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**WHAT CONSTITUTES “SUBSTANTIAL AND COMPELLING CIRCUMSTANCES” IN THE MANDATORY AND MINIMUM SENTENCING CONTEXT?**

By

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Dissertation submitted in fulfilment of the requirements for the  
degree of Master of Laws in the College of Law and Management  
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## **DECLARATION**

I, Thulisile Brenda Njoko, student number 215079735, hereby declare that “*What Constitutes Substantial and Compelling Circumstances in the Mandatory and Minimum Sentencing Context?*” for LLM is my own work and that it has not previously been submitted for assessment or completion of any postgraduate qualification to another University.

It may be made available for photocopying and inter-library loan.

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Thulisile Brenda Njoko

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# **CHAPTER 1**

## **1.1. BRIEF INTRODUCTION AND PROBLEM STATEMENT**

## **1.2. BRIEF INTRODUCTION**

Section 51 of the Criminal Law Amendment Act 105 of 1997, as amended (“the Act”), obligates a Regional or High Court, to sentence an accused person who has been convicted of offences specified in the Act to life imprisonment.<sup>1</sup> It further obligates the courts to impose certain minimum sentences to categories of offenders.<sup>2</sup> The provisions of the Act were a temporary measure and were to be effective for only two years,<sup>3</sup> but the period was later extended.<sup>4</sup> It was extended for a period of one year with effect from 1 May 2000 (Government Gazette 21122 GN 23, 20 April 2000) and thereafter for two years with effect from 1 May 2001 (Government Gazette 7059 GN 29, 30 April 2001), for two years with effect from 1 May 2003 (Government Gazette 24804 GN 40, 30 April 2003), for two years with effect from 1 May 2005 (Government Gazette 27549 GN 21, 29 April 2005) and for two years with effect from 1 May 2007 (Government Gazette 29831 GN 10, 25 April 2007). The Act covers a number of serious crimes, such as murder, robbery and rape. It further covers circumstances which trigger the imposition of the mandatory minimum sentences attached to the above-mentioned crimes.<sup>5</sup> The mandatory minimum sentences will attach unless the sentencing court is satisfied that there exist “substantial and compelling circumstances”, warranting a departure from the prescribed sentence and thus justifying the imposition of a lesser sentence.<sup>6</sup>

Various purposes for the Act have been advanced; this is despite the fact that its primary aim has been ascertained as deterrence.<sup>7</sup> The provisions of the Act were introduced in an effort to reduce serious and violent crimes as severe sentences will often deter potential offenders

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<sup>1</sup> s 51 (1) of the Act.

<sup>2</sup> Ibid s 51 (2).

<sup>3</sup> Ibid s 53 (2).

<sup>4</sup> s 3 of the Criminal Law (Sentencing) Amendment Act 38 of 2007.

<sup>5</sup> s 51 of the Act.

<sup>6</sup> Ibid s 51 (3) (a).

<sup>7</sup> *S v Mofokeng* 1999 (1) SACR 502 (W) at 526; *S v Homareda* 1999 (2) SACR 319 (W) at 325; *S v Eadie* 2001 (2) SACR 185 (C) at 187; *S v Kgafela* 2001 (2) SACR 207 (B) para 23.

from committing crimes.<sup>8</sup> This is also seen in *S v Malgas*,<sup>9</sup> where the SCA stated that the legislature, through the provisions, aimed at ensuring that there was a severe, standardised and consistent response from the courts to the commission of serious crimes.<sup>10</sup> It would thus seem that the key objective in introducing the minimum sentences was to provide a severe response against the commission of violent crimes. Though there is little doubt that deterrence was the primary aim for the enactment of the Act, it is said that the provisions of the Act have worsened the disparities and inconsistencies that are present in relation to the offences targeted by the law,<sup>11</sup> and one submits that this could be as a result of the different interpretations given by the courts as to what constitutes “substantial and compelling circumstances”.

### **1.3. PROBLEM STATEMENT**

The purpose of the dissertation is to evaluate what factors could possibly constitute “substantial and compelling circumstances”, by critically discussing and analysing the manner in which our courts have defined the phrase. One will further take into account certain mitigating and aggravating factors in conjunction with the *Zinn* triad, in order to establish whether certain factors such as the prospects of rehabilitation can be viewed as “substantial and compelling” during the sentencing process. In *S v Zinn*<sup>12</sup> and *S v Malgas*,<sup>13</sup> it was stated that in the sentencing process, it is essential to consider the crime, the offender and the interests of society. This is because the sentence imposed has to be proportionate, taking these three considerations into account and where the sentence proves to be disproportionate or grossly disproportionate, a lesser sentence than that which has been imposed ought to be considered.<sup>14</sup>

In the *Zinn* case,<sup>15</sup> it was implied that the interests of society require that the accused be incarcerated for a long time in order to protect society and to serve as a warning to future offenders, thus placing greater weight on the idea of deterring people in order to serve the

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<sup>8</sup> M Tonry *Sentencing Matters* (1996) 159-161.

<sup>9</sup> *S v Malgas* 2001 (1) SACR 469 (SCA).

<sup>10</sup> *Ibid* para 25.

<sup>11</sup> SS Terblanche, ‘Sentencing guidelines for South Africa: Lessons from elsewhere’, 2003 120 *South African Law Journal*, 881.

<sup>12</sup> *S v Zinn* 1969 (2) SA 537 (A).

<sup>13</sup> *S v Malgas* (n 9).

<sup>14</sup> *Ibid* para 25.

<sup>15</sup> *S v Zinn* (n 12).

interests of society.<sup>16</sup> Rehabilitation and deterrence thus become particularly important when considering the interests of society as they are focused on the reduction of crime in society and thus the protection of the society's interests. Rehabilitation is aimed at the improvement of the offender, with the aim of making them a law-abiding citizen, thus living a crime-free life.<sup>17</sup> Deterrence on the other hand is aimed at inflicting fear in both an offender and a potential offender by preventing the former from re-offending and by ensuring that the latter refrains from committing any crimes through a threat of the infliction of unpleasant punishment.<sup>18</sup>

Accordingly, it seems that the interests of society will be best served where offenders (including future offenders) are deterred from committing crimes and where there is a greater prospect of rehabilitating the offender in order to achieve a crime-free society. In light of this, a part of this dissertation will evaluate the argument that the prospects of achieving rehabilitation can be seen as a mitigating factor or a “substantial and compelling circumstance”, which once coupled with other considerations, warrants a departure from the prescribed sentences.

One will further look at certain developments in the law that have been recognised during the sentencing stage, specifically the concept of restorative justice as well as victim-impact statements.

#### **1.4. KEY RESEARCH QUESTIONS**

As highlighted above, the purpose of the dissertation is to evaluate what factors could possibly constitute “substantial and compelling circumstances”, by critically discussing and analysing the manner in which our courts have defined the phrase. One thus explores the principles relevant to the subject and further takes into account certain mitigating and aggravating factors in conjunction with the *Zinn* triad. In addition, one looks at the prospects of rehabilitation as a possible “substantial and compelling circumstance”, which once coupled with other considerations, can warrant a departure from the prescribed sentences under s 51 of the 1997 Act. Finally, one also looks at certain developments in the law that have been

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<sup>16</sup> Ibid.

<sup>17</sup> JM Burchell *Principles of Criminal Law* 3<sup>rd</sup> ed (2005) 78-79.

<sup>18</sup> Ibid 74-75.

recognised during the sentencing stage, specifically the concept of restorative justice as well as victim-impact statements.

The dissertation seeks to answer the following questions:

- a. Are the minimum sentencing provisions constitutional?
- b. Do the minimum sentencing provisions strip the courts of its sentencing discretion?
- c. How have the courts defined “substantial and compelling circumstances”?
- d. What factors could possibly constitute “substantial and compelling circumstances”?
- e. What factors are indicative of the prospects of rehabilitation and can the prospects of rehabilitation be recognised as a mitigating factor?
- f. Has the recognition of victim impact statements as well as the concept of restorative justice assisted in the sentencing process?

## **1.5. RESEARCH METHODOLOGY AND FEASIBILITY**

This is a qualitative study. As such, it is based largely on a critical analysis of information gathered from legal materials in order to identify gaps and trends in the relevant field of interest. The information gathered is analysed and applied to achieve the desired outcome of the research. The aims and objectives of the research are achievable given the questions, arguments and debates arising from the chosen focus in both literature and case law. Literature is readily available from the university library; University of KwaZulu-Natal. The information is gathered from text books, articles, law journals, statutes and other publications. Another source is articles that are available on the internet.

## **1.6. LIMITATIONS OF THE RESEARCH**

Although the research may give rise to difficult theoretical problems and may encompass a wide range of principles relating to sentencing, this dissertation focuses simply on the manner in which the courts have interpreted and applied the phrase “substantial and compelling circumstances”. This is done so as to determine what factors could possibly constitute such circumstances. Although the dissertation touches on some of the principles relating to sentencing as provided for in case law, these principles are only elaborated upon to the extent of their relevance.

## **CHAPTER 2**

### **2. MINIMUM SENTENCES LEGISLATION**

#### **2.1. INTRODUCTION AND BACKGROUND**

##### **2.1.1. SOUTH AFRICAN LEGISLATIVE FRAMEWORK**

In the *Makwanyane* case,<sup>19</sup> the Constitutional Court on the 6<sup>th</sup> of June 1995, decided against the death penalty. The court found that the death penalty was inconsistent with the provisions of the Constitution of the Republic of South Africa, Act 200 of 1993, then in force, and was later followed by the Constitution of the Republic of South Africa, Act 108 of 1996 (“the Constitution”). This was based on the fact that the penalty resulted in a violation of the right to life and the right not to be subjected to cruel, inhuman and degrading punishment.<sup>20</sup> Consequently, the Court in the circumstances ordered that the death penalty be “set aside in accordance with the law, and be substituted by appropriate and lawful punishment.”<sup>21</sup> The Court dismissed the argument that the sentence to death was the most effective one and was adamant in its finding that life imprisonment as a sentence was equally effective.<sup>22</sup>

Two years after the above-mentioned judgment, Parliament passed legislation which to some extent satisfied the order of the Constitutional Court in the *Makwanyane* case.<sup>23</sup> The legislation provided for the setting aside of all death sentences and for the substitution of these by appropriate and lawful punishments.<sup>24</sup> This legislation was the Criminal Law Amendment Act 105 of 1997, informally referred to as the “Minimum Sentences Legislation”.<sup>25</sup> Under this legislation, the sentence of death, which usually attached to the crime of murder, was substituted by the sentence of imprisonment for life.<sup>26</sup>

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<sup>19</sup> *S v Makwanyane* 1995 (6) BCLR 665 (CC).

<sup>20</sup> *Ibid* para 344.

<sup>21</sup> *Ibid* para 150.

<sup>22</sup> *Ibid* para 128.

<sup>23</sup> *Ibid*.

<sup>24</sup> JD Mujuzi ‘The Changing Face of Life Imprisonment in South Africa’ (Research Paper 15), 2008 *Civil Society Prison Reform Initiative* 17.

<sup>25</sup> *Ibid* 26.

<sup>26</sup> s 276 of the Criminal Procedure Act 51 of 1977; The Act (n 1).

Section 51 of the Act, which was headed “Discretionary Minimum Sentences for Certain Serious Offences” after the passing of the Criminal Law (Sentencing) Amendment Act 38 of 2007 (“CLSAA”), obligates a Regional or a High Court, to sentence an accused person who has been convicted of an offence specified in the Act to life imprisonment.<sup>27</sup> It further obligates the courts to impose certain minimum sentences to categories of offenders.<sup>28</sup> This is the case, unless the sentencing court is satisfied that there exist “substantial and compelling circumstances”, warranting a departure from the prescribed sentence and thus justifying the imposition of a lesser sentence.<sup>29</sup>

Section 51 (1) of the Act provides for a mandatory life sentence by stating that:

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

Section 51 (2) of the Act on the other hand provides for the minimum sentencing of categories of offenders who have been convicted of offences referred to in Parts II, III and IV of Schedule 2 by providing that:

‘Notwithstanding any other law, but subject to subsections (3) and (6), a Regional Court or a High Court shall sentence a person who has been convicted of an offence referred to in-

- (a) Part II of Schedule 2, in the case of-
  - a. A first offender, to imprisonment for a period not less than 15 years;
  - b. A second offender of any such offence, to imprisonment for a period not less than 20 years;  
and
  - c. A third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) Part III of Schedule 2, in the case of-
  - a. A first offender, to imprisonment for a period not less than 10 years;
  - b. A second offender of any such offence, to imprisonment for a period not less than 15 years;  
and
  - c. A third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) Part IV of Schedule 2, in the case of-
  - a. A first offender, to imprisonment for a period not less than 5 years;

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<sup>27</sup> s 51(1) of the Act.

<sup>28</sup> Ibid s 51 (2).

<sup>29</sup> Ibid s 51 (3) (a).

- b. A second offender of any such offence, to imprisonment for a period not less than 7 years; and
- c. A third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years.'

Lastly an escape clause appears under s 51 (3) (a) of the Act and provides that:

'If any court referred to in subsections (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceeding and must thereupon impose such lesser sentence.'

Before the introduction of the 1997 Act, the Minister of Justice and Constitutional Development, appointed a project committee of the then South African Law Commission ("the SALC") which was chaired by a judge of the High court.<sup>30</sup> This committee was appointed for purposes of investigating all issues and elements relating to sentencing, this included an enquiry into the desirability of introducing legislation governing the imposition of minimum and maximum sentences in South Africa.<sup>31</sup> The appointed committee produced an Issue Paper No. 11 which was titled *(Project 82) Sentencing: Mandatory minimum sentences in 1997*. The Issue Paper outlined options for sentencing reform and recommended that issues arising from the investigation of all sentencing aspects should be thoroughly debated before any legislation could be proposed.<sup>32</sup>

However, before any public comment on the Issue Paper could be made, the Act was already before Parliament and had included provisions which created a scheme of minimum sentences ranging from five-year sentences to life imprisonment.<sup>33</sup> This was the case regardless of the recommendations made by the SALC and consequently the Act was passed without due regard to the process of the SALC.<sup>34</sup> In 1998 however, the Minister of Justice appointed a new project committee which was under the leadership of Professor Dirk Van Zyl Smit and this committee was to investigate and undertake empirical studies on the

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<sup>30</sup> M O' Donovan & J Redpath 'The Impact of Minimum Sentencing in South Africa' (Report 2), 2006 *Open Society Foundation for South Africa* 10.

<sup>31</sup> Ibid.

<sup>32</sup> Ibid 11.

<sup>33</sup> Ibid.

<sup>34</sup> Ibid.

sentencing patterns before and after the introduction of the Act.<sup>35</sup> This also included an investigation into the attitudes of the key role-players (judges) towards the Act.<sup>36</sup> In the year 2000, the work of this committee resulted in a report titled ‘*Sentencing: A New Sentencing Framework*’, which also included a proposed Sentencing Framework Bill.<sup>37</sup> However, this Bill has never been put before Parliament.<sup>38</sup>

Before the abolition of the death penalty however, mandatory minimum sentences were already in existence in South Africa.<sup>39</sup> For instance, there were various prescribed mandatory sentences for drug-related offences, involving the dealing in, use or possession of potentially dangerous dependence-producing drugs which were prohibited.<sup>40</sup> Further, in 1952, corporeal punishment was imposed as a mandatory penalty in certain circumstances.<sup>41</sup> Again, in 1959 where certain requirements were met, the imposition of imprisonment for the prevention of crime as well as imprisonment for corrective training was compulsory.<sup>42</sup> For instance, for corrective training, a minimum of 2 years and a maximum of 4 years imprisonment was applicable and for the prevention of crime, a minimum of 5 years and a maximum of 8 years imprisonment was applicable.<sup>43</sup> In 1971 however, a finding of the Viljoen Commission<sup>44</sup> led to the subsequent abandonment of the prescribed sentences for corrective training and the prevention of crime. This was because the Commission had concluded that the mandatory nature of minimum sentences prevented individual circumstances from being taken into account in the different cases before the courts and thus resulted in unfair sentences being imposed and also, the prescripts interfered with the judicial sentencing discretion.<sup>45</sup>

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<sup>35</sup> *South Africa Law Commission Discussion Paper 91* (Project 82): ‘Sentencing (A New Sentencing Framework)’ (2000).

<sup>36</sup> *Ibid.*

<sup>37</sup> *Ibid.*

<sup>38</sup> M O' Donovan & J Redpath (n 30) 12.

<sup>39</sup> *Ibid* 11.

<sup>40</sup> See s 2 & s 3 of the Abuse of Dependence-producing Substances and Rehabilitation Centres Act 41 of 1971.

<sup>41</sup> *South African Law Commission Discussion Paper 11* (Project 82) ‘Sentencing: Mandatory Minimum Sentences’ (1997) 28 & 31.

<sup>42</sup> *Ibid.*

<sup>43</sup> JJ Neser ‘Mandatory Minimum Sentences in the South African context’ (2001) 3 *Crime Research in South Africa* (CRSA) 1.

<sup>44</sup> G Viljoen *Report of the Commission of Enquiry into the Penal System of the Republic of South Africa*. Pretoria: Government Printer (1976).

<sup>45</sup> SS Terblanche *Sentencing: Changes and effect since 1994*. Paper presented at conference, A Decade of Criminal Justice in South Africa, 7–8 February 2005. (2005).

On 1 May 1998, the 1997 Act re-introduced minimum sentencing in South Africa.<sup>46</sup> It seems the legislation was not only passed as a response to the order from the *Makwanyane* case,<sup>47</sup> but it was also passed as a response to the public outcry regarding the escalation of crime in South Africa.<sup>48</sup> Public dissatisfaction with the crime rate at the time and the lack of grave sentences for serious crimes was evidenced in newspaper articles.<sup>49</sup>

The legislature's intention in adopting the 1997 Act was to reduce the epidemic of serious and violent crimes through the imposition of grave sentences in order to achieve general deterrence.<sup>50</sup> This was endorsed in *S v Malgas*<sup>51</sup> as the Supreme Court of Appeal ("SCA") stated that "In short, the Legislature aimed at ensuring a severe, standardised and consistent response from the courts to the commission of serious crimes."<sup>52</sup> Another objective that is often advanced, although always secondary to the key objective of deterrence, relates to the eradication of the inconsistencies that are present in the sentencing process. This need for restoring consistency arises from the fact that judges have always had an almost unlimited discretion in the imposition of sentences, thus resulting in discrimination. This of course has led to "like cases not being treated alike as some offenders were treated differently on the grounds of race and social status in particular cases."<sup>53</sup> For example, there were accusations of racial bias,<sup>54</sup> which originated from the fact that some white judges were found to be more lenient when imposing sentences on their racial group as compared to situations where they had to impose sentences on black accused persons.<sup>55</sup> It has been said however that the

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<sup>46</sup> J Deziel *The Effectiveness of Mandatory Minimum Sentences: A Comparative Study of Canada and South Africa* (Unpublished LLM Thesis, University of Cape Town, 2013) 43.

<sup>47</sup> *S v Makwanyane* (n 19).

<sup>48</sup> *South African Law Commission* (n 41).

<sup>49</sup> "People are being murdered, raped, abused and hacked, either through political, recreational or gangster violence. Chaos reigns without control." (*The Citizen* 26 October 1995); "Tough jail sentences should be imposed on child abusers and this could be the only deterrent against child abuse. ... We have told Mr Omar that the sentences meted out for offenders were too lenient and that new laws with stiffer sentences had to be introduced." (*Sowetan* 10 November 1995); "We will never be in a position to bring the epidemic of serious economic crime and corruption in South Africa to an end if we do not bring in new structures to deal with it." (*Pretoria News* 26 October 1995); "A minimum sentence and tougher sentences could be introduced for child molesters, since existing sentences do not appear to be sufficient deterrent for the community." (*Beeld* 22 November 1995) in JJ Neser (n 43) 2.

<sup>50</sup> General deterrence: Infliction of fear in an offender and a potential offender by preventing them from committing crime through a threat or an infliction of an unpleasant punishment. JM Burchell (n 17) 74-75; SS Terblanche (n 11).

<sup>51</sup> *S v Malgas* (n 9).

<sup>52</sup> *Ibid* para 25.

<sup>53</sup> *South African Law Commission* (n 35) 26.

<sup>54</sup> D Van Zyl Smit, 'Mandatory Sentences: A Conundrum for the new South Africa?' (2000) 2 *Punishment and Society* 198 at 202-203.

<sup>55</sup> *Ibid*.

identification of this objective proves to be inaccurate as consistency in sentencing could not have been the key objective, particularly because the 1997 Act was initially intended to be for a temporary nature. Further, the 1997 Act is only triggered where specified aggravating circumstances are in existence and such circumstances may differ from case to case and thus warrant differing results.<sup>56</sup> It is also important to note that the Constitution places great importance on the principle of proportionality and thus one submits that the sentence imposed ought to be proportional to the seriousness of the crime, regardless of what is specified in the provisions of the 1997 Act.

Certain cases have also expressed views on the intention behind the passing of the 1997 Act. For instance, in *S v Mofokeng and Another*,<sup>57</sup> the court held that the main intention of the legislature was to deter perpetrators and potential perpetrators through the imposition of severe minimum sentences.<sup>58</sup> In *S v Homareda*,<sup>59</sup> the court endorsed deterrence and retribution as the intended purposes of the said legislation.<sup>60</sup> The court was however doubtful as to whether these intended purposes can only be achieved through prescribed minimum sentences which have proved to result in failure in the past in respect of drugs and drug trafficking.<sup>61</sup>

In the case of *Centre for Child Law v Minister for Justice and Constitutional Development and Others*<sup>62</sup> Cameron J held that there can be no doubt that the intention and effect of the minimum sentencing regime introduced in May 1998 was to impose a harsher system of sentencing for the scheduled crimes.<sup>63</sup> In *S v Majalefa and Another*,<sup>64</sup> Leveson J expressed the view that “the purpose of the legislation was to avoid disparities in sentencing”.<sup>65</sup> The court in *S v Montgomery*<sup>66</sup> also emphasised that the intention of the legislation was “to avoid

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<sup>56</sup> SS Terblanche 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' 2003 *Acta Juridica* 195.

<sup>57</sup> *S v Mofokeng and Another* 1999 (1) SACR 450 (C).

<sup>58</sup> *Ibid* para 454 C.

<sup>59</sup> *S v Homareda* 1999 (1) SACR 502 (W).

<sup>60</sup> *Ibid* para 526 A.

<sup>61</sup> *Ibid*.

<sup>62</sup> *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC).

<sup>63</sup> *Ibid* para 16.

<sup>64</sup> *S v Majalefa and Another*: Unreported judgment of the Witwatersrand Local Division delivered on 22 October 1998.

<sup>65</sup> *S v Blaauw* 1999 (2) SACR 295 (W) para 303 A.

<sup>66</sup> *S v Montgomery* 2000 (2) SACR 318 (N).

situations where surprisingly disparate sentences are imposed by different courts for a particular offence".<sup>67</sup>

Though the Act was to serve the above-mentioned purposes, the provisions of the Act were regarded as a temporary measure, to be effective for only two years and thereafter they were to be extended from time to time.<sup>68</sup> Their operation was first extended for a period of one year with effect from 1 May 2000, they were further extended for a period of 2 years in the ensuing years and this was done in May 2001 to 2007.<sup>69</sup> After they had been extended several times, s 51 was rendered permanent on 31 December 2007 by the CLSAA.<sup>70</sup> The subsequent amendments to the Act included the granting of jurisdiction to the Regional Court to pass life imprisonment, an automatic right of appeal against life imprisonment in respect of a juvenile accused and identification of circumstances that do not constitute "substantial and compelling circumstances".<sup>71</sup>

Section 1 of the 1997 Act also provides for the substitution of the sentence of death and evidently, South Africa following the abolishment of the sentence of death resorted to the imposition of life imprisonment as the maximum sentence.

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<sup>67</sup> Ibid para 322 H.

<sup>68</sup> s 53 (1) & (2) of the Act (n 1).

<sup>69</sup> Government Gazette 7059 GN 29, 30 April 2001; Government Gazette 24804 GN 40, 30 April 2003; Government Gazette 27549 GN 21, 29 April 2005; Government Gazette 29831 GN 10, 25 April 2007.

<sup>70</sup> s3 of the Criminal Law (Sentencing) Amendment Act (n 3).

<sup>71</sup> ES Nzimande *Minimum Sentence Legislation in South Africa* (Unpublished LLM Thesis, Nelson Mandela Metropolitan University, 2012) III.

## **2.2. JUDICIAL DISCRETION UNDER THE LEGISLATION**

### **2.2.1. SOUTH AFRICAN LEGISLATIVE FRAMEWORK**

The judgment of the Appellate Division of the Supreme Court in *S v Toms; S v Bruce*,<sup>72</sup> though decided prior to South Africa becoming a constitutional democracy with an enforceable bill of rights, is seemingly an important reference when dealing with the sentencing discretion of judicial officers. In the case, Smalberger JA held:

‘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* AD 56 at 57). The fact 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 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).’<sup>73</sup>

Accordingly, it has been submitted that the sentence discretion is a vital element of our law of sentencing and that at the heart of that discretion is the principle that each case should be treated on its own facts or merits and it is precisely for this reason that the sentencing discretion lies with the trial court.<sup>74</sup>

In the *S v Dodo* case,<sup>75</sup> with regards to the sentencing discretion of judicial officers under the Act, the High Court concluded that the provisions of the Act undermine the independence of the judiciary,<sup>76</sup> and it also pointed out that the imposition of the most severe penalty falls within the exclusive discretion of the sentencing court and judicial power cannot be usurped by the legislature for sentencing purposes.<sup>77</sup> The Constitutional Court however, disputed the fact that the imposition of a heavy penalty fell within the exclusive discretion of the

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<sup>72</sup> *S v Toms; S v Bruce* 1990 2 SA 802 (A).

<sup>73</sup> *Ibid* para 806H-I.

<sup>74</sup> SS Terblanche *A Guide to Sentencing in South Africa* 1st ed (1999) 122.

<sup>75</sup> *S v Dodo* 2001 (3) SA 382 (CC).

<sup>76</sup> *Ibid* para 8.

<sup>77</sup> *De Lange v Smuts NO and Others* 1998(7) BCLR 779(CC), 1998(3) SA 785 (CC) para 61.

sentencing court and concluded that this did not correctly reflect the law.<sup>78</sup> Thus, the question that arises when dealing with the minimum sentences legislation is of whether or not the discretion of a judicial officer imposing the sentence is fettered.

In *S v Toms; S v Bruce*,<sup>79</sup> judges expressed their concerns with regards to mandatory minimum sentences. Smalberger JA held:

'It reduces the court's normal sentencing function to the level of a rubber stamp. It negates the ideal of individualisation. The morally just and the morally reprehensible are treated alike. Extenuating and aggravating factors both count for nothing. No consideration, no matter how valid or compelling, can affect the question of sentence. Harsh and inequitable results inevitably flow from such a situation. Consequently judicial policy is opposed to mandatory sentences as they are detrimental to the proper administration of justice and the image and standing of the courts'.<sup>80</sup>

Chief Justice Corbett in support also stated that:

'the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the Legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted of statutory offences and as a kind of enactment that is calculated in certain instances to produce grave injustice'.<sup>81</sup>

One submits that this to some extent holds to be correct as one is of the opinion that a court faced with a case where the minimum sentencing provisions apply, will have no choice, but to impose the prescribed sentence, when an accused is convicted of an offence referred to under the different parts of Schedule 2. One further submits that this will happen regardless of what the court might regard as the appropriate sentence in the circumstances and accordingly, it would seem their discretion in the circumstances stands to be fettered. This is largely because the enactment of the legislation meant that it was no longer business as usual, when sentencing for the specified offences.<sup>82</sup>

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<sup>78</sup> *S v Dodo* (n 75) para 13.

<sup>79</sup> *S v Toms; S v Bruce* (n 72).

<sup>80</sup> *Ibid* 807A-C.

<sup>81</sup> *Ibid* 817 C-D.

<sup>82</sup> *S v Malgas* (n 9) para 7.

In terms of the legislation, courts are granted discretion to deviate from the prescribed minimum sentences in so far as there are “substantial and compelling circumstances” which allow for the imposition of a lesser sentence.<sup>83</sup> Owing to this, the minimum sentences cannot be perceived as an interference with the independence of the judicial officers.<sup>84</sup> This is the case regardless of the fact that the provisions of the 1997 Act have been viewed as an attempt by the legislature to do so.<sup>85</sup> Those judicial officers, who were opposed to the Act coming into operation, have continued to address their concerns that arise from the fact that the legislation interferes with their sentencing discretion.<sup>86</sup> Even if their objection in principle is set aside by the *Malgas* case,<sup>87</sup> there are difficulties associated with the interpretation and application of the Act. These difficulties arise largely from the fact that judges have difficulties applying the “substantial and compelling circumstances” test,<sup>88</sup> which in turn is primarily because the relationship between the test and the general principles of sentencing has not been clearly defined.<sup>89</sup>

In *S v Blaauw*<sup>90</sup> Judge Borchers found that the Act limits the sentencing discretion of judicial officers to the extent that courts no longer have the discretion they previously had to impose sentences.<sup>91</sup> It was said that the Act affects the discretion of the courts “more rigorously” than it would have, if the courts had to merely find that there were “circumstances” that justified a departure from the prescribed minimum sentences.<sup>92</sup> The legislature has deliberately left out those characteristics that would make circumstances that ought to be considered by the court meet the criteria of being substantial and compelling.<sup>93</sup> Accordingly, they did this in order to leave it to the court to decide in their final stage of analysis, whether the circumstances of a particular case before it presents a case that is substantial and compelling and that calls for a departure from the prescribed sentences.<sup>94</sup> In addition, the legislature has not specified whether or not the circumstances should be “exceptional” to qualify as being substantial and compelling, if this was the case however, the discretion of the courts would be made even

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<sup>83</sup> The Act (n 1) S51 (3) (a).

<sup>84</sup> *Sv Malgas* (n 9) para 25.

<sup>85</sup> JJ Neser (n 43) 1.

<sup>86</sup> South African Law Commission (n 35) at xviii .

<sup>87</sup> *S v Malgas* (n 9) para 25.

<sup>88</sup> South African Law Commission (n 35) at xviii.

<sup>89</sup> Ibid.

<sup>90</sup> *S v Blaauw* (n 65).

<sup>91</sup> Ibid.

<sup>92</sup> Ibid.

<sup>93</sup> *S v Malgas*(n 9) para 18.

<sup>94</sup> Ibid.

narrower by the requirement of “exceptional”.<sup>95</sup> In the *Mofokeng* case,<sup>96</sup> the court concluded that the words “substantial and compelling circumstances” leave the trial court with almost no discretion and in fact compel it to impose the minimum sentence.<sup>97</sup> However, the said case is superseded by the *Malgas* case,<sup>98</sup> which suggests that the said phrase does not deviate from the traditional factors ordinarily taken into account when imposing a sentence.

The court’s advantage centres on the fact that they try individual cases and they can thus make sentencing decisions based on the particular facts of each case as they possess information pertaining to a particular accused.<sup>99</sup> It is this advantage that South African judges have used as the basis of their argument, when arguing that they should be granted an unfettered discretion to impose sentences in cases presented to them,<sup>100</sup> as the sentencing discretion can only be properly exercised on the basis of all the facts relevant to the matter.<sup>101</sup> It seems however, that a free and unfettered discretion amounts to an exercise of absolute power that our democratic system cannot tolerate.<sup>102</sup> It can be and has been argued that in South Africa the sentencing discretion of judicial officers is to be exercised within statutory defined bounds and is not to go entirely unstructured.<sup>103</sup>

Section 51 (3) (a) of the Act however, referring to “substantial and compelling circumstances” has been viewed as an escape clause, which reinstates the courts discretion.<sup>104</sup> This is also reinforced in *S v Malgas*,<sup>105</sup> where the court stated that “Section 51 has limited but not eliminated the courts’ discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2)”.<sup>106</sup>

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<sup>95</sup> Ibid.

<sup>96</sup> *S v Mofokeng* (n 7).

<sup>97</sup> Ibid.

<sup>98</sup> *S v Malgas*(n 9).

<sup>99</sup> South African Law Commission (n 35) 25.

<sup>100</sup> Ibid.

<sup>101</sup> South African Law Commission (n 35) 77.

<sup>102</sup> Ibid.

<sup>103</sup> Ibid 26.

<sup>104</sup> SS Terblanche (n 56).

