate sentence is handed down, for example: which facts/factors are relevant, what weight to be attached to them, whether the accused should be accommodated in or outside prison. Terblanche also (with reference to Baxter³⁴) acknowledges the subjective role played by the specific judicial official’s specific attributes, life experiences and values.

The mythical nature of a so-called “free and unfettered” discretion, is also well-illustrated by Terblanche³⁵ and it is clear that a sentencing officer can only operate within the

30 Gottfredson *supra* p6

31 Gottfredson *supra* p6

32 Terblanche SS *The guide to sentencing in South Africa* (1999) 122

33 See also: Du Toit *et al* *Commentary on the Criminal Procedure Act* (especially Chapter 28)

34 Terblanche SS *supra* par 2.2.3

35 Terblanche SS *supra* par 2.2.5

parameters of the law pertaining to him/her. However, within these parameters (for example: jurisdiction, specific authorizing legislation in respect of penalties, pre-requisites for imposition of sentences) the presiding officer is given a great amount of latitude. It is this uncontrolled freedom that offends (and lacks) scientific qualification, enhances the unpredictability of the outcomes of cases, contributes to unequal treatment for similar behaviour and reinforces perceptions of arbitrariness and discrimination.

CONCLUSION

In response to the initial question posed (as to whether sentencing is necessarily a judicial function), my respectful opinion is that it is not. The CC decision in *S v Dodo*³⁶ reinforces the common interests regarding sentencing, shared by the judiciary, legislature and executive. My respectful submission in this regard is that although the judicial official in the South African context is tasked with the sentencing decision, this is tantamount to no more than collating, formulating, evaluating, analyzing and translating relevant information acquired not only from the preceding trial/plea of guilty, but also from relevant role-players, where after it “mouthpieces” a sentence which is in accordance with a wide variety of considerations (*inter alia* the interests of the legislature and the executive).

What is of crucial importance for the present discussion and to determine if sentencing is solely a judicial function, is *how* this function is (or at least, ought to be) exercised. Various factors militate against the idea that sentencing is necessarily exclusively a judicial function, as the whole procedure allows for (and encourages) participation of a number of role-players³⁷ on the one hand, and on the other, prescribes the limitations³⁸ within which the specific decision must be made.

The input of various role-players and limitations may vary from case to case, but the essence remains: it all forms part of the process of assisting the judicial official to come to a fair, just and suitable sentence, which process in turn, detracts from the very notion

36 *supra*

37 Du Toit *supra* (chapter 28)

38 Eg: Magistrates’ Court Act 32/1944

that sentencing is necessarily exclusively a judicial function. Other aspects, indicative of the fact that sentencing is not necessarily exclusively a judicial function, are the provisions made for sentencing to be passed by a judicial official other³⁹ than (and as opposed to) the one “finding the facts and applying the relevant law in a triangular setting”.⁴⁰ Also, some statutory requirements compel judicial officials to first obtain inputs from other role-players before a specific sentence can be imposed⁴¹. In certain instances, obtaining pre-sentence reports will be indispensable (for example: youthful offenders⁴²), whilst in others it certainly will make an invaluable contribution to the sentencing process. Provision is also made for re-consideration of sentence⁴³ and pertinent discretion is also given to the commissioner of correctional services to release a convicted person on correctional supervision⁴⁴, parole or apply to court to re-consider a prison sentence.

The ideal position of course, would have been to be able to place all these relevant factors before a panel, consisting of suitably equipped members representing the legislature, the executive (e.g.: correctional supervision officials), criminologists, penologists, psychologists, probation officials, academics, etc. Practical reality and lack of resources, however, dictate otherwise and not even the bare minimum is often available to judicial officials. Analytical self-help, common sense and continuous judicial training appear to be the only way out.

I would respectfully submit that the shared interests (referred to in *S v Dodo*⁴⁵) can and should be reflected in any sentence, if properly applied. Instead of a mere regurgitation of the factors renowned in *S v Zinn*⁴⁶, they can be applied to effectively reflect on and encompass all the abovementioned interests. Without going into a detailed discussion of these factors as such, the argument I am trying to raise is the following: upon viewing those factors and a proper construction thereof, the very point made in *S v Dodo*⁴⁷ (i.e.:

39 Eg: Sections 114, 116 and 275 Criminal Procedure Act 51/1977 & Sections 51 and 52 of the Criminal Law Amendment Act 105/1997

40 See footnote 2 *supra*

41 Eg: Section 276 A of the Criminal Procedure Act *supra*

42 See for example: *S v Cloete* 2003 (2) SACR 489 (O)

43 Section 276A(3)

44 Section 276A(2)

45 *supra*

46 1969 (2) SA 537 (A)

47 *supra*

“[b]oth the legislature and executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity.”) is already part and parcel of the sentencing procedure.

The “seriousness of the offence” is normally reflected in the sentences, (albeit in minimum-, maximum- or mandatory form) prescribed by the legislature (currently even most of the common law offences⁴⁸ are so prescribed) and in a democratic system that translates to be also reflective of the will (or interests) of the broader populace. On the other hand, the interests of the executive (mainly correctional services), is also addressed under the factor “interests of society”, as the sentencing officer will have to decide on a custodial sentence or not: if so, it certainly is in the interest of society that the offender can be properly and gainfully accommodated (having due regard to the available resources) in a correctional facility and that somehow, her incarceration will (eventually) benefit the broader society, albeit that society is a safer place without her presence or that she will return to society to take up her life as a fruitful member of the society. By properly weighing up these factors (with the personal circumstances of the accused person) and the purposes of punishment, effect is then given to the common interests shared by the legislature, executive and the administration of justice (through the judiciary).

48 See Act 105/1997

SHAMING AS A FORM OF RESTORATIVE JUSTICE - A POSSIBLE SOUTH AFRICAN APPLICATION

L H CLAASSEN¹

Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

- Lord Hewart"

Introduction

Some of the problems besieging the South African Criminal Justice system are the overcrowding of prisons and the strain on the court system to deal with ever increasing crime. Irrespective of what the courts do it seems that they will receive criticism from one or other source.

Initially criticism was levelled against the courts for failing to reduce the amount of outstanding cases and also the amount of awaiting trial prisoners. To alleviate these problems the Department of Justice and Constitutional Development have employed retired magistrate on contract to reduce the court rolls.

Although this system was effective, criticism was levelled that current District Magistrates were not utilized and hence were deprived of the opportunity to gain experience. The system of re-hiring retired magistrates was abolished and replaced with one where district magistrates or attorneys were appointed. This system is yet again criticized for the slow pace at which cases are finalized.

The law of unintended consequences now dictates that if there are more courts more cases are finalized and consequently the prison population increase or prisoners are converted from awaiting trial prisoners to sentenced prisoners.

On a recent visit to prisons by members of the portfolio Committee on Correctional Services

¹ Regional Magistrate Limpopo – Private Bag X4010 Tzaneen 0850.

severe criticisms were levelled against magistrates for imposing direct imprisonment for certain offences.² The Portfolio Chairperson was very animated in the criticisms he levelled. Some of the more flowery comments he made were reported as follows:

"Magistrates are wasting taxpayers' money by sending women to prison for calling others "witches" or "lizards". "It's true, this is a reality. Women are sitting in prison for this," he said after visiting Thohoyandou Prison in Limpopo. "We will save millions for taxpayers if these women received alternative sentencing instead of going to prison."³

The fact that several persons in the Limpopo Province have been killed after being pointed out as witches or wizards, as well as the prevalent belief in the supernatural and witchcraft seem to be lost on the honourable member of the Portfolio Committee.

Further criticisms of similar nature were also reported in the following fashion:

".... I spoke to some of the women and found that many had been imprisoned for petty offences. "One woman stole perfume valued at R16. She is in prison for four months because she could not pay a R2 000 fine. "Another woman is in prison for six months because she called another woman 'a witch'. "Yet another is in for six months because she called somebody 'a lizard'. She did not get an option of a fine. She also has a baby.

Apparently it is not only magistrates that erred in the sentences they impose. That is patently clear from the following:

".....magistrates, and to a certain extent judges, had to come to terms with the extreme poverty facing some South Africans." Limpopo is a poor province. Most of these are economic offences."

One cannot objectively comment on the criticism levelled, without perusing the circumstances the magistrate took into account prior to sentencing. There may be valid reasons why the Magistrate imposed sentence as he or she did. Canvassing the "facts"

² The Star newspaper page 6 2005-05-11 edition

³ Whether the criticisms levelled in this regard have any substance is a debatable one. The *ratio* for sending people to jail for offences of this nature can be attributed to the Witchcraft Suppression ACT 3 OF 1957 which increase the jurisdiction of District

and reasons for sentencing from the accused seem to be a dangerous pursuit as there is no validation for the correctness of their recollection or version of the “truth”.

The only inference that can be drawn from the above mentioned criticism is that certain members of the executive arm of Government regard economic offences as trivial and do not share the view that such perpetrators should be incarcerated in suitable cases.

The question however is not whether one agrees with the above mentioned criticism or not. The root cause for the criticism is the overcrowding of prison accommodation. The judiciary bear a double burden in this regard:

Firstly there is a legal duty on the judiciary to impose a suitable sentence that would comply with all or most theories on sentencing and;

Secondly the judiciary should strive to limit political interference and political solutions to judicial problems.

To alleviate overcrowding the Department of Correctional Services may in terms of the Correctional Service Act 111 of 1998 release prisoners in terms of the so- called “bursting” provisions.⁴

These measures are both contentious and de-motivating from a judicial point of departure. Irrespective of how well the Magistrate has motivated his reasons for sentence, the functionary who reduces the sentence is totally oblivious to the reasons for sentence or the seriousness of the specific offence.

In recent history we have experienced a mass release of Prisoners in South Africa. There was a varied reaction from the different political parties as to the prudence of the

Magistrates to imprisonment up to five (5) years for offences of this nature.

⁴ See Sections 81 & 82

release.^{5 6}

It is submitted that the only way the Judiciary can prevent or reduce the need for political intervention in the sentences the court imposes is to be creative in the sentence the court imposes and to send accused to jail only as a sentence option of last resort.

Other sentence options do exist that a court may impose under the current legislative framework. These options however may require a more involved approach. Better results may be achieved if presiding officers are willing to have a paradigm shift in their approach as to what a suitable sentence may be.

ALTERNATIVE SENTENCING OPTIONS:

Although the concepts of Restorative Justice and Shaming are not often taught at university level and are almost foreign to handbooks on sentencing, shaming as a form of retribution and punishment manifests itself in various and diverse ways from the earliest of times.

The Roman law paid scant regard to insolvent persons. They were made to stand naked on the town square for three (3) days shouting that they were insolvent, before they were sold into slavery to defray the loss suffered by their creditors.

Several examples of shaming are also present in modern day South Africa. The following examples emanate from local newspapers.

- Recently a shoplifter was handcuffed to a lamp post with a notice reading "I've been caught while stealing"⁷
- The names of Home Affairs officials found to have committed serious acts of misconduct, have been released by the Department of Home Affairs.⁸
- The University of Pietermaritzburg displays the names of "cheats" on notice boards⁹.

⁵ See in this regard The Mercury Newspaper P3 June 2 2005

⁶ www.iol.co.za – "Department has to answer for freeing 'rapist' - 2005-08-11 13:20:56

⁷ www.news24.co.za – "Shoplifter shamed at his post" – 5 May 2005

⁸ www.news24.co.za – "Graft officials named, shamed" - 18/07/2005

⁹ www.news24.co.za – "Cheats 'named and shamed' – 22/02/2004

- Courts also have taken notice of the effect of naming and shaming of offenders, this is evident from the following “A British paedophile has escaped a jail sentence when the judge said he had suffered after being identified by the News of the World tabloid.”¹⁰

It is in this regard that it is submitted that the hypothesis of Restorative Justice and Shaming as an equitable sentence option needs to receive closer scrutiny.

Accordingly I will now deal with each of these concepts.

Definitions:

Before one can deal with the notions of Restorative Justice or Shaming it is necessary to determine what is meant by this terminology. The subject matter does not seem to have a universally accepted definition of the above mentioned terminology. The lists seem not to be exhaustive.

