



**GUIDELINES
TO A PROPER APPROACH TO SENTENCING
IN THE REGIONAL COURT**

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SENTENCE

A. Introduction & Definition

John Hogarth, *Sentencing as a human Process* (1971) : "There is no decision that is so difficult to make

B. Aims of legal punishment

as that of the sentencing Judge."

State vs Martin 1996(1) SACR 172 on 176:

"A court of law is not a court of perfection. As the word 'judgment' indicates, the court's order represents an evaluation. It is not a scientific calculation. Sentence cannot be objectively measured and then snipped off in correct lengths. It can never have perfect concurrence from all members of the community."

State vs Martin 1996(1) SACR 172 @ 176:

"The court must take command of all directions of strain on the decision about punishment. Neither the call for true punishment and revenge nor the cry for understanding must be given undue weight. The interests of the community requires that the court should be strict enough to ensure that the objects of punishment are adequately furthered. Those objects include that it is signalled clearly that crime will be effectively punished. But the concern of public interest to some extent coincides with that of the accused. Society has a real and distinct interest therein that an accused should be free where the requirements of due punishment do not justify a curtailment of freedom. Also that the accused be brought onto a non-criminal track. It is in the public interest that punishment be meted out fairly and without that excessiveness which marks it as being merciless or unacceptably unfair. See *S v D Rabie* 1975 (4) SA 855 (A) at 861."

Salmond Jurisprudence (3rd ed) s 28 : (as quoted in *S vs Nkambule* 1993 (1) SACR 136 @ 145)

"The ends of criminal justice are four in number, and in respect of the purpose so served by it, punishment may be distinguished as (1) deterrent, (2) preventive, (3) reformative, and (4) retributive. Of these aspects the first is the essential and all important one, the others being merely accessory. Punishment is before all things deterrent, and the chief end of the law of crime is to make the evildoer an example and a warning to all that are like-minded with him."

S vs Stephen and another 1994 (2) SACR 163 (W) @ 168:

"In deciding on the appropriate sentence I take into account the factors that the law enjoins me to, retribution, prevention, individual and G general deterrence and rehabilitation of the accused."

C. Triad

S vs Banda and Others 1991 (2) SA 352 (B) @ 355 a-c:

"The elements of the triad contain an equilibrium and a tension. A court should, when determining sentence, strive to accomplish and arrive at a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others. This is not merely a

formula, nor a judicial incantation, the mere stating whereof satisfies the requirements. What is necessary is that the Court shall consider, and try to balance evenly, the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern."

S vs Somo 1980(3) SA 143 TPD @145a:

"In imposing punishment a court must consider 'the triad consisting of the crime, the offender and the interests of society'. See *S v Zinn* 1969 (2) SA 537 (A) at 540G.

The basic requirement, recognised in Roman-Dutch law, is that a court should, when determining sentence, strive to achieve, in the light of the knowledge, attitudes and demands of our time, a reasonable balance between the elements of the aforesaid triad."

D. Discretion & duty to harmonise

S vs Somo 1980(3) SA 143 TPD @145a:

"The basic requirement, recognised in Roman-Dutch law, is that a court should, when determining sentence, strive to achieve, in the light of the knowledge, attitudes and demands of our time, a reasonable balance between the elements of the aforesaid triad."

"In **S v Holder** (supra at 74H) RUMPF CJ commented as follows on the application of the abovementioned requirement: "(Daar) moet egter nie net gewaak word teen 'n onderbeklemtoning van of die besondere mens (die beskuldigde), of die misdaad of die maatskappy nie, maar ook teen 'n oorbeklemtoning van een van hierdie drie elemente."

In S v Runds 1978 (4) SA 304 (A) at 312G JANSEN JA stated:

'Overemphasis of any facts, in the sense of a misdirection, is only constituted by an unreasonable accentuation of such factor.'