<sup>105</sup> *S v Malgas*(n 9).

<sup>106</sup> Ibid para 25.

In *Centre for Child Law v Minister of Justice and Constitutional Development and Others*,<sup>107</sup> Judge Cameron also confirmed the interpretation adopted in the *S v Malgas* case,<sup>108</sup> stating that under the minimum sentencing provisions, the discretion granted to judicial officers was not eliminated, but was substantially constrained.<sup>109</sup> In *S v Mahomotsa*<sup>110</sup> it was held that, the sentence to be imposed once “substantial and compelling circumstances” are found to exist, is within the sentencing discretion of the court, of course subject to the prescripts imposed by the Act.<sup>111</sup> In *Malgas*,<sup>112</sup> the court remarked as follows:

‘What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed’.<sup>113</sup>

Where legislation lacks an “escape clause” or the possibility for judges to depart from the mandatory sentences, the legislature eliminates the court’s discretion to impose an appropriate sentence, based on the particular circumstances of each individual case and substitutes it with a predetermined sentence that ought to apply to all cases.<sup>114</sup>

## 2.2.2. FOREIGN JURISPRUDENCE RELATING TO JUDICIAL DISCRETION

Arguments relating to judges being given absolute independence in imposing sentences were rejected by the Supreme Court of the United States of America in the *Mistretta v United States* case,<sup>115</sup> which held that:

‘although up to that time Congress had delegated an almost unfettered sentencing discretion to judges, the scope of judicial sentencing discretion remained within congressional control.

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<sup>107</sup> *Centre for Child Law* (n 62).

<sup>108</sup> *S v Malgas* (n 9).

<sup>109</sup> *Centre for Child Law* (n 62).

<sup>110</sup> *S v Mahomotsa* 2002 (2) SACR 435 (SCA).

<sup>111</sup> *Ibid* para 18.

<sup>112</sup> *S v Malgas* (n 9).

<sup>113</sup> *Ibid* para 25.

<sup>114</sup> H.Dumont ‘Disarming Canadians, and Arming Them with Tolerance: Banning Firearms and Minimum Sentences to Control Violent Crime. An Essay on an Apparent Contradiction in Mandatory Minimum Sentences: Law and Policy’ (2001) 39 *Osgoode Hall L.J.* 339.

<sup>115</sup> *Mistretta v United States* ( 1989) 488 U.S 361.

Congress therefore had the constitutional authority to take back this wide discretion within statutorily defined limits'.<sup>116</sup>

Under Australian law and in the leading case of *Palling v Corfield*,<sup>117</sup> it was emphasised that the imposition of sentences is solely associated with the powers of the legislature and they need not grant any judicial discretion.<sup>118</sup> In Germany on the other hand, the independence of the judiciary from the other branches of government is a well-established principle. It is said that “judicial power may be exercised only by judges.”<sup>119</sup> Article 104(2) of the Basic Law in Germany further holds that “only a judge may decide on the admissibility or continuation of detention”,<sup>120</sup> thus implying that the sentencing authority is attributed to the judicial function. In India and in the case of *Bachan Singh v State of Punjab*,<sup>121</sup> all justices agreed that the enactment of legislation by the legislature, adjusting judicial sentencing discretion was a legitimate legislative function.<sup>122</sup> Most of the jurisdictions that have prescribed mandatory penalties have permitted judicial officers to depart from the prescribed sentences by the inclusion of an “escape” clause, like the one apparent in South Africa under s 51 (3)(a) of the 1997 Act. This permits courts to impose a lesser sentence than that which is prescribed where certain circumstances exist.

In England and Wales for instance, limited judicial discretion has been granted to courts where they are of the opinion that particular circumstances, relating to either the specified offences or to the offender, exist and they render the imposition of the mandatory sentence unjust, thus warranting a departure from the prescribed sentence.<sup>123</sup> The judge, like in South Africa, is expected to provide written reasons for not imposing the prescribed sentence, but through this, judges are then given some flexibility in the imposition of mandatory sentences.<sup>124</sup> An example is to be found under the Criminal Justice Act of 2003 (“JA”) where it is stated that:

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<sup>116</sup> South African Law Commission (n 35)27.

<sup>117</sup> *Palling v Corfield* (1970) 123 CLR 52.

<sup>118</sup> Ibid paras 58-59; *Leask v Commonwealth of Australia* (1996) 187 CLR 579 para 15.

<sup>119</sup> Article 92 and 97 of the Basic Law for the Federal Republic of Germany (Grundgesetz, GG) of 1949.

<sup>120</sup> Ibid Article 104(2).

<sup>121</sup> *Bachan Singh v State of Punjab* (1980) 2 SCC 684.

<sup>122</sup> Ibid paras 74-75.

<sup>123</sup> *Mandatory Sentences of imprisonment in Common Law jurisdictions: some representative models (Canada; England and Wales; Scotland; Ireland; Australia, New Zealand and South Africa)*, Department of Justice Canada (Research and Statistics Division), (2005)14 [http://www.justice.gc.ca/eng/pi/rs/rerap/2005/rr05\\_10/rr05\\_10.pdf](http://www.justice.gc.ca/eng/pi/rs/rerap/2005/rr05_10/rr05_10.pdf) Last accessed on 20 April 2015.

<sup>124</sup> Ibid.

‘The court shall impose an appropriate custodial sentence for a term of at least the required minimum term (with or without a fine) unless the court is of the opinion that there are exceptional circumstances relating to the offence or to the offender which justify it not doing so’.<sup>125</sup>

This is reiterated in the Sentencing Act<sup>126</sup> where it is stated that:

‘the mandatory sentences can only be avoided where the court is of the opinion that there are particular circumstances which – (a) relate to any of the offences or to the offender; and (b) would make it unjust to impose the sentence in all the circumstances’.<sup>127</sup>

In contrast to the above, judicial officers in Canada are not granted this limited discretion following a finding of guilt.<sup>128</sup> There is no “escape clause” allowing for the imposition of a lesser sentence.<sup>129</sup> The lack of an “escape clause” prevents the judiciary from departing from the minimum sentences, even if there are exceptional circumstances allowing for such a departure.<sup>130</sup> This of course is likely to lead to injustices as minimum sentences will apply to every offender regardless of their individual circumstances.<sup>131</sup> A departure is however allowed where there is evidence that the imposition of the sentence will amount to cruel and unusual punishment for the offender in the circumstances.<sup>132</sup> In USA on the other hand, the sentencing judge is given an amount of flexibility when exercising their discretion in relation to mandatory minimum sentences, for instance a federal district court is allowed to impose a term of imprisonment which is lower than the prescribed minimum penalty in situations where the defendant provides “substantial assistance” in the investigation or prosecution of another person.<sup>133</sup>

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<sup>125</sup> s 287 (2) of the JA.

<sup>126</sup> The Powers of Criminal Courts (Sentencing) Act 2000.

<sup>127</sup> Ibid s 110; s 110(2); s 111.

<sup>128</sup> J Deziel (n 46) 27.

<sup>129</sup> Ibid.

<sup>130</sup> Ibid.

<sup>131</sup> K.Roach ‘The Constitutionality of Mandatory Sentences’ (2001) 39 *Osgoode Hall L. J.* 371.

<sup>132</sup> *R v Smith* 1987 1 S.C.R 1045 para 1072.

<sup>133</sup> Rule 53(b) of the Federal Rule of Criminal Procedure; s 3553 (e) of the Title 18 of the United States Code.

## **2.3. CONSTITUTIONAL CHALLENGES**

### **2.3.1. SOUTH AFRICAN LEGISLATIVE FRAMEWORK**

In *S v Dodo*,<sup>134</sup> the constitutional validity of s 51 (1) of the 1997 Act was challenged as the High Court found aspects of the provision to be unconstitutional. The Constitutional Court however decided not to confirm the order of invalidity by the High Court.<sup>135</sup> In the High Court the provision was challenged on the basis it violated the principle of the separation of powers<sup>136</sup> and the right of an accused to a public trial before an ordinary court.<sup>137</sup>

The Constitutional Court held with regards to an accused's right to a fair trial<sup>138</sup> that such a right will only be unjustifiably limited, if the provision has some material effect on the courts' independence, or if it deprives the courts of judicial function in such a manner that the courts can no longer be classified as ordinary courts.<sup>139</sup> The Constitutional Court however, held that though our Constitution recognises the doctrine of the separation of powers and a system of checks and balances<sup>140</sup> in relation to the exercise of the functions and powers of the three different branches of government, there is no absolute separation of powers between the judicial function, on the one hand, the legislature and the executive on the other hand.<sup>141</sup> It found that both the legislature and the executive as the branches of government have a real interest in the severity of the sentences<sup>142</sup> and consequently courts do not have the sole authority in determining the nature and the severity of punishments imposed on convicted persons.<sup>143</sup> It further found that though the legislature has an interest in the imposition of penal sentences; it cannot compel courts to impose a sentence which is contrary to the Constitution.<sup>144</sup>

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<sup>134</sup> *S v Dodo* (n 75).

<sup>135</sup> M O' Donovan & J Redpath (n 30).

<sup>136</sup> *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) paras 106–113.

<sup>137</sup> s 35 (3) (c) of the Constitution of the Republic of South Africa, 1996 (“the Constitution”).

<sup>138</sup> *S v Dodo* (n 75).

<sup>139</sup> *Ibid* para 44.

<sup>140</sup> Checks and balances: “constitute an integral part of the separation of powers principle; they prevent one separate arm of the state from becoming too powerful in the exercise of the powers allocated to it. In modern constitutionalism a most important check on the legislature in this regard is an entrenched bill of rights enforceable through an independent judiciary. A bill of rights protects individual rights by limiting the power of the legislature.” *S v Dodo* (n 75) para 41.

<sup>141</sup> *S v Dodo* (n 75) para 33.

<sup>142</sup> *Ibid* Para 33.

<sup>143</sup> *Ibid* Para 33.1.

<sup>144</sup> *Ibid* para 33.5.

Accordingly, the Constitutional Court noted that the only relevant enquiry was of whether the provisions of the Act compelled the High Court to pass a sentence that is inconsistent with the right not to be subjected to cruel, inhuman or degrading punishment.<sup>145</sup> The court also pointed out that where a person is subjected to punishment that shows characteristics of being cruel, inhuman or degrading; their right to dignity is also affected.<sup>146</sup> It agreed with foreign law and pointed out that *gross disproportionality* and not just mere *disproportionality* between the sentences prescribed by the Act and that one merited by the offence would lead to a limitation of the right to dignity.<sup>147</sup>

It held that proportionality is an important aspect of the enquiry relating to whether or not the right not to be subjected to cruel, inhuman or degrading punishment has been infringed, and that this was the case because of the fact that the time to be served has to be proportionate to the offence.<sup>148</sup> The offence must be regarded as being inclusive of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender.<sup>149</sup> It was further stated that humans should not be treated as means to an end through the imposition of a sentence that bears no relationship to the seriousness of the offence or to what the committed offence merits, as this would result in denying the offender their humanity.<sup>150</sup>

The court was however of the view that the “substantial and compelling circumstances” exception provided by the 1997 Act, ensured that the courts did not impose a *grossly disproportionate* sentence that would limit the right to dignity<sup>151</sup> and consequently, the offender’s right under s 12(1) (e) of the Constitution. The court made a distinction between two tests. Firstly, it stated that the test in *Malgas*<sup>152</sup> must be employed for purposes of determining whether or not s 51 (3) (a) can legitimately be invoked by a sentencing judge in order to pass a lesser sentence than that prescribed by section s 51. Secondly, the court noted that the test of *gross disproportionality* must be applied in order to determine whether or not a sentence prescribed by law is in violation of the offender’s right not to be subjected to cruel,

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<sup>145</sup> *S v Dodo* (n 75) para 35.

<sup>146</sup> *Ibid.*

<sup>147</sup> *Ibid* para 39.

<sup>148</sup> *Ibid* para 37.

<sup>149</sup> *Ibid.*

<sup>150</sup> *Ibid* para 38.

<sup>151</sup> *Ibid* para 39 and 40.

<sup>152</sup> *S v Malgas* (n 9).

inhuman and degrading punishment as outlined in s 12 (1) (e) of the Constitution.<sup>153</sup> The court then ruled that s 51 (1) of the Act is not inconsistent with the right of an offender not to be punished in a cruel, inhuman or degrading way.<sup>154</sup> It also ruled that the provision is not inconsistent with the principle of the separation of powers and the right of an accused to a public trial before an ordinary court.<sup>155</sup>

In *S v Vilakazi*,<sup>156</sup> it was said that the sentencing approach laid down in *Malgas*<sup>157</sup> makes it possible for the courts to avoid the possibility of imposing “incongruous and disproportionate” sentences and it is safe to say that, it is through this approach that the Constitutional Court in *S v Dodo*<sup>158</sup> found the provisions of the Act to be constitutional.<sup>159</sup> Accordingly, it was said in the case that it is clear that every court in each and every case, before imposing a prescribed sentence must assess whether or not the sentence is indeed proportionate to the particular offence and of course this assessment must arise after a consideration of all the circumstances of that particular case.<sup>160</sup> It was said that the phrase “substantial and compelling circumstances” vests the sentencing judge with the discretion, in fact an obligation to consider whether the circumstances in a particular case require that a different sentence be imposed.<sup>161</sup> Other writers such as Van Zyl Smit have also argued that “an adequate departure mechanism is one way of ensuring that a mandatory minimum sentence requirement does not produce a constitutionally unacceptable degree of disproportionality between crime and the imposed punishment”.<sup>162</sup>

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<sup>153</sup> *S v Dodo* (n 75) para 40.

<sup>154</sup> The Constitution (n 137) s 12 (1) (e).

<sup>155</sup> *S v Dodo* (n 75) para 51.

<sup>156</sup> *S v Vilakazi* 2009 (1) SACR 552 (SCA).

<sup>157</sup> *S v Malgas* (n 9).

<sup>158</sup> *S v Dodo* (n 75).

<sup>159</sup> *S v Vilakazi* (n 158) para 14.

<sup>160</sup> *Ibid* para 15.

<sup>161</sup> *Ibid*.

<sup>162</sup> D Van Zyl Smit “Current developments: Mandatory Minimum Sentences and Departures from them in Substantial and Compelling Circumstances:” (1999) 15 SAJHR 271.

### **2.3.2. FOREIGN JURISPRUDENCE RELATING TO THE SEPARATION OF POWERS AND THE RIGHT AGAINST CRUEL, INHUMAN AND DEGRADING PUNISHMENT**

In Canada, the mandatory sentences have also faced constitutional challenges on the basis that it violates certain rights of the accused and the case of interest in this regard is that of *R v Smith*.<sup>163</sup> This was the first decision dealing with the constitutionality of mandatory penalties.<sup>164</sup> The Supreme Court in *R v Smith*<sup>165</sup> ruled that the imposition of 7 years' imprisonment for the import of narcotics (without regard to the type and quantity of the substance) constituted a violation of the Canadian Charter of Rights and Freedoms ("the Charter"),<sup>166</sup> which contained a provision that was against the imposition of cruel and unusual punishment.<sup>167</sup> It was said that the court when deciding on whether or not to impose the prescribed sentence, must first consider whether the sentence violates the Charter and if so whether such violation could be justified under s 1 of the Charter as it guarantees the rights and freedoms set out in the Charter subject to justifiable limits prescribed by law.<sup>168</sup>

It was warned however, that courts should not "stigmatise every disproportionate or excessive sentence as unconstitutional, but only those that were grossly disproportionate and so excessive as to outrage standards of decency",<sup>169</sup> this of course mirrors the decision in the *Dodo case*.<sup>170</sup> In a recent case however in Canada, the same court stated that the sentencing court does not have the right to ignore a sentence set out by parliament by imposing a sentence less than that one prescribed, as such sentences could only be ignored in the presence of exceptional circumstances and in the absence thereof, the sentence set out by parliament must be applied,<sup>171</sup> thus abandoning any argument for the doctrine of the separation of powers.

Under Australian law, it appears that no violation of the separation of powers doctrine occurs when mandatory minimum sentences are set by the legislature leaving little or no discretion to the sentencing judge.<sup>172</sup> In *Palling v Corfield*,<sup>173</sup> Barwick CJ stated that:

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<sup>163</sup> *R v Smith* (n 132).

<sup>164</sup> J.Deziel (n 46) pg 14.

<sup>165</sup> *R v Smith* (n 132).

<sup>166</sup> The Constitution Act of 1982, being Schedule B to the Canada Act of 1982.

<sup>167</sup> s 12 of the Canadian Charter of Rights and Freedoms.

<sup>168</sup> *R v Smith* (n 132).

<sup>169</sup> Ibid 1072.

<sup>170</sup> *S v Dodo* (n 75).

<sup>171</sup> *R v Nasogaluak* (2010) 1 S.C.R. 206.

<sup>172</sup> *Palling v Corfield* (n 117) paras 58-9.

<sup>173</sup> Ibid.

'It is both unusual and in general, in my opinion undesirable that the court should not have a discretion in the imposition of sentences, for circumstances alter cases and it is a traditional function of a court of justice to endeavour to make the punishment appropriate to the circumstances as well as to the nature of the crime. But whether or not such discretion shall be given to the court in relation to a statutory offence is for the decision of the parliament. It cannot be denied that there are circumstances which may warrant the imposition on the court of a duty to impose specific punishment. If Parliament chooses to deny the court such discretion, and to impose such a duty, as I have mentioned the court must obey the statute in this respect assuming its validity in other respects. It is not, in my opinion, a breach of the Constitution, not to confide any discretion to the court as to the penalty to be imposed'.<sup>174</sup>

Thus, in countries where parliamentary supremacy applies, courts ought to apply the law enacted by parliament;<sup>175</sup> this argument may also be applicable to s 269 of the JA, found in England and Wales.<sup>176</sup> However the case is different in South Africa because constitutional supremacy applies and thus courts have to abide by the prescripts of the Constitution when deciding on an appropriate sentence.

In the United States, the power of the legislatures to define crimes and their punishment is not considered to be in breach of the separation of powers principle and the courts will not interfere with the exercise of such power unless it has been exercised in a manner which breaches the Constitution.<sup>177</sup> It is accepted that the doctrine of the separation of powers, imposes on the different branches "a degree of overlapping responsibility, a duty of interdependence as well as independence the absence of which would preclude the establishment of a nation capable of governing itself effectively."<sup>178</sup>

In the case of *Booker*,<sup>179</sup> the court ruled that the Sentencing Commission's Guidelines (The Sentencing Commission created by the Sentencing Reform Act of 1984), which gave judges very little power in imposing a sentence either higher or lower than those established by the guidelines were said to be unconstitutional due to their mandatory characteristics<sup>180</sup> and the

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<sup>174</sup> Ibid para 52.

<sup>175</sup> *Nicholas v The Queen* (1998) 193 CLR 173 para 37.

<sup>176</sup> A Ashworth *Sentencing and Criminal Justice* 5<sup>th</sup> ed (2010) 54.

<sup>177</sup> *Weems v United States* (1910) 217 U.S. 349.

<sup>178</sup> *Mistretta v United States* (n 115) per Blackmun J citing *Buckley v Valeo* (1976) 424 U.S. 1.

<sup>179</sup> *United States v Booker* (2005) 543 U.S. 220.

<sup>180</sup> Ibid 221,226,260,265.

only way they could be maintained was if they were rendered merely advisory.<sup>181</sup> The Supreme Court stated that the guidelines should be rendered advisory because criminal sentencing must be conducted on a case-by-case basis.<sup>182</sup> The decision restored the discretion of federal courts with regard to the imposition of sentences but it unfortunately did not affect the statutory mandatory sentences, though they amount to a similar system of sentencing.<sup>183</sup>

## 2.4. CONCLUSION

Mandatory minimum sentences place a bar on a judge's ability to set a sentence lower than that prescribed by the applicable legislation; it does this without stripping the judiciary completely of its sentencing powers. In most jurisdictions that have been discussed above, including South Africa, an "escape clause" is usually present to give courts some limited discretion in the application of the prescribed legislation. It seems it is only where the imposition of the sentence would constitute as *grossly disproportionate*, will the mandatory sentences be rendered unconstitutional and in violation of the right not to be subjected to cruel, inhuman and degrading punishment. Where the doctrine of the separation of powers constitutes the basis for challenging the validity of such sentences, courts have indicated that the judiciary, legislature and the executive all have an interest in sentencing.

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<sup>181</sup> Ibid 258-59.

<sup>182</sup> Ibid 233.

<sup>183</sup> K Riley 'Trial by Legislature: Why Statutory Mandatory Minimum Sentences Violate the Separation of Powers Doctrine' (2010) 19 *Public Interest Law Journal* 285-310 at 294.

## **CHAPTER 3**

### **3. “SUBSTANTIAL AND COMPELLING CIRCUMSTANCES”**

#### **3.1. INTRODUCTION**

This chapter involves a discussion of the manner in which the courts have looked at the phrase “substantial and compelling circumstances” as an escape clause from the prescribed minimum sentences. It will also be inclusive of a discussion of the Minnesota Sentencing Guidelines as the phrase “substantial and compelling circumstances” has been borrowed from the State of Minnesota in the United States of America. The point of departure will be the *Malgas*<sup>184</sup> case which provided a step-by-step approach to the interpretation of the phrase in South Africa. The writer also intends looking at case law that precedes and succeeds the above-mentioned case and the Act in general in order to determine how courts have generally approached the question of sentencing.

#### **3.2. THE INTERPRETATION OF “SUBSTANTIAL AND COMPELLING CIRCUMSTANCES” IN SOUTH AFRICA**

In terms of s 51(3) (a) of the 1997 Act, a court is granted a discretion to impose a lesser sentence than that one prescribed by the Act where “substantial and compelling circumstances” exist. The phrase “substantial and compelling circumstances” has given rise to much debate as there has been a wide range of interpretations. Three approaches have developed from the differing interpretations of the phrase, namely a narrow interpretation and a wide interpretation.<sup>185</sup>

The case of *S v Mofokeng*<sup>186</sup> presents a narrow interpretation, which leaves almost no discretion for courts. Stegmann J held that:

‘The absence of previous convictions, the comparative youthfulness of the offenders, the unfortunate factors in their backgrounds, the probable effect upon them of the liquor which they had taken, the absence of dangerous weapons, and the fact that the complainant had not

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<sup>184</sup> *S v Malgas* (n 9).

<sup>185</sup> South African Law Commission (n 35) 11-13.

<sup>186</sup> *S v Mofokeng* (n 7).

suffered serious injury are all factors that a court sentencing a convicted rapist in the ordinary course, would weigh up as substantial factors relevant to the assessment of a just sentence, and as tending to mitigate the severity of the punishment to be imposed. However, in my judgment, these factors, ‘substantial’ though they are, are matters that Parliament must have had in mind as everyday circumstances that would be found present in many or most of the crimes referred to in Part I of Schedule 2 of Act 105 of 1997. Without emasculating the legislation, they cannot be thought of as ‘compelling’ the conclusion that a sentence lesser than that prescribed by Parliament should be substituted for the prescribed sentence. This is owing to the absence of any exceptional factor to explain the prisoners’ conduct (which evidently sprang from nothing other than their own wicked desire to slake their lust regardless of the cost to the victim), and the absence of any mitigating factors other than the everyday factors already enumerated. As I understand this legislation, substantial and compelling circumstances must be factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2’.<sup>187</sup>

In Stegmann J’s view, factors that would ordinarily be regarded as aggravating or mitigating circumstances for purposes of sentencing cannot be simply weighed up in order to determine if they amount to substantial and compelling grounds for a departure, unless they are of an “unusual and exceptional kind that Parliament cannot be said to have contemplated when it prescribed standard penalties for certain scheduled crimes”.<sup>188</sup> He said that to regard circumstances falling outside of the “unusual and exceptional” scope would mean that the court prefers its own judgment to that of Parliament and would compromise the integrity of the court.<sup>189</sup>

This approach was adopted in cases that followed. For instance, in the Natal Division in *S v Madondo*,<sup>190</sup> Squires J, in a case involving rape, emphasised that the intention of Parliament was focused on ensuring that sentences imposed for the rape of young girls are more severe and that courts would not easily intervene by imposing a lesser sentence as compelling reasons for doing so would not be lightly found. He explained that “compelling reasons referred to more than just a disparity between what the Court feels may be the appropriate sentence and the actual prescribed sentence.”<sup>191</sup> He further stated that to consider such a

<sup>187</sup> Ibid 523i-524d. *S v Segole* 1999 (2) SACR 115 (W) and *S v Zitha and others* 1999 (2) SACR 404 (W) both followed the approach adopted by Stegmann J.

<sup>188</sup> Ibid 524d.

<sup>189</sup> Ibid 523b.

<sup>190</sup> *S v Madondo* Unreported judgment of the NPD, case CC22/99, delivered on 30 March 1999.

<sup>191</sup> Ibid.

difference alone as constituting compelling reasons would equate to the undermining of the legislature's intention.<sup>192</sup> He also explained that "compelling was a strong word that meant "almost irresistible", constituting at least a strongly sensed obligation".<sup>193</sup> He went on to say that factors such as the age of the girl and whether she was physically harmed or not, would usually not come into play for the purpose of sentencing under the Act. This decision, which is substantially similar to that one adopted in *S v Mofokeng*,<sup>194</sup> has been followed in other decisions in the same Division.<sup>195</sup>

The unreported judgment of Leveson J in *S v Majalefa and Another*<sup>196</sup> laid down a wider approach, by highlighting that regardless of the provisions of the Act, at the outset of the enquiry relating to whether or not a departure from the prescribed sentence is warranted, there is a consideration of all aggravating and mitigating factors in the traditional sense.<sup>197</sup> The judge in the case was of the opinion that the words "substantial and compelling" served as a confirmation for the consideration of traditional factors, while distinguishing factors of material significance from all the other factors which still had to be taken into account during the sentencing process. Thus, according to this view, the Act should not be regarded as introducing a major change in the approach to sentencing.<sup>198</sup>

Jones J gave support to the above-mentioned approach in the case of *S v Cimani*<sup>199</sup> in the Eastern Cape Division and attempted a definition for "substantial and compelling circumstances". He held that:

'In every case, however, the nature of the circumstances must convince a reasonable mind that a lesser sentence is a proper sentence and that it is justified when regard is had to

- a. the aggravating and mitigating features attendant upon the commission of what is already classified by the lawgiver as among the most serious of offences, and
- b. the interests of society weighed against the interests of the offence.'<sup>200</sup>

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<sup>192</sup> Ibid.

<sup>193</sup> Ibid.

<sup>194</sup> *S v Mofokeng* (n 7).

<sup>195</sup> *S v Ngubane* Unreported judgment of the NPD, per Squires J, case CC31/99, delivered on 30 March 1999; *S v Shinga* unreported judgment of the D&CLD, per Nicholson J, case CC176/99, delivered on 26 October 1999 and *S v Khuzwayo*, unreported judgment of the D&CLD, per Combrink J, case CC103/99, delivered on 30 August 1999.

<sup>196</sup> *S v Majalefa and Another* (n 64), quoted extensively in *S v Blaauw* (n 65) 305i - 306i.

<sup>197</sup> Ibid.

<sup>198</sup> Ibid.

<sup>199</sup> *S v Cimani* Unreported judgment of the ECPD, case CC11/99, delivered on 28 April 1999.

<sup>200</sup> Ibid.

A third approach which falls in between the two above-mentioned approaches has also been developed. This approach was followed in *S v Blaauw*<sup>201</sup> where Borchers J held that the discretion that courts previously had when imposing sentences was narrowed by the introduction of the Act, particularly because of the high standard set as a qualifier for circumstances that need to be considered for a departure from the provisions of the Act. The judge further stated that in order to determine if a departure was allowed, the court need not look for exceptional circumstances but has to look at the cumulative effect of all the aggravating and mitigating circumstances of the case. If, in the light of these, the prescribed sentence would be “startlingly inappropriate” it could depart from them, but otherwise it was bound to impose them.<sup>202</sup> This approach has been followed in decisions of the Witwatersrand Local Division.<sup>203</sup>

The *Malgas*<sup>204</sup> case has however, paved the way to the interpretation of the phrase “substantial and compelling circumstances” for our South African courts by detailing a step-by-step procedure. The above-mentioned case is particularly important because it was the first time the SCA expressed itself on the interpretation of the said circumstances. Further, the *Malgas* judgement has been largely accepted by subsequent judgements and has thus rendered any notions previously developed regarding the subject irrelevant. Lastly, the case has been endorsed by the Constitutional Court in the *Dodo*<sup>205</sup> case. It is thus important to discuss the case in detail.

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<sup>201</sup> *S v Blaauw* (n 65).

<sup>202</sup> Ibid 311a-h.

<sup>203</sup> *S v Dithotze* 1999 (2) SACR 315 (W); *S v Homareda* (n 7).

<sup>204</sup> *S v Malgas* (n 9).

<sup>205</sup> *S v Dodo* (n 75).

### **3.2.1. THE MALGAS CASE**

#### **a. FACTS**

A 22-year-old woman was convicted of murder and sentenced to life imprisonment. Leave to appeal to the Supreme Court of Appeal against her sentence was granted by the court *a quo*.<sup>206</sup> The appellant had been residing with the deceased's family for about a month and at the instigation of his wife, shot the deceased in the head while he was asleep. The precise nature of their relationship was unclear. This is particularly because she had testified that on the night before the shooting, she was struck by the deceased, as he believed that she had been sexually involved with another man.<sup>207</sup> The deceased's wife, on the other hand, had allegedly been unfaithful to him with various other men and as a result their relationship was stormy, resulting in many quarrels. On the night before the shooting, his wife had even indicated that she intended to kill him.<sup>208</sup>

On the day of the shooting, a quarrel between the deceased and his wife took place.<sup>209</sup> Later, the deceased's wife (Carol) woke up the appellant and told her to proceed to shoot her husband. She handed her a loaded and cocked firearm and some equipment that she was to use in order to avoid discharging any evidence.<sup>210</sup> The appellant then knelt alongside the deceased and pointed the firearm at his head. After being persuaded by the deceased's wife to shoot, she shot the deceased to death.<sup>211</sup> Later, she and the deceased's wife attempted to pass off what had occurred as an act of suicide. Sometime thereafter however, she confessed to a friend as well as a member of the South African Police who was also her friend that she had shot the deceased and that led to her arrest and trial.<sup>212</sup>

#### **b. DECISION OF THE COURT A QUO**

The trial judge (as per Liebenberg J) made reference to the very serious nature of the crime. He did this by pointing out to the element of premeditation present and the defencelessness of

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<sup>206</sup> Ibid para 26.

<sup>207</sup> Ibid.

<sup>208</sup> Ibid.

<sup>209</sup> Ibid para 27.

<sup>210</sup> Ibid para 28.

<sup>211</sup> Ibid.

<sup>212</sup> Ibid para 29.

the deceased as he was asleep when he was shot.<sup>213</sup> He considered that the motive for the killing was greed as there appeared to be some life insurance policies from which the appellant stood to gain. He further made reference to the occurrence of violent crimes in South Africa and how the community had an interest in receiving a severe response from courts.<sup>214</sup> As against these considerations he took into account that the appellant had no previous convictions and was merely dominated by the deceased's wife. Though he accepted that the deceased's wife had been the instigator, who had influenced the appellant to shoot her husband, he did not consider this to be a weighty factor when measured against the appellant's act.<sup>215</sup> The learned judge however, considered the fact that the appellant's remorse had induced her voluntary admission of her guilt to her friends and pointed out that this could possibly be the strongest point in the appellant's favour but then tended to minimise its importance by observing that subsequent remorse was not something exceptional.<sup>216</sup>

Having balanced all these considerations he concluded that they did not amount to "substantial and compelling circumstances" within the meaning of the legislation and passed the sentence of life imprisonment.<sup>217</sup> Liebenberg J did not find "substantial and compelling circumstances" which warranted a departure from the prescribed sentence as he was of the view that in order to avoid the imposition of the prescribed minimum sentence, the circumstances would have to be exceptional.<sup>218</sup> He reached that conclusion with regret and said that if it had not been for the fact that a sentence of life imprisonment was prescribed by the relevant statute, he would not have considered sentencing appellant to imprisonment for life.<sup>219</sup> He referred to the lack of unanimity as to the correct interpretation of the legislation and regarded himself as bound by the approach indicated by Stegmann J in *S v Mofokeng*,<sup>220</sup> where it was held that:

'for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, to the extent

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<sup>213</sup> Ibid para 31.

<sup>214</sup> Ibid.