The following are advanced as possible definitions:

Restorative justice:¹¹

- ...” A very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation and crime prevention ... It also means transformed foundations of criminal jurisprudence and of our notions of freedom, democracy and community”.
- “Restorative justice is a philosophical approach to responding to crime aimed at repairing the harm caused by a criminal act and restoring the balance in the community affected by the crime”.¹²
- “Restorative justice is a theory of criminal justice that focuses on crime as an act against another individual or community rather than the state. The victim plays a

¹⁰ www.news24.co.za - 'Named and shamed' paedophile avoids jail" – 11/08/2000

¹¹ <http://www.aic.gov.au/rjustice/rise/working/risepap1.html>

¹² http://www.gov.bc.ca/prem/popt/service_plans/srv_pln/pssg/appen_a.htm

major role in the process and receives some type of restitution from the offender.”¹³

- “Restorative justice assumes that the victim or their heirs or neighbours can be in some way restored to a condition “just as good as” before the criminal incident. Substantially it builds on traditions in common law and tort law that require all who commit wrong to be penalized. In recent time these penalties that restorative justice advocates have included community service, restitution, and alternatives to imprisonment that keep the offender active in the community, and re-socialized him into society.”¹⁴

Shaming:¹⁵

- “All social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and or condemnation of the offence by others who become aware of the shaming”
- “... The use of shame or shaming as mechanisms to evoke remorse”
- “Through the method of shaming, the criminal justice system meant more to teach a lesson than simply punish the offender.”

Shame¹⁶

Shame differs from embarrassment in that it does not necessarily involve public humiliation; one can feel shame for an act known only to oneself, but in order to be embarrassed, one's actions must be revealed to others. Also, shame carries the connotation of a response to actions that are considered morally wrong, whereas one can be embarrassed regarding actions that are morally neutral but socially unacceptable (such as an accident).

Shame as a method of sentencing in practice:

As set out above, “shame” and “embarrassment” may be synonymous with each other but

¹³ http://en.wikipedia.org/wiki/Restorative_justice

¹⁴ http://en.wikipedia.org/wiki/Criminal_justice

¹⁵ <http://www.restorativejustice.org/resources/docs/morris>

¹⁶ <http://en.wikipedia.org/wiki/Shaming>

not in all cases. Whether the use of shame as a “tool” in sentencing will also embarrass will depend on how and under which circumstances the shame is applied. One of the most prominent proponents of shaming is the Australian academic Professor John Braithwaite. He proposed a system of Re-integrative shaming.

Stigmatic Shaming v Re-Integrative Shaming

Professor Braithwaite has defined two different kinds of shame. One kind is stigmatic shaming, which disintegrates the moral bonds between the offender and the community. The other is re-integrative shaming, which strengthens the moral bonds between the offender and the community.

Stigmatic shaming is what American judges employ when they make an offender post a sign on his property saying "a violent felon lives here", or a bumper sticker on his car saying "I am a drunk driver". Stigmatic shaming is designed to set the offender apart as an outcast for the rest of the offender's life. By labelling him or her as someone who cannot be trusted to obey the law, stigmatic shaming says the offender is expected to commit more crimes.

Professor Braithwaite's alternative to stigmatic humiliation is to condemn the crime, not the criminal. It gives offenders the opportunity to re-join their community as law-abiding citizens. In order to earn that right to a fresh start, offenders must express remorse for their past conduct, apologise to any victims and repair the harm caused by the crime. The Braithwaite's model was applied by the Canberra police.

The Canberra Re-integrative Shaming Experiments (RISE)¹⁷

This experiment includes the following re-integrative measures:

- Diverting confessed offenders from court to a more intense, personal (and lengthy) alternative known as Diversionary Conferencing. In these conferences, which are

¹⁷Lawrence W Sherman of the University of Maryland is an Adjunct Professor of Law at the Research School of Social Sciences, ANU and Scientific Director of the Re-integrative Shaming Experiments (RISE). Heather Strang is a Research Fellow in the Law Program at the Research School of Social Sciences, ANU, and Project Manager of RISE.

convened by a police officer, offenders, their family and friends, and their victims or a community representative all actively participate.

- With one small exception, Canberra does not employ the "wrong" kind of shame - the humiliation that is growing so rapidly in the US. The names of all convicted drink drivers in The Canberra Times is a modest form of public humiliation, but the stigma may be short-lived
- The "no-shame" (or limited shame) approach, are aimed at the offenders' acts and not their character. Thus succeeding in making offenders feel ashamed of what they have done without making them into shameful people. This is sometimes difficult to achieve because of the anger that victims and their supporters may feel and their temptation to humiliate the offender.

Clearing the slate

Re-integrative shaming aims to prevent crime by allowing offenders to put their crimes behind them. Before this can happen it is essential that they repay society and their victims the costs their crimes have incurred, material and emotional. Statistics show that since the introduction of the RISE – system offences targeted by this process generally showed a decline by as much as 5 to 10% in the age groups targeted.

Models of restorative conferencing in other countries¹⁸

Conferencing with offenders in a process of restorative justice is by no means novel to the Canberra Police. The following examples are indicative of what happens in other parts of the world.

Victim-offender mediation

This process has operated since the mid 1970's throughout North America and Europe. Offenders are referred to the process as a means of diversion from the formal justice system, and this option is generally undertaken in relation to property offenders and young people for whom diversion is the most appropriate option. Cases involving violence and

¹⁸<http://www.aic.gov.au/rjustice/models.html>

serious offences may only be referred on a discretionary basis (at the victim's request).

Community reparative boards

Community reparative boards are comprised of community members who are seeking reparation for crimes committed by non-violent adult offenders, and convene to determine a range of appropriate sanctions and monitor the offenders' compliance. The process operates at a probationary level and aims to ensure community involvement in justice procedures, victim involvement and satisfaction with the justice system, and encourages the offender to take responsibility for their actions.

Family group conferencing

This process primarily targets juvenile offenders and operates as a diversionary measure. In the New Zealand model, all young offenders are eligible for enrolment (with the exception of those charged with murder and manslaughter), and the foundations of this approach are centred in Maori sanctioning and dispute resolution procedures.

Circle sentencing

Adult and juvenile offenders may be referred to the process, either as a diversionary mechanism or as an alternative to a formal court hearing. All offenders are eligible for involvement, provided that they have expressed their guilt and desire for reform. Similarly, the entire range of offences may be dealt with, including those that may be considered serious and violent.

The South African Reality

Diversion programmes are not unknown to the South African judicial system and are currently implemented solely at the discretion of the Prosecutorial Authority¹⁹. In terms of the policy manual for prosecutors issued by the Director of Public Prosecutions (DPP) diversion programmes are defined as ***“...the election in suitable & deserving cases a manner of disposal of a criminal case other than through normal court proceedings”***

¹⁹ Policy Directives for Prosecutors, Part 7 page B12 + B13.

The DPP clearly regard diversion programmes as trivial as it only pays a cursory view to the subject matter at hand. The “guidelines” as to the selection criteria for suitable cases that should “guide” the prosecutor are set out as follows:²⁰

- “The following selection criteria are not hard and fast rules, and should serve as a guide to a prosecutor in exercising his discretion to determine whether or not an offender qualifies for the (diversion) programme. The accused should:-
- have a fixed address
- acknowledge liability for the offence
- be prepared to partake in the diversion programme, and in the case of juvenile offenders:
 - be between 12 – 18 years old
 - have a parent or guardian who is prepared to take responsibility for his or her court appearance, and to be present in court.

Diversion is regarded as inappropriate for the following offences:²¹ Murder, Rape, and Robbery with aggravating circumstances, or a similarly serious offence. Offenders with a previous conviction should only be included in exceptional circumstances.”

This system is also plagued by its own problems:

- Only juvenile offenders benefit from it.²²
- The system only applies to offenders who indicate that they intend to plea guilty,²³
- Young adults do not benefit from it.
- There is a total lack of transparency as to whom or how the system is applied or not.
- The establishment of a diversion programme remains the responsibility of the Department of Welfare. Prosecutors and NICRO may be of assistance.²⁴
- Diversion programmes in South Africa currently do not deal with re-integration,

²⁰ Page B14 paragraph 4 supra

²¹ Page B14 paragraph 3 supra

²² Section 28(3) of the Constitution of South Africa Act 108 /1996 defines a child as a person younger than 18 years.

²³ If faced with a possibility of a fine or even a prison sentence it is highly improbable that any juvenile would not “indicate” that he/she intend to plead guilty, in order to be refer to a diversionary program as an alternative.

²⁴ Page B13 paragraph 8 supra.

victim-offender mediation or any community involvement.

- The diversion programme in South Africa does not allow for the shaming of the offender.
- The program only reduces the number of “first offenders” as they are not formally charged, convicted or sentenced. This system does nothing to reduce prison population as the juveniles referred to the diversion program are not there as result of a sentence but rather to avoid being sentenced.
- Upon completion of the diversion program the prosecutor is supplied with a report. If the accused have “co-operated and it appears to the prosecutor that the accused have benefited from the programme the matter is withdrawn. If not prosecution proceeds.”²⁵
- No records are kept officially of offenders who were subjected to a diversion programme. A case is withdrawn against the offender upon completion of the diversion programme. In practise a juvenile offender therefore can commit several offences and each time just “indicate” that he/she intends to plea guilty and then “escape” prosecution.²⁶
- Upon conviction of an accused in court there is currently no mechanism to refer an accused to any form of restorative justice conference or diversion programme.
- The implementation of diversion programs depends on the active involvement of the prosecutor. During an impromptu survey of ten magistrate courts in central Limpopo it was found that in only three (3) of those courts a diversion program was running.
- The reason for the non-existence of such programs in other courts was not forthcoming.²⁷

Re-Integrative Shaming: a Possible South African Application

On a daily basis members of the public are vociferous in the criticism they level towards the

²⁵ Page B13 paragraph 9 *supra*. The question that begs an answer is what happens if the accused have co-operated and despite his co-operation he did not benefit from the programme. There is no benchmark which can be employed to measure co-operation and or benefit. Clearly this will depend on either the social worker or prosecutor's perception of the notions.

²⁶ Prosecutors are instructed to keep a register of persons referred to Diversion Programs, there is however no database of persons who completed such programs.

²⁷ Only in Tzaneen, Ritavi and Phalaborwa Courts diversion programs exist. Courts like Lulekani, Namakgale, Bolebedu, Naphuno, Bushbuck Ridge and Mhala no diversion programs exist. Even in the courts where such a program exist the local prosecutor were unable to inform as to the content of the diversion program. It appears that NICRO were responsible for the running of the program and its content.

Criminal Justice System. It seems that society experiences the legal system as one that “protects” the criminal and pays “no attention” to the victim.

Most of the criticism levelled against the Judiciary is founded on a lack of information and understanding regarding the cases being dealt with by the courts and the sentences imposed. It is common cause that newspapers only report on matters that are either very sensational or gruesome in nature. Cases which do not comply with these prerequisites do not make good reading and are hence not reported. This lack of reporting perpetuates the notion that crime pays.

In perusing the Re-integrative Shaming Experiments (RISE) proposed by Braithwaite (supra) it is clear that the main aim is restorative justice and to a very limited extent shaming. It is submitted that neither shaming nor restorative justice in isolation can render the same results as a combination of both. The efficiency of both exceeds the sum of the individual parts.

The questions that now need to be answered are whether it is possible in South Africa under the current legislative procedures to impose any sentence that encompasses the principles of shaming and restorative justice which is above all fair to the offender and satisfies the victim’s quest for justice & restoration

The hallowed words of Lord Hewart that “Justice should not only be done, but should manifestly and undoubtedly be seen to be done” bely the rational of the element of shaming in any sentence. That is also the reason why whenever possible trials are conducted in open courts.

No system exists where the victims in particular and the society at large can express their views as to a suitable sentence. This is “disempowering” to society, as they are not active participants in the sentencing phase of the trial.