S v TOMS; S v BRUCE 1990 (2) SA 802 (A) @ 806 h-j:

The first principle is that the infliction of punishment is pre-eminently a matter for the discretion of the trial court (cf *R v Mapumulo and Others* 1920 AD 56 at 57). That courts should, as far as possible, have an unfettered discretion in relation to sentence is a cherished principle which calls for constant recognition. Such a discretion permits of balanced and fair sentencing, which is a hallmark of enlightened criminal justice. The second, and somewhat related principle, is that of the individualisation of punishment, which requires proper consideration of the individual circumstances of each accused person. This principle too is firmly entrenched in our law (*S v Rabie* 1975 (4) SA 855 (A) at 861D; *S v Scheepers* 1977 (2) SA 154 (A) at 158F - G).

E. **Mercy**

S v SWART 2004 (2) SACR 370 (SCA) @ p377

[10] It is almost otiose to repeat what was said by this court in S v Zinn 1969 (2) SA 537 (A) at 540G - in approaching the question of sentence a court must consider 'the triad consisting of the crime, the offender and the interests of society' - and in S v Rabie 1975 (4) SA 855 (A) at 862G - H - 'punishment should fit the criminal as well as the crime, be fair to society, and be blended with a measure of mercy according to the circumstances'.

S v V 1972 (3) SA 611 (A) @ 614C – D:

'Punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy.'

S v Rabie 1975 (4) SA 855 (A) @ 865:

'In his Commentary on the Pandects 5.1.57, Voet writes of the need for Judges to be free from hatred, friendship, anger, pity and avarice. In a note on this section in his Supplement to the Commentary (published in 1973) Van der Linden makes interesting reference to the views of a number of writers, classical and otherwise, as to the proper judicial attitude of mind towards punishment. (A translation of this particular note conveniently appears in the Selective Voet -Gane's translation, vol 2, at 72.) The note (quoting Gane's translation) commences:

"It is true, as Cicero says in his work on Duties bk 1, ch 25, that anger should be especially kept down in punishing, because he who comes to punishment in wrath will never hold that middle course which lies between the too much and the too little. It is true also that it would be desirable that they who hold the office of Judges should be like the laws, which approach punishment not in a spirit of anger but in one of equity."

Van der Linden further notes that among the most harmful faults of Judges is, inter alia, a striving after severity (*severitatis affectatio*). Apropos this, a passage is quoted from Seneca on Mercy, including the declaration: "Severity I keep concealed, mercy ever ready" (*severitatem abditam, clementiam in promptu habeo*). Van der Linden concludes with a warning that misplaced pity (*intempestiva misericordia*) is no less to be censured.

Despite their antiquity these wise remarks contain much that is relevant to contemporary circumstances. (They were referred to, with approval, in S v Zinn 1969 (2) SA 537 (A) at 541.) A judicial officer should not approach punishment in a spirit of anger because, being human, that will make it difficult for him to achieve that delicate balance between the crime, the criminal and the interests of society which his task and the objects of punishment demand of him. Nor should he strive after severity; nor, on the other hand, surrender to misplaced pity. While not flinching from firmness, where firmness is called for, he should approach his task with a humane and compassionate understanding of human frailties and the pressures of society which contribute to criminality. It is in the context of this attitude of mind that I see mercy as an element in the determination of the appropriate punishment in the light of all the circumstances of the particular case.'

S v V 1972 (3) SA 611 (A) :

"True mercy has nothing in common with soft weakness, or maudlin sympathy with the criminal, or permissive tolerance. It is an element of justice itself."

F. Accused

Previous Convictions

S v Sibiya 1993(1)SASV 235(A)

S v Barnabas 1991 (1) SASV 467 (A) – not to be overemphasized.

S v Morebudi [2000] 1 All SA 123(A) @ 125 G-H

First Offender

S v Holder 1979 (2) SA 70 (A) @ 77H- 78 A

S v Silimela 1999(2) SACR 7 @ 11G

S v Potgieter 1991 (2) SASV 135 (A) @137 H

Commission of Further Offences

S v Zonele & others 1959 (3) SA 319 (A)

Time in custody prior to sentence

S v Stephen & Others 1994(2) SACR 163 (W)- It is suggested that this case should not be followed- see Vilikazi hereunder

S v Olyn 1992 (2) Sa 73 NK

S v Nkomonde 1993 (2) SASV 597 (W)

S v Vilikazi and Others 2000 (1) SACR 140 (W)

Influence

S v De Boer 1968 (4) SA 866 (A)