<sup>215</sup> Ibid para 32.

<sup>216</sup> Ibid.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid para 33.

<sup>219</sup> Ibid para 30.

<sup>220</sup> *S v Mofokeng* (n 7).

that it could be described as compelling the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified'.<sup>221</sup>

### c. DECISION OF THE SUPREME COURT OF APPEAL

On appeal, the court, after considering the purpose of the legislature when it enacted the minimum sentences legislation, interpreted the words "substantial and compelling circumstances" in s 51 (3) (a) of the 1997 Act by providing a detailed step-by-step procedure to be followed in the application of the provision to the actual sentencing situation. In paragraph 25 of the judgement it was stated that:

- a. 'Section 51 has limited but not eliminated the court's discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).
- b. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- c. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe standardised and consistent response from the courts.
- d. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- e. The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

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<sup>221</sup> Ibid; *S v Malgas* (n 9) para 30.

- f. All factors (other than those set out in (d) above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.
- g. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as to cumulatively justify a departure from the standardized response that the legislature has ordained.
- h. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentences as the sole criterion.
- i. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- j. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and the sentence to be imposed in lieu of the prescribed sentences should be assessed paying due regard to the benchmark which the legislature has provided’.

Further, it was noted that the legislature refrained from using the word “or” in favour of the word “and” thus creating a composite description of the circumstances that ought to warrant a departure from the prescribed sentences. The circumstances considered must thus be both, compelling and substantial as the words are to be examined conjointly.<sup>222</sup> Courts are not prohibited from using past sentencing patterns when deciding whether or not a prescribed sentence in the particular circumstances of a case should be regarded as unjust.<sup>223</sup> It was stated however; that the courts need to appreciate the fact that a mere discrepancy between the two compared sentences will not be the sole criterion justifying a departure, something more will be needed.<sup>224</sup> Though that something more cannot be expressed in precise and accurate language, it is clear that the circumstances of a particular case must render the

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<sup>222</sup> Ibid para 19.

<sup>223</sup> Ibid para 21.

<sup>224</sup> Ibid.

imposition of the prescribed sentence unjust or disproportionate to the crime, the criminal and the legitimate needs of society, because only then will the circumstances of a case be characterised as substantial and compelling to the extent that they justify the imposition of a lesser sentence.<sup>225</sup> It was said that the injustice contemplated need not amount to a “shocking injustice” before a departure is justified, the occurrence of a mere injustice is sufficient.<sup>226</sup>

The judge (Marais JA) in the circumstances said that he found erroneous any previous decisions that suggested that traditional factors such as age or previous convictions or the lack thereof were to be eliminated in their entirety from the outset of the enquiry or at the subsequent stage.<sup>227</sup> He went on to say that:

‘equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be “exceptional” in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling’.<sup>228</sup>

It was also said that though it was not clear to what extent the trial judge was influenced by the proposition that the circumstances would have to be classifiable as “exceptional” before they are considered substantial and compelling, the power of the appeal court to reconsider the matter afresh arose as a result of his misdirection in adopting the proposition in his evaluation of the circumstances.<sup>229</sup>

In considering whether or not the circumstances of the case constituted “substantial and compelling circumstances”, warranting a departure from the prescribed sentences, Marais JA held that:

‘the circumstances in which the crime was committed are undoubtedly such as to render it necessary to impose a sentence of imprisonment for life unless substantial and compelling circumstances justify a lesser sentence. The shooting was premeditated and planned. The fact that the planning and premeditation occurred not long before the deed was accomplished cannot alter that. It was also carried out in the execution of a common purpose to kill the deceased. Giving all due weight to the enormity of the crime and the public interest in an appropriately

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<sup>225</sup> Ibid para 22.

<sup>226</sup> Ibid para 24.

<sup>227</sup> Ibid para 10.

<sup>228</sup> Ibid.

<sup>229</sup> Ibid para 33.

severe punishment being imposed for it, I consider that the personal circumstances of the accused (her relative youth, her clean record and her vulnerability to the deceased's wife's influence by reason of her status as a resident in the latter's home at the latter's pleasure) and the fact that she was dragooned into the commission of the offence by a domineering personality are strongly mitigating factors. As a fact she gained nothing from the commission of the crime. Her remorse cannot be doubted and her spontaneous confession which brought to light the commission of a crime which would otherwise have gone undetected is deserving of recognition in a tangible sense. She is young enough to make rehabilitation of her a real prospect even after a long period of imprisonment. These circumstances, cumulatively regarded, satisfy me that a sentence of life imprisonment would be unjust. They qualify therefore as substantial and compelling circumstances within the meaning of the provision. None the less, it remains a particularly heinous crime of the kind which the legislature has singled out for severe punishment and the sentence to be imposed in lieu of life imprisonment should be assessed paying due regard to the bench mark which the legislature has provided. In my judgment, imprisonment for twenty-five (25) years is appropriate'.<sup>230</sup>

Consequently, the appeal against the sentence of life imprisonment succeeded. The sentence was set aside and substituted by one of 25 years' imprisonment.<sup>231</sup>

### **3.2.2. THE ENDORSEMENT, CRITICISM AND MODIFICATION OF THE MALGAS JUDGMENT**

The judgment of the *Malgas*<sup>232</sup> case has been endorsed in a number of cases.<sup>233</sup> For instance, in a judgment delivered by Ackermann J in the case of *Dodo*,<sup>234</sup> it was stated that:

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

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<sup>230</sup> Ibid para 34.

<sup>231</sup> Ibid para 35.

<sup>232</sup> *S v Malgas* (n 9).

<sup>233</sup> *Centre for Child Law* (n 62); *S v Vilakazi* (n 158); *S v Matyityi* 2011 (1) SACR 40 (SCA); *S v Mahomotsa* (n 110); *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo and Others* 2009 (2) SACR 361 (SCA); *S v Ntsheno* 2010 (1) SACR 295 (GSJ); *S v Mvamvu* 2005 (1) SACR 54 (SCA); *S v Vermeulen* 2004 (2) SACR 174 (SCA).

<sup>234</sup> *S v Dodo* (n 75).

covered by section 51 and at the same time promoting the spirit, purport and objects of the Bill of Rights'.<sup>235</sup>

Further, it was said that the construction that the court placed on the concept of "substantial and compelling circumstances" was undoubtedly correct.<sup>236</sup>

In *Matyityi*,<sup>237</sup> Ponnan JA stated that the *Malgas*<sup>238</sup> case is the starting point when dealing with cases that fall within the purview of the 1997 Act.<sup>239</sup> He went on to quote Navsa JA who stated that "it is not only a good starting point but the principles stated therein are enduring and uncomplicated."<sup>240</sup> In *Ntsheno*,<sup>241</sup> Willis J in support of the *Malgas*<sup>242</sup> case stated that "everyday" (traditional) factors continue to play a role when deciding whether or not to depart from the minimum sentences.<sup>243</sup> In the *Vilakazi* case,<sup>244</sup> Nugent JA in support of the decision of *Malgas*<sup>245</sup> stated that sentences that perpetrate an injustice will only be avoided by approaching sentencing under the 1997 Act, in the manner that was laid down by the latter case.<sup>246</sup>

Though the decision of the above-mentioned case has provided a detailed step-by-step procedure to the interpretation of the phrase "substantial and compelling circumstances"; a procedure which has been widely endorsed, it is still however, subject to some criticism. For instance, Terblanche has pointed out that even in a situation where reasonable people (judicial officers) are concerned, the concept of justice still differs from one person to another and thus tends to differ from one case to another. Consequently, he argues that a disparity in sentencing will arise where the discretion to deviate from the prescribed sentence is linked to an individual's recognition of "an easily foreseeable injustice".<sup>247</sup> In *S v Kgafela*<sup>248</sup> Friedman JP remarked that the terms "substantial and compelling circumstances" had not been textually

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<sup>235</sup> Ibid para 11.

<sup>236</sup> Ibid para 40.

<sup>237</sup> *S v Matyityi* (n 233).

<sup>238</sup> *S v Malgas* (n 9).

<sup>239</sup> *S v Matyityi* (n 233) para 11.

<sup>240</sup> *Director of Public Prosecutions* (n 270) para 12.

<sup>241</sup> *S v Ntsheno* (n 233).

<sup>242</sup> *S v Malgas* (n 9).

<sup>243</sup> *S v Ntsheno* (n 233) para 11.

<sup>244</sup> *S v Vilakazi* (n 158).

<sup>245</sup> *S v Malgas* (n 9).

<sup>246</sup> *S v Vilakazi* (n158) para 14.

<sup>247</sup> SS Terblanche"Die praktyk van vonnisoplegging onder minimumvonniswetgewing: *S v Malgas* 2001 (1) SASV 469 (HHA)" (2002) 15 SACJ 365.

<sup>248</sup> *S v Kgafela* 2003 (5) SA 339 (SCA); *S v Kgafela* 2001 (n 7).

interpreted or defined in *Malgas*<sup>249</sup> and the court had failed to state what was meant by the phrase. He granted leave to appeal and suggested that the SCA should revisit *Malgas*<sup>250</sup> in order to give more definition or formulation to the phrase “substantial and compelling circumstances” and to reverse the order of the enquiry.<sup>251</sup>

The SCA in *Rammoko v Director of Public Prosecutions*<sup>252</sup> though in support of the *Malgas*<sup>253</sup> judgment modified the judgment by providing further direction in relation to what circumstances could constitute as substantial in the sentencing of sex offenders, particularly where the victims are children. It was stated in the case that the youthfulness of the victim in rape cases is not the only criterion necessitating the imposition of a life sentence. This is because the objective gravity of the crime plays an important role, as does the present and future impact of the crime on the victim.<sup>254</sup> In the case the offender, a 34-year-old, had participated in non-consensual sexual intercourse with a minor. Consequently, life imprisonment was considered to be the maximum and the most appropriate sentence that could be legally imposed on him.<sup>255</sup> Though no evidence was led concerning the after-effects of the crime on the victim,<sup>256</sup> the court held that the failure to lead evidence relating to the impact of the crime on the victim, led to a risk for the accused as no fair decision relating to the imposition of a life sentence can be taken in the case. It was said that “substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment which has been prescribed for a very specific reason simply because such circumstances are, unwarrantedly, held to be present.”<sup>257</sup>

In the *Vilakazi* case,<sup>258</sup> the court clarified an aspect of the *Malgas*<sup>259</sup> decision and said that the case does not say that prescribed sentences should be imposed as the norm and be departed from only as an exception. It was held that the case said that:

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<sup>249</sup> *S v Malgas* (n 9).

<sup>250</sup> *Ibid.*

<sup>251</sup> *S v Kgafela* 2001 (n 7) at 210 (g)-213F para 13.

<sup>252</sup> *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA).

<sup>253</sup> *S v Malgas* (n 9).

<sup>254</sup> *Rammoko v Director of Public Prosecutions* (n 252).

<sup>255</sup> Life imprisonment serves as an alternative to the death sentence which was ordinarily imposed on a conviction of rape before the abolishment of it in *S v Makwanyane* (n 19).

<sup>256</sup> *Rammoko v Director of Public Prosecutions* (n 252) 204a.

<sup>257</sup> *Ibid* 205e.

<sup>258</sup> *S v Vilakazi* (n 158).

<sup>259</sup> *S v Malgas* (n 9).

‘a court must approach the matter involving the application of the Act, conscious of the fact that the legislature has ordained the prescribed sentence as the sentence that should be ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances’.<sup>260</sup>

It was further held that any circumstances rendering the prescribed sentence disproportionate to the offence committed will constitute “weighty justification”, warranting the imposition of a lesser sentence.<sup>261</sup>

### **3.2.3. CASES DECIDED BEFORE AND AFTER THE *MALGAS* CASE**

The writer will now turn to look at cases decided before and after the *Malgas* case<sup>262</sup> including those decided after the CLSAA.<sup>263</sup> Though one will discuss cases that have involved the application of the 1997 Act, the focus will mostly be on rape cases owing to the fact that the legislature has already provided some guidance in cases of rape, by specifying what would not constitute “substantial and compelling circumstances” in such cases. For instance, s 51 (3) (aA) of the 1997 Act, as amended provides that:

‘When imposing a sentence in respect of the offence of rape, the following shall not constitute substantial and compelling circumstances justifying the imposition of a lesser sentence:

- a. The complainant’s previous sexual history;
- b. An apparent lack of physical injury to the complainant;
- c. An accused person’s cultural or religious beliefs about rape; or
- d. Any relationship between the accused person and the complainant prior to the offence being committed.’

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<sup>260</sup> *S v Vilakazi* (n 158) para 16.

<sup>261</sup> *Ibid.*

<sup>262</sup> *S v Malgas* (n 9).

<sup>263</sup> The Criminal Law (Sentencing) Amendment Act (n 3).

### **3.2.3.1. CASES DECIDED BEFORE THE *MALGAS* CASE**

#### **(i) *S v Boer*<sup>264</sup>**

A 14-year-old virgin, with a rather muscular physique, was raped by three males in a deserted area. The first offender was 21 years of age at the time and had no previous convictions. He had completed grade 9 and was employed at a retail shop. The second offender was a year younger, had only done grade 8 at school and was also an employee of the same retail shop. The third accused was considered to be a minor as they had not reached majority age. At the time of the offence, they were busy with grade 9 and had a clean criminal record. The prescribed sentence of life imprisonment was imposed on both the first and second offenders, while the third accused received a lesser term of imprisonment (15 years' imprisonment). The court followed the narrow approach as laid down by the *Mofokeng* case.<sup>265</sup>

It was found that the seriousness of the offence outweighed the relevant mitigating factors, which in the case could not be regarded as sufficiently substantial and compelling. Aggravating factors included the fact that three males had brutally forced themselves on the female complainant. They had not only assaulted her, but they also humiliated her by exposing her private body parts to the public. On the arrival of other people on the scene, they still continued to assault her and refused to release her from their captivity. She was still a virgin at the time of the rape and the offence was thus considered to be scandalous and repulsive. It was noted that the purposes of punishment demanded greater recognition and reference was made to the dictum of Mahomed CJ in *S v Chapman*<sup>266</sup> where he said that:

‘courts are under a duty to send a clear message to the accused, to other potential rapists and the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade those rights’.<sup>267</sup>

With regards to the third offender, the court found that despite his youth, what counted as an aggravating factor was that, on the night of the incident, the third accused had behaved like

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<sup>264</sup> *S v Boer* 2000 (2) SACR 114 (NC).

<sup>265</sup> *S v Mofokeng* (n 7).

<sup>266</sup> *S v Chapman* 1997 (2) SACR 3 (SCA).

<sup>267</sup> *Ibid* 5b.

an adult and had shown a great deal of maturity. The court however, failed to place any importance on the impact of the offence on the victim and consequently, did not consider it to be an important factor in the determination of the eventual sentence.<sup>268</sup>

(ii) *S v Dithotze*<sup>269</sup>

The accused in this case was convicted of raping a 12-year-old girl, who happened to be the daughter of his girlfriend's sister. On the day of the incident, they had been visiting the sister and ended up drinking. When the alcohol ran out, the accused was accompanied by the complainant in order to obtain more. On their journey, the accused had non-consensual sexual intercourse with the minor. The accused raped the victim once and as a result she did not sustain any major harm and it became apparent from the medical examination that she had been a victim of rape prior to the incident.

The crime was described as one of a very disgusting nature. It was noted that although particularly serious, it did "not lie in the ionosphere of criminal depravity"<sup>270</sup> when compared to similar cases that proved to be particularly serious. The court went on to compare the case to that of "a nine-year-old girl who had been injured so severely by the act of rape that the flesh between her vagina and her rectum had been torn. She would, in all probability, never be able to have a satisfactory sex life in adulthood and would experience difficulties with child birth". The court like in similar cases, failed to put any focus on the psychological harm caused to the victim as they solely focused on the physical harm or lack thereof caused by the incident.

The court did however note that the cumulative effect of certain factors weighed heavily and were in favour of the accused. It considered for instance, that the accused was relatively young as he was 22 years old; that this was his first offence; that he did not wield or threaten to use a firearm or other dangerous weapon to force compliance and other than the commission of the crime of rape, he did not subject the victim to any violence; that he was intoxicated at the time of the commission of the crime; that he did not forcefully enter the

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<sup>268</sup> *S v Boer* (n 264).

<sup>269</sup> *S v Dithotze* (n 241).

<sup>270</sup> *Ibid* 317a.

victim's home and finally, that he received his "just deserts" when the victim's aunt (his girlfriend) retaliated against his act.

In conclusion, the court accepted the fact that various interpretations may be borne from the question relating to what could amount to "substantial and compelling circumstances" as the subject was a particularly complex one. The mitigating factors above amounted to "some circumstances that loom large" and were sufficiently substantial and compelling enough to warrant a departure from the prescribed minimum sentence of life imprisonment.<sup>271</sup> The court in imposing a sentence of 18 years' imprisonment held that the imposition of the prescribed sentence in the circumstances would be "disturbingly inappropriate".<sup>272</sup>

### (iii) *S v Gqamana*<sup>273</sup>

Though this case was decided prior to the SCA judgment in *Malgas*,<sup>274</sup> the court in this case resorted to a comparable approach. After the *Homareda* judgment,<sup>275</sup> the court concluded that the final decision in this regard depended on the merits of each particular case and such a decision was to be reflective of the cumulative effect of all aggravating and mitigating factors. As per the then applicable law, the accused was convicted in the Regional Court, but was referred to the High Court for sentencing as a result of his engagement in non-consensual sexual intercourse with a minor. In the case, the accused and the victim were not familiar with each other and on the night of the incident, the accused had forcefully persuaded the victim to accompany him a certain living quarter. On arrival, the accused had non-consensual sexual intercourse with the victim twice within a 30-minute period. He further kept her under his custody until she was eventually able to escape.

The court wished to hear evidence from the victim, her mother and the probation officer who had prepared reports on both the victim and the perpetrator. The court had to decide in the circumstances whether the sentence of life imprisonment was warranted. In doing so, they considered the following mitigating factors:

<sup>271</sup> "The court conceded that it was hardly surprising that judgments differed regarding the meaning of "substantial and compelling circumstances", as issues of great moral and intellectual complexity were involved"(S v *Dithotze* (n 241) 316d).

<sup>272</sup> *Ibid.*

<sup>273</sup> *S v Gqamana* 2001 (2) SACR 28 (C).

<sup>274</sup> *S v Malgas* (n 9).

<sup>275</sup> *S v Homareda* (n 7).

- a. the fact that the accused was relatively young ( 20 years old );
- b. the fact that he had no criminal record;
- c. the fact that the complainant had not sustained severe physical injury, except for a torn hymen (though contrary to s 51 (3) (Aa) (ii) of the 1997Act, this judgement preceded the 1997 Act, as amended);
- d. the fact that the victim's mental instability was not of a grave and permanent nature;
- e. the fact that the accused did not utilise a firearm or any dangerous weapon when they committed the crime;
- f. the fact that, after an assessment of the victim's appearance and maturity, the court found that it was probable that the accused had mistaken the complainant for a 16 year-old; and
- g. the fact that the victim's maturity was of a person older than her true age.

The question before the court was whether after a consideration of the above factors, their cumulative effect outweighed the aggravating circumstances to the extent that the imposition of a sentence of life imprisonment was warranted. Thring J in the case concluded that to impose the prescribed life sentence would be “grossly disproportionate, startlingly inappropriate and offensive to the court’s sense of justice”. Though a sentence of 10 years was said to be the appropriate sentence in the circumstances, such sentence was reduced to 8 years as regard was had to the time already spent in prison.<sup>276</sup>

#### **(iv)    *S v Jansen*<sup>277</sup>**

The accused in the case was 26 years old and after an admission of guilt for the rape of a nine-year-old girl, he was convicted. In his plea explanation, he maintained that the sexual intercourse was consensual. The court refused to hear evidence led by the prosecution regarding the force exerted by the accused in the commission of the crime and held that subsequent evidence could not be used to extend or alter the actual plea.<sup>278</sup> The court went on to criticise the introduction of the minimum sentence legislation and stated that it was panic-induced and essentially came about as result of desperation. The court further held that the said legislation could not be justified, particularly because the South African sentencing

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<sup>276</sup> *S v Gqamana* (n 273).

<sup>277</sup> *S v Jansen* 1999 (2) SACR 368 (C).

<sup>278</sup> Ibid 371e, this was said to be the case, with the exception that the mere filling in of the plea remains permitted.

regime is more flexible than the that of the State of Minnesota in the United States of America where the term “substantial and compelling circumstances” has been borrowed from and further, that the lack of information available regarding the subject makes it difficult to apply the said minimum sentencing legislation in our South African system.<sup>279</sup>

The court further raised concerns about borrowing legislation from other countries, it stated that this was an unfortunate practise which was often done without due consideration of the particular circumstances of that country that led to the implementation of the said legislation.<sup>280</sup> The Minnesota guidelines provide a particularly desert-based approach<sup>281</sup> which includes the application of a grid system<sup>282</sup> to the issue of sentencing. Contrary to Minnesota, South Africa has no existing grid system and the rigid application of s 51 of the 1997 Act (as in the case of *Mofokeng*<sup>283</sup>) proves to be unfeasible in the South African context,<sup>284</sup> particularly because of the phrase “substantial and compelling circumstances”, which makes provision for a departure.

Despite an admittance by the court that an argument based on the fact that there was consensual sexual intercourse with a nine-year-old was objectionable, it still held that the medical report indicating that less severe harm was caused to the complainant made this case a less serious one when compared to other similar cases of rape.<sup>285</sup> Consequently, this results in the existence of “substantial and compelling circumstances”, justifying a deviation from

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<sup>279</sup> *S v Jansen* (n 277) 373f.

<sup>280</sup> *Ibid* 374 j.

<sup>281</sup> “This approach ensures that perpetrators are not treated as more (or less) blameworthy than is warranted by the nature of their crime. This means that punishment in the first instance must be proportionate to the seriousness of the offence so that offenders can get their just deserts”. (South African Law Commission (n 35) 15 and 36).

<sup>282</sup> “This typically works according to a grid not unlike a crossword puzzle. Along the one axis (often the down blocks) provision is made for the severity of crime, with the least severe crimes usually at the top and the most severe at the bottom. Along the other axis (often the across blocks) provision is made for the criminal history of the offender, usually increasing in severity from left to right. The sentencing court establishes the severity of the crime and the extent of the offender’s criminal history. This is no simple matter. Once the severity of the crime and the extent of the offender’s criminal history have been established, the sentencing judge will follow the row “across” and the column “down” to the block where they intersect. In this cell at least one figure (sometimes up to three figures) is found; this is the suggested duration of imprisonment in months (the presumptive sentence). The court then has the discretion to move about within the limits provided in that cell and, in exceptional circumstances, to depart from these limits completely.” (*SS Terblanche A guide to Sentencing in South Africa* 2<sup>nd</sup> ed (2007) 134).

<sup>283</sup> *S v Mofokeng* (n 7).

<sup>284</sup> *S v Jansen* (n 277) 376i.

<sup>285</sup> *Ibid* 378g. “The doctor reported that only one finger had been admitted into the vagina and that no sign of rape had been found during the medical examination which took place two days after the incident”.

the prescribed sentence. Further, the court noted that this was the accused's first offence and accordingly went on to consider the possibility of him being re-integrated in society.

The court acknowledged the seriousness of the crime before it and regarded it as an "appalling and perverse abuse of male power". It stated that the occurrence of child rapes had a negative impact on the environment in which children were expected to grow in as such a crime limited a child's freedom and instilled fear in them.<sup>286</sup> The court also took acknowledgement of the mental impact of the crime on the victim as well the society's view in regard to the appropriate sentence:

'It is sadly to be expected that the young complainant will now suffer the added psychological trauma which resulted in a marked change in attitude and of school performance. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflects the societal censure'.<sup>287</sup>

After a consideration of the year that the accused had served in prison while awaiting trial, the sentence eventually imposed was 18 years. By virtue of the sentence imposed, the accused was to continue being detained until such time the victim reaches adulthood.<sup>288</sup>

Despite the fact that little information regarding the circumstances leading to the crime, the relation that existed between the accused and complainant and the place in which the offence was committed, the mental impact of the crime on the victim remained recognised. The court however, accorded great weight to the presence of physical injuries caused by the incident as the absence of such injuries influenced its decision. This results in the conclusion that judges view the crime of rape as one which ordinarily results in the infliction of physical harm. Further, this indicates a lack of insight by the court regarding the grooming process and the fact that a child will ordinarily be incognisant of the consequences of sexual involvement with adults, even where they are alleged to have consented.<sup>289</sup>

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<sup>286</sup> Ibid 378j.

<sup>287</sup> Ibid 378h-i.

<sup>288</sup> Ibid 379d.

<sup>289</sup> A Van der Merwe *Aspects of the Sentencing Process in Child Sexual Abuse Cases* (Unpublished Phd Thesis, Rhodes University, 2005) 75.

### **3.2.3.2. CASES DECIDED AFTER THE MALGAS CASE**

#### **(i) *S v Fatyi*<sup>290</sup>**

This case fell within the scope of Schedule 2, Part III offences. The accused had initially been charged with raping a six-year-old girl, but was instead found guilty of indecent assault. The accused provided after-care transport for school children. On the day of the incident, he had fetched the victim at her school and had transported her to an excluded area, where he indecently assaulted her. Following this, he transported her to the after-care centre where her grandmother was to fetch her later that afternoon.<sup>291</sup> Injuries to the complainant's genitalia included bruising of the labia minora (two inner folds of the external parts of the female's sex organ), the vestibule (the passage leading to the vagina) and vaginal area, as well as tearing of the hymen and fourchette, with mild bleeding. It was presumed in the circumstances that the perpetrator had utilised his fingers and not his penis in order to penetrate the victim. In its decision, the court found as mitigating factors, the fact that the accused was elderly as he was 51 years old, that he had not been previously convicted of any offences and that he suffered from asthma attacks and required regular medical attention. Further, that he was self-employed as he owned taxis and that he was a family man who supported not only his wife and children, but his extended family as well.

The court also looked at the following factors as having an aggravating effect:

- a. The age of the offender;
- b. The force used in the assault which resulted in moderate to severe genital injuries;
- c. The assault did not only result in physical injuries, but also in psychological trauma; and
- d. The accused abused his position of trust: "his conduct was appalling for own sexual gratification the accused took advantage of a little girl entrusted to his care."<sup>292</sup>

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<sup>290</sup> *S v Fatyi* 2001 (1) SACR 485 (SCA).

<sup>291</sup> Ibid.

<sup>292</sup> Ibid at 23.

With due regard to the above factors as well as the principles laid out in *S v Malgas*,<sup>293</sup> the court concluded that were no “substantial and compelling circumstances” in existence which justified the imposition of a lesser sentence and consequently confirmed the sentence of 10 years imprisonment which was passed in terms of s 51 (2) (b) of the 1997 Act.<sup>294</sup> In its judgment, the court raised a valuable point and concluded that “bodily harm” was inclusive of all kinds of physical injury, even the most trivial.

(ii) *S v Mahomotsa*<sup>295</sup>

The accused in this case was found guilty of two incidents of rape, which took place in a space of two months. He had committed the crimes against two minors of the same age. He had approached both victims while they were walking on the street and had used deadly force against them in order to lure them into his room. Thereafter he engaged in non-consensual sexual intercourse with both victims more than once. Though the victims’ age was never proven, the case nevertheless fell within the purview of S51 of the Act as the accused had repeatedly raped the victims.

The sentencing court imposed a sentence of 10 years’ imprisonment (six years for count one and 10 years for count two to run concurrently). On appeal, the sentence for both counts was increased and the maximum time the accused was to serve in prison was 12 years. It was found that the court *a quo* failed to consider the gravity of the crime in the passing of its sentence. The appeal court in reconsidering the matter looked at these factors as having an aggravating effect:

- a. the accused had previously committed a similar crime and also had a previous conviction for another crime;
- b. the accused was a serial rapist who objectified young girls for his own sexual desires;
- c. the accused had repeatedly raped the young girls;
- d. The accused failed to release the first victim from his custody even after her father’s attempts to free her.

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<sup>293</sup> *S v Malgas* (n 9).

<sup>294</sup> *S v Fatyi* (n 290).

<sup>295</sup> *S v Mahomotsa* (n 110).

The court went on to look at the following factors as having a mitigating effect:

- a. the accused's relatively young age, as he was 23 years old at the time;
- b. both victims had already started engaging in sexual intercourse (though contrary to S51 (3)(aA) (i) of the Act, the judgement preceded the 1997 Act, as amended) ; and
- c. the accused had been incarcerated for a period of eight months.

The trial judge was said to have been erroneous in his decision and his misdirection resulted in the appeal court hearing the matter afresh. The court found that it was unlikely to have an absence of physical and psychological harm in a case of rape. Furthermore, it held that a man's manhood could never be viewed as a justification for a lesser sentence, if he chooses to gratify himself by having non-consensual sexual intercourse with women. The victims' sexual history was considered to be irrelevant in the circumstances. Though the accused had initially made an incorrect submission with regards to his age, such submission did not negatively affect him as the court did not view this as an aggravating factor, particularly because the accused had withdrew his submission before sentencing (he stated that he was a 17-year-old and not a 23-year-old). A lesser sentence than life imprisonment was imposed for both counts of rape as it was said that the imposition of life imprisonment would be disproportionate in the circumstances, particularly because the crime was considered to be less heinous when compared to other rapes.<sup>296</sup>

### (iii) *Rammoko v Director of Public Prosecutions* <sup>297</sup>

The perpetrator in this case was a 34-year-old male. He had raped his 13-year-old neighbour. Despite the age of the victim being an aggravating factor, the court felt that other factors such as the seriousness of the crime as well as the immediate and future effects of the crime on the victim were equally important and necessitated the imposition of a life sentence.<sup>298</sup> The court went on to place great weight on the consequences of the crime on the victim by stating that "evidence relating to the extent to which the complainant had been affected by the rape, and would be affected in future, was relevant and indeed important". The matter was reverted to

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<sup>296</sup> *S v Mahomotsa* (n 110).

<sup>297</sup> *Rammoko v Director of Public Prosecutions* (n 252).

<sup>298</sup> *Ibid* 205b.

the sentencing court (High Court) by the SCA so as to gather the relevant information pertaining to the impact of the rape on the victim before punishment could be imposed.<sup>299</sup>

The victim, who had reached majority age at the time, testified yet again in the High Court; 5 years after the happening of the incident. Though she stated that the rape had affected her relationship with her partner, she admitted that with time, she was able to overcome the impact of the incident. When asked by the state what she would convey to her perpetrator if an opportunity arose, in tears, she replied by saying: “wat jy gedoen het was nie reg nie” (“What you did was not right”). Even though she had initially been reluctant about facing the accused again, her testimony provided further relief for her.<sup>300</sup> As a mitigating factor, the court considered the fact that she appeared to have since healed from the emotional trauma associated with the crime. At the commission of the crime, the victim was under the guidance of her uncle for educational reasons, but because of the incident, she was unable to complete her studies and accordingly, this was viewed by the court as having an aggravating effect.<sup>301</sup> The High Court concluded that life imprisonment was not an appropriate sentence in the circumstances and accordingly imposed a sentence of 21 years’ imprisonment.<sup>302</sup>

The SCA before referring the matter back to the High Court, ascertained that the prosecutor’s failure to lead evidence pertaining to the after-effects of the crime on the victim, including the failure to call witnesses to give evidence to that effect could potentially lead to unfavourable consequences for the accused as there could be no fair assessment made regarding the imposition of a life sentence.<sup>303</sup>

(iv) *S v Blaauw*<sup>304</sup>

The perpetrator in this case was an 18-year-old male, who was found guilty of premeditatedly raping a 5-year-old girl while under the influence of alcohol. As a consequence of his actions, the child suffered severe genital harm and it also appeared from the evidence presented by a social worker that the child was likely to suffer additional harm in the future. The accused

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<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> *Rammoko v Director of Public Prosecutions* (n 252).

<sup>302</sup> Ibid.

<sup>303</sup> Ibid.