By means of creative sentencing the court can empower offenders and involved society by

the application of section 297(1) (a) (i) of the Criminal Procedure Act 51/1977. This section reads as follows:

§ 297 (1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, ***the court may in its discretion-***

(a) ***postpone for a period not exceeding five years the passing of sentence and release the person concerned-***

(i) ***on one or more conditions***, (my italics) whether as to-

(aa) compensation;

(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991

(Act 116 of 1991);

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period;

If applied correctly this section grant exceptional flexibility and options to a presiding officer. Not only can he or she incorporate certain restorative justice principles in his sentence but he or she can also monitor the rehabilitation process of the accused.

Sections 297 (1) (a) (i) (aa) – (cc) are clearly aimed at the principles of Restorative Justice. The court can attempt to restore the harm done by the accused not only by ordering him to pay compensation but also by rendering a benefit or performing a duty free of charge in lieu of the payment of compensation. Often courts are faced with unemployed offenders or juvenile offenders who own no assets and earn no money. This section creates an alternative form of restitution in the absence of the payment of compensation.

Sections 297(1) (a) (i) (ccA)-(ff) make it possible for the court to enforce measures that are aimed at the rehabilitation of the accused. If the accused fails to comply with these provisos, the court can always reconsider the sentence of the accused.

By ordering the accused to appear before the court at the expiration of a relevant period the court can now monitor the accused compliance with the conditions upon which the imposition of sentence was deferred.

Sections 297(1) (a) (i) (hh) make it possible for the court to impose any other condition it may deem necessary. It is this section that makes it possible for the court to impose conditions that may “shame” the accused.

In the application of section 297(1) (a) (i) shaming can be effected directly or indirectly. The endless possibilities in imposing a suitable sentence and the amount of community involvement can create the situation that the accused cannot hide. He cannot just appear in court or pay an admission of guilt fine. Sentences of this nature can be highly visible. The community can see the accused whilst doing community service. In small towns where the community is a close nit one the sentence become even more effective if the local newspaper report on the offence. In this regard the indirect consequence of conditions imposed has the effect that the community take note of the conviction as well as the

suspensive conditions imposed.

It is submitted that nothing prevents the court in terms of section 297(1) (a) (i) (hh) from ordering the accused to comply with “American styled shaming conditions”. These conditions may depend on the offence the accused has been convicted of. Although this kind of shaming is regarded as stigmatising it may serve several purposes. It may serve as a warning to society that the accused may be dangerous. It may serve as a deterrent to other would be offenders in that it instils fear in their minds of suffering a similar fate.

Benefits of applying Section 297 act 51/1977.

The creative application of this section has benefits for all parties involved.

Benefits to society:

- Society in general does not derive any benefit from the direct imprisonment of convicted accused. Only in those cases where the court has no other option other than removing the accused from society as a preventative measure does society benefit from the incarceration in the sense that society is in theory a safer place.
- Both shaming and restorative justice strive to rehabilitate the accused within the community. The community can be both actively involved in the execution of the sentence and also see that justice is done.
- Depending on the conditions imposed, the court can create a lot of community involvement in the execution of the sentence. In this way it will both inform society at large and educate society as well.
- It is suggested that all complainants seek victim restoration and or retribution for the harm done to them. The rehabilitation is not always a priority in the mind of that part of society which suffers the effects of crime.
- Victim restoration and retribution are not mutually exclusive and both aims can be realised by an appropriate sentence. In imposing a sentence that contain both elements of shaming and restorative justice the accused can be rehabilitated, the harm done to society can be restored, and society’s sense of retribution can also be

satisfied.

Benefits to the presiding officer:

In focusing on repairing the harm done as well as empowering the victim whilst also causing justice to be seen to be done the courts will:

- reduce the prison population
- create active community participation in the manner the accused repay society for his actions
- lend credibility to the judicial process
- shift the mindset on sentencing
- The benefits for the presiding officer is that he or she can be extremely creative in the sentence he /she impose other than direct imprisonment.
- In sentencing an accused to jail the court serve no other purpose other than removing the accused from society. The court can at most hope that it's sentence serve the purpose of rehabilitation, prevention and retribution. There is no way in which the court can measure the outcome of direct imprisonment.
- Hence if the court has any other objective in sentencing other than removing the accused from society, there is no way in which the court can measure the outcome or achievement of the goal it set itself in sentencing the accused.
- However if the court utilize the opportunities which section 297 affords it the court can set measurable goals. The court itself can define the parameters & conditions within which the imposition of sentence is suspended. The court can measure and ensure that the accused complies with these conditions.
- If the accused does not comply with the conditions imposed by the court the court can act and still sentence the accused to jail should it be prudent to do so.
- If the court sentences the accused to direct imprisonment or Correctional Supervision in terms of section 276 of act 51/1977 the court is dependant on the Department of Correctional Services and its members to give effect to the court sentence. Due to maladministration, a lack of resources, poor monitoring and evaluation, lack of skills and lack of capacity sentences of this nature often achieve nothing. Courts often have to wait months for the compilation of a correctional officer

report. All these factors lead to the courts entertaining other sentencing options in an effort to follow the path of least resistance.

- The implementation of section 297 of Act 51/1977 does not limit the court or force the court to make use of the resources of the Department of Correctional Services. The court can make use of non-governmental organizations like NICRO or even the Community Policing Forums (CPF's) to monitor the compliance with the conditions the court imposes.
- In employing other recourses, other than those supplied by the state, the court also reduce the cost of rehabilitation to the taxpayer. The cost of rehabilitating the accused within the community: there is little or no cost to society. The accused can repay society in the form of free community service. In this way the accused is paying for his own rehabilitation whilst repaying the debt to society.

Benefits to the accused:

- Sentence in terms of this section can be imposed on all accused. It is also irrelevant whether the accused have pleaded guilty or not guilty.
- The accused if he/she is a first offender also benefit from a sentence of this nature as his /her previous conviction will fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine.²⁸
- Imposition of any sentence in terms of this section is extremely effective when dealing with first offenders, juveniles and young adults. It often happens that juveniles and young adults commit serious offences out of mischief or peer pressure or due to the abuse of alcohol or drugs. If direct imprisonment is imposed whether it is suspended or not, it disqualifies such a person from practising certain professions. It often seems unjust that one "mistake" due to bad judgement can mar the career of an individual for the rest of his or her life.

²⁸ Section 271 Act 51/1977.

Examples from practise:**S v Taylor²⁹**

The accused in this matter was 17 years old at the time of the commission of the offences. The accused lost his father and two step fathers before his 16th birthday. As a result a trust fund was established in his name to the sum of R2 000 000. Mr. Taylor left school on his own volition in Grade 9 and became a self-styled menace to society. His new lifestyle included parties with woman of low moral values and an excess of liquor. All this created the impression in Mr. Taylor's mind that he was untouchable and "bullet proof."

On one fateful night Mr. Taylor took his own 4 x 4 vehicle and he and his friends took it for an outing through the town. The South African Police spotted the vehicle travelling at high speed and swerving over the road. After several unsuccessful attempts to stop the vehicle the police set up a road block where they apprehended Mr. Taylor.

Mr. Taylor did not co-operate, he swore at the arresting officers, he also assaulted a police captain. When he was taken to the hospital so that his blood could be drawn he also assaulted the doctor. Mr. Taylor was duly charged and subsequently released in the care of his mother, pending the blood results.

Whilst awaiting trial in the care of his guardian Mr. Taylor took a rifle and shot his neighbour's cat. At this stage Mr. Taylor was arrested again and was referred to the Regional Court together with all the traffic offences.

Mr. Taylor was yet again released in the care of his mother. This time the court placed him under house arrest and ordered that he may only leave his house in the presence of his mother. Less than a week later Mr. Taylor was again arrested for assault and reckless driving and a plethora of road traffic offences.

Mr. Taylor and his guardian were back in court again. The State requested that he is kept in custody. His mother also informed the court that she is unable to look after him as he ignores any instructions from her and does as he likes. Mr. Taylor was clearly not impressed with this admission of his mother and he even swore at her in court.

At that stage Mr. Taylor was remanded in custody pending the laboratory results on his intoxication. After seven (7) days the accused was requisitioned to court at the request of

²⁹ Tzaneen Case RC 856/2000

his legal representative and pleaded guilty to all counts levelled against him.

Prior to sentencing two School Principals testified that both of them had requested the accused to leave their schools because of his lack of discipline. It also transpired that he left school at the end of Grade 7 with an aggregate of 37% for all his subjects.

Mr. Taylor's sentence was subsequently deferred in terms of section 297(1) (a) (i) act 51/1977 under the following conditions:

- he was placed under house arrest and was not allowed to leave the house except to attend school or church or if he was in the company of his guardian.
- he was ordered to attend school until such time he reached Grade 12 or the age of 21 years, whichever came first.
- he was ordered to perform community service at a rate of 16 hours per month at the local hospital.
- he was ordered not to use any liquor or drugs unless prescribed by a registered medical practitioner.
- he was ordered to appear in court after every term and submit his school report for scrutiny by the court. The accused's house arrest, community service and other privileges were adjusted each term in accordance with his scholastic performance and his adherence to the conditions imposed.
- The Community Policing Forum undertook to monitor the compliance with the conditions the court imposed for the deferment of sentence.

The local press reported through out the whole process extensively on the conditions of the deferment of sentence as well as the accused's compliance with the said conditions and his scholastic achievements

After three (3) years Mr. Taylor successfully completed High School and obtained a university exemption and an average of 70% aggregate for all his subjects. He also obtained provincial colours for Gymkhana Mr. Taylor currently successfully runs his own business and arranges workshops for young business leaders in the community.

S v Olivier³⁰

The accused pleaded guilty in the Regional Court on a charge of assault of her stepson. It transpired that she was convicted and sentenced to a suspended sentence the previous year on a similar offence where the stepson was also the victim. An expert witness testified that the complainant is a hyperactive child and the accused an immature stepmother. At the time of her conviction the child had already been removed from the care of the complainant and placed in foster care. The court deferred the imposition of sentence.

The accused sentence was deferred on condition that she:

- submit herself to psycho therapy,
- that she perform community service
- that she actively participate in rehabilitation programs prescribed by a clinical psychologist who is paid for by the accused.
- the accused is also placed under correctional supervision.
- The accused is placed in the care of a social worker in private practise for whose services the accused paid.
- Both the Clinical Psychologist and Social Worker submit progress reports to court on a six monthly basis, upon which the conditions of the accused correctional supervision and community service are adjusted in accordance with her co-operation.

After eighteen (18) months of intensive therapy the stepson was removed from foster care and placed back within the family on the advice of a panel consisting of the Social Worker, Psychologist and the accused's attorney who acted on an ***amicus curiae*** basis. After three (3) years of monitoring no incident of family violence was reported by either the Social Worker or Psychologist.

S v Labuschagne³¹

³⁰ Phalaborwa RC 15/2002

³¹ Tzaneen Case no A74/2004

The accused was part of the local rugby team. One evening the rugby club held a braai (after a disastrous season which could only be matched by that of the national soccer team). During this social interaction large quantities of liquor were consumed.

At the conclusion of the meeting the accused and some fellow players drove into town damaging the grass of unsuspecting home owners by spinning their motor vehicles tyres on the neatly manicured lawns of suburbia.

One of the aggrieved home owners gave chase and found the accused on another lawn busy creating a "donut" in the grass. The complainant walked up to the car and noticed that the accused was under the influence of alcohol. The complainant removed the keys of the accused's car to prevent him from causing any further damage or injury to either himself or the property. The accused took extreme exception to this and attacked the complainant by kicking him and beating him severely. The complainant suffered severe head injuries which had to be repaired cosmetically at a cost of R18 000.

Upon conviction the court deferred the imposition of sentence on the following conditions:

- the accused is placed under correctional supervision.
- the accused is ordered to perform community service on Saturday afternoons whilst his former team mates play rugby.
- the accused is ordered to pay compensation in the amount of R18 000 to the complainant in instalments of R1000 per month.
- In addition the accused's licence is cancelled in terms of the Road Traffic Act and the court ordered that he may only apply after 12 months to obtain a learner's licence again.
- the accused is ordered to appear quarterly in court so that the court can adjust his conditions of house arrest and correctional supervision in accordance with his compliance with the conditions of deferment.
- The Community Police Forum conducts monitoring to see if the accused comply with the conditions of the deferment of sentence.