Loss of employment

Ex Parte Minister Of Justice (In Re Berger) 1936 AD 334

S v Van Vuuren 1992 (1) PH H 30 79 (A)

S v Hoffman 1984 SA 61 (A)

Remorse

S v Kundishara 1976(4) SA 51 (RAD)

S v Seegers 1970 (2) SA 506 (A)

S v Mvelase 1958 (3) SA 126 (N)

Under the influence

S v Ndhlovu (2) 1965 (4) SA 692 (A)

S v Schlebusch 1993 (2) SASV 662 (A)

S v Popo 1978 (1) SA 476 (A)

Factual errors

Family of the offender

S v Botha 1970 (4) 407(T)

S v Howells 1999(1) SASV 675 (NPA) @ 682 e-f

State of health

S v Berliner 1967(2) SA 193 (A)
S v Magida 2005 (2) SACR 591 (SCA)

Accused part in the offence

S v Mtshali 1991 (3) SA 255 (A)
S v Goldman 1990 (1) SASV 1 (A)

Youthfulness

S v Lehnberg en 'n Ander 1975(1) SA 553 (A) @651A.
S v Cloete 2003 (2) SASV 489 (O)
S v D 1999 (1) SASV 122 (NKA) @124
S v Z +4 1999(1) SASV 427 (OKA) @430 f-j & 440i- 441g

Compensation of the victim

S v Zindogo 1980(2) SA 911 (RA)
S v Benetti 1975 (3) SA 603 (T)
S v Wakiri 1981 (2) SA 527 (ZAD)
S v Barnard 2004 (1) SACR 191 (SCA)

Prejudice additional to Punishment

S v Poswell 1969(4) SA 194 (RA)
S v Lennon 1973 (1) SA 515 (RAD)
S v Njanwe 1972 (2) SA 903 (OK)

Provocation

S v Mokonto 1971 (2) SA319 (A)
S v Rammatha 1992 (1) SASV 564 (BA)

Witchcraft

S v Netsiava 1990 (2) SASV 331 (A)

Political Motives

S v Mncube & Others 1991 (3) SA 132 (A)
S v Gerber 1998 (2) SASV 441(NKA)
S v Masina & others 1990 (4) 709 (A)

Person of importance

S v Louw 1986 (2) SA 236 (T)
S v Van Vuuren 1992(1) SASV129 (A)

Assisting with the investigation

S v Sibitha 1994 (2) SACR 319 (C)

Motive**G. The Offence****Prevalence**

S v Seegers 1970 (2) SA 506 (A)
S v Mbingo 1984 (1) SA 552 (A)

S v Reay 1987 (1) SA 873 (A)
S Collet 1990 (1) SASV 465 (A)

Planning

R v Fanuel 1966 (3) SA 672 RAD
S v Ivanisevic 1967 (4) SA 572 (A)
S v Petrus 1969 (4) SA 85 A

Time over which the offence was committed

Position of trust

Offences committed by Employees
S v Reddy 1975 (3) SA 759 (AD)@759 c-d
S v Herbst 1979 (1) SA 306 (O)
S v Verwey 1968 (4) SA 682 (AA)
S v Kunene 2000 (1) SACR 199 (W) @ 200
S v Prinsloo 1998 (2) SACR 669 (W) @ 671
S v Lister 1993 (2) SASV 228 (A) @ 232 g-h
S v Sandler 2000(1) SACR 331 (SCA)@ p335

Offences committed by Members of the court

Offences committed by Police etc.

S v Verkuil 1963 (1) PH H 37 (K)
S v Lepelesane 1963 (1) PH H 124 (T)

Difficulty in apprehending the perpetrator

Helpless victim
S v Mtinkulu 1971(4) SA 141 (T)
S v Ivanisevic And Another 1967 (4) 572 (AD)

Cruelty

S v Valley 1998 (1) SASV 417 (WLD) @ 420 c

H. Interest of Society

S v Banda & Others 1991 (2) SA 352 (BG)
S v Arnolds 1980 (2) PH H 15 (A)
S v Du Toit 1979 (3) SA 864 (A)
S v Snyders 1991 (1) SACR 453 (KPA)@ 454j – 455a
S van Dyk 1998 (2) SASV 363 (W) @ 381 i-j
S v Mokgoje 1999(1) SASV