<sup>304</sup> *S v Blaauw* (n 65).

had been previously convicted of two offences and had been consequently committed to a reformatory, which he later escaped from. The court held that such committal to the reformatory might have negatively affected the accused, particularly because of his unfavourable background. The court viewed the offence as being repulsive and was adamant that the interests of society in the circumstances demanded a severe sentence. Following the approach laid out in *Malgas*,<sup>305</sup> the cumulative effect of the factors looked at by the court compelled it to consider the imposition of a lesser sentence. These factors included the young age of the accused, both at the commission of the offence and at sentencing, the accused's unfavourable background and the fact that he had consumed alcohol at the time of the incident.<sup>306</sup>

Van Heerden J considered the imposition of the prescribed mandatory sentence to be a harsh measure because of the accused's age. The court held that the cumulative effect of the mitigating factors warranted a lesser sentence and as a result imposed a sentence of 25 years imprisonment. The court further recommended that the accused be committed to a rehabilitation programme.<sup>307</sup>

(v) *S v Abrahams*<sup>308</sup>

This case dealt with an appeal of a seven-year sentence imposed on a father who was found guilty of raping his daughter of 14 years of age. It was established that the approach taken by the sentencing court in reaching an appropriate sentence amounted to a misdirection and warranted an interference by the Supreme Court of Appeal. Despite the fact that the sentence initially imposed was increased on appeal, the court after a consideration of material factors held that the imposition of the maximum sentence of life imprisonment was still not warranted in the circumstances. The approach taken by the presiding judge in dealing with the issue of whether "substantial and compelling circumstances" were present in the circumstances was acceptable as material factors ordinarily taken into account in the sentencing process were regarded. These factors did not only pertain to the accused's

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<sup>305</sup> *S v Malgas* (n 9).

<sup>306</sup> *S v Blaauw* (n 65).

<sup>307</sup> *Ibid.*

<sup>308</sup> *S v Abrahams* 2002 (1) SACR 116 (SCA).

personal background, but also the nature of the crime and the circumstances under which it was committed.

The court looked at the following factors as having an aggravating effect:

- a. the accused's sexual attraction for his daughter and his attitude towards women ;
- b. that the accused had abused his position as a father and had used such a position to force compliance from his daughter;
- c. that the victim had suffered severely as a result of the rape; and
- d. that incestuous rape was considered as a heinous crime.

The court also took into account the following mitigating factors:

- a. the accused had not been previously convicted of any offence;
- b. apart from the act of rape itself, the victim had not sustained physical injuries;
- c. two years prior to the commission of the offence, the victim's brother had committed suicide and this negatively affected the accused's judgment; and
- d. his actions did not amount to the worst kind of rape.

The court further referred to *S v Swartz and Another*<sup>309</sup> and held that not all crimes of rape resulted in the same punishment.<sup>310</sup>

It was also held that once “substantial and compelling circumstances” were found to be in existence, the imposition of a sentence which is in accordance with those applied before the operation of the legislation amounted to an error. It was further held that the existence of “substantial and compelling circumstances” did not defray from the fact that the legislation created a minimum standard that played an important consideration when the sentencing of scheduled crimes was in issue<sup>311</sup> and further, past cases could no longer be the deciding factor when determining the lengthiness of a sentence and as such, reliance on *S v B*<sup>312</sup> by the court *a quo* for such was a misdirection.<sup>313</sup>

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<sup>309</sup> *S v Swartz and Another* 1999 (2) SACR 380 (C).

<sup>310</sup> *Ibid* 386b-c.

<sup>311</sup> *S v Malgas* (n 9).

<sup>312</sup> *S v B* 1996 (2) SACR 543 (C).

<sup>313</sup> *S v Swartz and Another* (n 309) 126b.

(vi) *S v Njikelana*<sup>314</sup>

The accused, who was 24 years old at the time of the incident, was found guilty of raping a 16-year-old girl on two consecutive occasions. The girl was not only his neighbour, but was also his friend. After the court considered the cumulative effect of some mitigating factors, it found “substantial and compelling circumstances” to be in existence and the imposition of a lesser sentence to be warranted in the circumstances. At the time of the incident, both the victim and the accused were intoxicated and the rape appeared to have taken place on impulse.<sup>315</sup> As mitigating factors, the court found that the accused had no previous convictions and was fairly young. It further found that he had no formal education and was unsophisticated. Further, the victim had not sustained any permanent physical injuries and only had a scar on her forehead which was barely visible. The court also considered the fact that the accused had served a period of 35 months in prison while awaiting sentencing.

The aggravating factors included the fact that the accused had used force in order to obtain compliance from the victim and had further applied force in the commission of the crime and this was evidenced by the physical injuries caused to the victim, although not permanent and severe. Although another perpetrator engaged in non-consensual sexual intercourse with the victim on the day, the accused remained the lead perpetrator and had thus abused his position as a friend. Despite the fact that the crime of rape was considered to be prevalent, the court held that life imprisonment was unwarranted in the circumstances and considered precedent<sup>316</sup> which leaned towards a sentence of 18 years’ imprisonment as an appropriate one. The court however reduced such a sentence as a result of the time already served by accused in prison while he was awaiting sentencing and trial. Consequently, the sentence eventually imposed was 14 years’ imprisonment.<sup>317</sup>

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<sup>314</sup> *S v Njikelana* 2003 (2) SACR 166 (C).

<sup>315</sup> *Ibid.*

<sup>316</sup> *S v Jansen* (n 277); *S v Swartz and Another* (n 309); *S v Dithotze* (n 241).

<sup>317</sup> *S v Njikelana* (n 314).

(vii) *S v G*<sup>318</sup>

An unemployed 32-year old male was found guilty of raping a 10-year-old girl, who happened to be his girlfriend's daughter. Though he was not her biological father, he was ultimately regarded as such, particularly because they all resided in one household as a family. On receiving the case for sentencing, the High Court considered the impact of the crime on the victim and found the following factors to be aggravating:

- a. though it appeared as if the victim had overcome the incident, she and her immediate family suffered from severe emotional trauma;
- b. the crime negatively affected the victim's grooming process, and ultimately robbed her of a life with her mother as she had to move and live in an impoverished area with her grandmother;
- c. the victim was relatively young and was not sexually mature or active at the time of the offence and this resulted in the crime being categorised as a heinous one.
- d. the accused abused his position of trust; and
- e. the accused displayed no remorse.

The court also found the following factors to be mitigating:

- a. the accused had no previous convictions;
- b. the accused had not exerted excessive force to obtain compliance and as a result, the rape did not yield serious bodily harm. The court did however note that little force was needed to force compliance of a 10-year-old; and
- c. the accused had served two years in prison while awaiting sentencing.

The court then went on to compare the circumstances of this case with those of *Abrahams*,<sup>319</sup> *Mahomotsa*<sup>320</sup> and *Rammoko*,<sup>321</sup> in order to make a suitable decision. As a result, the court found that though this was a serious case, it did not fall within the category of the worst cases of rape previously brought before the court. A sentence of 18 years' imprisonment was then

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<sup>318</sup> *S v G* 2004 (2) SACR 296 (W).

<sup>319</sup> *S v Abrahams* (n 308).

<sup>320</sup> *S v Mahomotsa* (n 110).

<sup>321</sup> *Rammoko v Director of Public Prosecutions* (n 252).

deemed to be appropriate, particularly because an imposition of the prescribed mandatory sentence of life imprisonment would be disproportionate to the seriousness of the crime.<sup>322</sup>

The cases decided before and after the *Malgas* case,<sup>323</sup> considered traditional factors (as laid out by the latter case) in concluding whether or not “substantial and compelling circumstances” existed, thus allowing a deviation from the sentence prescribed by the 1997 Act, as amended. The cases decided before the above-mentioned case appear to have placed greater weight on the presence of physical injuries or absence thereof (contrary to S51 (3) (aA) (ii) of the Act). The courts were consistent in considering the age of the accused as well as the victim and the accused’s criminal history. With the exception of cases that followed *Mafokeng*<sup>324</sup> or a similar narrow interpretation, the cases decided prior to the *Malgas*<sup>325</sup> decision appear to have taken similar factors into account and came to conclusions that would probably not have differed even if decided after *Malgas*.<sup>326</sup> Cases decided after the *Malgas* case,<sup>327</sup> did not only consider the physical injuries caused to the victim, but also considered the victim’s psychological trauma or the after-effects of the rape. The cases also considered the time already served by the accused in prison and viewed it as a mitigating factor. The cases decided after the leading case also categorised rape and repeatedly implied that life imprisonment is only justified in extreme cases of rape (*S v Abrahams*<sup>328</sup>; *S v Mahomotsa*<sup>329</sup>; *Rammoko v Director of Public Prosecutions*<sup>330</sup>).

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<sup>322</sup> *S v G* (n 318).

<sup>323</sup> *S v Malgas* (n 9).

<sup>324</sup> *S v Mafokeng* (n 7).

<sup>325</sup> *Ibid.*

<sup>326</sup> *S v Malgas* (n 9).

<sup>327</sup> *Ibid.*

<sup>328</sup> *S v Abrahams* (n 308).

<sup>329</sup> *S v Mahomotsa* (n 110).

<sup>330</sup> *Rammoko v Director of Public Prosecutions* (n 252).

### **3.2.3.3. CASES DECIDED AFTER THE CRIMINAL LAW (SENTENCING) AMENDMENT ACT**

#### **(i) *S v Matyityi*<sup>331</sup>**

The respondent was a 27-year-old ringleader of a gang of three. He was a repeat offender and had committed the crimes of rape, murder and robbery. He was convicted of one count of rape, one count of murder, and two counts of robbery. The respondent chose not to testify, nor was any evidence led in mitigation on his behalf, although some submissions regarding his personal circumstances were made.<sup>332</sup> He had expressed a willingness to tender a plea of guilty to all of the charges and thereafter he was duly sentenced in the Eastern Cape High Court. He was sentenced to 25 years' imprisonment on each of the murder and rape charges and in respect of each of the two counts of robbery, the respondent was sentenced to 13 years' imprisonment. The sentences were ordered to run concurrently. He was thus sentenced to an effective term of 25 years' imprisonment as he could only serve a total of 25 years at most.<sup>333</sup> The state appealed against the sentences which were imposed in respect of the rape and murder (but not robbery) convictions, as they were regarded as being too lenient.<sup>334</sup>

The crimes took place on two separate occasions in a space of five days. In the first occasion, the respondent was a member of a gang of three who attacked and robbed the complainant ("Mr AC"). The complainant had been sitting in his car at the beach when his car window was smashed, and he was hit in the face. His cell phone, cash and ATM card were then stolen. The respondent had placed a hood over the complainant's face, and drove him in the back seat of his car to an isolated place, where he was bound up and tied to a tree.<sup>335</sup> His attackers demanded his ATM pin number, and in an attempt to buy himself some time to escape, he deliberately gave an incorrect one. The attackers left him in search of an ATM, but returned when they discovered that the pin was incorrect. After he had tendered them with a correct pin, they left again and fortunately for him, this time he was able to free himself from

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<sup>331</sup> *S v Matyityi* (n 233).

<sup>332</sup> *Ibid* para 12.

<sup>333</sup> *Ibid* para 7.

<sup>334</sup> *Ibid* para 8.

<sup>335</sup> *Ibid* para 1.

the tree and escaped from the area on foot.<sup>336</sup> His car was later recovered, but the CD player had been stolen.<sup>337</sup>

Five days after the above-mentioned incident, the respondent and his gang hit again. This time they attacked a couple (male and female) which was parked in an isolated spot at the same beach. The male complainant (“Mr MF”) was attacked and was placed in the boot of the car despite the fact that he bleeding badly. The female complainant (“Ms KD”) was driven in the same car to a secluded area and was raped by all three of the attackers. Mr MF, who was unconscious at the time, was then removed from the boot and placed on the back seat of the car. The attackers then drove the vehicle back in the direction from which it had come, and after obtaining an affirmative response from Ms KD relating to her familiarity with her whereabouts, they alighted from the motor vehicle. MS KD then drove the vehicle to the hospital, but Mr MF was pronounced dead on arrival.<sup>338</sup> The respondent and the other gang members were later arrested as a result of a tip-off.<sup>339</sup>

The court *a quo* acknowledged the fact that the nature of the offences brought the case within the ambit of s 51 of 1997 Act, which prescribed minimum sentences, namely life imprisonment for each of the counts of rape and murder.<sup>340</sup> This was because the murder took place in the course of a robbery accompanied by aggravating circumstances, and also because the complainant was raped by not only the respondent, but also by his accomplices (S51, read with Part 1 Schedule 2 of the Act and S1 of the CPA). Matiwana AJ in identifying the issue stated that “the question, therefore, that I am faced with, is whether there are any compelling circumstances in this case, which, if present, would justify a departure from the prescribed sentences laid down by the legislature”.<sup>341</sup> He answered the question as follows:

‘As I have stated, in my mind, the court should not impose the prescribed minimum sentence in this case, in view of the accused's age, and in the light of the remorse displayed by him during the trial here’.<sup>342</sup>

The court *a quo* thus did not impose the prescribed minimum sentence of life imprisonment for any of the counts. The reason behind this was the respondent’s age as he was said to have

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<sup>336</sup> Ibid para 2.

<sup>337</sup> Ibid para 3.

<sup>338</sup> Ibid paras 3-5.

<sup>339</sup> Ibid para 6.

<sup>340</sup> Ibid para 9.

<sup>341</sup> Ibid.

<sup>342</sup> Ibid.

been 27 years old at the time, and because he had pleaded guilty and thus had expressed remorse during the trial.<sup>343</sup>

Therefore, the central question in the court of appeal was of whether or not the trial court was correct in concluding that “substantial and compelling circumstances” existed. The appeal court went on to say that the starting point was the *Malgas* case,<sup>344</sup> meaning that the court had to approach the question conscious of the fact that the minimum sentence had been ordained as the sentence which ordinarily should be imposed unless there exist the above-mentioned circumstances.<sup>345</sup> The court then noted that the respondent was also married at the time of the commission of the offences. It also noted that he had three children, the oldest of whom was 10 years and the youngest one month and that his highest level of education was Standard 7 (Grade 9),<sup>346</sup> though the trial judge had only considered as mitigating factors, the fact that the respondent had displayed remorse and that he was 27 years.<sup>347</sup>

In relation to remorse, it was said to have been manifested in his guilty plea and his apology to the victims. The court in this regard said that a guilty plea amounts to a neutral factor and cannot be accorded any weight in the mitigating sense.<sup>348</sup> The court further pointed out to the difference between remorse and regret by stating that:

‘Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one’s error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look’.<sup>349</sup>

The court went on to say that in order for the remorse to be regarded as a mitigating factor, it has to be sincere and the accused must be able to convince the court of its genuineness. The court further noted that before a court can be convinced of the genuineness of the remorse, it needs to have a proper appreciation of what motivated the respondent to commit the crime,

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<sup>343</sup> Ibid.

<sup>344</sup> *S v Malgas* (n 9).

<sup>345</sup> *S v Matyityi* (n 233) para 11.

<sup>346</sup> Ibid.

<sup>347</sup> Ibid para 12.

<sup>348</sup> Ibid para 13.

<sup>349</sup> Ibid.

what has since provoked his change of heart and whether he does indeed have a true appreciation of the consequences of those actions.<sup>350</sup> The court then concluded that such information was never placed before the court and it remained peculiarly within the respondent's knowledge. Accordingly the court held that it cannot be said that the respondent was remorseful, particularly because the incidents were five days apart, thus giving the respondent enough time to reflect after the first incident and also because he had played a prominent part in the commission of the crimes as he was the ringleader and this reflected an awareness for what he was participating in.<sup>351</sup>

Regarding his age, the court stated that a court will generally not punish an immature young person as harshly as it would punish an adult. It stated that the age of an offender will count as a mitigating factor, only where there is proof of immaturity, unless the viciousness of their conduct rules out immaturity. It was said that though a person under the age of 18 years is regarded *prima facie* immature, a person of 20 years or more must provide evidence of their immaturity that reduces his blameworthiness to such an extent that it can operate as a mitigating factor.<sup>352</sup> The court then concluded that:

‘At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor. Nothing in it served, without more, to reduce his moral blameworthiness. He chose not to go into the box and we have been told nothing about his level of immaturity or any other influence that may have been brought to bear on him to have caused him to act in the manner in which he did’.<sup>353</sup>

In addition, the trial judge was found to have misdirected himself as they had found no aggravating factors to be present. Firstly, it held that the respondent's previous conviction was irrelevant to the case before it or to the charges he had been found guilty of, and secondly, the learned judge also held that the rape victim had sustained no injuries.<sup>354</sup> On this misdirection, the appeal court found that the trial judge was correct to the extent he was referring to the “absence of permanent physical injuries”, but also held that “to limit the enquiry to permanent physical injuries amounts to a fundamental misconstruction of the act of rape itself and its profound psychological, emotional and symbolic significance for the

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<sup>350</sup> Ibid.

<sup>351</sup> Ibid.

<sup>352</sup> Ibid para 14.

<sup>353</sup> Ibid.

<sup>354</sup> Ibid para 10.

victim.”<sup>355</sup> For instance, at the time of the trial; one year after the incident, the victim (Ms KD) was still receiving counselling as the trauma she suffered was severe.<sup>356</sup>

The SCA emphasised the importance of a victim-centred approach to sentencing. It held that by accommodating the victim during the sentencing stage, the court would be well informed about the impact and future impact of the crime on the victim, and thus better able to achieve proportionality rather than harshness. The court further said that the involvement of the victim is important as courts do not possess the necessary experience that allows them to draw conclusions about the effects and consequences of rape for a rape victim.<sup>357</sup> In its support, the court quoted Muller and Van der Merwe,<sup>358</sup> who said:

‘It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse’.<sup>359</sup>

The SCA also commented on the need for courts to comply with prescribed sentencing legislation, it noted that sentencing courts are often willing to:

‘deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons, such as speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation and like considerations’.<sup>360</sup>

The SCA found this to have been the case in the court *a quo* as the accused’s age and purported remorse were incorrectly regarded as “substantial and compelling circumstances” justifying a deviation from the prescribed minimum sentence. Consequently, the court set aside the sentences imposed by the court of first instance and imposed life imprisonment for the counts of murder and rape.<sup>361</sup>

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<sup>355</sup> Ibid.

<sup>356</sup> Ibid para 20.

<sup>357</sup> Ibid para 16.

<sup>358</sup> K Müller and A Van der Merwe “Recognising the Victim in the Sentencing Phase: The Use of Victim Impact Statements in Court” (2006) 22 SAJHR 647.

<sup>359</sup> Ibid 253-254.

<sup>360</sup> *S v Matityi* (n 233) para 23.

<sup>361</sup> Ibid para 24.

(ii) *S v Vilakazi*<sup>362</sup>

The complainant in this case was a girl under the age of 16 years; who lived in poor circumstances and had no formal schooling. On the day of the incident, she had been visiting at a nearby mine and was walking home alone in the late afternoon. The appellant drove by in what appeared to be a tanker-truck. He stopped to give her a lift and after travelling for a while changed routes and turned into a nearby plantation, where he apparently stopped.<sup>363</sup> According to the complainant both she and the appellant then jumped off from the truck and sat in the plantation for a while. After some time the appellant proceeded to the truck and returned with a condom which he put on. The appellant then caught the complainant, covered her mouth and had sexual intercourse with her against her will. Once done, he departed in his truck and was said to return.<sup>364</sup> At that time, the complainant continued to wait in the plantation for the appellant to return in order to get a lift home. When the appellant did not return, she decided to get a lift from another vehicle.<sup>365</sup> The appellant pleaded guilty and acknowledged that he had had sexual intercourse with the complainant, but said his act did not amount to rape because he had utilised a condom and also because he had obtained the complainant's consent.<sup>366</sup>

According to the Act, on account of the girl being under the age of 16 years, life imprisonment was the maximum sentence to be imposed unless "substantial and compelling circumstances" exist and justify a lesser sentence.<sup>367</sup> The High Court found that no such circumstances existed and sentenced the appellant to life imprisonment on the count of rape, leading to this appeal against the sentence.<sup>368</sup>

The SCA in this case as a starting point held that it is only by approaching sentencing under the Act in the manner that was laid down by this court in *Malgas*,<sup>369</sup> that disproportionate sentences can be avoided.<sup>370</sup> It was further stated that the terms in which the approach was framed meant that a court in every case, before it imposes a prescribed sentence, should

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<sup>362</sup> *S v Vilakazi* (n 158).

<sup>363</sup> Ibid para 33.

<sup>364</sup> Ibid para 34.

<sup>365</sup> Ibid para 35.

<sup>366</sup> Ibid para 43.

<sup>367</sup> Ibid para 6.

<sup>368</sup> Ibid paras 6-7.

<sup>369</sup> *S v Malgas* (n 9).

<sup>370</sup> *S v Vilakazi* (n 158) para 14.

assess, upon a consideration of all the material circumstances of the particular case, whether the prescribed sentence is indeed proportionate to the particular offence as any circumstances that would render the prescribed sentence disproportionate to the offence would constitute the required “weighty justification” for the imposition of a lesser sentence of which the court is bound to impose.<sup>371</sup> The court went on to say that that the 1997 Act is triggered once any of the aggravating features specified under it are present and life imprisonment is then applicable regardless of the degree in which the feature is present and irrespective of whether the convicted person is a first or repeat offender.<sup>372</sup>

In the case, the SCA also held that the imposition of life imprisonment was not reserved for extreme cases of rape only and stated that, “there comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more”.<sup>373</sup> It is however unclear as to why courts will often approach sentencing in cases of rape in this manner.

Turning to the circumstances of the case, the SCA held that the trial court misdirected itself by not evaluating the circumstances in which the offence was committed. The court went on to say that the matter was approached on the basis that the prescribed sentence ought to be imposed unless the personal circumstances of the appellant proved to be exceptional. It further said that such approach was not permissible as the court was required to apply its mind to whether sentence to be imposed was proportional to the offence committed and accordingly the court had failed in that regard.<sup>374</sup> Owing to this misdirection, the SCA found that it had to evaluate the proportionality of the sentence, in accordance with the approach that was laid down in the case of *Malgas*.<sup>375</sup>

The court after considering the circumstances of the case, considered the following mitigating factors as a justification for a lesser sentence:

- a. There was no extraneous violence and no physical injury was caused other than physical injury inherent in the offence;
- b. There was also no threat of extraneous violence of any kind;

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<sup>371</sup> Ibid paras 15-16.

<sup>372</sup> Ibid para 13.

<sup>373</sup> Ibid para 54.

<sup>374</sup> Ibid para 30.

<sup>375</sup> Ibid para 31.

- c. The appellant at least minimized the risk of pregnancy and the transmission of disease by using a condom;
- d. That after the event the complainant felt herself able to await the appellant's return and to be in his company once more while he drove her home and became exasperated when he did not return; and
- e. When she was examined by the district surgeon a little later he observed no signs of distress, though the court on this held that "it must be accepted that no woman, and least of all a child, would be left unscathed by sexual assault, and that in this case the complainant must indeed have been traumatized".<sup>376</sup>
- f. The appellant was arrested on the day the offence was committed and has been incarcerated ever since and it would be unjust if the period of imprisonment while awaiting trial is not then brought to account in any sentence that is imposed.<sup>377</sup>

The court further considered the personal circumstances of the appellant and stated that in such a case, they are largely immaterial in the question relating to the period of imprisonment to be imposed and they merely amount to the "flimsy" grounds of departure contemplated in the *Malgas* case.<sup>378</sup> The court however noted that they assist in other respects, for instance, where the material question to be answered is of whether or not the accused can be expected to offend again. In the case, the court then considered the appellant's personal circumstances to reach a conclusion in this regard. It noted that the appellant had reached the age of 30 years without any serious clashes with the law and that his stable employment and "apparently" stable family circumstances are not indicative of an inherently "lawless character".<sup>379</sup>

Looking at the age of the complainant as an aggravating factor the court held:

'the complainant's age fits in the range between infancy and 16 I do not think that her age by itself justifies what would otherwise have been a sentence of 10 years imprisonment being raised to the maximum sentence permitted by law. A substantial sentence of 15 years' imprisonment seems to me to be sufficient to bring home to the appellant the gravity of his offence and to exact sufficient retribution for his crime. To make him pay for it with the remainder of his life would seem to me to be grossly disproportionate'.<sup>380</sup>

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<sup>376</sup> Ibid paras 55-57.

<sup>377</sup> Ibid para 60.

<sup>378</sup> *S v Vilakazi* (n 158) para 58.

<sup>379</sup> Ibid.

<sup>380</sup> Ibid para 59.

Consequently, the appeal against the sentence of life imprisonment succeeded and was substituted by 15 years imprisonment, from which the two years that the appellant had spent in jail while awaiting trial was to be deducted.<sup>381</sup>

(iii) *DDP v Thusi*<sup>382</sup>

In this case, three respondents were convicted and sentenced on various counts. The appeal however relates to the counts of murder in respect of all the respondents and the count of rape (involving the infliction of grievous bodily harm) in respect of the second accused.<sup>383</sup> The counts on which they were convicted on were born from separate incidents. Regarding the count of rape, the respondents had unlawfully broken into the complainant's ("McKnight") home in her absence. She however returned home while the respondents were still on the premises in the company of her elderly helper. The men then attacked and assaulted the two women and the second respondent in the midst of this, solely proceeded to rape McKnight, who was then 84 years in one of the bedrooms and as a result she sustained severe physical injuries and profound trauma.<sup>384</sup> Regarding the count of murder, the same trio, seven days after this, unlawfully broke into the house of the deceased ("Andrade"), who was then 64 years old, in his absence. When he returned, they attacked and assaulted him, tied his hands behind his back, pushed a sock into his mouth and strangled him with an electric cord and as a result he died of suffocation by strangulation.<sup>385</sup> Owing to the circumstances under which these offences were committed, the minimum sentence for each of them was and is still life imprisonment unless "substantial and compelling circumstances" allowing for the imposition of a lesser sentence exist.<sup>386</sup> The trial judge found that such circumstances existed and thus on the murder count, sentenced all three respondents to 15 years' imprisonment and on the count of rape; sentenced the second to 18 years' imprisonment.<sup>387</sup>

The trial court as mitigating factors had considered the following:

- a. the relative ages of the respondents and their good prospects of rehabilitation;

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<sup>381</sup> Ibid para 61.

<sup>382</sup> *DPP v Thusi* 2012 (1) SACR 423 (SCA).

<sup>383</sup> Ibid para 2.

<sup>384</sup> Ibid para 4

<sup>385</sup> Ibid para 5.

<sup>386</sup> Ibid paras 7-8.

<sup>387</sup> Ibid para 2.

- b. regarding the first responded, the fact that he had co-operated and assisted the police in their investigation, thus displaying remorse; and
- c. regarding the count of murder, regarded the fact that the state only proved oblique intent to kill (*dolus eventualis*).<sup>388</sup>

The question before the SCA was thus of whether the trial court misdirected itself in its finding that “substantial and compelling circumstances” existed in respect of the murder and rape charge. The court mentioned the case of *Malgas*<sup>389</sup> as a starting point and then noted that though the trial court had regarded the “relative youthfulness” of the respondents as a factor counting in their favour, none of them proved to be immature as their conduct demonstrated brutality that was inconsistent with immaturity and further, there was no evidence suggesting that they had subjected each other to undue pressure in the commission of the offences.<sup>390</sup> The court went on to dismiss the proving of *dolus eventualis* for the count of murder as a mitigating factor. It stated that the fact that the respondents were armed and made no attempts to flee the scene after the return of the home-owners indicated an intention on their part to confront resistance which was foreseeable with force.

The court further said that if their intention was only to steal, the rape, murder and assault of elderly people who were defenceless was unnecessary.<sup>391</sup> This means that they planned the housebreakings to an extent that included the understanding that anyone who offered resistance will be killed.<sup>392</sup> The court did however mention that though this is a relevant factor, it is not a compelling one in the circumstances especially because of their brutality in the commission of the murder.<sup>393</sup> Regarding the respondents’ good prospects of rehabilitation evidenced in their personal circumstances and age, the court held that when it is weighed against the objective gravity of the offences that they committed, the prevalence of such offences in South Africa and the expectations of the society that such crimes will be severely punished, the factor does not weigh in favour of them.<sup>394</sup>

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<sup>388</sup> Ibid para 9.

<sup>389</sup> *S v Malgas* (n 9).

<sup>390</sup> *DPP v Thusi* (n 382) para 11 and para 17.

<sup>391</sup> Ibid.

<sup>392</sup> Ibid.

<sup>393</sup> Ibid para 22.

<sup>394</sup> Ibid para 19.

The court concluded by saying:

‘As appears from what has been said above, in imposing sentence on both the murder and the rape charges, the trial court over-emphasised the personal interests of the respondents over the seriousness and prevalence of the offences, the interests of society and the harm suffered by the complainant and by the family of the deceased. In my view there were no substantial and compelling circumstances present in the case of either offence that warranted a departure from the prescribed statutory norm. To my mind, even having regard to the time spent in custody by the respondents pending finalisation of the trial, the prescribed minimum sentences are, in the totality of the circumstances encountered here, the only fair and just sentences’.<sup>395</sup>

Consequently, the court set aside the sentences imposed by the trial court and substituted them with life imprisonment, which was to run concurrently with any other sentences imposed on the respondents.<sup>396</sup>

(iv) *S v Bailey*<sup>397</sup>

The appellant was convicted of raping his 12-year-old daughter in the Regional Court. He had pleaded guilty to the charge of rape as he admitted to having unlawful sexual intercourse with the complainant, despite knowing the fact that she was below the age of sixteen years at the time of the incident. In fact she was 12 years at the time of the incident.<sup>398</sup>

The court found that no “substantial and compelling circumstances” and sentenced the appellant to life imprisonment. The appellant appealed to the High Court, which dismissed the appeal and subsequently to the SCA.<sup>399</sup> The appellant’s attack against the imposition of life imprisonment was based on the fact that the previous court erred in not finding that the sentence imposed was unreasonable and inconsistent with the sentences imposed for similar offences by the court and that the facts and circumstances advanced by the appellant as evidence amounted to “substantial and compelling circumstances” which justified a sentence less than life imprisonment.<sup>400</sup> The issue in this appeal was thus whether or not the previous

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<sup>395</sup> Ibid paras 23-24.

<sup>396</sup> Ibid.

<sup>397</sup> *S v Bailey* 2013 (2) SACR 533 (SCA).

<sup>398</sup> Ibid para 2.

<sup>399</sup> Ibid para 1.

<sup>400</sup> Ibid para 3.

court erred in not finding that the facts put forward by the appellant amounted to “substantial and compelling circumstances” justifying a sentence other than life imprisonment.<sup>401</sup>

In the case, it was submitted on behalf of the appellant that three considerations should be considered as “substantial and compelling circumstances”, justifying the imposition of a lesser sentence.<sup>402</sup> Firstly, it was said that the appellant had displayed remorse, which emanated from his guilty plea and that he had further expressed such remorse to the probation officer; secondly, that there were prospects of the appellant being rehabilitated as he had shown an appreciation of the wrongfulness of his conduct and an insight which made him open to rehabilitation and consequently, life imprisonment will deny him the opportunity for rehabilitation. Thirdly, that he was using drugs at the time of the commission of the offence.<sup>403</sup>

Regarding the inconsistency of the sentence when looking at similar cases, the court held that a court that follows past precedent without proper consideration of the peculiar facts of that particular case will be acting improperly and would be abdicating its duties and discretion to consider an appropriate sentence. The court went on to say that where a court imposes a sentence which is within the confines of a previously decided similar case, the sentence will be appealable on the basis that the court has either failed to exercise its discretion properly or at all.<sup>404</sup> The court further quoted Marais JA in *Malgas*,<sup>405</sup> who commented on the comparative approach and said:

‘It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust. To attempt to deny a court the right to have any regard whatsoever to past sentencing patterns when deciding whether a prescribed sentence is in the circumstances of a particular case manifestly unjust is tantamount to expecting someone who has not been allowed to see the colour blue to appreciate and gauge the extent to which the colour dark blue differs from it. As long as it is appreciated that the mere

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<sup>401</sup> *Ibid* para 4.

<sup>402</sup> *Ibid* para 5.

<sup>403</sup> *Ibid* para 5.

<sup>404</sup> *Ibid* para 16.