The local newspaper had from the outset reported in full on the matter and the conditions of the deferment of the sentence. Members of the community have welcomed the sentence in letters addressed to the editor.

After 14 months the accused was allowed to return to the rugby field, his community service has been changed to a day on which it would not interfere with rugby matches or practises. The accused has complied with all the conditions of the deferment of sentence.

Conclusions:

- Although this section is available to all presiding officers few seem to make use of it.
- Although this section allows for great creativity & flexibility in the sentences the courts impose it is also true that it is not a miracle cure for all offences and that it can only be imposed in offences of a less serious nature.
- Although the above examples paint a picture of success, there were also those matters where the accused did not comply with the conditions of deferment. In all cases where this court deferred sentence and the accused did not comply with the conditions of deferment these were cases where the accused had committed the initial offences to sustain a drug habit.
- Sentences of this nature task the creativity of the presiding officer and call for a prolonged involvement by the court in each case.
- This section makes it possible for the courts to impose a sentence with a measurable outcome; it also affords the court the opportunity to impose a suitable sentence if the accused does not comply with the conditions imposed in the deferment of the sentence.
- Sentences in terms of this section are beneficial to all parties concerned.

DOES THE SOUTH AFRICAN JUDICIARY PROTECT THE RIGHTS OF THE VICTIMS AND THE OFFENDERS THROUGH THE AVAILABLE SENTENCING OPTIONS?

MOGOENG WA MOGOENG¹

INTRODUCTION

I was asked to deliver a keynote address on the theme of the day, which is whether or not the South African Judiciary does protect the rights of the victim and of the offender through the sentencing options at their disposal. The request was also about dealing with the role of Departments and agencies such as Correctional Services, Social Services, and I assume, the South African Police Services, the National Prosecuting Authority and any other relevant non-governmental organisations in the protection of the aforementioned rights.

I share the view that sentencing is still the most difficult task in a criminal trial for any judicial officer. For this reason, judicial officers require as much help as they may legitimately be availed to produce an informed sentence which truly gives expression to, not only the rights of the victim and of the offender, but also the interests of the community whose peace would have been disturbed by the commission of the offence.

Such a sentence, which effectively protects the rights of the victim, the offender and the interests of the community, depends on the groundwork done by the police, the probation officers, the prosecuting authority, the defence, correctional services and the community in which the crime was committed. If all these key role-players in the criminal justice system would always be conscious of the critical nature of the role they are supposed to play, from the time of reporting the commission of a crime all the way to the time for the imposition of sentence, and play their part fully, the sentences produced by the courts would be so rich and well-balanced that none of the rights would, as it sometimes happens, be inadvertently or unduly compromised. Sadly, this role is often neglected probably owing to an unfortunate collective mindset that society harbours about sentencing.

¹ JUDGE PRESIDENT: MAFIKENG HIGH COURT PRESENTED AT THE UNIVERSITY OF NORTH WEST POTCHEFSTROOM CAMPUS ON HUMAN RIGHTS DAY - 21 March 2006

THE PUBLIC MINDSET ABOUT SENTENCING

It appears that we, as South Africans, have inadvertently embraced a collective mindset which betrays an 'addiction' to retribution, with the result that any sentence which is a product of a proper balancing of the equally important rights of the victims, the offenders and the interests of the community is often viewed as a betrayal of the victim and the community by the presumably insensitive judiciary which has lost touch with the interests of the people on the ground. This is the usual reaction particularly when the sentence is thought to be lenient. Such a mindset could inhibit the aforementioned stakeholders from fully playing their role. What has largely contributed to this somewhat negative mindset follows below.

A lot of money, time and energy were invested in raising the awareness of the broader public about the rights of the victim and the interests of the community without any reference to the rights of the offender. The media, through talk shows and other means, have had their fair share of this lopsided awareness campaign. Some government officials, who are not judicial officers, often make promises to the public, before the trial even commences, that suspected offenders shall be severely punished. Consequently, we have seen our people before and during trials engaging in protest marches, carrying placards and uttering statements which forecast certain verdicts and stiff custodial sentences in total disregard of the evidence yet to be led, the rights of the offender and the authority of the court to decide on the appropriate verdict and sentence.

I mention the collective mindset of the public because I have reason to believe that it does affect some judicial officers to the point where they probably consider custodial sentences to be a safer route to avoiding the public humiliation, by *inter alia*, being labelled as so-called insensitive and possibly corrupt judicial officers who have allowed the offenders to get away with murder. A fresh and balanced campaign must be launched to conscientise the public of the fact that offenders also have rights which must be respected and properly considered and factored into the sentence to be imposed. The public must be informed that whilst they are entitled to vent their frustration and anger through protest action and other lawful means, their protestation will have no bearing whatsoever on the verdict to be arrived at and the sentence to be imposed. This, I think, will go a long way

towards preparing the broader public for whatever sentence the court may deem appropriate.

This public mindset needs to be changed to create a climate which is consonant with respect for the rights of all the affected parties, and to also create some space for the many sentencing options at the judiciary's disposal, to be fearlessly and optimally exploited as and when a suitable opportunity presents itself. The role that the judiciary has played and still plays in protecting the rights of the affected parties is highlighted below.

THE OVERALL PROTECTION OF RIGHTS THROUGH CUSTODIAL SENTENCES

I believe that the judiciary has done and continues to do a good job in upholding the rights of the victim, the offender and the interests of the affected community through the sentences hitherto imposed, where necessary retribution being given prominence over other elements of sentencing. Life imprisonment and long terms of imprisonment have been handed down to the perpetrators of those serious crimes which cried out for severe sentences. The legislation which has become known as the Minimum Sentences Act² has, controversial though it is, further strengthened the hand of judicial officers in meting out appropriate punishment to offenders who have been convicted of the listed offences. I am, therefore, not particularly concerned about the general sentencing trend in dealing with victims and people convicted of very serious crimes like murder, rape, etc. It is the neglect of alternatives to custodial sentences, especially in respect of perpetrators of less serious crimes that I am concerned about. Having highlighted the suitability of an effective term of imprisonment, I find it fitting to deal with the shortcomings of such a sentence before considering the use of alternatives thereto in protecting the rights of the victim and of the offender.

THE SHORTCOMINGS OF IMPRISONMENT

Many victims have only been able to help send to prison the person who caused them a loss. Notwithstanding this, they continued to be burdened with the loss and sometimes did not even have the money to sue nor knew how to approach the likes of the legal aid board for assistance. This often happened and still happens notwithstanding the offender's willingness and ability to restore to the victim what he or she may have been dispossessed of. The ability and willingness of the offender to step into the shoes of the deceased or

² Criminal Law Amendment Act 105 of 1997.

crippled sole breadwinner in order to mitigate the harsh consequence of the breadwinner's incapacity to look after the family, coupled with an apology and other measures as alternatives to imprisonment, are not seriously considered.

Many offenders who were sole bread winners have lost their jobs as a result of the harsh consequences of imprisonment. This has resulted in the suffering of their families and has at times left their children with no choice but to opt for a life of crime, which could have been avoided, had a serious effort been made to explore alternatives to imprisonment. Whereas the dependants of the killed or incapacitated sole breadwinner could be maintained and paid for at school by the offender who is able to so, the offenders are often sent to gaol, which result in the suffering of their own dependants and the dependants of their victims who all become a burden to society. The ripple effect of the prison terms that we sometimes so readily impose has been to cause more harm than good to the people for whose supposed good we impose sentence.

THE NEGLECT OF ALTERNATIVES TO CUSTODIAL SENTENCES

Alternative to effective terms of imprisonment are generally relegated to the realm of the obsolete. I say this being very much alive to the fact that the circumstances surrounding the commission of some of the serious crimes may well qualify the offender for one of the alternative options to a custodial sentence.³ I am also aware that some judicial officers, who are desirous of imposing non-custodial sentences, are often frustrated by problems relating to, for example, the lack of facilities and capacity for proper correctional supervision, the shortage of probation officers and other logistical problems.

Notwithstanding such challenges, whenever judicial officers impose sentences they need to recognise the problem that our country faces, namely that our correctional facilities are disturbingly over-populated.⁴ At times there isn't sufficient space for the exclusive

³ For example, in *S v Potgieter* 1994 (1) SACR 61 (A); *S v Larsen* 194 (2) SACR 149 (A); *S v Ingram* 1995 (1) SACR 1 (A) the Supreme Court of Appeal held that, depending on the circumstances, correctional supervision may be an inappropriate sentence in the case of a conviction for murder. The appellants in these cases had been sentenced to effective terms of imprisonment. As a result of the circumstances surrounding the commission of the offence (murder), the Appeal Court remitted the matters to the respective trial Courts for a consideration of the suitability of correctional supervision.

⁴ The problem of overcrowding has serious undesirable consequences. First, it constitutes a gross infringement of the basic human rights of prisoners as guaranteed in section 35(2)(e) of the Constitution of the Republic of South Africa Act 108 of 1996 (the Constitution) (See the 2005/2006 *Annual Report of the Inspecting Judge of Prisons* pp. 18-19). It exposes the Department of Correctional Services to delictual liability should aggrieved prisoners institute legal actions. Secondly, it constitutes a further punishment on prisoners. This is unreasonable as the prisoners have already been punished by the courts, and it is not the duty of the Department to punish prisoners. Third, it negatively affects the ability of the Department to rehabilitate offenders (See *the Report of the Portfolio Committee on Correctional Services on Solutions and*

accommodation of juvenile offenders, with the result that they have to share cells with much older offenders.⁵ This in itself may well be a violation of the rights of the affected prisoners. The space which our correctional facilities have could best be utilised to accommodate the people who really deserve to be imprisoned.

This then brings into sharp focus the critical importance of some of the sentencing options which judicial officers seem to hardly ever consider as serious options to effective terms of imprisonment, for the purpose of protecting the rights of prisoners to be held under humane conditions.

i ***Correctional Supervision***

My view is that the Commissioner of Correctional Services has not made adequate use of section 276A (3) of the Criminal Procedure Act.⁶ A regular use of that option would, in my view, not only help to address the overpopulation of correctional facilities but would also reduce the unfortunate incidents of totally unrehabilitated people being released on Presidential pardon,⁷ obviously without the benefit of prior judicial scrutiny, with the result

that they soon become a menace to society again, as it has reportedly happened in the past. The reason for the scarce usage of this means of alleviating the overcrowding seems to be the overall lack of a proper understanding of the practical application of the section.

Recommendations to Prison Overcrowding, dated 15 November 2004). Fourth, it places a huge financial burden on the State to care for prisoners as required by the Constitution.

⁵ There is a real risk that sharing cells with much older offenders may result in juvenile offenders turning into hardened criminals.

⁶ Act 51 of 1977. The relevant part of section 276A(3) provides:

“(a) Where a person has been sentenced by a court to imprisonment for a period—

(i) not exceeding five years; or

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the relations made thereunder is not more than five years in the future,

and such person has already been admitted to a prison, the Commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court *a quo* in order to reconsider the said sentence.”

⁷ Section 84(2)(j) of the Constitution provides that the President is responsible for pardoning or relieving offenders and remitting any fines, penalties or forfeitures.

Generally, correctional supervision as a sentencing option may not be imposed on a specific category of serious offenders.⁸ It is a legislative measure which distinguishes between offenders who ought to be removed from society and those who should not be so removed.⁹ This option does away with the negative consequences of a sentence of imprisonment on the dependants of the offender.¹⁰ As the following dictum indicates, it is a deterrent sentence for all crimes:¹¹

“Correctional supervision can be coupled with appropriate conditions to make it a suitably severe sentence even for serious offenders.”

As already stated above, there are, however, certain practical impediments affecting the effectiveness of correctional supervision. In terms of section 276A (1) (a) of the Criminal Procedure Act, correctional supervision may only be imposed after a report of a probation officer or a correctional officer has been placed before the Court. There is an acute shortage of probation officers and suitably qualified prison personnel. This shortage often leaves judicial officers with no option but to impose sentences with insufficient information about the offender. The shortage of correctional facilities and personnel has denuded correctional supervision of its effectiveness as an alternative to imprisonment and has resulted in some judicial officers avoiding it. This scarcity of skill has also led to abscondments from community correction programmes.¹²

These problems must be addressed by the relevant agencies so that the rights and interests of the various parties can be regularly and meaningfully accommodated through this medium as well. A fine coupled with compensation is not made use of as regularly as the overall situation in the country requires.

ii ***A fine and compensation***

In the many reviews and appeals that I have come across as well as the deduction that I make from the discussions I have held with my colleagues on the subject, judicial officers generally tend to be more willing to consider a fine rather than compensation as an

⁸ *S v Ingram supra* at 9f–g.

⁹ *S v R* 1993 (1) SACR 209 (A) at 221i–g.

¹⁰ *S v Ingram supra* at 9f.

¹¹ *S v Ingram supra* at 9e.

¹² See paragraphs 4(c) and 5 of *the Report of the Portfolio Committee on Correctional Services* (footnote 3 *supra*).

alternative to effective imprisonment. This happens even in cases where a victim has lost property (for example, through theft) or where there has been damage to property or the victim was assaulted or in the case of *crimen injuria*, etc.¹³

The concern with the imposition of a fine as an alternative to imprisonment is that the fine is payable to the State and does not address the loss suffered by the 'real' victim.¹⁴ We all know I assume, that litigation is very expensive these days and that an average South African cannot afford it. Those who report the loss of their property, or damage to property, or some bodily injury which requires money to be treated, are more interested in the restoration of the *status quo ante* than in seeing the offender 'rot in gaol' as people often say. They are also not impressed when the State is being 'compensated' in their stead for the loss it has not suffered in the true sense of the word. For this reason we should shift our focus from a fine as a primary alternative to a term of imprisonment to compensation.

Even where a fine is a suitable alternative or option to an effective term of imprisonment, the amount is generally so high that the offender is effectively denied the opportunity to avoid imprisonment.¹⁵ Magistrates more often than not, fail to enquire into the ability of the accused to pay a fine.¹⁶ The consequence has been the imposition of fines which are patently beyond the means of the accused. A fine which is to be regarded as a real option to imprisonment should be within the means of the accused.¹⁷ It is not for a moment suggested that fines should be so low that they do not adequately reflect the gravity of the offence in question.¹⁸ They should, obviously, not be such that they trivialise the offence and encourage others to commit crimes.¹⁹ Some judicial officers have also paid little or no attention to the duty placed upon them by section 297(6) (a) of the Criminal Procedure

¹³ See paragraph 4(d) of *the Report of the Portfolio Committee on Correctional Services* (footnote 3 *supra*). See also sections 297 and 300 of the Criminal Procedure Act.

¹⁴ Llewellyn and Howse, 'Restorative Justice – A Conceptual Framework' accessed at <http://www.lcc.gc.ca/includes/print.asp>.

¹⁵ *S v Matthnsi* 2003 (1) SACR 625 (T); *S v Zitha* 2003 (1) SACR 628 (T).

¹⁶ It is the duty of the judicial officer to enquire into the accused's ability to pay a fine. As Oliver JA remarked in *S v Siebert* 1998 (1) SACR 554 (A):

"Sentencing is a judicial function *siu generis*. It should not be governed by considerations based on notions akin to onus of proof. In this field of law, public interest requires the court to play a more active, inquisitorial role. The accused should not be sentenced unless and until all the facts and circumstances necessary for the responsible exercise of such discretion have been placed before the court."

(at 558i-559a)

¹⁷ *S v Hluhela* 2003 (1) SACR 642 (T) at 643f.

¹⁸ *S v Kekana* 1989 (3) SA 513 (T) at 518E-F; *S v Mlalazi & Another* 1992 (2) SACR 673 (w) at 675f.

¹⁹ *S v Hluhela supra* at 643h; *S v Mlalazi & Another supra*.

Act.²⁰ Their imposition of fines has been such that it must have led the accused persons to believe that the fine should of necessity be paid immediately as one lump sum. Accused persons are hardly ever informed that the fine may be paid in instalments or that the payment of the fine may be deferred.²¹

iii ***Committal to a treatment centre***

Repeat drunken drivers or drivers with blood alcohol content in excess of the minimum level,²² who have a related and fairly recent previous conviction, are often sent to prison instead of considering the above options with suitable conditions, in particular committal to a treatment centre.²³

iv ***“Plea bargaining”***

The spadework which the police, the prosecuting authority and the defence need to do with a view to exploring alternative options to effective imprisonment, should inevitably cause those officials to also consider the possibility of a plea and sentence agreement envisaged by section 105A of the Criminal Procedure Act. I think that the section is definitely underutilised to the detriment of the rights of the victim, the offender and the interests of the community. I have come to appreciate that the proper use of section 105A may be a very effective tool for the protection of the rights of all interested parties. An attorney had stolen the Road Accident Fund payments due to his clients.²⁴ The clients had to wait for several years before the Attorneys’ Fidelity Fund paid out what the attorney had stolen, and interest was obviously not paid. That sickly attorney had already been struck off the roll when the matter was heard. Section 105A was explored, with the result that the proceeds of the sale of his assets²⁵ were proportionately distributed to his former clients to make up for the interest lost and other losses that the Fund did not cover.

²⁰ Basically, the section requires judicial officers to inform the accused that they have the right to apply for a deferment of the payment of the fine.

²¹ According to De Villiers J in *S v Maluleke* 2002(1) SACR 260 (T), the High Courts have tried in vain since 1987 to persuade Magistrates’ Courts to inform the accused upon whom fines are imposed that they are entitled to apply for the deferment of payment.

²² Section 65(2) of the National Road Traffic Act 93 of 1996 makes it an offence for any person to drive a vehicle, or occupy the driver’s seat of a motor vehicle, the engine of which is running on a public road while the concentration of alcohol in a specimen of his or her blood is not less than 0.05 grams per 100 millilitres, or in case of a professional driver, not less than 0.02 grams per 100 millilitres.

²³ Section 296 of the Criminal Procedure Act read with sections 21 and 22 of the Prevention and Treatment of Drug Dependency Act 20 of 1992, confers a discretion on judicial officers to order that any person convicted of any offence be detained at a treatment centre established under the latter Act.

²⁴ *S v Ramosime*, case number CC 150/2003 of the Bophuthatswana Provincial Division (Mafikeng High Court).

²⁵ The assets had been seized in terms of the provisions of section 26 of the Prevention of Organised Crime Act 121 of 1998.

Consequently, the sickly attorney did not have to go to gaol and he, the victims and the community were happy. An 'obsession' with retribution would have suggested that since he had, *inter alia*, abused his position of trust, he had to be sent to gaol.

Judicial officers are clearly not making as much use of other sentencing options as they should.²⁶ There are, of course, many reasons for this, ranging from sharing in the general 'obsession' with retribution, to a lack of a proper understanding of how compensation, committal to a treatment centre, periodical imprisonment and correctional supervision, in particular, work in practice.

"WORK SHOPPING" JUDICIAL OFFICERS AND OTHER STAKEHOLDERS

I think the time has come for a meaningful paradigm shift in our sentencing patterns, and that time is now.

i "Work shopping" the police, the prosecution and the defence

We, therefore, need to find a way to encourage the police, the prosecution and the defence to gather all the information about possible restitution and other meaningful alternatives to effective terms of imprisonment in certain cases at the earliest possible stage. We also need to find a way and the correct forum at which to assist the police and the prosecuting authority to tone down their apparent over-zealousness about very high sentences in respect of certain cases which are regarded, apparently by their superiors, as generally deserving of stiff sentences which, if achieved, in turn attract some reward for those officials for a job well done. Those are cases which are regarded as adding up to good statistics and are held out as shining examples of effective delivery of services which can be boasted about.²⁷ That approach is one-sided and tends to inadvertently encourage a serious disregard for the rights of all the key role-players, especially the victim and the offender. The focus is on the high conviction rate and severe sentences instead of real justice which accommodates everybody's rights and interests.

²⁶ This is contrary to what "an enlightened and just penal policy" espoused by Olivier JA in *S v Siebert supra* requires. The learned Judge of Appeal observed:

"An enlightened and just penal policy requires a broad scope of sentencing options from which the most appropriate option, or combination of options, can be selected to fit the unique circumstances of the case before the court. It requires a willingness on the part of the trial court actively to explore all the available options and to choose the sentence best suited to the crime, the criminal, the public interest, and also the aims of punishment."
(at 559c-d)

²⁷ See *the National Prosecution Authority's Strategic Plan* for 2001.

Sometimes justice requires that we resort to alternatives to a custodial sentence. If we are properly exposed to these alternatives and we are committed to justice as opposed to winning, then we would know that the alternative sentences take away nothing from anybody.

ii **“Work shopping” the judiciary**

All judicial officers need to be “work shopped” afresh on the purpose of restorative justice.²⁸ A sound understanding of those aspects of restorative justice which are compatible with and which may be harmoniously streamlined with our criminal justice system²⁹ coupled with the judicial officers’ re-orientation about the above sentencing options, that they seem to be loath to consider, would help to generate a new enthusiasm in them to impose sentences which truly accommodate the rights of the victim, the offender and the interests of the community. No sentence would, as sometimes happens, be passed in total disregard of the views of the victim, the offender and the community as to what sentence they think would best address the damage and the consequent hurt caused by the offence. Sometimes such an opportunity to ventilate serves the purpose of healing the aggrieved person and also gives the offender the opportunity to express genuine remorse to the victim, the victims’ family and the affected community. Depending on the circumstances of the case, that may well be all that the victim, the community and the offender needed from the criminal justice system.³⁰

CONCLUSION

In conclusion, I answer the above-stated question, in the first paragraph of the introduction, in the negative. We need to indulge in serious introspection about our sentencing patterns and the effect thereof on the rights of the victims, the offenders and the interests of the community, and consider the many options already at our disposal.

²⁸ Restorative justice is a form of criminal justice based on reparation, that is, actions which attempt to repair the damage caused by the crime, either materially (at least in part) or symbolically. Apart from the payment of money, reparation may include demonstrations of the offender’s willingness to cooperate in counselling, therapy or training, from *the New Zealand Discussion Paper on Restorative Justice* (1996).

²⁹ Unlike England and Australia, we do not have the victim-offender mediation programmes nor do we have the equivalent of the United States and Canada’s victim-offender conciliation programmes, all of which are based on the consensus approach. The other element of restorative justice which is incompatible with our criminal justice system is in so far as it is projected as an alternative to our criminal justice system, paragraph 2.4 of the above Discussion Paper.

³⁰ I also believe that the views of the victim, the offender and the community on sentence will often prove how way-off the mark we, as judicial officers, may have been in focussing on the retribution-driven sentences which have characterised the many cases we have each handled.

THE IMPORTANCE OF CO-OPERATIVE GOVERNANCE AND THE MEANING OF 'SEPARATION OF POWERS' IN SENTENCING BY THE JUDICIARY

SS Terblanche¹

True to my nature as the analytical lawyer, my first instinct on seeing the title was to head for the dictionary. However, in the end I thought it best to go to a place most of you will be quite familiar with.

That place is the Criminal Law Amendment Act of 1997.² Despite its rather innocuous title, it is a law of great importance for our criminal justice system. The death penalty had been declared unconstitutional in 1995. This law, in showing Parliament's acceptance of the Constitutional Court's directive, provides for the substitution, by the President, of capital sentences imposed at an earlier stage.³ Therefore, the Act also provided for the way forward, from a political, constitutional and policy perspective. It still hasn't lost its importance, as is reflected in the fact that its constitutionality was attacked in the Constitutional Court as recently as last year, in *Sibiya v Director of Public Prosecutions, Johannesburg*.⁴ Apart from this important provision, the Act contains a further 53 sections, mostly a variety of amendments to the Criminal Procedure Act of 1977.⁵ Some of these amendments were also very important. Through sections 33 and 34 all references to the death penalty was removed from our legislation. These amendments were vital, because in declaring the death penalty unconstitutional, the Constitutional Court nevertheless left open the position in the case of treason committed while the country was in a state of war.⁶ With this legislation, the legislature removed that option and any remaining doubts it might have caused.