<sup>405</sup> *S v Malgas* (n 9).

existence of some discrepancy between them cannot be the sole criteria and something more than that is needed to justify departure, no great harm will be done'.<sup>406</sup>

The court then concluded that similar cases should only be used as guidelines and cannot be elevated to binding precedent, particularly because in rape cases, it is hard to imagine a situation where two different complainants in two different cases would have the same physical, emotional and behavioural problems after the rape. Owing to the fact that these are important factors to be considered when determining an appropriate sentence, a sentence imposed will be different not only because of the variation in the problems encountered after the rape, but also in personal circumstances of the accused, the nature and gravity of the offence and all other factors relevant to sentencing.<sup>407</sup> The court further stated that the after-effects of the rape on the complainant in this case were devastating and far reaching, making this case heinous and different from the similar decided cases in which life imprisonment was not imposed.<sup>408</sup>

With regards to the existence of “substantial and compelling circumstances”, the court noted that a consideration of the appellant’s personal circumstances was necessary.<sup>409</sup> The court then looked at the fact that the appellant was 38 years old at the time of the commission of the offence and 40 years old during sentencing. He was married to the complainant’s mother and had 3 children including the complainant. He was employed before his arrest and was responsible for the maintenance of his children. He had a drug habit which was caused by the death of his father. He pleaded guilty and expressed remorse for his actions. Lastly he had previous convictions for theft, fraud, attempted rape and other offences.<sup>410</sup> On the other hand as aggravating factors, the court considered the fact that the complainant was 12 years old at the time of the rape; that the appellant was her biological father, resulting in the rape being incestuous and being found to be morally repugnant by many if not all reasonable persons. The court also considered the fact that before the rape the appellant had performed improper sexual practices on the complainant on two occasions. The court also considered the emotional and psychological suffering of the complainant.<sup>411</sup>

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<sup>406</sup> Ibid para 21.

<sup>407</sup> *S v Bailey* (n 397) para 18.

<sup>408</sup> Ibid para 13.

<sup>409</sup> Ibid para 23.

<sup>410</sup> Ibid.

<sup>411</sup> Ibid para 24.

The court then concluded that the above-mentioned circumstances were seriously aggravating and deserved appropriate weight in the consideration of an appropriate sentence. Consequently, the court held that no “substantial and compelling circumstances” existed and accordingly dismissed the appeal.<sup>412</sup> In addition, the court stated that the phrase “substantial and compelling circumstances” is so elastic that it includes the ordinary mitigating circumstances and a value judgment on the part of the sentencing court.<sup>413</sup>

(v) *S v Nkomo*<sup>414</sup>

The appellant was convicted in the Regional Court of rape and kidnapping. The complainant testified that she was at the bar drinking a cold drink, given to her by the appellant, which he had laced with alcohol. The appellant forced her into a hotel room that he had hired, forced her to undress and raped her.<sup>415</sup> The appellant locked her in the room and went back to the bar for more drinks, hence the kidnapping conviction. She attempted to escape from the room by jumping out of a window, fell some ten metres to the ground and injured her leg.<sup>416</sup> Unfortunately, where she fell was where the appellant had been sitting and drinking. He forced her back into the hotel room and raped her four more times during the course of the night, thus resulting in the rape falling within s 51 (1) of the 1997 Act. He also forced her to perform oral sex on him and slapped her, pushed her and kicked her. He prevented her from leaving the room again by taking her clothes away.<sup>417</sup>

When the complainant managed to escape the following morning, she went straight away to the police station.<sup>418</sup> The appellant was arrested and charged. The Regional Court sentenced him to a three year sentence on the kidnapping charge and referred him to the High Court for sentence on the charge of rape. The High Court did not find any “substantial and compelling circumstances” and sentenced the appellant to life imprisonment. The appellant appealed to the SCA against the sentence.<sup>419</sup>

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<sup>412</sup> Ibid paras 24-25.

<sup>413</sup> Ibid para 21.

<sup>414</sup> *S v Nkomo* 2007 (2) SACR 198 (SCA).

<sup>415</sup> Ibid para 5.

<sup>416</sup> Ibid para 6.

<sup>417</sup> Ibid para 7.

<sup>418</sup> Ibid para 8.

<sup>419</sup> Ibid paras 1-2.

The sentence was however imposed in 1999 before the leading case in *Malgas*<sup>420</sup> determined the approach to be adopted in finding whether “substantial and compelling circumstances” exist.<sup>421</sup> The High Court thus relied heavily on earlier authority which suggested that ordinary mitigating factors did not in themselves warrant the imposition of a sentence less severe than that prescribed by the Act.<sup>422</sup> The SCA was said to be free to impose a sentence that it considered appropriate as the High Court had erred by not considering the mitigating factors adduced by the appellant.<sup>423</sup>

The court as aggravating factors then looked at the fact that the appellant had not only raped the complainant once, but had raped her five times during the course of the night; that he held her captive in a room while he demeaned and hurt her, forcing himself on her repeatedly throughout the night, even after she had seriously hurt herself when she jumped out of the window, and was in pain. It also considered that he showed no remorse, throughout the proceedings and claimed that the complainant had lied about being raped and about the events that had taken place in the bar, despite the fact that he was prepared to pay her in order to persuade her to withdraw the charge of rape.<sup>424</sup> The appellant was also in a comparatively better position than the complainant as he had some education and a permanent job and should have known better, but instead had behaved like a “sexual thug”.<sup>425</sup>

The court noted as mitigating factors in favour of the appellant, the fact that the appellant was relatively young at the time of the rapes (he was 29 years old); that he was employed and that there was a chance of rehabilitation.<sup>426</sup> It also considered the fact that the appellant did not use any weapon although he assaulted the complainant and that he did not seriously injure the complainant, though he “callously and cruelly” disregarded the injury caused when she tried to escape from the hotel room.<sup>427</sup> Lastly, it considered the fact that the appellant was a first offender.<sup>428</sup>

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<sup>420</sup> *S v Malgas* (n 9).

<sup>421</sup> *S v Nkomo* (n 414) para 2.

<sup>422</sup> *Ibid* para 3.

<sup>423</sup> *Ibid* para 4.

<sup>424</sup> *Ibid* para 13.

<sup>425</sup> *Ibid* para 21.

<sup>426</sup> *Ibid* para 13.

<sup>427</sup> *Ibid* para 20.

<sup>428</sup> *Ibid* para 22.

In concluding that the sentence of life imprisonment was unjust in the circumstances, the court quoted the *Mahomotsa* case,<sup>429</sup> which dealt with multiple rapes. In the case Mpati JA was quoted saying:

‘Even in cases falling within the categories delineated in the Act there are bound to be differences in the degree of their seriousness. There should be no misunderstanding about this: they will all be serious but some will be more serious than others and, subject to the caveat that follows, it is only right that the differences in seriousness should receive recognition when it comes to the meting out of punishment. As this Court observed in *Abrahams*,<sup>430</sup> some rapes are worse than others and the life sentence ordained by the Legislature should be reserved for cases devoid of substantial factors compelling the conclusion that such a sentence is inappropriate and unjust. Of course, one must guard against the notion that because still more serious cases than the one under consideration are imaginable, it must follow inexorably that something should be kept in reserve for such cases and therefore that the sentence imposed in the case at hand should be correspondingly lighter than the severer sentences that such hypothetical cases would merit. There is always an upper limit in all sentencing jurisdictions, be it death, life or some lengthy term of imprisonment, and there will always be cases which, although differing in their respective degrees of seriousness, nonetheless all call for the maximum penalty imposable. The fact that the crimes under consideration are not all equally horrendous may not matter if the least horrendous of them is horrendous enough to justify the imposition of the maximum penalty.’<sup>431</sup>

The court imposed 16 years of imprisonment, partly because this case did not fall within the worst category of rapes and also because of the mitigating factors that weighed in favour of the appellant.

(vi) *S v Kwanape*<sup>432</sup>

The complainant, a 12-year-old girl (“K”), was playing in the street with her friends when the appellant, who was well-known to her, emerged. Having asked them what they were doing, the appellant grabbed the complainant and dragged her to a nearby bush. One of K’s friends tried to intervene and asked the appellant as to what they were doing and the appellant instead

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<sup>429</sup> *S v Mahomotsa* (n 110).

<sup>430</sup> *S v Abrahams* (n 308).

<sup>431</sup> *S v Mahomotsa* (n 110) paras 14, 17, 18 and 19.

<sup>432</sup> *S v Kwanape* 2014 (1) SACR 405 (SCA).

threw stones at the two friends causing them to flee.<sup>433</sup> When K tried to scream, the appellant averted the noise by closing her mouth with his hand. He further pushed her to the ground, undressed her, and after undressing himself, raped her three times albeit at different spots. During the rape, K said that she was feeling pain. The appellant subsequently took her to his home where she is said to have slept with the appellant's sister. The next day, whilst returning home, K met her father on the road. She then reported the incident to him and upon reaching home she also reported the incident to her mother. She was then taken to hospital where she was examined by a doctor, who described the complainant's vaginal examination as having been painful. The doctor also recorded that the complainant sustained, *inter alia*, scratch marks on her knees and elbows and a small tear in her private part.<sup>434</sup>

Due to the fact that she was under the age of 16 years, this case fell within S51 (1) of the Act. The High Court in the circumstances found that were no "substantial and compelling circumstances" warranting the imposition of a lesser sentence and consequently imposed life imprisonment. The appellant then got leave to appeal to the SCA.<sup>435</sup> The issue before the SCA was therefore whether or not the High Court was correct in finding that there were no "substantial and compelling circumstances".<sup>436</sup>

The appellant submitted that the High Court failed to consider factors that would have weighed in his favour. These factors were that the appellant was:<sup>437</sup>

- a. A first offender;
- b. 24 years of age when the rape was perpetrated;
- c. Gainfully employed and earning R500 fortnightly;
- d. had attended school up to grade 5;
- e. HIV positive (even though one would consider this to be an aggravating factor as the appellant raped a minor knowingly);
- f. A primary care-giver;
- g. Running a tuck-shop from which he generated R400 per month; and
- h. Capable of being rehabilitated

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<sup>433</sup> Ibid para 10.

<sup>434</sup> Ibid para 11.

<sup>435</sup> Ibid para 2.

<sup>436</sup> Ibid para 9.

<sup>437</sup> Ibid para 12.

The court quoted the leading case of *Malgas*<sup>438</sup> as a starting point, and stated that when dealing with a case falling under the scope of S 51(1), courts have to be mindful of the objectives of the Act.<sup>439</sup> The court then went on to quote the *Matyityi* case,<sup>440</sup> which said that “the crime pandemic that engulfs our country has not abated. Thus courts are duty-bound to implement the sentences prescribed in terms of the Act and that ill-defined concepts such as relative youthfulness or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer’s personal notion of fairness ought to be avoided.”<sup>441</sup>

The court stated that the mitigating factors advanced by the appellant must be weighed against the aggravating circumstances of the case, which were:<sup>442</sup>

- a. The fact that the appellant had steadfastly maintained his innocence even in the face of overwhelming evidence against him;
- b. He brazenly abducted the complainant in the presence of her friends to satisfy his sexual desires without using a condom;
- c. He subjected the complainant to the agony, pain and indignity of rape;
- d. The age of the complainant when she was raped, coupled with her immaturity and anatomical under-development render this rape a dreadful one;
- e. The complainant was effectively held hostage the whole night thus exacerbating her anguish;
- f. The complainant was forced to drop out from school, compelling her mother to give up employment to offer her emotional support; and
- g. The complainant has been driven to becoming a recluse to avoid being ridiculed by her peers, thus exacerbating the consequential emotional and psychological trauma she suffered.

In dismissing the appeal and after considering the aggravating circumstances, Petse JA held that:

‘For all the foregoing reasons I am not persuaded that the court below erred in its conclusion that substantial and compelling circumstances were absent. To come to a contrary decision in

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<sup>438</sup> *S v Malgas* (n 9).

<sup>439</sup> *S v Kwanape* (n 432).

<sup>440</sup> *S v Matyityi* (n 233).

<sup>441</sup> *Ibid* 53c-g.

<sup>442</sup> *Ibid* para 17.

this case would constitute a failure to heed the caution in *Malgas*<sup>443</sup> that the specified sentences are not to be departed from lightly or for flimsy reasons and that speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders are to be excluded. Although the High Court did not say so in terms, it is evident from the tenor of its judgment that before it imposed the prescribed sentence, it had assessed, upon a consideration of all the circumstances of this case, whether the prescribed sentence was indeed proportionate to the offence charged'.<sup>444</sup>

Accordingly, it was said that this case was horrendous enough to justify the imposition of the maximum penalty.<sup>445</sup>

(vii) **DPP v Gcwala**<sup>446</sup>

The deceased ("Thandi") was a deputy mayor, whose municipality had awarded a number of tenders to a Ms Lukhele. She however, subsequently cancelled these tenders for some reason. Ms Lukhele then arranged for her to be murdered. She enlisted the help of a number of people, including one called Madoda to execute her plan. Madoda agreed to execute Ms Lukhele's mandate for a fee of R60 000 and he in turn obtained the assistance of the three respondents.<sup>447</sup>

On the day of the murder, the deceased died on the scene in the presence of her family, after several shots were fired at her. This happened on arrival at her home, while she was approaching her front door. Ms Lukhele was then charged with the murder together with the respondents; however, she pleaded guilty to the charge and was sentenced to 20 years' imprisonment. She agreed to give evidence at the respondents' trial and testified that she had conspired to murder the deceased and implicated other people in her testimony. She also testified as to the financial arrangements that she had made with Madoda.<sup>448</sup>

Madoda on the other hand gave evidence in court on the basis that if he answered questions frankly and honestly he may be discharged from prosecution (though he was not discharged

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<sup>443</sup> *S v Malgas* (n 9).

<sup>444</sup> *S v Kwanape* (n 432) para 25.

<sup>445</sup> *Ibid* para 20.

<sup>446</sup> *DPP v Gcwala* 2014 (2) SACR 337 (SCA).

<sup>447</sup> *Ibid* para 2.

<sup>448</sup> *Ibid* para 3.

because he failed to answer questions frankly and honestly).<sup>449</sup> Madoda testified to the fact that he had approached the three respondents to assist in him with the killing of the deceased and to the fact that all three respondents were in attendance for the meeting held at Madoda's house. All acknowledged the fact they were mandated to kill the deceased for a fee. After executing the mandate, they informed Madoda that the mandate was accomplished and accordingly, they were paid a fee.<sup>450</sup>

The evidence that the three respondents were responsible for the killing of the deceased was corroborated by a number of other witnesses. Though it was not clear which respondent actually shot the deceased, evidence proved beyond reasonable doubt that all three respondents had acted in execution of a common purpose to murder the deceased.<sup>451</sup> They were convicted on a charge of murder and sentenced to an effective sentence of 12 years' imprisonment by the High Court.<sup>452</sup> The state in the circumstances was thus appealing against the sentence of the High Court.<sup>453</sup>

In determining the sentence, the trial court took a number of factors into account. Those factors included:

- a. the fact that the murder was planned;
- b. that the respondents willingly agreed to kill a woman who was a dedicated member of the community;
- c. that they spent time travelling a distance to plan the commission of the offence;
- d. that they received a fee once the mandate to kill the deceased was carried out;
- e. that the murder was politically motivated;
- f. that they showed no remorse; and
- g. that communities "have been riddled with these offences of killing officers holding decisive positions in government especially those who refuse to subscribe to corruption".<sup>454</sup>

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<sup>449</sup> Ibid para 2.

<sup>450</sup> Ibid para 4.

<sup>451</sup> Ibid para 4.

<sup>452</sup> Ibid para 1.

<sup>453</sup> Ibid.

<sup>454</sup> Ibid para 6.

The High Court however, decided that the following circumstances justified the imposition of a sentence less than the prescribed period of life imprisonment for the murder of the deceased:<sup>455</sup>

- a. all three accused had been in custody for 4 years awaiting trial;
- b. there was no evidence before the court as to who shot the deceased;
- c. accused 1 and 3 were first offenders; and
- d. all three were capable of being rehabilitated.

The trial judge also explained that he had taken the 4 years spent in custody by the respondents while awaiting trial into account, and had, doubled that number, resulting in the deduction of 8 years from the sentence he would otherwise have imposed.<sup>456</sup> This consideration follows from a finding of *S v Brophy*,<sup>457</sup> where the court held that as a rule of thumb, time spent in custody while awaiting trial equates to double the time one actually spends in prison.<sup>458</sup> The SCA in the light of this had to address the following questions:<sup>459</sup>

- a. How should the period spent in custody be dealt with in cases where a life sentence is appropriate, and in this case?
- b. How must a court deal with and give credit to the accused for the time spent in custody before conviction and sentence?

In respect of this, the SCA quoted *S v Radebe*,<sup>460</sup> where the court held that there should be no rule of thumb in respect of the calculation of the weight to be given to the time spent in custody while awaiting trial.<sup>461</sup> Lewis JA said that:

‘In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial. A mechanical formula to determine the extent, to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced. A better approach, in my view, is that the period in detention pre-sentencing is but one of the

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<sup>455</sup> Ibid para 8.

<sup>456</sup> Ibid para 10.

<sup>457</sup> *S v Brophy & another* 2007 (2) SACR 56 (W).

<sup>458</sup> *DPP v Gcwala* (n 446) para 10.

<sup>459</sup> Ibid para 14.

<sup>460</sup> *S v Radebe & another* 2013 (2) SACR 165 (SCA).

<sup>461</sup> *DPP v Gcwala* (n 446) para 16.

factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining, whether substantial and compelling circumstances warrant a lesser sentence than that prescribed, the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one'.<sup>462</sup>

Accordingly, the SCA held that the sentencing court in its assessment of the particular circumstances of a case, should consider whether the prescribed sentence is proportionate to the offence committed; taking into account traditional factors as well as the period spent in custody while awaiting trial.<sup>463</sup> Thus, the trial court in this matter, should have determined whether, after a consideration of all the circumstances of the case, including the period spent in custody awaiting trial, a sentence less than that one prescribed was justified.<sup>464</sup> This means that the 4 years spent in custody by each of the respondents while awaiting trial should have been taken into account as a factor warranting a lesser sentence, but the doubling of such a period cannot be justified.<sup>465</sup> Thus, the deduction of 8 years of imprisonment from the number of years that the trial court considered appropriate amounted to a misdirection on the part of the court, warranting interference by the SCA.<sup>466</sup>

The SCA then held that the trial court failed to consider all the factors necessary in determining an appropriate sentence, resulting in the imposition of sentences far too lenient in the circumstances. The above-mentioned aggravating circumstances indicate that the sentences imposed were inappropriate.<sup>467</sup> After noting that the time spent in custody while awaiting trial should only be regarded as a factor, and should not be decisive of the appropriate sentence, the court held that though life imprisonment was inappropriate in the circumstances, a lengthy term of imprisonment, much longer than that one prescribed was warranted. The court further stated that people who kill people for financial gain ought to be

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<sup>462</sup> *S v Radebe* (n 460) paras 13-14.

<sup>463</sup> *DPP v Gcwala* (n 446) para 18.

<sup>464</sup> *Ibid* para 19.

<sup>465</sup> *Ibid*.

<sup>466</sup> *Ibid*.

<sup>467</sup> *Ibid* para 27.

severely punished and consequently, imposed a sentence of 20 years of imprisonment in respect of each of the respondents.<sup>468</sup>

The cases after the decision of *Malgas*<sup>469</sup> and after the 1997 Act, as amended, like the previously discussed cases, consider traditional factors in concluding whether or not “substantial and compelling circumstances” in a particular case exist. In rape cases, though the courts consider the victim’s psychological trauma or the impact of the rape on the victim, they still place great weight on the presence of physical injuries or absence thereof, despite the fact that this is contrary to s 51 (3) (aA) (ii) of the Act. Traditional factors such as the age of the accused as well as the victim, including the accused’s criminal history continue to be an important consideration.

The approach laid down by the leading case of *Malgas*<sup>470</sup> is used as a point of departure and is often quoted by the different judicial officers. The courts also often consider the time already served by the accused in custody while awaiting trial and view this as a mitigating factor and not as the sole criterion for deciding whether “substantial and compelling circumstances” exist. The judicial officers continue to categorise rape and repeatedly imply that life imprisonment is only justifiable in extreme cases of rape (*S v Nkomo*;<sup>471</sup> *S v Bailey*<sup>472</sup>). However, the SCA in *Vilakazi*<sup>473</sup> has clarified this misconception by holding that the imposition of life imprisonment is not reserved for extreme cases of rape.<sup>474</sup> Courts are now also considering the accused’s good prospects of rehabilitation as a mitigating factor in the enquiry relating to “substantial and compelling circumstances” (*S v Nkomo*;<sup>475</sup> *S v Bailey*;<sup>476</sup> *DPP v Thusi*<sup>477</sup>). Though remorse has also been viewed as a mitigating factor, it is said that it can only be regarded as such, where there is evidence of it being genuine.<sup>478</sup> Judicial officers throughout the above-mentioned cases appear to have a tendency of looking at the personal circumstances of the accused when determining whether there are mitigating

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<sup>468</sup> Ibid para 28.

<sup>469</sup> *S v Malgas* (n 9).

<sup>470</sup> Ibid.

<sup>471</sup> *S v Nkomo* (n 414).

<sup>472</sup> *S v Bailey* (n 397).

<sup>473</sup> *S v Vilakazi* (n 158).

<sup>474</sup> Ibid para 30.

<sup>475</sup> *S v Nkomo* (n 414).

<sup>476</sup> *S v Bailey* (n 397).

<sup>477</sup> *DPP v Thusi* (n 382).

<sup>478</sup> *S v Matyiyi* (n 233) para 13.

factors. Regarding this, it was stated in the *Vilakazi* case,<sup>479</sup> that such circumstances are immaterial in the question relating to the period of imprisonment to be imposed, though they are able to assist the court in deciding whether or not the accused is likely to re-offend.<sup>480</sup> The court stated that what had to be evaluated in such an enquiry were the circumstances in which the offence was committed.<sup>481</sup>

The above-mentioned cases have not textually defined what amounts to “substantial and compelling circumstances”, but have rather set out an approach that is to be followed when faced with an enquiry relating to such circumstances. This is also the case under Minnesota Guidelines, but contrary to South Africa, in Minnesota, the presence of “substantial and compelling circumstances” may result in both a lesser and harsher sentence, in that some aggravating circumstances may be substantial and compelling enough to warrant a sentence higher than the prescribed one (upward departure).<sup>482</sup> The Minnesota Guidelines (“the Guidelines”) do not only contain a list of factors that may not be considered in the decision as to whether a departure is justified, but equally, a list of factors indicating when “substantial and compelling circumstances” will be said to exist is provided, though it is not a closed list. The Minnesota Sentencing Guidelines will be discussed below.

### **3.3. MINNESOTA GUIDELINES**

#### **3.3.1. INTRODUCTION**

The Minnesota sentencing guidelines are aimed at establishing a rational and consistent sentencing standard that eradicates any sentencing disparities. Unlike South Africa however, they ensure that the punishment imposed on convicted persons is not only proportional to the severity of the offence, but also to the offender’s criminal history, notwithstanding the fact that South Africa also considers previous convictions in the sentencing process. Persons convicted of similar crimes under similar circumstances receive similar punishment and those convicted under substantially different circumstances receive different punishments.<sup>483</sup>

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<sup>479</sup> *S v Vilakazi* (n 158).

<sup>480</sup> *Ibid* para 58.

<sup>481</sup> *Ibid* para 30.

<sup>482</sup> D Van Zyl Smit (n 162) 272

<sup>483</sup> Minnesota Sentencing Guidelines & Commentary (1 August 2013) 1. <http://mn.gov/sentencing-guidelines>. accessed 17/06/2015.

According to the Guidelines, sentencing should be impartial in the sense that the race, gender, social, or economic status of convicted persons is to be considered irrelevant. Under the Guidelines, the severity of punishment increases with an increase in the severity of the offence and the convicted person's criminal record. Though imprisonment is not the only punishment available to the court, it is the most severe punishment that could be imposed on a criminal and it is usually limited to cases where the offenders are convicted of serious offences and have a long criminal record. Although the Guidelines are only advisory and not mandatory, the sentences established under them are deemed appropriate for the crimes they cover. A departure from the established sentences is possible when "substantial and compelling circumstances" can be identified and articulated.<sup>484</sup>

### **3.3.2. SENTENCES ESTABLISHED UNDER THE GUIDELINES**

The Guidelines establish presumptive sentences, which are those sentences presumed to be appropriate for all similar cases, where the offenders have the same criminal history and have committed crimes of the same severity.<sup>485</sup> The sentences imposed on criminals are presented through a grid system, similar to a crossword puzzle,<sup>486</sup> and they are found in a cell where the offender's criminal record and the severity of the offence they have committed intersect.<sup>487</sup> Regarding offence severity, the level of severity is determined by the crime for which the offender has been convicted of and if the offender has been convicted of more than one offence, the most severe offence for which he has been convicted of will determine the level of severity.<sup>488</sup> Serious offences either than sex offences are arranged vertically on the grid into eleven levels and they range from high to low; level eleven being the most severe and level one being the least severe, though they are all presumed equally serious. Sex offences are arranged in a similar way on a separate sex offender grid.<sup>489</sup>

Regarding the offender's criminal history, it is represented horizontally on the grid and is made up of the offender's prior offences; custody status at the time of the offence; prior

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<sup>484</sup> Ibid 1-2.

<sup>485</sup> Ibid 4.

<sup>486</sup> Terblanche (n 282) 134.

<sup>487</sup> Ibid 7.

<sup>488</sup> Ibid 8.

<sup>489</sup> Ibid.

misdemeanours and gross misdemeanours (misdemeanours being less serious crimes); and prior juvenile adjudications.<sup>490</sup> This means that the offender's criminal history is not only made up of his past convictions, but it also comprises of offences for which the offender has not been convicted of as well as their clashes with the law in general.

The grid displays shaded and unshaded cells. If a case results in a sentence that falls in the cells outside of the shaded areas, it means the sentence is to be carried out. If it has a sentence falling in the cells within the shaded areas; the sentence should be stayed unless the offence for which the offender is convicted of carries a mandatory minimum imprisonment sentence.<sup>491</sup> On each unshaded cell on the grid, there is a fixed imprisonment term that a court is to impose as well as a discretionary sentence range within which a court may choose from in an instance where it does not impose the fixed term. This is not the same for shaded areas of the grid as they do not display such discretionary ranges.<sup>492</sup>

If the duration for an imprisonment sentence is found within the unshaded areas, the court is empowered to impose a sentence that is 15 per cent lower and 20 per cent higher than the fixed duration displayed on the grid and it is able to do this without the sentence being deemed a departure from the fixed term. If the court imposes a sentence lower than the fixed term, such sentence must not be less than one year and one day, and if it imposes a sentence higher than the fixed term, the sentence imposed must not be more than the statutory maximum.<sup>493</sup> It is important to note that premeditated murder (1<sup>st</sup> degree murder) has not been included in the Guidelines as it carries a mandatory life sentence.<sup>494</sup>

### **3.3.3. DEPARTURES FROM THE GUIDELINES**

The sentence ranges provided in the grids (including the sex offences grid) are presumed to be appropriate for the crimes to which they apply and thus, the court is expected to pronounce a sentence within the specified range unless there exist identifiable "substantial and compelling circumstances" warranting a sentence outside the appropriate range on the

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<sup>490</sup> Ibid 10.

<sup>491</sup> Ibid 34.

<sup>492</sup> Ibid.

<sup>493</sup> Ibid.

<sup>494</sup> Ibid 50.

applicable grid.<sup>495</sup> Where such circumstances exist, the court may depart from the presumptive sentence and impose a sentence that it deems to be more appropriate. A sentence for a conviction that is outside the appropriate range on the grid is a departure from the Guidelines and is thus not controlled by the Guidelines, but rather, is an exercise of judicial discretion constrained by either statute or case law.<sup>496</sup>

Like in South Africa, the court is expected to disclose in writing or on the record the particular “substantial and compelling circumstances” that make the departure more appropriate than the prescribed sentences.<sup>497</sup> However, unlike South Africa, the Guidelines have set out departure factors which the courts are to consider when departing from the presumptive sentences. In addition, those factors that are not to be considered in the enquiry concerning the presence of “substantial and compelling circumstances” have also been set out in the same manner South Africa has set out factors that do not amount to “substantial and compelling circumstances” in a case of rape. The factors that can be considered are however only advisory unless otherwise established by case law.<sup>498</sup>

According to the Guidelines, the following factors should not be used as reasons for departing from the presumptive sentences provided in the appropriate cell on the applicable grid:<sup>499</sup>

- a. Race
- b. Gender
- c. Employment factors, which include occupation or the impact of the sentence on their profession or occupation; their employment history; their employment at the time of the commission of the offence; and their employment at the time of sentencing.
- d. Social factors, which include their educational attainment; their living arrangements at the time of the commission of the offence or sentencing; their length of residence (how long they have resided in one area); and their marital status.
- e. The offender’s exercise of constitutional rights during the adjudication process.

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<sup>495</sup> Ibid 39.

<sup>496</sup> Ibid.

<sup>497</sup> Ibid.

<sup>498</sup> Ibid 40.

<sup>499</sup> Ibid 41-42.

The Guidelines in addition to this have set out factors that have to be considered in the enquiry relating to whether or not “substantial and compelling circumstances exist”. The factors have been divided into mitigating factors, for when the court departs and imposes a lesser sentence (downward departure) and aggravating factors, for when the court departs and imposes a higher sentence (upward departure). This is however not a closed list as new factors may be established through case law. Accordingly, the mitigating factors will be found where;<sup>500</sup>

- a. The victim was an aggressor in the incident.
- b. The offender played a minor or passive role in the crime or participated under circumstances of coercion or duress.
- c. The offender, because of some physical or mental impairment, lacked substantial capacity for judgment when the offence was committed. This factor however does not include the voluntary use of intoxicants such as drugs or alcohol.
- d. The offender’s presumptive sentence is an imprisonment term, but not a mandatory minimum sentence, and either of the following exist:
  - i. The offence the offender is convicted of falls at Severity Level 1 or 2 and the offender received all of his or her prior convictions at two separate court appearances; or
  - ii. The current offence for which the offender is convicted of is at Severity Level 3 or 4 and the offender received all of his or her prior convictions at one court appearance.
- e. Other substantial grounds exist that tend to excuse or mitigate the offender’s culpability, although not amounting to a defence.
- f. The court is ordering an alternative placement as the offender has a serious and persistent mental illness.

On the other hand, aggravating factors will be found where;<sup>501</sup>

- a. The victim was particularly vulnerable due to age, infirmity, or reduced physical or mental capacity, and the offender knew or should have known of this vulnerability.
- b. The victim was treated with particular cruelty for which the individual offender should be held responsible.
- c. The offender is convicted for a sexual offence, or an offence in which the victim was otherwise injured, and in the circumstances, the offender has a prior conviction for a sexual offence or an offence in which the victim was otherwise injured.

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<sup>500</sup> Ibid 43.

<sup>501</sup> Ibid 44-46.

- d. The offender committed the crime against another person and was paid a fee for its commission.
- e. The offender is being sentenced as a “dangerous offender”.
- f. The offender is being sentenced as a “career offender”.
- g. The offender committed the crime as part of a group of three or more offenders who all actively participated in the crime. (Common purpose).
- h. The offender intentionally selected the victim because of the victim’s actual or perceived race, religion, sex, sexual orientation, disability, age, or national origin.
- i. The offence was committed in the presence of a child.
- j. The offence was committed in a location in which the victim had an expectation of safety and privacy.

Van Zyl Smit has expressed the view that a noteworthy feature of the above circumstances is that they all focus on features which relate to the gravity of the offence itself, and the blameworthiness of the offender in respect of that offence; mimicking what was once known as “extenuating circumstances” in South Africa when courts were confronted with mandatory sentences for murder in the past.<sup>502</sup> He submits that in this regard, South African courts proved adept at developing criteria for identifying mitigating circumstances by including all those circumstances that diminished the moral blameworthiness of the offender’s conduct. He further submits that though the application of this test was controversial, it greatly widened the discretion of the courts whilst still structuring the decision-making process. He further stated that the current legislation demands a similar judicial initiative in determining what circumstances are relevant to deciding whether “substantial and compelling circumstances” exist. He submits that if this is done “rigorously and systematically” it could go a long way towards balancing the clear legislative desire to encourage the courts to impose heavier sentences on the grounds of deterrence or incapacitation, with the avoidance of sentences that are grossly disproportionate to the specific crimes committed.<sup>503</sup> The concept of “extenuating circumstances” will be discussed below.

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<sup>502</sup> D Van Zyl Smit (n 162) 272.

<sup>503</sup> Ibid 275-276.

### **3.4. EXTENUATING CIRCUMSTANCES**

#### **3.4.1. INTRODUCTION**

Section 277 (2) of the Criminal Procedure Act (“CPA”)<sup>504</sup> read as follows:

‘Where a woman is convicted of the murder of her newly-born child or where a person under the age of eighteen years is convicted of murder or where the court, on convicting a person of murder, is of the opinion that there are ‘extenuating circumstances’, the court may impose any sentence other than the death sentence.’