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² Act 105 of 1997.

³ Section 1.

⁴ 2006 (1) SACR 220 (CC).

⁵ Act 51 of 1977.

⁶ *S v Makwanyane* 2005 (1) SACR 1 (CC) par 149.

Right at the back of the Criminal Law Amendment Act, in sections 51 to 53, provision is made for a new sentencing measure – a measure that would, predictably so, dominate our sentencing jurisprudence to this day. As you all know, these provisions introduced a wide range of mandatory and minimum sentences for a wide range of the most serious and sensational crimes.⁷ I suppose one could find a symbolism in the fact that the same Act that starts with an acknowledgement of the end of the death penalty, would end with the introduction of long minimum prison sentences. This kind of symbolism is often missed in the formality of laws. The symbolism was not assisted by the fact that these provisions only came into operation in May 1998, or that it only applies to offences committed after this date. Neither was it assisted by the fact that it was initially intended to be in place for only two years.⁸ Clearly, the legislature's intent was a short period of shock treatment.⁹

The precise legislative process that lead to, what has now colloquially become known as the “minimum sentences legislation”, is shrouded in the mists of time, parliamentary procedure and the traditional South African approach that the arguments offered and the intentions expressed during the legislative process are irrelevant for purposes of the statute's interpretation. It is not an unreasonable assumption that most of the finer detail of the Bill that resulted in this Act was determined by officials of the Department of Justice, based on who-will-ever-know what kind of information. Here I am thinking, in particular, about the crimes that had to be included, the terms of imprisonment it would refer to, the detail of the selected crimes, the schedule where each offence should be located, et cetera.

If you might be wondering where I am heading, I remind you that I am talking about the functions of the legislative arm of the government, and that I will get to the judiciary and the Executive.

The legislature did not do a good job with the minimum sentences legislation. Thanks to computers I can inform you that the legislation has been addressed in at least 170

⁷ When read with Schedule 2 of the Act.

⁸ Section 53.

⁹ Cf *S v Malgas* 2001 (1) SACR 469 (SCA).

judgments reported in the South African Criminal Law Reports since 1998. Scores of others were never reported, or only reported elsewhere. The vast majority of the reported judgments dealt with some difficulty that came directly from the wording of the legislation. It benefited by a major overhaul in the form of the Judicial Matters Amendment Act of 2000.¹⁰ This Act resolved some issues, but more are arising on a regular basis. Whether the legislation prescribes minimum sentences also for offenders aged 16 and 17 has only been resolved at the end of 2004.¹¹ The meaning of s 51(4), which provides that sentences imposed in terms of s 51 “shall be calculated from the date of sentence”, is still unclear. A decision by the Supreme Court of Appeal in this regard is awaited at present. I could entertain you with further problems for the rest of the day. Of course by then it would be so tedious that you will not feel entertained at all. But let me underscore the statement that the legislature did not do a good job by quoting a few pertinent judicial expressions:

- Mr Justice Marais said in *S v Mdatjiece*:¹² “Again I am obliged to say that the wording is badly chosen and obscure in the extreme.”
- Mr Justice Davis in *S v Jansen*:¹³ “This important piece of legislation has in its short period been the subject of considerable criticism.” And in *S v Swartz*:¹⁴ “The provisions are appallingly drafted. It was no surprise that the magistrate encountered great difficulty in deciding whether the proceedings as a whole should be heard in the High Court.”
- Mr Justice Buys in *S v Swartz*:¹⁵ “Die Wet is al male sonder tal deur die Howe gekritiseer as 'n onelegante en ondeurdagte stuk wetgewing. In hierdie maand se Hofverslae word daar weereens kritiek gelewer teen die bewoording van die Wet en word daarop gewys dat die Wet regsonsekerheid in die hand werk.”
- Mr Justice PC Combrinck in *S v Sukwazi*:¹⁶ “The piece of legislation is ill-conceived and badly drafted.”¹⁷

¹⁰ Act 62 of 2000.

¹¹ In *Brandt v S* [2005] 2 All SA 1 (SCA).

¹² Unreported (TPD), 30 September 1998.

¹³ 1999 (2) SACR 368 (C) at 371.

¹⁴ 1999 (2) SACR 380 (C) at 383.

¹⁵ 2002 (1) SACR 591 (NC) at 593*e*.

¹⁶ 2002 (1) SACR 619 (N) at 623*g-h*.

¹⁷ See also Cleaver J in *S v Ibrahim* 1999 (1) SACR 106 (C) at 114: “I share the learned Judge's view as to the appalling bad manner in which the sections have been drafted”; Booyens AJ in *S v Snyders* 2000 (2) SACR 125 (NC)

On untold other occasions the courts have complained about the absurd results that would follow if the words of the Act were given their ordinary meaning.

Criticism of the concept of minimum sentences

The judiciary has not only been critical of the language used in the legislation – it has often been very critical of the whole concept of minimum sentences. In *S v Mofokeng*¹⁸ Stegmann J formally protested against this idea, as an affront against “...the civilised principles of sentencing that the courts have been accustomed to apply.” The legislature does not know the nature and circumstances of the particular crime, the victim, or the criminal. It cannot reconcile all the purposes of punishment through legislation. The substance of the protest has been repeated on many occasions, even if later courts have been less harsh, when it was realised that the legislation does leave the court with some discretion.¹⁹ However, whereas the criticism against the language used in the legislation has been almost unanimous amongst judicial officers, the condemnation of the principle of minimum sentences is by no means universal. The legislation allows a judicial officer, in many instances, to impose sentences far more severe than previously thinkable. And ..., let’s put it this way ...; some judicial officers have no problem with that.

Listening to the points of criticism against the Act, do you get the impression of “co-operative governance” between the legislative and the judicial arms of government?

And what about the executive arm? The Department of Correctional Services is tasked with the execution of the sentences prescribed by the legislature and imposed by the judiciary.

at 132: “... the only way in which a sensible interpretation can be given to this section will be to attempt to determine the intention of the Legislature”; Cachalia J in *S v Nkosi* 2002 (1) SACR 135 (W) at 142c, referring to the “peculiar wording of s 51(3)(b)”.

¹⁸ 1999 (1) SACR 502 (W) at 525ff.

¹⁹ E g, in *S v Blaauw* 1999 (2) SACR 295 (W): “The Courts are not reduced by these provisions to the mere rubber stamp complained of in *S v Toms*, *S v Bruce* 1990 (2) SA 802 (A), for some discretion is left to the Court if substantial and compelling circumstances are found to be present.”

But the prisons sit with chronic overcrowding, to the point of making it impossible for meaningful programmes to be utilised for a meaningful number of prisoners. An additional problem with the overcrowding caused by the minimum sentences legislation lies in the increase it caused in the percentage of long-term prisoners, where the turnover of prisoners is low. But let's leave the problems of overcrowding, since some of the following speakers might want to address that in some detail.

Claims that the minimum sentences legislation makes a very substantial contribution to the overcrowding of prisons are sometimes disputed, based on the argument that it cannot be said that this legislation is responsible for the overcrowding, since it is impossible to determine which percentage of long prison sentences was imposed specifically in terms of the legislation. I must confess that this argument leaves me speechless. The whole intention of the legislation was to increase the sentences imposed for the offences contained therein, on the assumption that the courts are not imposing sufficiently severe sentences. I can quote a number of cases, but the following quote from *S v Blaauw*²⁰ will suffice: "The Legislature certainly intended the Courts to increase drastically the sentences imposed for the offences defined in Schedule 2."

Even before the minimum sentences legislation, South African prisons operated at the limits of their capacity. An increase in the terms of imprisonment or the number of people sentenced to imprisonment would inevitably result in the capacity being exceeded. Since Parliament did not increase the budget for increased capacity to house the additional numbers of criminals for the longer periods it prescribed, how could severe overcrowding not be the result of this legislation?

There does not appear, therefore, to have been much co-operation between the legislature, when it passed this legislation, and Correctional Services, regarding its capacity to cope with increases in sentences and the number of offenders imprisoned.

²⁰ 1999 (2) SACR 295 (W) at 311.

Overcrowding and the judiciary

Should the overcrowded conditions in our prisons be any concern of the judiciary? I mention only a few factors that might influence the answer, and then I leave it to you to ponder. If there should be any co-operation between the judicial and executive arms of government one would think the answer should be yes, overcrowding should concern the courts. Before the constitutional dispensation, in *S v Holder*,²¹ the appellate division made it clear that the overcrowding of prisons had nothing to do with the question of an appropriate sentence. The issue has not been reconsidered since.

Re-legislation the minimum sentences

Back to the minimum sentences legislation: it was initially intended to be in operation for two years only, after which it could be re-legislated, so to speak, by the President with the concurrence of Parliament. The extension of the legislation was initially for one-year-periods, and later on for two years at a time. This means we have the Head of the Executive, the President, determining whether the legislation should remain in force. Does he heed the advice of the Minister of Justice, or of Correctional Services, or both, or neither. The process is not really open, and it is hardly possible to comment on it. There is no doubt that the impact of the legislation, over an eight year period, is much more far-reaching, with respect to court hours and prison overcrowding, than it had been after the two year period as initially intended by Parliament.

Let us consider the title of this paper again – “the importance of co-operative governance in sentencing by the judiciary.” To a large extent the example of the minimum sentences legislation summarises this importance. Today is Human Rights Day. So let us turn our ears to the Constitution. Chapter 3, which follows the Bill of Rights, is headed “Co-operative Government”. This really should have read “co-operative **governance**”, because it illustrates the processes of co-operation in governing the country. Let me quote parts of section 41. It reads, inter alia, as follows:

²¹ 1979 (2) SA 70 (A) 76-77.

“All spheres of government and all organs of state within each sphere must secure the well-being of the people of the Republic²²; [must] not assume any power or function except those conferred on them in terms of the Constitution;²³ [must] co-operate with one another in mutual trust and good faith²⁴ by [(ii)] assisting and supporting one another, [by (iii)] informing one another of, and consulting one another on, matters of common interest, [by (iv)] co-ordinating their actions and legislation with one another....”

In my view, these provisions speak for themselves.²⁵ If section 41 was adhered to with the introduction of the minimum sentences legislation, it would probably not have appeared on our statute books in its current form, and it would certainly not have stayed there for so long.

Separation of powers

I intend to highlight other difficulties that could be relieved through co-operative governance. But first, it is necessary to consider the separation of powers and its influence on the question. A superficial look at “co-operation” and “separation” might bring one to the conclusion that these issues are really opposites, and that they cannot co-exist. Yet, the just quoted s 41 of the Constitution actually requires separation of powers, when it states that the spheres and organs of government must “not assume any power or function except those conferred” by the Constitution. In the end any concern that co-operation and separation of powers cannot co-exist is fairly easily dealt with: the co-operation is required across functions, not within functions. In a way this has also been decided in *S v Dodo*,²⁶

²² Section 41(1)(b).

²³ Section 41(1)(f).

²⁴ Section 41(1) (h).

²⁵ Strictly speaking Chapter 3 might apply only to government across the various “spheres” of government, namely national, provincial and local – s 40. What follows is stated in the realization that s 41 might be given a wider meaning than originally intended.

²⁶ 2001 (1) SACR 594 (CC).

where the Constitutional Court explained why the legislature was entitled to legislate minimum sentences of the nature found in Act 105 of 1997. The legislature has the power to legislate sentencing. It has always done so. In the Criminal Procedure Act, through all its amendments over the decades, the legislature determines which sentences are available to the judiciary, and under which conditions they may or may not be imposed. Basically every statutory offence is created, conjoined with a penalty clause, in which the legislature places a cap on the maximum sentences that may be imposed for that offence. However, the legislature would exceed its powers if it were to impose sentence in a specific instance, through its legislation -- in other words, if it leaves the court with no discretion, no power but to impose the single sentence that is mandated in the legislation. And despite a few hiccups, usually because it was not interpreted restrictively, as it should be done, our courts now accept that the minimum sentences legislation does not place nearly such severe limits on the discretion of the sentencing court as used to be argued in some circles. This is because of the “departure clause”, which permits a court to impose a lesser sentence if satisfied that “substantial and compelling circumstances” are present, justifying such a departure from the prescribed sentences.²⁷

And the executive: do they not interfere with the sentencing powers of the judiciary if they release prisoners before their sentences have been served? I suspect that there are judicial officers who maintain this point of view. Their first problem is, of course, that it is a personal view, without any support from an authoritative source. The current authority clearly points towards the opposite,²⁸ namely that the judiciary may not interfere with the powers of the Department of Correctional Services, as provided by the legislature, and as now contained in the Correctional Services Act of 1998.²⁹ Every judicial officer who has ever imposed imprisonment should have studied the detail of this Act. Without doing so, how can they ever know what the sentence of imprisonment looks like in theory and should look like in practice? In the end, when we talk of “imprisonment”, we should all talk of the same thing, through co-operative governance. It would be ridiculous if the theory of what imprisonment should be, and what it is in reality would be dependant on the individual view held on the

²⁷ Section 51(3) (a).