Like in the case with “substantial and compelling circumstances”, the legislature did not provide a definition of “extenuating circumstances”. This means that there was no guidance as to what factors should be taken into account in an enquiry relating to extenuating circumstances and further there was no guidance as to whether the factors taken into account should relate to the accused’s state of mind or their degree of participation in the commission of the crime.<sup>505</sup> Owing to this, the concept was susceptible to various interpretations, like in the case with “substantial and compelling circumstances”, and the approach adopted in its interpretation was established through case law.<sup>506</sup>

#### **3.4.2. INTERPRETATION OF EXTENUATING CIRCUMSTANCES**

The first expressed interpretation of “extenuating circumstances” was provided in the 1935 decision of *R v Mfoni*,<sup>507</sup> where it was held that “only such circumstances as are connected with or have a relation to the conduct of the accused in the commission of the crime should have any weight at all” (should be considered).<sup>508</sup> A couple of years later, the case of *R v Biyana*<sup>509</sup> defined extenuating circumstances as any “fact associated with the crime which serves in the minds of reasonable men to diminish, morally albeit not legally, the degree of

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<sup>504</sup> Criminal Procedure Act (n 26).

<sup>505</sup> R J Mbali *Extenuating Circumstances in Murder* (Unpublished LLM thesis, University of Zululand, (1989)) 10.

<sup>506</sup> G Devenish “The application of the death penalty in South Africa: Its historical and jurisprudential evolution and background and its relationship with constitutional and political reform” (1992) 5 *South African Journal of Criminal Justice* 1-31 at 8.

<sup>507</sup> *R v Mfoni* 1935 OPD 191.

<sup>508</sup> *Ibid.*

<sup>509</sup> *R v Biyana* 1938 EDL 310.

the prisoner's guilt".<sup>510</sup> In support of the above, the case of *R v Fundakubi*<sup>511</sup> held that "No factor not too remote or too faintly or indirectly related to the commission of the crime, which bears on the accused's moral blameworthiness in committing it, can be ruled out from consideration".<sup>512</sup>

The interpretation of extenuating circumstances as set out in *S v Letsolo*<sup>513</sup> was however the supported one. Though it did not textually define the concept, it set out the nature of factors that were to be taken into account during the enquiry into the existence of extenuating circumstances. The interpretation as laid out by the above-mentioned case did not put a limit on the type or nature of factors that were to be considered in the enquiry and accordingly, it was accepted as being correct by numerous cases that followed it.<sup>514</sup> The onus to prove the existence of extenuating circumstances rested on the accused, however, like in the case with "substantial and compelling circumstances", the accused was not expected to lead evidence during the trial or the sentencing stage, as the court was able to draw inferences from the evidence led by the state and the accused during the trial.<sup>515</sup>

The *Letsolo* case,<sup>516</sup> introduced a 3-step approach that was to be followed in the enquiry as to whether extenuating circumstances existed in a particular case.<sup>517</sup> The first step dealt with an enquiry into whether or not there were facts, factors or circumstances which could have influenced the state of mind of the accused.<sup>518</sup> This was a factual question as the courts were merely required to scrutinise the evidence as a whole and then conclude whether such factors existed. Where the accused was a youthful offender, or where there was evidence that the accused was intoxicated, provoked, acting in self-defence or acting under compulsion or duress, the court was likely to find that such factors existed and had a bearing on the accused's state of mind. It was not possible however, to put a limit to the nature of factors or circumstances that could affect the accused's state of mind as different cases could present different circumstances. If a court did not find any fact, factor or circumstances which could have influenced the mental ability or the state of mind of the accused during the commission

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<sup>510</sup> Ibid.

<sup>511</sup> *R v Fundakubi* 1948 (3) SA 810 (AD).

<sup>512</sup> Ibid.

<sup>513</sup> *S v Letsolo* 1970 (3) SA 476 (A).

<sup>514</sup> R J Mbali (n 505) 15.

<sup>515</sup> *R v Lembete* 1947 (2) SA 603 (A).

<sup>516</sup> *S v Letsolo* (n 513).

<sup>517</sup> Ibid.

<sup>518</sup> Ibid.

of the murder, the court could not be said to have found extenuating circumstances. Consequently, the imposition of the mandatory death sentence followed as the court did not have the discretion to impose any other sentence.<sup>519</sup>

The second step dealt with an enquiry relating to whether or not the facts, factors or circumstances which were present during the commission of the murder, considered cumulatively did in fact influence the accused's conduct.<sup>520</sup> This was once again a factual question and the court was to be satisfied on a balance of probabilities that the said facts, factors or circumstances did influence the accused. If they did not influence the accused, the court will not proceed to the next step but will conclude that it did not find extenuating circumstances.<sup>521</sup>

The third stage of the enquiry relating to the existence of extenuating circumstances involved a value judgment by the court. The court was required to judge whether in its opinion, the influence on the mental ability or state of mind of the accused was of such a nature that the accused's conduct could be regarded as less morally reprehensible. It was during this third step of the enquiry that the question of moral blameworthiness came into play.<sup>522</sup> Thus, according to *Letsolo*,<sup>523</sup> before imposing the sentence of death, the court was required to ask three questions, namely; whether there were relevant mitigating facts, such as immaturity, drunkenness or provocation; whether such facts, considered cumulatively, had an influence on the accused's conduct and lastly whether the facts were sufficient enough to reduce the moral blameworthiness of the accused.<sup>524</sup> The above court further pointed out that the discretion of the court in such an enquiry was expected to be exercised in a judicial manner, taking into account all relevant facts, which were inclusive of the personal circumstances of the accused, particularly their criminal record.<sup>525</sup>

A number of factors continued to emerge through case law. For instance, the criminal law requirement of intention for the crime of murder that presents itself in the form of *dolus*

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<sup>519</sup> R J Mbali (n 505) 18.

<sup>520</sup> *S v Letsolo* (n 513).

<sup>521</sup> R J Mbali (n 505) 18.

<sup>522</sup> *S v Letsolo* (n 513).

<sup>523</sup> *Ibid.*

<sup>524</sup> SS Terblanche 'Sentencing Murder and the Ideal of Equality' (2011) XLIV CILSA 97.

<sup>525</sup> *Ibid.*

*eventualis* was accepted as an extenuating circumstance.<sup>526</sup> The reason for this was because this form of intention amounts to an indirect one, which is based, not on the desire to kill, but on an intention which amounts to exposing the deceased to harm and then being reckless as to whether death ensues or not.<sup>527</sup>

In 1990, the concept of extenuating circumstances was abolished by passing of the Criminal Procedure Amendment Act of 1990 (“the Amendment Act”), as it substituted a discretionary death sentence in all cases.<sup>528</sup> The legislation was applicable to all pending appeals and required that the death sentence be imposed only after a full consideration of both mitigating and aggravating factors. It also provided for the review of cases where the appeals were exhausted and the death sentence was confirmed.<sup>529</sup> In *S v Nkwanyana*,<sup>530</sup> the Appellate Division found that mitigating factors included a broader range of factors than those required in the consideration of extenuating circumstances as the concept included more than just those factors connected to the commission of the crime. The Court also concluded by stating that the prosecution had the burden of showing aggravating factors and the absence of mitigating factors thereof beyond a reasonable doubt.<sup>531</sup>

### **3.4.3. FACTORS CONSIDERED AFTER THE 1990 AMENDMENT ACT**

Du Toit et al states that although the imposition of the death penalty continued even after the 1990 Amendment Act, courts were no longer required to establish whether or not there were extenuating circumstances but rather whether there were mitigating or aggravating factors.<sup>532</sup> Offenders who would have ordinarily attracted the death penalty in the absence of extenuating circumstances could be sentenced to lesser sentences such as life imprisonment

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<sup>526</sup> *S v Mazibuko* 1988 3 SA 190 (A) 199–200; *S v Sethoga* 1990 1 SA 270 (A); *S v Rapitsi* 1987 (4) SA 351 (A) 358–359; MM Loubser & MA Rabie ‘Defining *dolus eventualis*: a voluntative element?’(1988) 3 SACJ 415-436 at 432.

<sup>527</sup> *S v Ngubane* 1985 3 SA 677 (A) 685: “The distinguishing feature of *dolus eventualis* is the volitional component: the agent (the perpetrator) “consents” to the consequence foreseen as a possibility, he “reconciles himself” to it, he “takes it into the bargain”.... Our cases often speak of the agent being “reckless” of that consequence, but in this context it means consenting, reconciling or taking into the bargain ... and not the “recklessness” of the Anglo-American systems nor an aggravated degree of negligence.”

<sup>528</sup> A Novak ‘Capital Sentencing Discretion in Southern Africa: A Human Rights Perspective on the Doctrine of Extenuating Circumstances in Death Penalty Cases’ (2014) 1 AHRLJ 24-42.

<sup>529</sup> Ibid.

<sup>530</sup> *S v Nkwanyana* 1990 (4) SA 735 (AD).

<sup>531</sup> Ibid.

<sup>532</sup> E Du Toit et al, *Commentary on the Criminal Procedure Act* (1993) 277.

because the “term mitigating factor, had a wider interpretation than an extenuating circumstance and included factors that were not related to the crime, such as the accused’s behaviour after the commission of the crime or the accused’s clean criminal record.”<sup>533</sup> In other words, after the 1990 Amendment Act and prior to the abolishment of the death penalty, the sentence of death for murder became discretionary and could only be imposed when it was “the only appropriate sentence”.<sup>534</sup> Joubert argued that “life imprisonment was considered to be a valuable alternative to the death sentence and was imposed in cases of extreme seriousness, but this was the case when the death penalty was not considered to be the only appropriate sentence.”<sup>535</sup>

Life imprisonment was imposed instead of the death penalty in those “cases of extreme seriousness”, where the courts thought that it would serve the same purpose as the death penalty and permanently remove the accused from society;<sup>536</sup> where the offender was young and immature;<sup>537</sup> where they had no previous criminal record and had committed the murder while intoxicated;<sup>538</sup> and where there was a “reasonable prospect” of their rehabilitation.<sup>539</sup> Courts also imposed life imprisonment where the offender was unlikely to re-offend because the circumstances that led to him committing the murder were unlikely to re-occur;<sup>540</sup> where the offender had no previous record for “serious” convictions and where it was a case of rape in which none of his victims suffered severe or prolonged psychological effects.<sup>541</sup> Courts also considered the fact that the interests of justice demanded the imposition of a life sentence instead of the death penalty, where the prisoner’s detention would enable the prison

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<sup>533</sup> Ibid.

<sup>534</sup> Ibid.

<sup>535</sup> JJ Joubert (ed) *Criminal Procedure Handbook* 8<sup>th</sup> ed (2007) 290-291.

<sup>536</sup> Ibid.

<sup>537</sup> *S v Cotton* 1992(1) SACR 531 (A).

<sup>538</sup> Ibid.

<sup>539</sup> Ibid.

<sup>540</sup> *S v Cele* 1991(1) SACR 627(A) where the appellant, a 40-year-old man, had paid two young men to murder his former employee who had caused trouble for his business which led him to lose his customers.

<sup>541</sup> *S v D* 1991(2) SACR 543 (A), where the accused was found guilty of various crimes, including six counts of rape (in which some of his victims contracted sexually transmitted diseases), one count of attempted rape and one count of indecent assault. See also *S v P* 1991 (1) SA 517 (A) where the court set aside the death penalty that had been imposed on the appellant and substituted it with life imprisonment on, amongst other grounds, that the women the appellant had raped were not virgins, they had not experienced serious psychological problems as a result of rapes, and that the appellant could be rehabilitated during his long term of imprisonment. In *S v W* 1993 (2) SACR 74 (A) the Court substituted the appellant’s death sentence into life imprisonment on amongst other grounds that the victim of his rape had suffered no serious physical injuries.

authorities to treat him for his mental condition,<sup>542</sup> and where the murder had not been accompanied by cruel and humiliating acts.<sup>543</sup>

The circumstances under which the crime of murder was committed and the accused's level of participation in the crime were also important factors in determining whether the accused should be sentenced to life imprisonment or death. Consequently, where the circumstances proved to be less cruel and where the accused had not directly participated in the murder, they would be sentenced to life imprisonment.<sup>544</sup> Also, the court would sentence an elderly accused to life imprisonment regardless of the fact that they were found guilty of murder with no extenuating circumstances and this was because it found that society did not expect an old person to be sentenced to death.<sup>545</sup> The fact that a dangerous offender may be released on parole if sentenced to life imprisonment was said not to be sufficient reason to justify the imposition of the death penalty.<sup>546</sup> In cases of rape, on the other hand, an accused was more likely to be sentenced to life imprisonment instead of death if the victim appeared to not have sustained serious physical or psychological injuries as a result of the rape.<sup>547</sup> It is important to note that in most cases where the accused was sentenced to life imprisonment instead of death, the youthfulness of the accused was highlighted.

The above-mentioned cases indicate that the cumulative effect of the factors considered was important and a sole factor, for example, the youthfulness of the offender was normally not sufficient for the court to depart from the imposition of the death penalty. Courts had to consider other factors such as the prospect of rehabilitation; whether the accused had previous criminal convictions; and the nature of the crime.<sup>548</sup> This is the same as in a case where "substantial and compelling circumstances" have to exist for the court to impose a sentence lesser than life imprisonment.<sup>549</sup>

In 1995, the Constitutional Court in the *Makwanyane* case,<sup>550</sup> declared the death penalty unconstitutional and ordered, amongst other things, that all death sentences be "set aside in

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<sup>542</sup> *S v Lawrence* 1991(2) SACR 57 (A).

<sup>543</sup> *S v Mdau* 1991 (1) SA 169 (A).

<sup>544</sup> *S v Mthembu* 1991 (2) SACR 144 (A).

<sup>545</sup> *S v Munyai and others* 1993 (1) SACR 252 (A).

<sup>546</sup> *S v Oosthuizen* 1991 (2) SACR 298 (A).

<sup>547</sup> JD Mujuzi (n 24) 15.

<sup>548</sup> *Ibid* 14.

<sup>549</sup> *S v Malgas* (n 9).

<sup>550</sup> *S v Makwanyane* (n 19).

accordance with the law, and substituted by appropriate and lawful punishments".<sup>551</sup> Accordingly, the Minister of Justice was obliged to refer cases of those prisoners who had been sentenced to death and had in respect of that sentence exhausted all the recognised legal procedures pertaining to appeal or review, to the court in which the sentence of death was imposed. The court was then required to consider the case for purposes of converting the sentence to a lesser one, but before converting the sentence and based on the evidence and arguments provided in the case, the court was to "advise the President, with full reasons of the need to set aside the sentence of death, of the appropriate sentence to be substituted in its place and if, applicable, of the date to which the sentence shall be antedated".<sup>552</sup> The President was then required to set aside the sentence of death and substitute it with the punishment advised by the court.<sup>553</sup> In converting the sentences, the court looked at numerous factors and these factors are discussed below.

#### **3.4.4. FACTORS CONSIDERED IN CONVERTING THE DEATH PENALTY**

When the courts were converting the death sentence, they reviewed the facts of the case, that is, the nature of the offence committed by the accused, the personal circumstances of the accused, for instance, whether he was capable of rehabilitation or not. This also included a consideration of any aggravating and mitigating factors, and when the aggravating factors outweighed the mitigating factors, the death penalty was converted to life imprisonment.<sup>554</sup> In cases where the courts imposed a lesser sentence than life imprisonment however, the courts concluded that the mitigating factors outweighed the aggravating factors. For instance, in the case of *S v Musingadi and others*,<sup>555</sup> the court held that the death sentence had to be converted to 16 years imprisonment, because the appellant was relatively young (31 years old); he was a first offender; he had a wife and a child whom he supported; his level of education was low (Standard 5); and he had not played a leading role in the murder and robbery.<sup>556</sup> In *S v Nogqala*<sup>557</sup> however, the court held that though the accused was also

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<sup>551</sup> Ibid para 150.

<sup>552</sup> The Act (n 1) s 1 and s 1 (3) (b).

<sup>553</sup> Ibid s 1(4).

<sup>554</sup> *S v Khaba* 1999 JOL 5758 (A); *S v Kruger and another* 1999 JOL 5341 (A); *S v Mafumo and another* 1999 JOL 5342 (A); *S v Mashego* 1999 JOL 5525 (A); *S v Motshwedi* 1999 JOL 5511 (A); *S v Ndungweni and another* 2001 JOL 7324 (A); *S v Ngcobo* 1999 JOL 5731(A); *S v Rasmeni* 1999 JOL 5510 (A); *S v Shabalala and another* 2000 JOL 7270 (A); *S v Smith* 1999 JOL 5730 (A).

<sup>555</sup> *S v Musingadi and others* 2004 (4) SA 274 (SCA).

<sup>556</sup> Ibid para 52.

<sup>557</sup> *S v Nogqala* 1999 JOL 5527(A).

relatively young (30 years old); was a first offender; came from an impoverished background; and had good prospects of rehabilitation, his death sentence still had to be converted to life imprisonment because of the cruel nature of the murder he had committed. The court held that the murder of an elderly man in the most brutal of circumstances amounted to a “heinous murder” and retribution and deterrence as the objectives of punishment outweighed the good prospects of rehabilitation.<sup>558</sup>

In some cases the court put greater weight on the character of the accused. For instance, in *S v Boy and another*,<sup>559</sup> the sentence of death was converted to life imprisonment because the court was of the opinion that the appellants were irretrievably beyond any possibility of rehabilitation.<sup>560</sup> In another case, the court justified the imposition of life imprisonment on the ground that the appellant’s removal from society should be permanent and that life imprisonment was the only fitting sentence.<sup>561</sup> The courts also continued to take into account the accused’s previous convictions.<sup>562</sup>

### 3.5. CONCLUSION

The inference one draws from the above jurisprudence is that where a court is faced with an issue of whether or not certain circumstances exist in order to justify a lesser sentence, it weighs the mitigating factors against the aggravating factors or vice versa. In a case where the former outweighs the latter, it is very likely that the court will impose a lesser sentence. It is also important to note that in an attempt to establish whether “substantial and compelling circumstances” exist, courts look at the personal circumstances of the accused and the circumstances under which the crime was committed. In cases of rape, courts have often considered the impact the rape had on the victim. If the effect was less serious or if the rape did not fall into the worst category of rape, some courts have opted for a lesser sentence than that one of life imprisonment.

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<sup>558</sup> Ibid.

<sup>559</sup> *S v Boy and another* 1999 JOL 5392(A).

<sup>560</sup> Ibid.

<sup>561</sup> *S v December* 1999 JOL 5508(A).

<sup>562</sup> *S v Mokoena* 1999 JOL 5396(A).

## **CHAPTER 4**

### **4. TRADITIONAL CONSIDERATIONS AND NEW DEVELOPMENTS IN THE SENTENCING PROCESS**

#### **4.1. INTRODUCTION**

In this chapter, the writer will discuss the traditional factors usually taken into account in the imposition of an appropriate sentence or in the making of a decision relating to whether or not a departure from the prescribed sentences is warranted. In doing so, the writer also intends to look at the basic considerations (the crime, the offender and the interests of society) in imposing a sentence as laid out in the cases of *Zinn*<sup>563</sup> and *Malgas*.<sup>564</sup> The writer will further look at restorative justice and victim impact statements as new developments considered in the sentencing enquiry.

#### **4.2. TRADITIONAL FACTORS (AGGRAVATING AND MITIGATING FACTORS)**

##### **4.2.1. BASIC ELEMENTS IN IMPOSING A SENTENCE**

In the case of *Zinn*,<sup>565</sup> Justice Rumpff stated that “what has to be considered in sentencing is the triad consisting of the crime, the offender and the interests of society.”<sup>566</sup> This was largely endorsed in the case of *Malgas*,<sup>567</sup> where it was said that when deciding whether or not to depart from the prescribed sentences, the sentencing court on consideration of the circumstances of the particular case, must be satisfied that the prescribed sentence is unjust in that it is disproportionate to the crime, the criminal and the needs of society, thus resulting in an injustice which can only be averted by the imposition of a lesser sentence.<sup>568</sup> Thus in imposing a sentence, the judicial officer has to consider the gravity or seriousness of the offence, the personal circumstances of the offender as well as the interests of society,

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<sup>563</sup> *S v Zinn* (n 12).

<sup>564</sup> *S v Malgas* (n 9).

<sup>565</sup> *S v Zinn* (n 12).

<sup>566</sup> Ibid 540G-H.

<sup>567</sup> *S v Malgas* (n 9).

<sup>568</sup> Ibid para 25.

specifically the protection of the community. In recent years and in rape cases however, a more victim-centred approach has emerged in sentencing, placing additional focus not only on the crime, the offender and the interests of society, but also on the impact of the crime on the victim.<sup>569</sup> This means that the physical as well as the psychological effects of the incident on the victim have also become a vital consideration in the imposition of an appropriate sentence.<sup>570</sup> Sentencing involves an evaluation of the above-mentioned considerations and a process of weighing up each against the other, without over-emphasising one at the expense of the other.<sup>571</sup>

It is submitted that the above suggests that the factors traditionally taken into account when sentencing should be divided into four categories, particularly factors relating to the circumstances surrounding the commission of the crime; factors relating to the personal circumstances of the offender; factors having a bearing on society's interests and factors pertaining to the harmful effects of the crime on the victim.<sup>572</sup> These factors may have an aggravating or mitigating effect.<sup>573</sup> Aggravating and mitigating factors influence the extent to which the offender should be blamed and punished for their unlawful conduct.<sup>574</sup> A mitigating factor reduces the severity of the sentence while an aggravating factor increases the severity of the sentence.<sup>575</sup> It has been acknowledged however that though many factors may be listed as aggravating or mitigating, some only have a neutral effect and do not really influence the sentencing process.<sup>576</sup> Factors which either aggravate or mitigate the sentence can be divided into those relating to the crime, the offender and the interests of society.

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<sup>569</sup> A Van der Merwe (n 289) 15 & 20.

<sup>570</sup> Ibid.

<sup>571</sup> CGH Hlatshwayo *Sentencing of Youth Offenders For Housebreaking with Intent to Steal: Practises and Attitudes of Magistrates and Prosecutors* (Unpublished LLM Thesis, University of Cape Town, 2002) 16.

<sup>572</sup> Ibid 303-304.

<sup>573</sup> J Jacobson & M Hough 'Mitigation: The role of personal factors in sentencing' *Prison Reform Trust* (2007) 9.

<sup>574</sup> A Van der Merwe (n 289) 301.

<sup>575</sup> Ibid.

<sup>576</sup> *S v Matyityi* (n 233); J Jacobson & M Hough (n 573) pg 10; *S v E* 1992 (2) SACR 625 (A).

#### **4.2.2. AGGRAVATING AND MITIGATING FACTORS RELATING TO THE OFFENCE**

The crime is an important element of sentencing and has a great influence on the nature and extent of the sentence imposed.<sup>577</sup> When dealing with the crime, the main focus is on the seriousness of the offence committed by the offender, as the sentence imposed thereof must reflect the seriousness of the crime.<sup>578</sup> In considering the seriousness of any offence, the court must consider the offender's culpability in committing the offence and the effects caused or foreseeably caused by the offence (harm).<sup>579</sup> This is owing to the fact that the seriousness of the offence is reflected through the extent to which the offender could be held accountable for the harm arising out of the criminal act.<sup>580</sup> Harm is construed as contributing to the seriousness of the offence as well as a finding of a higher degree of culpability on the offender's part.<sup>581</sup> When considering the crime component, courts are to consider in each individual case, the offender's particular crime and its seriousness and are precluded from making a generalised assessment of the severity of a specific crime.<sup>582</sup> Further, according to Holmes JA in the case of *Rabie*,<sup>583</sup> the courts are to guard against allowing the heinousness of the crime to cloud their judgment as a balancing of all relevant factors is essential.<sup>584</sup>

##### **a. AGGRAVATING FACTORS**

Almost every crime has its own inherent set of factors which aggravate it and result in the imposition of a more severe sentence. Though this is not a closed list, these factors include:

- a. The degree and extent of violence used.<sup>585</sup>
- b. The type of weapon used.<sup>586</sup>
- c. The brutality and cruelty of the attack on the victim.<sup>587</sup>

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<sup>577</sup> Terblanche (n 282) 148.

<sup>578</sup> Ibid 149.

<sup>579</sup> J Jacobson & M Hough (n 573) 5.

<sup>580</sup> Terblanche (n 282) 150.

<sup>581</sup> A Van der Merwe (n 289) 387.

<sup>582</sup> *S v De Kock* 1992 (2) SACR 171 (T) 192*i*.

<sup>583</sup> *S v Rabie* 1975 (4) SA 855 (A).

<sup>584</sup> Ibid 863 A-B.

<sup>585</sup> *S v B* 1994 (2) SACR 237 (E) 251*h-i*.

<sup>586</sup> Ibid.

<sup>587</sup> *S v Qamata* 1997 (1) SACR 479 (E) 481*h*.

- d. The nature and character of the victim; whether they were unarmed or rendered helpless.<sup>588</sup>
- e. The presence of a direct intention to commit the crime.<sup>589</sup>
- f. The fact that the crime was pre-meditated or planned.<sup>590</sup>
- g. In a case of rape, where the victim was raped by more than one person acting in the furtherance of a common purpose.<sup>591</sup>
- h. In a case of rape, where the victim was raped more than once, whether by the accused, a co-perpetrator or an accomplice.<sup>592</sup>
- i. The presence of physical injuries which cause permanent damage.<sup>593</sup>
- j. In a case of murder, the crime will fall within the purview of S51 of the Criminal Law Amendment Act 105 of 1997 and consequently carry a heavy sentence of life imprisonment, where the death of the victim was caused by the accused while committing or attempting to commit either rape or robbery with aggravating circumstances.<sup>594</sup>
- k. Where the offence was committed in the furtherance of a common purpose.<sup>595</sup>
- l. In a case of rape, where the rape involved the infliction of grievous bodily harm.<sup>596</sup>
- m. In a case of rape, where the offender rapes, knowing that they have HIV/AIDS.<sup>597</sup>

## **b. MITIGATING FACTORS**

Similar to the above, a wide variety of factors may mitigate the crime and result in the imposition of a lesser sentence. Though this is not a closed list, these factors include:

- a. The fact that the crime was incomplete and only amounted to an attempt.<sup>598</sup>
- b. The fact that the offender played a limited role in the commission of the crime.<sup>599</sup>

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<sup>588</sup> *S v Mnguni* 1994 (1) SACR 579 (A) 583e.

<sup>589</sup> *DPP v Thusi* (n 382).

<sup>590</sup> *S v Makwanyane* (n 19) 161c-e.

<sup>591</sup> Part I of Schedule II of the Act.

<sup>592</sup> *Ibid.*

<sup>593</sup> *S v Matyiyi* (n 233).

<sup>594</sup> Part I of Schedule II (n 591).

<sup>595</sup> *Ibid.*

<sup>596</sup> *Ibid.*

<sup>597</sup> *Ibid.*

<sup>598</sup> *Terblanche* (n 282) 193.

<sup>599</sup> *S v Sinama* 1998 (1) SACR 255 (SCA) 259c-d.

- c. The fact that the crime was committed as a result of inducement or the offender was acting under duress when they committed the crime.<sup>600</sup>
- d. In a case of rape, the fact that the rape does not fall within the worst category of rape.<sup>601</sup>
- e. The fact that the physical injuries, emotional harm, loss or damage caused by the offence was minimal.<sup>602</sup>
- f. The fact that there was an absence of cruelty and violence.<sup>603</sup>
- g. The fact that there was no use of a dangerous weapon or threats.<sup>604</sup>
- h. The fact that the crime was committed not with direct intent, but with *dolus eventualis*.<sup>605</sup>
- i. The fact that the crime was not planned or organised.<sup>606</sup>
- j. The fact that the offender attempted to prevent, remedy or limit the harmful consequences of the crime.<sup>607</sup>

#### **4.2.3. AGGRAVATING AND MITIGATING FACTORS RELATING TO THE OFFENDER**

The second leg of the triad, which relates to the offender, considers their personal circumstances, in line with what is known as the concept of individualisation. This is because the sentence imposed needs to fit the offender.<sup>608</sup> Many factors are involved when the offender is considered, including age, marital status, the presence of dependants, level of education, employment and health. This leg of the sentencing enquiry focuses on the character of the offender.<sup>609</sup> The character of the offender is however difficult to ascertain and consequently, the personal circumstances of the offender, like those circumstances relating to the crime assist in determining the offender's blameworthiness as they serve to either lessen or increase the blame that can be attributed to the offender.<sup>610</sup> The offender's

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<sup>600</sup> Ibid.

<sup>601</sup> *S v Nkomo* (n 414).

<sup>602</sup> *S v G* (n 318).

<sup>603</sup> *S v Dithotze* (n 306).

<sup>604</sup> Ibid.

<sup>605</sup> *DPP v Thusi* (n 382).

<sup>606</sup> J Jacobson & M Hough (n 573) 75.

<sup>607</sup> Ibid 77.

<sup>608</sup> Terblanche (n 282) 150.

<sup>609</sup> Ibid.

<sup>610</sup> Ibid.

blameworthiness is thus used as a measure for determining the appropriate sentence and the more blameworthy or accountable the offender, the more severe their sentence may be.<sup>611</sup>

Regarding the influence of the offender's personal circumstances on the sentence, Rumpff CJ in the case of *Du Toit*<sup>612</sup> stated that:

'when considering the other legs of the triad, particularly the nature of the crime and the interests of society, the accused is somewhat in the background, but when considering factors pertaining to the accused, a full investigation of his whole person with all its facets should be undertaken. His age, gender, background, mental state, motive and other relevant factors have to be investigated, despite the seriousness of the crime. This is because the offender should not be regarded with vengeance, but with humanity, which requires the investigation of mitigating factors in order to give rise to an appropriate sentence'.<sup>613</sup>

Rumpff CJ in the case of *Holder*<sup>614</sup> went on to say that though society may expect heavy sentences to be imposed for serious crimes, it also expects courts to make a thorough assessment of the mitigating circumstances applicable and the offender's particular position.<sup>615</sup> Judicial officers have often looked at the personal circumstances of the accused when determining whether there exist mitigating factors, however, in the case of *Vilakazi*<sup>616</sup> it was held that such circumstances are immaterial in the question relating to the period of imprisonment to be imposed and they only assist the court as far as the question of whether or not the accused is likely to re-offend is concerned.<sup>617</sup>

### (a) AGGRAVATING FACTORS

The cumulative effect of these factors relating to the offender result in an increased sentence. Though this is not a closed list, factors falling under this category include:

- a. The fact that the accused is a career offender.<sup>618</sup>
- b. The fact that they have previous convictions.<sup>619</sup>

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<sup>611</sup> Ibid.

<sup>612</sup> *S v Du Toit* 1979 (3) SA 846 (A).

<sup>613</sup> Ibid 857 H- 858B.

<sup>614</sup> *S v Holder* 1979 (2) SA 70 (A).

<sup>615</sup> Ibid 81B.

<sup>616</sup> *S v Vilakazi* (n 158).

<sup>617</sup> Ibid para 58.

<sup>618</sup> *S v Mhlakaza* 1997 (1) SACR 575 (SCA) 518a.

<sup>619</sup> *S v Scheepers* 2006 (1) SACR 72 (SCA) para 11.

- c. The fact that they abused their physical strength.<sup>620</sup>
- d. The fact that they abused their position of trust (for instance, they were a teacher or policeman).<sup>621</sup>
- e. The fact that they lacked remorse.<sup>622</sup>
- f. The fact that they were motivated by greed or some other morally unacceptable motive.<sup>623</sup>
- g. The fact that the accused had knowledge of their HIV/AIDS status or some other life threatening disease that could be possibly transmitted to the victim.<sup>624</sup>
- h. The fact that the accused exploited their position of power to the full, especially in cases of rape.<sup>625</sup>
- i. The fact that they are awaiting trial for a similar offence.<sup>626</sup>
- j. The fact that they were the leader of a gang and were aware of what they were doing.<sup>627</sup>
- k. The fact that they have committed numerous crimes in a short space of time.<sup>628</sup>
- l. The fact that they had formal education and a permanent job and thus should have known better.<sup>629</sup>

## **(b) MITIGATING FACTORS**

The cumulative effects of these factors relating to the offender substantially reduce the effect of the sentence. Though this is not a closed list, factors falling under this category include:

- a. The fact that the offender acted under substantially reduced criminal capacity because of provocation, mental instability, intoxication or some other reason.<sup>630</sup>
- b. The fact that they are a first offender.<sup>631</sup>

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<sup>620</sup> *S v Jackson* 1998 (1) SACR 470 (SCA) 478b.