²⁸ Cf *S v Mhlakaza* 1997 (1) SACR 515 ((SCA).

²⁹ Act 111 of 1998.

matter by a single magistrate or judge, instead of on the collective view of the legislature that prescribe it and its institutions, the judiciary that imposes it, and the Department that sits with the results of the sentencing, for years and often for decades.

For the closing topics I want to steer away from imprisonment. It is frequently said that judicial officers need to be more creative in their sentencing of offenders. This afternoon restorative justice will be addressed and I am sure this button will have to be pressed again – one cannot pursue restorative justice without being creative. We see a lot of action from the Executive in connection with restorative justice.³⁰ The Departments of Justice and Correctional Services promote it on several fronts, but something is required from the legislature, and more than a single provision requiring of judicial officers to inform victims of some crime that they may have a role in the parole proceedings.³¹ A very useful role for the legislature would be a fundamental one, namely to set the scene for restorative justice against the background of proportionality and equality. This is fundamental, as there are choices to be made here. At the same time, all these organs have to co-operate with the judiciary if there is to be any hope of success.

As it is, there is ample provision in the Criminal Procedure Act for sentences that include elements of restorative justice, such as the suspension of sentences on condition that the offender pays compensation, or that he attends various programmes aimed at his training or interaction with the victim. The main problem is that there is no support for the judiciary. The sentence must be executed, but there is no organ of the executive that is ready to do so. Any of these kinds of conditions, or any other creative conditions and sentences, and the judicial officer is basically forced to find her own executive agent to see to implementation.

Directly linked to this is the sentence of correctional supervision. I was involved with the team that developed the sentence, and involved in promoting it at the beginning. It is held

³⁰ Cf Mike Batley “Outline of relevant policies” in Traggy Maepa (ed) *Beyond retribution: Prospects for restorative justice in South Africa* (2005) 120 ff.

³¹ Section 299A, as amended by Act 55 of 2003.

in high regard as a concept, and is still supported in principle in most of the conferences I go to.

As a magistrate I imposed correctional supervision, and was even involved in having to reconsider a few of them because the probationers were not interested in the opportunities it offered. In those days we were fortunate in having close ties with the Department of Correctional Services. Reports could be obtained quickly, and the supervision was meaningful and monitoring regular. This does not appear to be the case any longer. I have both anecdotal and other evidence for this misgiving. The anecdotal evidence comes from a colleague, whose daughter was a victim in a car crash, when the offender crossed a red light at an intersection. She was actually the only surviving victim, as both her friends died. The evidence against the accused was slim and in a plea agreement he ended up with correctional supervision. He never started the sentence, and no steps were taken by the Department either. After months the relatives of one of the deceased victims used a connection to get the affair in order, and they now employ a private investigator to check whether the sentence is actually enforced. In isolation this anecdotal evidence is, of course, anecdotal. But that is not the case when it is corroborated by the judges of the Supreme Court of Appeal, when they, based on all the evidence placed before them, completely lose confidence in correctional supervision. They said so in a recent case, *Director of Public Prosecutions, KwaZulu-Natal v P*,³² a high profile case where the state appealed a sentence of correctional supervision imposed for murder by a 14 year old girl. Even in this high profile case the Department did a poor job of monitoring the sentence.

When correctional supervision was placed on the statute books, there was good co-operative governance between the various state departments. Now the judiciary appears to have lost its confidence in Correctional Services' commitment towards the sentence. Obviously they will not impose this sentence in meaningful numbers for as long as they don't trust that it will be executed, regardless of how good it might be in principle.

³² 2006 (1) SACR 243 (SCA) par 25.

What should be said to conclude this paper? Only this: The ideal drafted by the crafters of the Constitution that co-operative governance is worth striving for, is worthwhile enough that every player in the criminal justice system should consider it anew, should consider what he or she can do to take co-operation in the governance of the criminal justice system to new heights, so that, eventually, there will be no more “Government speaks with forked tongue.”

GAGU V THE STATE [2006] SCA 5 (RSA)**CONFIRMING THE POSITION ON MINIMUM PRESCRIBED SENTENCES FOR JUVENILES AGED 16 – 17 AND THE PRESIDING OFFICER'S ACTIVE ROLE DURING SENTENCING**

Anette van der Merwe¹

JUDGMENT

Both the accused pleaded guilty to rape in the East London Regional Court and their legal representatives' submitted s 112(2) statements in terms of the Criminal Procedure Act 51 of 1977. These statements, in addition to the information contained in the charge sheet served as the only evidence before court. The regional court imposed 15 years imprisonment on both accused, seemingly under the impression that the Criminal Law Amendment Act 105 of 1997 prescribed 15 years as the minimum sentence for this type of offence. They were both youthful at the time of the commission of the crime, namely first appellant was 17 years old and second appellant 18 years old. According to statements from the bar, both the accused were under the influence of liquor and also had remorse about their acts of rape.

The case took six years to reach the Supreme Court of Appeal. On a first appeal against the imposed sentences the Grahamstown High Court held that life imprisonment was the applicable sentence and referred it to the East London High Court for sentencing in terms of s 52(1)(a)(i) of the Criminal Law Amendment Act 105 of 1997. The reasoning was that the charge was one of rape as listed in Schedule 2 Part I, namely committed with common purpose, and the regional court magistrate thus had no authority to decide on the presence of substantial and compelling circumstances in terms of s 51(3) (a), thereby justifying discretion to impose a lesser sentence than that prescribed by the Act. The East London High Court disagreed and suggested the present appeal to solve matters.

The Supreme Court of Appeal held that all the elements of rape as listed in Schedule 2 Part I, namely 'rape – when committed ... by more than one person, where such persons acted

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in the execution or furtherance of a common purpose or conspiracy' had not been established before conviction [*S v Legoa* 2003 (1) SACR 13 (SCA)]. Therefore the offence for which the accused had to be sentenced was rape as listed in Schedule 2 Part III, carrying the prescribed penalty of 10 years for first offenders. The case was referred back to the regional court in order to obtain more information on both the victim and the two accused in order to impose a proper sentence.

The Supreme Court of Appeal pointed out the following misdirections:

- The magistrate misinterpreted Schedule 2. The offence in this case resorted under Part III of Schedule 2 and not Part II.
- The first appellant was only 17 years old during the commission of the rape. The court confirmed the judgment in *Brandt v S* [2005] 2 All SA 1 (SCA) par 12, that the Criminal Law Amendment Act 105 of 1997 is not applicable to offenders aged between 16 and 18 because of the special dispensation created by s 51(3)(b) of the Act. The court is thus free to apply the usual sentencing criteria in deciding on the appropriate sentence. The court must however not lose sight of the fact that offenders of the kind specified in Schedule 2 of the Act have been singled out by the Legislature for severe sentences. No finding of substantial and compelling circumstances is thus necessary in order to impose a lesser sentence than the prescribed minimum.
- Rape without a condom should not be taken into account as aggravating.
- A court cannot sentence on the mere allegations in the charge sheet. The presiding officer should take the final responsibility to request more information (facts and circumstances) – particularly, as in this case, where the offence is serious and a lengthy prison sentence is considered for youthful offenders.

COMMENT

The case of *Gagu* raises a few important issues. Firstly, it highlights the problem of interpretation and implementation of the much-criticised Criminal Law Amendment Act 105 of 1997 with specific regard to s 51(3)(b) of the Act. Secondly, it illustrates the difficulty some judicial officers have with adapting to the more inquisitorial and active role that they

should assume during sentencing, especially after a plea of guilty, to ensure that all relevant information is available in order to impose a proper sentence. In addition, the need for more formal guidance with regard to which factors should be accepted as aggravating (or mitigating) in specific offence categories, is illustrated. This note will focus on the first and second issues.

Interpretation of s 51(3) (b) of the Criminal Law Amendment Act 105 of 1997

Judicial debate prior to the Supreme Court of Appeal judgments of Brandt and Gagu

Section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997 refers specifically to the situation where prescribed sentences are imposed on juvenile offenders, aged 16 to 17, and provides as follows:

‘If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.’

In contrast to s 51(3)(a) which requires the explanation of any substantial and compelling circumstances justifying a lesser sentence than the prescribed one, s 51(3)(b) requires explicit reasons when the prescribed sentence is indeed imposed in this age category. With regard to the applicability of minimum sentences to offenders aged 16 and 17, the high court has adopted different interpretations since the legislation came into operation in 1998. In *S v Blaauw* 2001(2) SACR 255 (C), Van Heerden J remarked in passing that the court is not obliged in terms of s 51(3) (b) to impose a minimum sentence on an accused who, at the time of committing the offence, was 16 or 17 years, unless the state satisfies the court that the circumstances justify the imposition of such a sentence. The state must thus provide evidence to show why the prescribed sentence should be imposed and that must be recorded. In *S v Nkosi* 2002 (1) SACR 135 (W), Cachalia J, delivering the judgment of the full bench, confirmed the responsibility of the state to persuade the court that the minimum sentence should be imposed. He concluded:

‘[D]espite the peculiar wording of s 51(3)(b), the legislature intended children aged between 16 and 18 years of age to be treated more leniently than those

offenders who have turned 18 and are consequently deemed to be more mature.’ (at 142c-d)

In contrast to the previous two decisions, the court in *Director of Public Prosecutions, Transvaal v Makwetsja* 2004 (2) SACR 1 (T) at 13f, held that, although the statutorily prescribed minimum sentence should be imposed on offenders between the ages of 16 and 18 only in extreme cases, this did not mean that the legislature did not intend those sentences to apply to all offenders above the age of 16 years. If the legislature did not intend the minimum sentences to apply to offenders aged 16 and 17 as a starting point, it would have explicitly excluded that category of offender, as it has children below the age of 16 in s 51(6) of the Criminal Law Amendment Act 105 of 1997. Requiring the court to set out clearly its reasons for imposing the prescribed minimum sentence on a youthful offender in this category serves as a reminder to the court to be cautious and to make ‘doubly sure’ that the young offender is deserving of the prescribed minimum sentence.

The result of this approach would require the child offender to establish the existence of substantial and compelling circumstances, thereby burdening such offender in the same way as an offender over 18. In addition, all offenders older than 16 years had to be referred to the high court for their cases to be finalised by a court without having had the benefit of ‘being steeped in the atmosphere’ of the trial (*S v Gqamana* 2001 (2) SACR 28 (C)). The recalling of victims and other witnesses in terms of s 52(3) (d) of Act 105 of 1997 could also lead to further traumatisation caused by reliving the trauma of the offence or by being exposed to the criminal justice system once again.