<sup>621</sup> *S v Abrahams* (n 308) 123d.

<sup>622</sup> *S v Matyityi* (n 233) paras 12-13; *DPP v Gcwala* (n 446) para 6.

<sup>623</sup> *DPP v Gcwala* (n 446) para 6.

<sup>624</sup> *S v Blaauw* (n 65) 260g.

<sup>625</sup> *S v Abrahams* (n 308) 122g.

<sup>626</sup> *S v Mahomotsa* (n 110) 444d.

<sup>627</sup> *S v Matyityi* (n 233) para 13.

<sup>628</sup> *Ibid* paras 2-3.

<sup>629</sup> *S v Nkomo* (n 414) para 21.

<sup>630</sup> *Terblanche* (n 282) 194; *S v Ferreira* 2004 (2) SACR 454 (SCA) at para 46; *S v Smith* 1990 (1) SACR 130 (A) 136b-c.

<sup>631</sup> *S v Nkomo* (n 414) para 22.

- c. The fact that they are relatively young.<sup>632</sup>
- d. The fact that they are of an advanced age or are elderly.<sup>633</sup>
- e. The fact that they have a fatal or serious illness.<sup>634</sup>
- f. The fact that the accused has dependants.<sup>635</sup>
- g. The fact that they are employed.<sup>636</sup>
- h. The fact that they have no formal education.<sup>637</sup>
- i. The fact that they have an unfavourable background.<sup>638</sup>
- j. The fact that they have no previous convictions and they are of middle or older age.<sup>639</sup>
- k. The fact that they are remorseful.<sup>640</sup>
- l. The fact that they acted on the spur of the moment.<sup>641</sup>
- m. The fact that the offender spent some time in custody while awaiting the finalisation of the trial.<sup>642</sup>
- n. The fact that they had good prospects of rehabilitation.<sup>643</sup>

#### **4.2.4. FACTORS RELATING TO THE INTERESTS OF SOCIETY**

This third leg of the triad relates to serving the interests of society or community.<sup>644</sup> Case law has indicated that the interests of society refer to the reaction that the members of society have in relation to the commission of particular crimes as well as their subsequent expectations for a more severe sentence for such crimes.<sup>645</sup> It further indicates that they are best served through the prevention of crime by way of deterring the accused or potential offenders and by the reform and removal of such accused from society.<sup>646</sup>

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<sup>632</sup> Ibid para 13.

<sup>633</sup> *S v Fatyi* (n 290); *S v Zinn* (n 12) 541B; *S v Heller* 1971 (2) SA 29 (A) 55CD.

<sup>634</sup> *S v Zinn* (n 12) 542E-F; *S v Magida* 2005 (2) SACR 591 (SCA) paras 9-10.

<sup>635</sup> *S v Bailey* (n 397) Para 23; *S v Matyityi* (n 233) para 11; *S v Fatyi* (n 290).

<sup>636</sup> *S v Vilakazi* (n 158) para 58; *S v Bailey* (n 397) para 23.

<sup>637</sup> *S v Njikelana* (n 314); *S v Matyityi* (n 233) para 12; *S v Musingadi and others* (n 595) para 52.

<sup>638</sup> *S v Abrahams* (n 308) 126J; *S v Blaauw* (n 65) 262a-j.

<sup>639</sup> *S v Malgas* (n 9) para 32; *S v Fatyi* (n 290); *S v Gqamana* (n 273) 35g.

<sup>640</sup> *S v Matyityi* (n 233) paras 9 and 13; *S v Malgas* (n 9) para 32.

<sup>641</sup> *S v Mofokeng* 1992 (2) SACR 710 (A) 715g-h.

<sup>642</sup> *DPP v Thusi* (n 382) paras 23-24.

<sup>643</sup> *S v Dyantyi* 2011 (1) SACR 540 (ECG) para 26; *S v Nkomo* (n 414) para 13; *DPP v Thusi* (n 382) para 19.

<sup>644</sup> *Terblanche* (n 282) 154.

<sup>645</sup> Ibid 153.

<sup>646</sup> Ibid 154.

The case of *Du Toit*<sup>647</sup> in support of this provided that:

'the interests of society have several features. They sometimes come to the forefront when society is in need of protection from the offender; sometimes when the order and peace in society is threatened and lastly when potential offenders have to be deterred from committing crimes and consequently a severe sentence is to be considered where society is heavily shocked by the offender's crimes'.<sup>648</sup>

Further, Rumpff JA in the *Zinn* case,<sup>649</sup> stated that the interests of society demand that an offender be put away for a long time, not only to protect society, but also to serve as a warning to potential offenders and as punishment for crimes that have been committed over extended periods.<sup>650</sup> This implies that the protection of society and the deterrence of others are important elements of the interests of society and accordingly, a less severe sentence fails as a deterrent as it does not serve to instil fear of punishment in the minds of others and consequently does not serve the interests of society.<sup>651</sup> Nicholas JA in the case of *Skenjana*<sup>652</sup> opined that public interest is however not necessarily best served by long imprisonment terms.<sup>653</sup>

Harms JA in the *Mhlakaza* case,<sup>654</sup> cautioned against imposing harsh sentences purely for reasons of public satisfaction and further noted that though the court is allowed to consider public feelings and permanently remove the offender from society, the sentence imposed must not be grossly in excess of the otherwise appropriate sentence and it must not only serve to deter.<sup>655</sup> Though public opinion has some relevance in the sentencing enquiry, it cannot substitute the duty of the court to act as an independent arbiter and to impose an appropriate sentence,<sup>656</sup> especially because the public usually resorts to vengeance.<sup>657</sup>

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<sup>647</sup> *S v Du Toit* (n 612).

<sup>648</sup> *Ibid* 857D-F.

<sup>649</sup> *S v Zinn* (n 12).

<sup>650</sup> *Ibid* 542D.

<sup>651</sup> *Ibid* 453.

<sup>652</sup> *S v Skenjana* 1985 (3) SA 51 (A).

<sup>653</sup> *Ibid* 541-55A.

<sup>654</sup> *S v Mhlakaza* (n 618).

<sup>655</sup> *Ibid* 518e-g and 519j-520b.

<sup>656</sup> *S v Makwanyane* (n 19) paras 87-89.

<sup>657</sup> *S v Mafu* 1992 (2) SACR 494 (A) 497a.

The interests of society can operate either to decrease or increase the sentence to be imposed<sup>658</sup> and they usually refer to nothing more than the seriousness of the crime or rather the society's view of the seriousness of the crime.<sup>659</sup> They are often prioritised in violent crimes<sup>660</sup> and as a result, the fact that the offence committed is prevalent as well as the fact that society considers the crime to be "repulsive and scandalous" has an impact on the severity of the sentence.<sup>661</sup> Such factors however cannot be considered in isolation, they are only taken as material aggravating factors in conjunction with other aggravating factors, such as the seriousness of the crime and the circumstances under which it is committed.<sup>662</sup> Case law indicates that this third leg of the triad incorporates the traditional purposes of punishment, particularly deterrence, retribution, rehabilitation and incapacitation into the sentencing considerations.<sup>663</sup> Accordingly, the SCA recently went as far as equating the triad to the purposes of punishment by implying that sentencing involves the principle of proportionality, which is achieved through the consideration of the offence, offender and the interests of society "or, with different nuance, prevention, retribution, reformation and deterrence".<sup>664</sup>

#### **4.3. PURPOSES OF PUNISHMENT**

There are four traditional objectives of punishment namely; retribution, deterrence, incapacitation and rehabilitation.<sup>665</sup> These objectives suggest that punishment is justified either because it is deserved (retribution theory) or because it is in the interests of society and is thus justified because of the advantage it brings to social order (deterrence, incapacitation and rehabilitation).<sup>666</sup>

Retribution is not primarily about reducing re-offending as the retributive idea is based on the notion that punishment should be determined chiefly by the seriousness of the crime itself. It thus rests on the principle of proportionality as the punishment received by the offender must

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<sup>658</sup> Terblanche (n 282) 152.

<sup>659</sup> Ibid 153.

<sup>660</sup> *S v Nkambule* 1993 (1) SACR 136 (A).

<sup>661</sup> *DPP v Thusi* (n 382) paras 19 & 23-24; *S v Boer* (n 264).

<sup>662</sup> *S v Nkosi* (2012) (1) SACR 87 (GNP) para 30.

<sup>663</sup> Terblanche (n 74) 174.

<sup>664</sup> *S v RO* 2010 (2) SACR 248 (SCA) para 30.

<sup>665</sup> Terblanche (n 282) 138.

<sup>666</sup> J.M Burchell (n 17) 68 and 73.

bear some relationship to the harm done to society.<sup>667</sup> This means that according to the theory of retribution, the offender must get the punishment they deserve.<sup>668</sup> Deterrence on the other hand is very different in the sense that severe punishment is imposed solely for the purpose of inflicting fear in the minds of offenders and potential offenders so that they do not commit crimes, though they may still have a desire to do so.<sup>669</sup> It comes in two forms; general and individual deterrence. The former focuses on threatening potential offenders with punishment so they refrain from committing crimes and the latter focuses on teaching the offender a lesson so they will be deterred from re-offending.<sup>670</sup> Incapacitation deals with removing the offender from society by taking away their physical power to offend through imprisonment, though they may still have a desire to offend.<sup>671</sup> Lastly, rehabilitation is the idea of “curing” an offender of his or her criminal tendencies; of changing their habits, their outlook and possibly even their personality, so as to make them less inclined to commit crimes in the future.<sup>672</sup> It seeks to prevent a person from re-offending by taking away the desire to offend.<sup>673</sup>

#### **4.3.1. PURPOSES OF PUNISHMENT AND THE INTERESTS OF SOCIETY**

Regarding the role of the objectives of punishment in relation to the interests of society, the courts have had differing views with each individual objective. Though case law points to deterrence as the main objective to be considered in connection with the interests of society, Schreiner JA in the case of *Karg*<sup>674</sup> stated that:

‘while the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute

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<sup>667</sup> Ibid 69.

<sup>668</sup> Ibid 72.

<sup>669</sup> Ibid 74-75.

<sup>670</sup> Ibid.

<sup>671</sup> Ibid 73.

<sup>672</sup> Ibid 78-79.

<sup>673</sup> Ibid.

<sup>674</sup> *R v Karg* (n 674).

and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment'.<sup>675</sup>

These words have been frequently cited as authority for the notion that retribution is outmoded and deterrence is the main objective of punishment.<sup>676</sup> However, Judge Harms in *Nkambule*<sup>677</sup> noted that retribution should not be disregarded as it does not only have a subsidiary role to play in the sentencing process.<sup>678</sup> Though retribution can easily amount to vengeance, it is important to note that retribution in this context means requital for the evil done.<sup>679</sup>

In *Nkambule*,<sup>680</sup> it was acknowledged that though deterrence is an important consideration, only effective deterrence is in the interests of society.<sup>681</sup> Deterrence however is not always the most important consideration in sentencing and if it is, certainty of punishment rather than its severity is the main deterrent to crime.<sup>682</sup> Harms JA in *Mhlakaza*<sup>683</sup> noted that the focus of more severe sentences flows from both retribution and deterrence rather than from incapacitation or rehabilitation.<sup>684</sup> He further stated that the length of imprisonment will not always have a deterrent effect.<sup>685</sup> Courts have been urged to impose sentences that are realistic and do not exceed acceptable limits just for the purposes of satisfying public opinion.<sup>686</sup>

Though incapacitation and rehabilitation seem to be neglected, they are also accepted as legitimate ways in which punishment operates to protect the community.<sup>687</sup> With regard to incapacitation it is a justifiable consideration only on the evidence that the offender is likely to commit further crimes unless they are restrained from doing so.<sup>688</sup> Further, a balance between the protection of society and the offender's welfare must be reached.<sup>689</sup> However, incapacitation is a limited objective of punishment as the offender is restrained and removed

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<sup>675</sup> Ibid 236A-C.

<sup>676</sup> *S v Gardener* 2011 (1) SACR 570 (SCA) para 67; *S v Dyanti* (n 684) para 21.

<sup>677</sup> *S v Nkambule* (n 660).

<sup>678</sup> Ibid 147c.

<sup>679</sup> *S v Mafu* (n 657) 497c-e.

<sup>680</sup> *S v Nkambule* (n 660).

<sup>681</sup> Ibid 145d.

<sup>682</sup> Ibid 146d-e and h.

<sup>683</sup> *S v Mhlakaza* (n 618).

<sup>684</sup> Ibid 519d.

<sup>685</sup> Ibid 519g.

<sup>686</sup> Ibid 524a-b and e-f.

<sup>687</sup> J.M Burchell (n 17) 74.

<sup>688</sup> Ibid.

<sup>689</sup> Ibid.

from society for the term of the sentence they are serving.<sup>690</sup> The penalty must thus seek to reform the offender and possibly deter them from committing further crimes.<sup>691</sup>

With regards to rehabilitation, the reform of an offender is also possible even where the sentence imposed is long.<sup>692</sup> Judge Harms however noted that rehabilitation becomes less important where the seriousness of the crime demands a lengthy sentence especially for purposes of removing the offender from the society.<sup>693</sup> Though the court cannot predict the likely outcome of lengthy imprisonment, it is doubted that a lengthy sentence may have a rehabilitative effect, especially because the purpose of rehabilitation is downgraded where the seriousness of the crime demands a lengthy sentence.<sup>694</sup> Rehabilitation however remains an important consideration where the sentence imposed has the potential of achieving it.<sup>695</sup>

Nugent JA in the case of *Swart*<sup>696</sup> said that:

'retribution and deterrence are proper purposes of punishment and they must be accorded due weight in any sentence that is imposed. Serious crimes will usually require that retribution and deterrence should come to the fore and that the rehabilitation of the offender will consequently play a relatively smaller role'.<sup>697</sup>

However, Navsa JA stated that:

'Traditional objectives of sentencing include retribution, deterrence and rehabilitation. It does not necessarily follow that a shorter sentence will always have a greater rehabilitative effect. Furthermore, the rehabilitation of the offender is but one of the considerations when sentence is being imposed'.<sup>698</sup>

It thus seems that retribution, deterrence and incapacitation are all likely to be achieved through the imposition of imprisonment or lengthy imprisonment thereof. Thus one will look

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<sup>690</sup> Ibid 73 and 74.

<sup>691</sup> Ibid 74.

<sup>692</sup> *S v Nombewu* 1996 2 SACR 396 (E) 407; *S v Ngongo* 1996 1 SACR 557 (N) 559.

<sup>693</sup> *S v Mhlakaza* (n 618) 519h-i; *S v Nkambule* (n 660) 147h.

<sup>694</sup> Ibid; JD Mujuzi 'Life imprisonment in South Africa: Yesterday, today, and tomorrow' (2009) 2 SACJ 1-20; *S v Janssen* (2010) 1 SACR 237 (ECG) para 17.

<sup>695</sup> *S v Nkambule* (n 660) 147f; Terblanche (n 282) pg 165.

<sup>696</sup> *S v Swart* 2004 (2) SACR 370 (SCA).

<sup>697</sup> Ibid para 12.

<sup>698</sup> *Director of Public Prosecutions, KwaZulu-Natal v Ngcobo* (n 233) para 22.

at the prospects for rehabilitation as a mitigating factor warranting the imposition of a lesser sentence.

#### **4.3.2. PROSPECTS FOR REHABILITATION AS A MITIGATING FACTOR**

The SCA as evidenced in the previously discussed cases has often considered the prospect of rehabilitation as a substantial and compelling circumstance, justifying a departure from the prescribed sentences. The courts have often done this without defining what is meant by rehabilitation.<sup>699</sup> For instance, in *S v Sikipha*,<sup>700</sup> the appellant, a 31-year-old, was sentenced to life imprisonment for raping a 13-year-old girl and the SCA in deciding to reduce the sentence to 20 years' imprisonment, held that one of the factors in mitigation or in favour of the appellant was their good prospect of rehabilitation.<sup>701</sup> The court observed that the sentence imposed by the legislature, though it is the most serious one, it denies the appellant of the possibility of rehabilitation.<sup>702</sup> The court then added that "the mitigating factors, including rehabilitation are not speculative and flimsy".<sup>703</sup>

Rehabilitation is influenced largely by speculation that the offender, after undergoing the various training and attending the relevant courses in prison, will lead a crime-free life.<sup>704</sup> In light of this speculative nature of rehabilitation, Petse ADJP in the case of *Dyantyi*<sup>705</sup> said that:

'but it is, however, my view that seeds of rehabilitation can, in a manner of speaking, germinate only if the convicted person him/herself has first and foremost, expressed contrition for his/her criminal wrongdoing thereby accepting the gravity of the criminal act of which he/she has been convicted and commit to return to the path of rectitude. Without expression of contrition any hope of rehabilitation becomes illusory and thus an unrealistic expectation and not merely a speculative hypothesis'.<sup>706</sup>

The offender's good prospect of rehabilitation require that punishment be tailored to the offender rather than to the crime, this means that the punishment imposed in a particular case

<sup>699</sup> *S v Nkomo* (n 414); *S v Bailey* (n 397); *DPP v Thusi* (n 382).

<sup>700</sup> *S v Sikipha* 2006 (2) SACR 439 (SCA).

<sup>701</sup> *Ibid* para 18.

<sup>702</sup> *Ibid* para 19.

<sup>703</sup> *Ibid* para 19.

<sup>704</sup> JD Mujuzi 'The prospect of rehabilitation as a 'substantial and compelling' circumstance to avoid imposing life imprisonment in South Africa: A comment on *S v Nkomo*' (2008) 21 SACJ 1-21 at 11.

<sup>705</sup> *S v Dyantyi* (n 643).

<sup>706</sup> *Ibid* para 26.

is such that it gives the offender the opportunity to be rehabilitated and consequently, the severity of the crime appears to be trumped by such a possibility of rehabilitation.<sup>707</sup>

In the case of *Nkomo*,<sup>708</sup> Lewis JA stated that though it was difficult to imagine a rape more severe than that one considered in the case, the prospects of rehabilitation as well as the fact that the offender was a first offender was substantial and compelling enough to justify a lesser sentence.<sup>709</sup> Accordingly, the court concluded by saying that a sentence of 16 years was justified, as it served the purposes of punishment; more specifically deterrence and the interests of society.<sup>710</sup> Theron JA in her dissenting judgment on the other hand, acknowledged the fact that there is hardly any person whom it can be said that they are incapable of rehabilitation.<sup>711</sup> Further, she disagreed with the fact that the prospects of rehabilitation (of which there was no evidence), coupled with the fact that the accused was a first offender amounted to “substantial and compelling circumstances” within the meaning of that expression, and were truly convincing reasons to depart from the minimum sentence prescribed by the legislature.<sup>712</sup>

In reaching her conclusion and in relation to rape she said that:

‘Given the prevalence of rape in this country, courts must also be mindful of their duty to send out a clear message to potential rapists and to the community that they are determined to protect the equality, dignity and freedom of all women. Society’s legitimate expectation is that an offender will not escape the sentence of life imprisonment, which has been prescribed for a very specific reason simply because substantial and compelling circumstances are, unwarrantedly, held to be present. In our constitutional order women are entitled to expect and insist upon the full protection of the law’.<sup>713</sup>

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<sup>707</sup> N Smith, ‘Rehabilitation’ *The Criminal Justice Encyclopaedia* (2005). Available from <http://pubpages.unh.edu/~nicks/pdf/Rehabilitation.pdf> : accessed 14 September 2015.

<sup>708</sup> *S v Nkomo* (n 414).

<sup>709</sup> *Ibid* para 22.

<sup>710</sup> *Ibid* para 23.

<sup>711</sup> *Ibid* para 31.

<sup>712</sup> *Ibid* para 32.

<sup>713</sup> *Ibid* para 29.

### **4.3.3. FACTORS THAT HAVE AN INFLUENCE ON THE PROSPECTS FOR REHABILITATION**

#### **i) RELATIVE YOUTHFULNESS**

Courts have often referred to an offender's relative youthfulness, without defining what exactly is meant by the term and what the term meant in respect of the individual. It is common practice to regard a teenager as immature and as a result, the youthfulness of an offender usually amounts to a mitigating factor, unless their conduct is such that it rules out immaturity.<sup>714</sup> Though courts will often make the pronouncement that one's conduct may rule out immaturity, this notion proves to be flawed as it is still unclear what conduct will warrant maturity or good decision-making. In general however a court will be more lenient on a young person than on an adult, although the mitigating effect of one's age is usually unclear as it depends on the facts of each case.<sup>715</sup> It is trite that when dealing with a younger offender, the evidence adduced on his or her behalf especially evidence pertaining to background, education, level of intelligence and mental capacity needs to be clear in order to enable a court to determine the level of maturity as well as the moral blameworthiness of the offender.<sup>716</sup> The main question is thus whether or not the offender's immaturity, combined with other factors such as lack of experience, indiscretion and susceptibility to being influenced by others actually reduces the blameworthiness, especially because these are the factors that distinguish a young person from an adult.<sup>717</sup> Thus a person over the age of 18 years must adduce evidence of immaturity to such an extent that such immaturity operates as a mitigating factor.<sup>718</sup>

Accordingly, it has been said that the constitutional era has provided a different approach by providing a change in sentencing principles relating to young offenders.<sup>719</sup> The said principles make imprisonment the last resort and where it is inescapable, a shorter duration is warranted.<sup>720</sup> In *Centre for Child Law*,<sup>721</sup> it was held that "there is no intrinsic magic in the age of 18, except that in many contexts it has been accepted as marking the transition from

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<sup>714</sup> *S v Matiyiti* (n 233) para 14.

<sup>715</sup> Ibid.

<sup>716</sup> Ibid.

<sup>717</sup> Ibid.

<sup>718</sup> Ibid.

<sup>719</sup> *S v IO* 2010 (1) SACR 3423 (C) para 8.

<sup>720</sup> Ibid para 12.

<sup>721</sup> *Centre for Child Law* (n 62).

childhood to adulthood. The constitution's drafters could conceivably have set the frontier at 19 or at 17. They did not. They chose 18.”<sup>722</sup> The court in *PN*<sup>723</sup> held that an offender who is no longer a child cannot be said to be more “vulnerable or susceptible to negative influences and outside pressures” and their character unlike that one of children under the age of 18 years is therefore not “uniquely capable of rehabilitation”.<sup>724</sup>

## ii) PREVIOUS CONVICTIONS AND FIRST OFFENDER STATUS

Our courts have often considered relevant previous convictions as an aggravating factor and the fact that the offender is a first offender as a mitigating factor.<sup>725</sup> Apart from the seriousness of the offence, the existence or absence of previous convictions has been conceived as an important determinant of an appropriate sentence.<sup>726</sup> The court in *Zonele*,<sup>727</sup> though decided prior to the constitutional era, held that “generally speaking, previous convictions aggravate an offence because they tend to show that the offender has not been deterred by the previously imposed punishments and has proceeded to committing the crime under consideration in a given case.”<sup>728</sup> This meant that an offender who had not been deterred by his previous convictions had to be punished severely, though it was said that a consideration of the former amounted to double jeopardy.<sup>729</sup>

Some courts have also held that aside from indicating the fact that the offender did not learn the requisite lesson implicit in the previously imposed sentences, previous convictions implied that the offender possessed a bad character or criminal propensity and thus lacked any prospects of rehabilitation.<sup>730</sup> In the constitutional era however, it has been said that the sentence imposed must fit the crime, and previous convictions cannot serve to justify a sentence that is grossly disproportionate to the crime.<sup>731</sup> The court in *Oktober*<sup>732</sup> also stressed that the general principles in the form of the *Zinn* triad (crime, criminal and interests of society) must be used to determine an appropriate sentence, also in the presence

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<sup>722</sup> Ibid para 39.

<sup>723</sup> *S v PN* 2010 (2) SACR 187 (ECG).

<sup>724</sup> Ibid 195 a-c.

<sup>725</sup> *S v M* 2008 3 SA 232 (CC) para 43; *S v Scheepers* (n 619) para 11.

<sup>726</sup> South African Law Commission (n 35) 37.

<sup>727</sup> *R v Zonele* 1959 3 SA 319 (A).

<sup>728</sup> Ibid 330D.

<sup>729</sup> South African Law Commission (n 35) 37.

<sup>730</sup> *S v Morebudi* 1999 2 SACR 664 (SCA) 668; *S v Sethokgoe* 1990 2 SACR 544 (T) 545.

<sup>731</sup> *S v Stenge* 2008 2 SACR 27 (C) para 60.

<sup>732</sup> *S v Oktober* 2009 1 SACR 291 (C).

of previous convictions.<sup>733</sup> This further emphasises what was said in the case of *Dodo*,<sup>734</sup> where the court stated that the principle of proportionality is the guiding principle and an offender ought to receive punishment proportionate to the crime they have committed. This case is particularly important as it was decided in the constitutional court and thus reflects the position in the constitutional era and accordingly proportionality has to be achieved even in the presence of previous convictions.

### iii) REMORSE AND A PLEA OF GUILT

The existence of remorse as a mitigating factor has been addressed in a number of cases.<sup>735</sup> In *Martin*,<sup>736</sup> remorse was said to “denote repentance, an inner sorrow inspired by another’s plight or a feeling of guilt”.<sup>737</sup> In *Matyityi*,<sup>738</sup> it was described as “a gnawing pain of conscience for the plight of another”.<sup>739</sup> Remorse will only be regarded as being sincere, where the offender appreciates the extent of his error, but not when he merely regrets the consequences of his deeds.<sup>740</sup> It has been said that where the offender shows real remorse, there is a great possibility of rehabilitation, of which such possibility becomes remote where the perpetrator does not take responsibility for his actions or rather appreciate the wrongfulness of his conduct.<sup>741</sup> In *Dyantyi*,<sup>742</sup> the court found that an offender will rarely be able to show that he has prospects of rehabilitation, without proving to the court that he is genuinely remorseful.<sup>743</sup> Rumpff JA in *Seegers*,<sup>744</sup> held that remorse, as an indication that the offender will not be committing further crimes, is an important consideration, particularly in those cases where the deterrent effect of the sentence imposed on the accused is considered.<sup>745</sup> Accordingly, a truly remorseful offender is unlikely to be a repeat offender.<sup>746</sup>

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<sup>733</sup> Ibid 294.

<sup>734</sup> S v *Dodo* (n 75).

<sup>735</sup> Ibid; S v *Martin* 1996 (2) SACR 378 (W); S v *M* (*Centre for Child Law as Amicus Curiae*) 2007 (2) SACR 539 (CC) para 115.

<sup>736</sup> S v *Martin* (n 735).

<sup>737</sup> Ibid 383G-I.

<sup>738</sup> S v *Matyityi* (n 233).

<sup>739</sup> Ibid para 13.

<sup>740</sup> Ibid.

<sup>741</sup> S v *PN* (n 723) 194a-b and 195d-f.

<sup>742</sup> S v *Dyantyi* (n 643).

<sup>743</sup> Ibid para 26.

<sup>744</sup> S v *Seegers* 1970 (2) SA 506 (A).

<sup>745</sup> Ibid 512G-H.

<sup>746</sup> Terblanche (n 282) 204.

When dealing with remorse, the courts thus have to determine whether or not the offender is not simply regretful or feeling sorry for themselves,<sup>747</sup> particularly because remorse can easily be confused with regret.<sup>748</sup> Owing to this, it is the duty of the offender to satisfy the court of their true remorse.<sup>749</sup> This means that the accused must take the witness stand in order to enable the court to reach correct conclusions concerning the alleged remorse. Further, in such an instance, the court can have a proper understanding of what motivated the accused to commit the crime, what has since motivated his change of heart and whether he does indeed have a true appreciation of the consequences of his actions.<sup>750</sup> According to the Supreme Court of Appeal, where the offender fails to give such evidence, the genuineness of the alleged remorse cannot be determined.<sup>751</sup> Notwithstanding this, mere expressions of remorse, without sufficient proof of its existence have been accorded some weight by our courts.<sup>752</sup>

A guilty plea as well an apology to the victims may be viewed as an indicator for remorse.<sup>753</sup> However, courts generally do not accord much weight to such a plea when the evidence against the offender is overwhelming and resultantly, such a plea is merely regarded as a neutral factor.<sup>754</sup> Further, the guilty plea will be of little mitigating value, where the offender fails to satisfy the court of his true remorse.<sup>755</sup> Overwhelming evidence reduces the weight accorded to a guilty plea as the accused in the circumstances, has no other choice, but to plead guilty.<sup>756</sup>

The court in *De Klerk*,<sup>757</sup> accepted the fact that the appellant was genuinely remorseful. This was because after being convicted of indecent assault, he did not only plead guilty, but he also voluntarily entered into a treatment programme for paedophiles at his own expense and also informed the mother of the victim of his conduct. Further, he voluntarily avoided the

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<sup>747</sup> *S v Martin* (n 735) 383g-h.

<sup>748</sup> *S v Matyityi* (n 233) para 13.

<sup>749</sup> *Ibid; S v Seegers* (n 744) 512G-H. (See *S v Matyityi* (n 233) above for a discussion on remorse).

<sup>750</sup> *Ibid; S v Kgantsi* 2012 JDR 0856 (SCA) para 11; *S v Keyser* 2012 (2) SACR 437 (SCA) para 29; *S v Martin* (n 735) 383g-h.

<sup>751</sup> *Ibid.*

<sup>752</sup> *S v Scott-Crossley* 2008 (1) 223 (SCA) para 35; *S v Chipape* 2010 (1) SACR 245 (GNP) para 17.

<sup>753</sup> *S v Matyityi* (n 233) para 13; *S v Wilson* 1986 (4) SA 477 (A) 481I.

<sup>754</sup> *Ibid; S v Michele* 2010 (1) SACR 131 (SCA) para 7.

<sup>755</sup> *S v Van der Westhuizen* 1995 (1) SACR 601 (SCA) 605D; *S v Furlong* 2011 JDR 0591 (SCA) para 16.

<sup>756</sup> *S v Mashinini* 2012 (1) SACR 604 para 24; *S v Britz* 2010 JOL 25567 (SCA) para 11; *S v Michele* (n 754) para 17.

<sup>757</sup> *S v De Klerk* 2010 (2) SACR 40 (KZP).

situations that gave rise to the committed offences.<sup>758</sup> In *Michele*,<sup>759</sup> the court noted that in a case of unlawfully obtained money, remorse will manifest itself in the immediate repayment of the money.<sup>760</sup> In *Matyityi*,<sup>761</sup> the submission that the offender's plea of guilt and apology to the victims were strong indicators of remorse was rejected as the evidence against the offender was overwhelming.<sup>762</sup> The incriminating evidence included stolen items found at the home of the offender's girlfriend, DNA evidence linking him to the crime scene, some pointing-outs made by him and the fact that one of the victims had positively identified him at an identification parade.<sup>763</sup>

Courts have also dealt with the issue of whether or not a lack of remorse can be viewed as an aggravating factor. A lack of remorse in most cases is seen through the offender's demeanour and behaviour.<sup>764</sup> However, it has been submitted that a lack of remorse on the part of the offender should not be taken as an aggravating factor.<sup>765</sup> The court in *Ngada*<sup>766</sup> acknowledged the fact that a lack of remorse on the part of the accused may be regarded as relevant when imposing a sentence. In this regard, Jones J quoted the SCA in *Makhudo*,<sup>767</sup> where it was said that:

‘While the behaviour of an accused during the trial may be indicative of a lack of repentance or intended future defiance of the laws by which society lives and therefore be a relevant factor in considering sentence, neither the fact that an accused’s defence is conducted in an objectionable manner nor the fact that the accused’s demeanour in court is obnoxious, is a proper factor to be taken into account unless it is of a kind which satisfactorily establishes that the accused is the kind of person who would best be deterred from future criminal activity by being dealt with in a firmer manner than would have been appropriate if the accused was not that kind of person’.<sup>768</sup>

Accordingly, this implies that a lack of remorse may be relevant in imposing a sentence, but only to the extent that such a conclusion is not based solely on the accused demeanour and behaviour in court.

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<sup>758</sup> Ibid paras 6, 9 and 28.

<sup>759</sup> *S v Michele* (n 754).

<sup>760</sup> Ibid para 7.

<sup>761</sup> *S v Matyityi* (n 233).

<sup>762</sup> Ibid para 13.

<sup>763</sup> Ibid.