Brandt v S [2005] 2 All SA 1 (SCA)

The outcome in *Makwetsja* was criticised by the Supreme Court of Appeal in *Brandt v S supra* and the position was then clarified by giving preference to the approach adopted in *Nkosi (supra)* and *Blaauw (supra)*. Based on international trends in child justice and constitutional values (see par 16 -18), it was held that s 51(3) (a) finds no application in the case of the offender aged 16 to 18 (*Brandt supra* par 24). This decision was however qualified. The court held that the fact that the legislature has ‘ordinarily ordained the

prescribed sentences for the offences in question' should operate as a 'weighting factor in the sentencing process'. Bearing this in mind, the sentencing court is thus free to apply the usual sentencing criteria in deciding on the appropriate sentence for offenders aged between 16 and 17 who have been convicted of offences listed in any part of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

The result of *Brandt (supra)* and *Gagu (supra)* is thus that cases dealing with offences contained in Schedule 2, Part I to Part IV, such as pre-meditated murder, child rape, gang-rape, indecent assault inflicting bodily harm, where the offender is 16 and 17 of age, may now be finalised by the regional court if the appropriate sentence falls within its sentencing jurisdiction. The existence of 'substantial and compelling circumstances' is not relevant to this age group anymore. The offender's circumstances, maturity as well as intellectual and emotional capacity should be taken into account (*Brandt supra* par 15). Ponnar AJA further held in *Brandt supra* par 20, that the presiding officer must be guided by the principle of proportionality, the best interests of the child, and, the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time. The sentence should thus be individualised with the emphasis on preparing the child offender from the moment of entering the detention facility for his or her return to society (*Brandt supra* par 19).

Despite these lofty ideals, it is clear that in its earlier- mentioned qualification, the Supreme Court of Appeal accepts that the minimum sentencing legislation's approach of creating a new, more severe norm for serious offences listed in Schedule 2 (*S v Malgas* 2001 (1) SACR 469 (SCA) at 482f), should also influence juvenile sentencing. This raises the question as to what extent previous precedents can still serve as guidance to present sentencing decisions. The practice, in cases where factors of substance justify a lesser sentence in terms of s 51(3) (a), to consult precedents prior to the enactment of the General Law Amendment Act 105 of 1997 with regard to the length of imprisonment, was explicitly amended by *S v Abrahams* 2002 (1) SACR 116 (SCA) at 126b (it concerned an incestuous child rape case). By implication the same principle would be applicable when considering the length of prison sentences in cases of serious offences for offenders aged 16 to 18.

Thus, although the usual sentencing criteria must be applied, judicial officers should keep in mind that guidance may be sought from previous judgments only with regard to the type of factors that should be considered as aggravating and mitigating. In the case of *Brandt supra* the appropriate sentence, keeping in mind that the ordinarily appropriate sentence for the particularly heinous murder is life imprisonment, was a term of 18 years imprisonment. Rehabilitation was considered to be a real prospect even after a fairly long period of imprisonment (par 26). In *Blaauw supra*, the appropriate sentence imposed for the rape of a five-year-old girl was 25 years. Despite these sentences being lengthy periods of imprisonment, the practical implication of their terms of imprisonment will be regulated by recently introduced parole rules (see Proc R38 GG 26626 of 30/7/2004). Juvenile imprisonment will thus be for substantially shorter periods as opposed to adult cases meriting life imprisonment where parole may only be considered after a period of 25 years. In the light of our prison conditions and the general influence of prison life, the successful preparation of the juvenile offender for his return to society, as envisaged by Ponnar AJA in *Brandt supra*, should however be questioned.

Fact finding in the sentencing phase

The court in *Gagu supra*, experienced the dilemma of not having enough information for sentencing purposes after a plea of guilty. Though the regional court was prepared to proceed with sentencing nevertheless, the Supreme Court of Appeal refused to embark on the task, and referred the case back to the regional court to request more information.

In order to address the situation of the court a quo in *Gagu*, the Criminal Procedure Act 51 of 1977 provides the court with two possible ways of obtaining evidence for the determination of an appropriate sentence. Firstly, with regard to the procedure after a plea of guilty, s 112(3) provides that, notwithstanding the prosecutor's opportunity to present evidence on any aspect of the charge, the court may, with regard to sentence, hear evidence or a statement by or on behalf of the accused, or question the accused on any aspect of the case. Secondly, s 274(1) provides that the court may, before passing sentence, hear such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. These provisions place the court at the centre of the sentencing

stage (Law Commission *Sentencing (A New Sentencing Framework)* Discussion Paper 91 Project 82 (2000) 83). A similar provision is also proposed in s 47(1) of the draft Sentencing Framework Bill 2000 dealing with evidence on sentencing. What should be further emphasised is that a quasi-inquisitorial approach prevails during the sentencing phase, which requires more flexibility and a much *more active role* on the part of the *presiding officer*. Terblanche (*The Guide to Sentencing in South Africa* (1999) 99) emphasises that the duty to sentence is that of the court, which implies that the court must decide what information is necessary to fulfil that duty. By not having all the relevant information available, the court may select an inappropriate punishment, something which would be contrary to the interests of justice (Terblanche *supra*). Despite the above, it would however appear that only in some instances have courts in fact adopted an active approach, for example, when they refused to proceed with sentencing without being provided with further information on relevant matters i.e. the effect of the offence on the complainant (*S v L* 1998 (1) SACR 463 (SCA)); or requested an expert report (*S v W* 1994 (1) SACR 610 (A)) or even conducted their own research (*Abrahams supra* at 125).

Yet, even where the court adopts an active approach and accepts the final responsibility for requesting more information, the question arises as to what kind of information is relevant for sentencing purposes. In *Gagu supra* the court rightly remarked that in the case of juvenile offenders, a pre-sentence report regarding their personal circumstances, would always be extremely relevant. Further, at the very least, an enquiry into obtaining any medical report pertaining to the complainant was expected (par 13). Regrettably, the learned judge elected not to elaborate on the phrase 'at the very least'. It is submitted that the court had foregone a useful opportunity to provide guidance with regard to equally important aspects in this regard. In addition to focussing on physical harm in the determination of the seriousness of the crime, there is also an increased recognition of the importance of psychological harm caused by the commission of the crime to the victim, as reflected by the Supreme Court of Appeal, draft legislation and the Victims' Charter of 2004.

In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205, it was held that not only does the objective gravity of the crime play an important role, but also the

present and future impact of the crime on the victim in a rape case. It would appear that, in the absence of evidence of harm, no fair decision could be taken in cases where minimum sentences are applicable (compare *S v Ncheche* 2005 (2) 386 (W) for the view that a rape case may be serious enough to warrant life imprisonment without evidence on harm). Though *Rammoko* dealt with the suitability of the imposition of a life sentence on an adult offender convicted of child rape, it can be accepted that the impact of the crime on the victim is a relevant consideration in all cases where harm is caused through the commission of an offence. Section 17(b) of the Criminal Law (Sexual Offences) Amendment Bill 2003 provides that evidence of the impact of sexual offences may be presented to court, to prove, for the purpose of imposing an appropriate sentence, the extent of harm suffered by the person concerned. Section 3(2) of the Draft Sentencing Framework Bill 2000 provides that the degree of harmfulness, or risked harmfulness, to the victim as a result of the offence, should be one of two factors determining the seriousness of an offence (the other factor being the offender's degree of culpability). Clause 2 of the Victims' Charter 2004 refers to the victim's right to offer information during sentencing in order to bring the impact of the crime to the court's attention.

Evidence establishing harm experienced by the victim may include expert testimony on the emotional and psychological long-term effects of the offence on the victim and the presiding officer should request the reports where the prosecutor presents nothing. When evidence about harm is unchallenged, the testimony of relatives and other about trauma symptoms experienced by the victim may also be accepted (*Abrahams supra* at 124).

CONCLUSION

The Criminal Law Amendment Act 105 of 1997 is not applicable to offenders aged between 16 and 18 because of the special dispensation created by s 51(3) (b) of the Act. By clarifying that the minimum prescribed sentences are not applicable to juveniles aged 16 – 17, these cases are no longer divided into two parts and the regional court as the trial court can resume its rightful position in finalising these cases by deciding on an appropriate sentence. As Broom J stated five-and-a-half decades ago in *Rex v Conway* 1948 NPD 880 at 883, the severity of the punishment as well as the choice of punishment 'are all matters

within the discretion of the magistrate who, having dealt with the whole case, is in a much better position in regard to punishment than we are'.

The final responsibility being placed upon the presiding officer to request information to impose a proper sentence was reiterated in *Gagu's* case. The court is required to have sufficient and relevant facts and circumstances for consideration. It is submitted that these facts should also include evidence on the psychological harm caused by the commission of the crime to the victim. The ultimate aim in a criminal trial is the determination of an appropriate punishment proportionate to the seriousness of the crime, and that can only be done holistically.

S v Kleynhans 2005(2) SACR 582 (W)**Expert evidence- Admissibility of- Approach of court- Social worker and other professionals- In sentencing proceedings.**

Amanda Venter²

JUDGMENT

This case deals with the unacceptable practise of calling social workers or other professionals during sentence proceedings to provide the court with information as to the background to the commission of a crime and the personal circumstances of the accused as a conduit for introducing second-hand information.

The probation officer, social worker and other professionals called in sentencing procedures are expert witnesses if and because they have no personal knowledge of the personal circumstances or the background of the commission of the crime and will be able to assist the court in exercising it's discretion on sentencing.

The law is very clear on the circumstances when, the purpose for which, the uses to which, the evidence of an expert may be called for.

With reference to Holtzhauzen v Roodt 1997 (4) SA 766 SA (W), Satchwell J summarised certain guidelines pertaining to the admissibility of the opinion of an expert witnesses: namely

- There should be a basis for the leading of such evidence.
- Facts should be placed before the court on which the court can decide if it needs assistance or guidance of an expert to arrive at a just decision concerning sentence.
- The facts upon which the expert opinion is based must be proved by admissible facts.

² Regional Magistrate Nothern Cape – De Aar.

- The expert must furnish criteria for testing the accuracy and objectivity of his conclusions and the court must be told on what premises his opinion is based.
- The opinion evidence must not usurp the function of the court.
- Guidance offered by the expert must be relevant to the issue which is to be determined by the court.

Satchwell J on 586 [12] states that the procedure to commission a social worker or probation officer to express an opinion without sufficient facts before the court is unacceptable for a number of reasons:

- These reports are commissioned at some inconvenience to the administration of justice and at considerable cost to the *fiscus*.
- There should be a reason and motivation for expertise being required.
- It is for the trial court to exercise its own responsibilities with regard to evidence and the drawing of inferences from it.
- The evidence should comply with the requirements for admissibility.
- It should not constitute an attempt to introduce evidence through a third party simply because the party who has personal knowledge does not want to enter the witness box and thereby avoid the risk of being cross-examined.
- The information given by the so called expert should not be second hand information which comes from the accused himself
- The accused himself should testify or present evidence as to his age, family background, education, employment and most importantly the circumstances of the criminal activity.

DISCUSSION

Section 274 of the Criminal Procedure Act 51 of 1977 clearly places the court in the centre stage to procure relevant evidence or information to exercise a proper discretion on the basis of all the facts relevant to the matter in the interest of justice

Although section 274(1) leaves the court with discretion to decide which evidence to hear, such evidence should include what the defence and the state want to present if relevant.

The procedure I want to suggest is that whenever a probation report is requested that a proper factual basis be placed before the court and specifically the reason the accused himself cannot present such evidence, and also, in what way the expert opinion will assist the court in arriving at a just sentencing decision.

In the written request certain facts which might be common cause might be listed i.e.

1. That the accused was convicted of an offence which falls within the ambit of a specific statutory provision regarding sentence.
2. If it is necessary to deal with specific sentences and why.
3. Copy of the charge sheet setting out the nature of the offence
4. Age of the accused, his marital status, financial position etc.
5. Previous convictions should be attached.
6. Clear instructions as to what specific aspects should be dealt with in the probation report as requested by the defence, the state and as required by the court.
7. If any specific recommendations can be made to the Department of Correctional Services that may assist them in correcting the offender such as:
 - 7.1 steps that should be taken to further the education of the offender.
 - 7.2 that the offender be included in a life skills program;
 - 7.3 An alcohol or drug problem should be addressed;
 - 7.4 Psychological treatment should be provided.

It is further suggested that a victim impact report be obtained in which the following is addressed:

- current impact on victim
- possible future impact
- permanency of impact
- impact on family members
- restorative justice possibilities

CONCLUSION

Evaluating this case confirmed, once again, the belief that the sentencing phase is the neglected stepchild in the criminal justice system. Judicial officers should become more pro- active in their determination of an appropriate sentence. Evidence with substance which is relevant should be placed before the court.

Don't be rubber stamps.