<sup>764</sup> *S v Pakane* 2008 (1) SACR 518 (SCA); *S v M* (n 735); *S v Combrink* 2012 (1) SACR 93 (SCA); *S v SMM* 2013 (2) SACR 292 (SCA).

<sup>765</sup> *S v Ngada* 2009 JOL 24359 (ECG).

<sup>766</sup> Ibid para 8.

<sup>767</sup> *S v Makhudo* 2003 (1) SACR 500 (SCA).

<sup>768</sup> Ibid 504f-h.

Jones J further said that:

‘the role of absence of remorse in aggravation of sentence must be put in proper perspective. The real question is its relevance to the imposition of sentence. This seems to me to be at the heart of the passage quoted above from the judgment in *Makhudo*’s case. Lack of remorse may, for example, be relevant to the issue of rehabilitation, the possibility of repeat offences, or the need to protect society from the conduct of callous, relentless and remorseless offenders. As *Makhudo*’s case warns us, it is necessary to guard against the danger in, and the potential impropriety and injustice of, increasing a sentence because of the way in which a defence is conducted, or because of an accused person’s poor demeanour or arrogant behaviour in the witness box or in court. These considerations may go hand in glove with a lack of remorse but they will usually be irrelevant. An accused person should not, of course, be penalised for exercising his right to plead not guilty, to challenge the State evidence, and to require the prosecution to prove his guilt. This does not give him licence to conduct his defence in a vexatious manner. But even if that is what he does, this is not necessarily relevant to sentence’.<sup>769</sup>

Regardless of this, the conduct of the accused in and outside of court has proven to be detrimental in some cases. For instance, in *Combrink*,<sup>770</sup> a lack of remorse was construed from the fact that the offender had denied the commission of the crime.<sup>771</sup> In *Pakane*,<sup>772</sup> the accused was said to lack remorse because of the fact that they had concealed the truth by giving false evidence and testimonies, and had interfered with police investigations.<sup>773</sup> Madala J in his minority judgment in *Centre for Child Law*,<sup>774</sup> indicated that the accused lacked remorse particularly because she had committed further crimes whilst out on bail; this she did with the full knowledge of all consequences that could possibly arise from their actions. She also continued to plan the commission of further crimes while under imprisonment and accordingly, her re-offending indicated a lack of remorse.<sup>775</sup>

Scholars have also suggested with regard to remorse that disclosure of the impact of the crime by the victims through victim impact statements, has the potential to trigger an

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<sup>769</sup> *S v Ngada* (n 765) para 8.

<sup>770</sup> *S v Combrink* (n 764).

<sup>771</sup> *Ibid* para 23.

<sup>772</sup> *S v Pakane* (n 764).

<sup>773</sup> *Ibid* para 43.

<sup>774</sup> *S v M* (n 735).

<sup>775</sup> *Ibid* para 115.

emotional response in offenders.<sup>776</sup> This then creates a platform for offenders to express their remorse and apologise to their victims in the sentencing process.<sup>777</sup> Implicit in this claim is the fact that the occurrence of such victim-focused remorse is a positive feature of restorative justice.<sup>778</sup>

#### **4.4. NEW DEVELOPMENTS IN THE SENTENCING PROCESS (RESTORATIVE JUSTICE AND VICTIM IMPACT STATEMENTS)**

##### **4.4.1. THE MEANING OF RESTORATIVE JUSTICE**

Restorative justice is a relatively new concept in South Africa and it emphasises the aim of restoration between offender and victim.<sup>779</sup> Simply put, restorative justice addresses the damage and the needs of both victims and offenders in such a way that both parties, as well as the communities which they are part of, are healed.<sup>780</sup> When dealing with this concept, the involvement of victims of crime in the criminal justice process becomes particularly important.<sup>781</sup> This is because there is a desire to return to traditional systems of justice, which place greater importance on the victim as well as on the issue of redress and the healing of the community.<sup>782</sup>

Restorative justice is thus aimed at repairing the damages caused by crime; the goal is to heal the wounds of every person affected by crime. This does not only relate to the victims of crime, but the community at large.<sup>783</sup> Thus, restorative justice redefines and widens the scope of crime by interpreting it to mean more than just breaking the law, or offending against the state, but also an injury or wrong done to another person; whether that person is the victim or the community at large.<sup>784</sup>

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<sup>776</sup> T Booth ‘Victim Impact Statements and the Nature and Incidence of Offender Remorse: Findings from an observation study in a superior sentencing court’ *Griffith Law Review* (2013) (2) 430.

<sup>777</sup> Ibid.

<sup>778</sup> Ibid.

<sup>779</sup> A Van der Merwe (n 289) 11.

<sup>780</sup> South African Law Commission Discussion Paper 7 ‘Sentencing restorative justice (Compensation of victims of crime and victim empowerment)’ (1997) 6.

<sup>781</sup> Ibid.

<sup>782</sup> Ibid.

<sup>783</sup> Ibid 8.

<sup>784</sup> Ibid 9.

Restorative justice in the preamble of the Child Justice Act 75 of 2008 (“the CJA”), is defined as:

‘An approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation’.

It is important to note that the first part of the above-mentioned definition reiterates what has been said previously. It places emphasis on the involvement of the victim and further allows for family and community involvement. The next part of the definition also deals with the identification of issues such as harms and needs (of the victim, amongst others) and the addressing of those issues through the employment of various methods. These methods refer mainly, to the making of restitution, the protection of victims through the prevention of re-offending and lastly, the promotion of reconciliation.<sup>785</sup>

The Law Commission in its discussion paper also suggested that restorative justice is based on three assumptions,<sup>786</sup> namely:

- a. Crime does not only cause harm to the victims, but also the offenders themselves and communities at large.
- b. Not only government, but also victims, offenders and communities should be actively involved in the criminal justice process.
- c. In promoting justice, while the government is responsible for preserving law and order, the community is responsible for establishing peace.

Accordingly, these assumptions give rise to certain elements which are central to restorative justice programmes.<sup>787</sup> These elements include that:

- a. Crime is to be regarded not just as an injury to victims, but also as an injury to community peace.
- b. The focus is to be placed on correcting the wrong.

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<sup>785</sup> A Van der Merwe ‘A new role for crime victims? An evaluation of restorative justice procedures in the Child Justice Act 2008’ (2013) 4 *De Jure* at 1023 [http://www.dejure.up.ac.za/images/files/vol46-4\\_2013/Chapter\\_10.pdf](http://www.dejure.up.ac.za/images/files/vol46-4_2013/Chapter_10.pdf) : accessed 10 September 2015.

<sup>786</sup> South African Law Commission (n 781) 9.

<sup>787</sup> *Ibid.*

- c. The victim, community and offender are to be regarded as active role-players in the criminal process.
- d. Victims are to be compensated for their losses through restitution.
- e. Victims are empowered in their search for direct involvement in the criminal justice process, perhaps through requiring the submission of victim-impact statements.
- f. Victims are assisted to regain a sense of control in the areas of their lives affected by the offence.
- g. Offenders are held responsible for their conduct.

The discussion on restorative justice above, places great emphasis on victim-involvement in the sentencing process, of which such involvement is probably best recognisable by the submission of victim impact statements during the sentencing stage. This is because placing focus on the rights of victims by involving them in the sentencing stage requires that attention be paid to evidence submitted by the victims.<sup>788</sup> Victims of crime are not defined, but a broader definition of the term “victim” has been accepted. Accordingly, the term victim refers to “persons who, individually or collectively have suffered harm, including physical or mental injury, emotional suffering, economic loss, or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal law.”<sup>789</sup> The term also includes, where appropriate, the immediate family or dependants of the direct victim.<sup>790</sup> Thus the term includes both direct and indirect victims<sup>791</sup> and accordingly, persons falling under the scope of the definition are usually the ones to submit victim-impact statements.

#### **4.4.2. VICTIM IMPACT STATEMENTS**

A victim impact statement is defined in the CJA as “a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, and financial or any other consequences of the offence for

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<sup>788</sup> South African Law Commission (n 35) 83.

<sup>789</sup> The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power: United Nations Compendium of United Nations standards and norms in crime prevention and criminal justice. United Nations: New York 1992 211 ff. [https://www.unodc.org/pdf/criminal\\_justice/Compendium\\_UN\\_Standards\\_and\\_Norms\\_CP\\_and\\_CJ\\_English.pdf](https://www.unodc.org/pdf/criminal_justice/Compendium_UN_Standards_and_Norms_CP_and_CJ_English.pdf). Accessed 6/09/2015.

<sup>790</sup> A Van der Merwe (n 835) 1024.

<sup>791</sup> South African Law Commission (n 781) 7.

the victim.”<sup>792</sup> The statement which is addressed to the presiding officer for consideration may also include the effect that the crime will have in future on the victim as well as the victim’s opinion regarding the crime, the offender and the appropriate sentence.<sup>793</sup> The statement can either take the form of a written statement which is presented to the court as part of the pre-sentencing report or an oral one given by the victim during sentencing.<sup>794</sup> If the content of the statement is not disputed then it becomes admissible evidence on its production in court.<sup>795</sup> However, if it is disputed, the victim may be called to testify as a witness before the court.<sup>796</sup>

Courts generally do not have the necessary experience and expertise required to generalise or draw conclusions about the effects and consequences of a crime on the victim.<sup>797</sup> Muller and Van der Merwe argue that:

‘It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced. Each individual brings with himself or herself a different background, a different support system and, therefore, a different manner of coping with the trauma flowing from the abuse’.<sup>798</sup>

Victim impact statements do not only accommodate the victim during the sentencing process, but they also allow the court to be better informed before imposing a sentence based on the after-effects of the crime.<sup>799</sup> The court through such statements has at its disposal information concerning both the accused and victim, thus having the potential to achieve a more balanced approach to sentencing.<sup>800</sup> If there is no evidence produced by the victim regarding the impact of the crime, it is safe to say that the court only has half of the information necessary for the proper exercise of its sentencing discretion.<sup>801</sup> Accordingly, information pertaining to the impact of the crime on the victim as well as the objective gravity of the offence should be placed before the court.<sup>802</sup> The provision of such information will in turn contribute towards

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<sup>792</sup> s 70 (1) of the CJA.

<sup>793</sup> South African Law Commission (n 35) 83.

<sup>794</sup> Ibid.

<sup>795</sup> s 70 (3) of the CJA

<sup>796</sup> South African Law Commission (n 35) 85.

<sup>797</sup> *S v Gerber* 2001 (1) SACR 621 (W).

<sup>798</sup> K Müller & A Van der Merwe (n 358).

<sup>799</sup> *S v Matyiyi* (n 233) para 17.

<sup>800</sup> Ibid.

<sup>801</sup> Ibid.

<sup>802</sup> Ibid.

the enhancement of proportionality and the achievement of a balance.<sup>803</sup> Notwithstanding the fact that South Africa has no formal scheme for the production of victim impact statements, courts have taken into account evidence of this nature.<sup>804</sup>

The Law Commission in its discussion paper proposed improved victim participation in the sentencing process, as well as the recognition of victim concerns in relation to the sentences handed down.<sup>805</sup> The draft Sentencing Framework Bill of the Law Commission further stipulates that as a guiding principle, all sentences must be proportionate to the gravity of the offence; which is usually determined by the degree of harm caused by the offence or harm likely to flow from the offence.<sup>806</sup> In addition, the sentence must also be proportionate to the offender's culpability.<sup>807</sup> Under the Bill, though the sentences imposed must adhere to the principle of proportionality, the sentences must also serve to restore the rights of victims, protect society against the offender as well as give the offender an opportunity to be rehabilitated.<sup>808</sup> Prosecutors are then urged to consider the interests of victims in every case, and for this reason, victim impact statements relating to the harm caused to the victim as a result of the crime may be brought before the court so that it is better informed about the harm suffered as a result of the crime.<sup>809</sup>

In 2003, the Criminal Law (Sexual Offences) Amendment Bill (“the Bill”)<sup>810</sup> was published, and like the Sentencing Framework Bill, it provided that as a guiding principle, the interests of the victim must be considered in any decision regarding the imposition of punishment.<sup>811</sup> The Bill further provided that evidence of surrounding circumstances, and of the impact of a sexual offence may be adduced at criminal proceedings for purposes of imposing an appropriate sentence.<sup>812</sup> This allows the court to be well informed with regard to the extent of harm suffered by the person in question. The introduction of evidence on the after-effects of the sexual offence is only optional, but it provides a platform for impact statements.<sup>813</sup> The victim’s right to provide information relating to the impact of the crime during the sentencing

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<sup>803</sup> Ibid.

<sup>804</sup> A Van der Merwe (n 289) 226.

<sup>805</sup> South African Law Commission (n 35) 22.

<sup>806</sup> s 3 (1) and (2) of the draft Sentencing Framework Bill, 2000.

<sup>807</sup> Ibid at s 3 (3).

<sup>808</sup> Ibid at s 47.

<sup>809</sup> A Van der Merwe (n 289) 16.

<sup>810</sup> Criminal Law (Sexual Offences) Amendment Bill, 2003.

<sup>811</sup> Ibid at Schedule 1, s (l) (vi).

<sup>812</sup> Ibid at s 17 (1) (b).

<sup>813</sup> A Van der Merwe (n 289) 17.

stage is also highlighted in a clause under the Service Charter for Victims of Crime in South Africa.<sup>814</sup>

The effective implementation of victim impact statements can be complicated by the victim's age and level of intellectual development or maturity.<sup>815</sup> Such victims are often unable to express themselves and may be withdrawn and suffer from dissociation as a result of the offence, which, in turn, would then influence the weight attached to the evidence produced about the harm suffered.<sup>816</sup> It is submitted that, in the absence of any guidance regarding the use of victim impact statements in the sentencing process, such statements may lead to arbitrary application and a proper balance may not be achieved.<sup>817</sup> This is because the statement produced by the victim may result in the trigger of the presiding officers' moral conviction.<sup>818</sup> However, it has also been noted that it is possible to have a situation where the production of victim evidence may lead to the imposition of a lesser sentence.<sup>819</sup>

#### **4.4.3. VICTIM IMPACT STATEMENTS AS RESTORATIVE MEASURES**

The definition of restorative justice is not a straight-forward one, however it is clear from the above that it embraces victim involvement in the sentencing stage.<sup>820</sup> There are however difficulties relating to the influence such victim involvement has on the eventual punishment imposed. In *Thabetshe*,<sup>821</sup> the SCA was faced with the problem of how to approach the victim's request not to impose a sentence of imprisonment on the offender; who was her stepfather, based on the fact that the offender was the sole provider for the family.

The victim was just two months away from her 16<sup>th</sup> birthday and while she was away from home without the necessary permission, she was fetched by the stepfather. On the way home, she pleaded with her stepfather not to tell her mother of her whereabouts, especially because

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<sup>814</sup> Clause 2 of the Service Charter for Victims of Crime in South Africa, 2007. <http://www.justice.gov.za/VC/docs/vc/2007%20Service%20charter%20ENG.pdf> :Last accessed 20 September 2015.

<sup>815</sup> A Van der Merwe (n 289) 230.

<sup>816</sup> Ibid.

<sup>817</sup> Ibid 381.

<sup>818</sup> J Nadler and MR. Rose 'Victim impact testimony and the psychology of punishment' (2003) 88 *Cornell LR* 442.

<sup>819</sup> A Van der Merwe (n 289) 381.

<sup>820</sup> A Van der Merwe (n 835); South African Law Commission (n 35) 83.

<sup>821</sup> DPP, *North Gauteng v Thabetshe* 2011 2 SACR 567 (SCA).

she was at her boyfriend's place. In return for this favour, the stepfather coerced the victim into sex. She subsequently reported the matter as rape and the stepfather admitted to the commission of it.<sup>822</sup> As seen through the discussion of cases above, rape is considered a serious crime, especially that one relating to a child below the age of 16 years as it carries a minimum sentence of life imprisonment.<sup>823</sup> The case went to the High Court and Bertelsmann J presided over the case. This is when the victim of the crime; who was 17 years at the time of her testimony, stated that she did not intend having the offender imprisoned. She also stated that although she was still hurt by the incident as she trusted the offender, she had outgrown it and was no longer afraid of him as she had in fact returned to live in the same household with him.<sup>824</sup> In addition, the respondent was the breadwinner and both the victim and her family were dependent on him for survival.<sup>825</sup>

Bertelsmann J referred the matter to a probation officer; who had to facilitate a victim-offender conference between the victim, the mother and the stepfather. The victim-offender conference obviously yielded positive results and consequently the probation officer recommended that offender be sentenced to correctional supervision in terms of s 276 (1) (i) of the CPA.<sup>826</sup> Owing to the fact that the victim was under the age of 16 years, the sentence of life imprisonment was inevitable unless "substantial and compelling circumstances" existed to allow for a departure.<sup>827</sup> In his judgment; Bertelsmann J set out a list of factors which he found to be substantial and compelling enough to warrant a departure from the prescribed sentence of life imprisonment. Accordingly, he handed down as an alternative, a sentence of ten years imprisonment, wholly suspended for a period of five years and coupled with a number of conditions.<sup>828</sup> These conditions included the fact that he should not be convicted of a crime involving a sexual or violent offence and in addition, he was to remain under the employment of their current employer unless he is laid off through no fault on his part and he was also required to spend at least 80% of his salary on the support of the victim and her family. Lastly, he was required to attend a sex offenders' programme and to perform 800 hours of community service.<sup>829</sup>

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<sup>822</sup> Ibid para 5.

<sup>823</sup> *S v Vilakazi* (n 158); *S v Bailey* (n 397); *S v Abrahams* (n 308); *S v Gqamana* (n 273); *S v Mahomotsa* (n 110); *Rammoko v Director of Public Prosecutions* (n 252); *S v Kwanape* (n 432).

<sup>824</sup> *DPP, North Gauteng v Thabetshe* (n 821) paras 6 & 11.

<sup>825</sup> Ibid.

<sup>826</sup> Ibid para 8.

<sup>827</sup> The Act (n 1) at s 51 (1).

<sup>828</sup> *DPP, North Gauteng v Thabetshe* (n 821) para 2.

<sup>829</sup> Ibid.

Bertelsmann J further pointed out that in light of the peculiar circumstances of the case, restorative justice is to be recognised and applied. He went on to say that in the present case; one which was of a grave nature, restorative justice provided a just and appropriate sentence which was able to punish the accused, restore the victim, helped to heal the harm caused by the commission of the crime and benefited the society by ensuring the rehabilitation of the offender and by the rendering of community service.<sup>830</sup>

The above-mentioned sentence however went on appeal to the SCA.<sup>831</sup> The SCA like the court *a quo*, was of the view that there were factors that were sufficiently substantial and compelling to permit the court to depart from the prescribed minimum sentence of life imprisonment.<sup>832</sup> However, the SCA was also of the view that the court *a quo* had misdirected itself by according undue weight to the offender's personal circumstances and failed to pay due regard to the seriousness of the offence and the broader interests of society. Further, the court held that the court *a quo* allowed its undue sympathy for the offender to negatively impact its decision.<sup>833</sup> The court set aside the above-mentioned sentence and replaced it with a sentence of ten years imprisonment, of which no portion of it was suspended.<sup>834</sup> Bosielo J highlighted the fact that victim impact statements should be heard during sentencing and he referred to the *Matyityi*<sup>835</sup> judgment. In the mentioned case, emphasis was placed on the rights of victims to participate during the sentencing process, and the reason for this was that there was an absence of information pertaining to the victims of the crimes in that particular case and the involvement of either direct or indirect victims was required, so the court can be well informed with the situation before it. Thus, it seems that the decision of *Matyityi*<sup>836</sup> should be read as nothing more than a call for increased victim involvement in the sentencing process.<sup>837</sup>

In the case of *Thabethe*<sup>838</sup> on the other hand, there was victim involvement and the SCA had to deal with the issue of what weight to attach to the views of victims in the sentencing

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<sup>830</sup> Ibid para 10.

<sup>831</sup> Ibid para 3.

<sup>832</sup> Ibid para 22.

<sup>833</sup> Ibid.

<sup>834</sup> Ibid para 31.

<sup>835</sup> *S v Matyityi* (n 233).

<sup>836</sup> Ibid.

<sup>837</sup> *DPP, North Gauteng v Thabethe* (n 821) para 21.

<sup>838</sup> Ibid.

stage.<sup>839</sup> On the issue of restorative justice, the court also observed that restorative justice was slowly gaining recognition in the courts and has even received recognition in the Constitutional Court.<sup>840</sup> Bosielo JA went on to say that the advantages of restorative justice could not be doubted as a viable alternative sentencing option provided it is applied in proper cases. He further found that the application of restorative justice was inappropriate in the context of the serious crime of rape. He held that:

‘without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a sentencing option. Sentencing officers should be careful not to allow some over-zealousness to lead them to impose restorative justice even in cases where it is patently unsuitable. It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public’.<sup>841</sup>

Despite the court’s reiteration that victim impact statements must be heard, the court did not provide any practical guidelines in this regard. Further, though the court found reasons for a departure from the minimum sentence, those reasons were based on the merits of the case, and not on the basis that a restorative justice process had been held between the victim and offender.<sup>842</sup>

#### **4.5. CONCLUSION**

Despite the enactment of the 1997 Act, the sentencing task in cases that fall under the purview of s 51 of the 1997 Act, still poses some difficulty for courts because though they are consistent in the traditional factors they consider, they are still faced with the problem of how much weight should be placed on the *Zinn* triad, particularly the crime, the criminal and the interests of society. On the other hand, the prospects of rehabilitation remain highly speculative as there is no guarantee that prison terms falling outside of life imprisonment will yield positive results and will have a rehabilitative effect on the offender. The SCA will need

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<sup>839</sup> Ibid.

<sup>840</sup> Ibid para 20.

<sup>841</sup> Ibid.

<sup>842</sup> Ibid para 22.

to set the record straight and explain what it means to have prospects of rehabilitation and how this becomes a substantial and compelling circumstance, as this can easily amount to the speculative hypotheses mentioned in the case of *Malgas*.<sup>843</sup> The court further has to explain what criteria are to be used in the evaluation of whether an offender has the potential to be rehabilitated.

The concept of restorative justice and victim impact statements is also proving to pose some difficulties for our courts. Though it is slowly finding application and recognition in the different courts, some judicial officers have expressed concerns as to when it is the appropriate time to apply it. However, what remains clear is that the recognition of such a concept in our sentencing process cannot conflict with the principle of proportionality, which remains the guiding principle where courts are faced with the task of imposing a sentence. Another issue that arises during the sentencing process is of whether courts should accept victim impact statements as admissible evidence and how much weight should they accord to them.

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<sup>843</sup> *S v Malgas* (n 9).

## CHAPTER 5

### 5. CONCLUSION AND RECOMMENDATIONS

As previously stated, the purpose of the dissertation was to evaluate what factors could possibly constitute “substantial and compelling circumstances”, by critically discussing and analysing the manner in which our courts have defined the phrase. One explored the principles relevant to the subject and further took into account certain mitigating and aggravating factors in conjunction with the *Zinn* triad. In addition, one also looked at the prospects of rehabilitation as a possible substantial and compelling circumstance, which once coupled with other considerations, can warrant a departure from the prescribed sentences under s 51 of the 1997 Act. Finally, one also looked at certain developments in the law that have been recognised during the sentencing stage, specifically the concept of restorative justice as well as victim-impact statements.

The dissertation looked to answer the following questions:

- a. Are the minimum sentencing provisions constitutional?
- b. Do the minimum sentencing provisions strip the courts of its sentencing discretion?
- c. How have the courts defined “substantial and compelling circumstances”?
- d. What factors could possibly constitute “substantial and compelling circumstances”?
- e. What factors are indicative of the prospects of rehabilitation and can the prospects of rehabilitation be recognised as a mitigating factor?
- f. Has the recognition of victim impact statements as well as the concept of restorative justice assisted in the sentencing process?

After a thorough analysis of the law relating to the subject of interest, it is important to note that when dealing with a case falling within the purview of s 51 of the 1997 Act, the issue is of whether or not there are “substantial and compelling circumstances”, warranting a departure from the prescribed sentences as opposed to whether or not the prescribed sentences ought to be imposed in a particular case. Accordingly, a case falling within the purview of the said section will inevitably attract the applicable mandatory minimum sentence if certain triggering circumstances exist and only “substantial and compelling circumstances” will justify a deviation thereof.

It is widely accepted that deciding on an appropriate sentence forms the most difficult part of the criminal justice process.<sup>844</sup> Perhaps this is because sentencing is considered to be dependent on the exercise of a judicial discretion, thus implying that there is no single acceptable answer to the question relating to the appropriateness of a sentence. Judicial officers are expected to exercise this discretion properly, mainly because it is accepted that the wider it is, the greater the chance of imposing sentences that reflect the individual judge's personal convictions.<sup>845</sup> One submits that the proper exercise of judicial discretion however becomes particularly difficult as each case will often present many facts or factors which tend to have some bearing on the sentence eventually imposed. With that being said, the court is always faced with a difficult task of determining which of the many facts or factors are relevant in a particular case, and most importantly what weight to attach to each of those factors. As seen from the above-mentioned case law, when courts are faced with a case falling under s 51 of the 1997 Act, the difficult task they face is determining whether particular factors can be said to be substantial and compelling and the eventual evaluation depends largely on an individual judge's perception of what is compelling and what is not in that particular case.

In such instances however, it appears that though the discretion of the court is limited to the presence of "substantial and compelling circumstances" and is not totally free as it can only be exercised within statutorily defined bounds, courts still approach sentencing in the traditional manner by looking at mitigating and aggravating factors and accordingly, the enactment of the minimum sentences legislation has not fettered with the discretion they previously had. This is confirmed in the leading case of *Malgas*, which specifically provides for the consideration of traditional factors in the assessment of whether or not "substantial and compelling circumstances" exist.

Though the purpose of the 1997 Act has been speculated to be one of consistency, the above-discussed cases indicate that it cannot be the case because an offender ought to receive a sentence proportional to the seriousness of the offence he or she has committed and other practices, such as the characterisation of offences have since resulted in differing sentences

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<sup>844</sup> *S v Kok* 1998 1 SACR 532 (N) 55.

<sup>845</sup> *Terblanche* (n 282) 114-115.

being imposed for similar crimes, conceivably because the only available mechanism for deviation from the prescribed sentences has not been textually defined, thus resulting in different interpretations and inconsistent sentences as the discretion to deviate is linked to an individual's recognition of what amounts to a serious crime and more importantly what amounts to substantial and compelling factors. For instance, the cases of *Bailey* and *Abrahams* present a similar situation in that in both cases, a father had been convicted of raping their daughter, who was under the age of 16 years and although one would perceive these cases as falling within the same spectrum, the sentences imposed were particularly different, so much so that in *Bailey*, the offender received a sentence of life imprisonment, while in *Abrahams* a sentence of 12 years was imposed.

It would however be erroneous for one to conclude on this one basis that the enactment of the Act has not brought about any consistency as in the *Malgas* case, it was noted that though a court may consider past precedent, a mere discrepancy cannot be used as a sole criterion and a court that follows past precedent without proper consideration of the unique facts of a particular case will be abdicating its discretion to consider an appropriate sentence. Thus, there can be no doubt that the facts of a particular case remain important in the exercise of the court's discretion when dealing with cases falling under s 51 of the 1997 Act, mainly because the sentencing court still has to impose a sentence that is proportional to the seriousness of the offence committed and it is safe to say that such can only be achieved by looking at the unique facts of a particular case. *Dodo* reiterates the principle of proportionality, and further states that the discretion to deviate from the prescribed sentences is the mechanism that ensures that courts do not impose *grossly disproportionate* sentences through the imposition of the prescribed sentences and consequently such a discretion makes the minimum sentences legislation constitutional.

In the interpretation of what amounts to "substantial and compelling circumstances", a strict approach was developed and adopted in the *Mofokeng* case and it depicted that circumstances warranting a departure from the prescribed minimum sentences have to be exceptional and should not simply amount to the old traditional factors ordinarily considered when imposing a sentence, this seems appropriate in light of the *Malgas* case, where it was stated that the minimum sentences legislation meant that it was no longer "business as usual" when faced

with cases falling under s 51 of the 1997 Act. The approach adopted in *Mofokeng* proves to be particularly problematic however in that, the very discretion that makes the minimum sentences provisions constitutional will be limited as the requirement of exceptionality means that the court has to find circumstances which are seldom encountered or rare and this may result in courts seldom deviating from the minimum prescribed sentences and as implied above, the excessive limitation of the discretion to deviate from the minimum prescribed sentences legislation may well result in the provisions of the legislation being rendered unconstitutional. Though the phrase “substantial and compelling circumstances” was borrowed from the state of Minnesota in the United States of America, no guidance can be obtained from their application of the phrase as they apply a strict grid system which cannot be welcomed in our South African legislative framework as the rigid application of s 51 of the 1997 Act will impede on the discretion of judicial officers. Further, though a departure from the strict grid system is possible under the Minnesota Guidelines, such a departure is limited to a certain range specified under the grid, which means where a departure is warranted, the court will still have to adhere to a defined minimum and cannot deviate outside of that minimum.

South African courts have previously encountered a similar problem under the doctrine of “extenuating circumstances” as there was no guidance as to what factors were relevant in the enquiry relating to whether extenuating circumstances existed and warranted a departure from the prescribed maximum sentence of death. Similar to the case of “substantial and compelling circumstances”, various interpretations emerged through case law. The interpretation of the phrase as set out in *Letsolo* however was largely accepted as it did not impede on the courts discretion by limiting the type of or nature of factors that were to be considered in the enquiry. Thus, similar to a case relating to “substantial and compelling circumstances”, courts approached sentencing in the traditional manner and considered the traditional mitigating and aggravating circumstances. Accordingly, it appears that the discretion of the judicial officers remained unfettered and the eventual sentence still depended on an individual’s appreciation of what amounted to an appropriate sentence in the particular case.

One submits that if courts are to approach sentencing in the traditional manner, particularly by taking into account the cumulative effect of mitigating and aggravating circumstances, the position before the enactment of the 1997 Act remains intact and the introduction of the 1997 Act thus has no dominating outcome. One further submits that owing to the fact that the 1997 Act also aims at ensuring a severe, but proportional response from the courts to the commission of serious crimes, courts ought to revert back to the basic sentencing principles in conjunction with the *Zinn* triad in order to ensure a proportional balance between the different factors and the seriousness of the crime. The personal circumstances of the offender will not be underestimated and the effects of the crime will not be overstated, particularly because the courts will have to consider the offender, the crime and the interest of society in reaching an appropriate decision. Courts, in addition to the consideration of the harm caused by the commission of the crime, will look at all the circumstances that are related to or connected with the conduct of the offender in the commission of the crime, this includes all those factors that will either increase or diminish the offender's guilt. By doing this, the courts may be able to guard against focusing on the heinousness of the offence as a balance between all relevant legs of the *Zinn* triad will have to be achieved.

In determining the circumstances relevant to the commission of the crime, courts ought to guard against placing greater weight on speculative factors such as the prospects of rehabilitation, which could be inferred from not only the immaturity (age) of the offender, but also from the remorse shown by the accused as well as the accused's plea of guilt and the accused's first offendership, which leads one to conclude that the offender is not a "habitual" offender and consequently, can still be rehabilitated. These mentioned factors are largely based on assumptions. For instance, a plea of guilt and remorse is largely dependent on the principle of genuineness, in which case, the accused has to satisfy the court of their true remorse. Considering the fact that the question of whether or not the remorse displayed by the accused is genuine is highly factual and it depends on the evidence presented by the accused in court, such remorse can easily be fabricated by the accused, for instance where the evidence against them is overwhelming. Similarly, one's first offendership cannot be said to warrant the conclusion that they are unlikely to re-offend. One submits therefore that placing unwarranted weight on these speculative factors, may well result in in a consideration of what the *Malgas* case termed as "flimsy" factors.

In addition to aiming at striking a balance between the offence, the offender and the interests of society, the courts ought to consider repairing the damages caused by the crime, those that do not only relate to the victims, but also to the community at large. In doing so, the courts will be empowered to recognise the concept of restorative justice as forming part of the sentencing process. Accordingly, it is important to remember that the concept of restorative justice places emphasis on the involvement of the victim in the sentencing process, through victim impact statements. One submits that such statements may well assist the court in achieving proportionality as the seriousness of the offence may be ascertained from the expressed impact of the crime on the victim. This means that the court will find “substantial and compelling circumstances” in the evidence that the victim has adduced in the process of relaying the impact of the crime to it. This will also mean that the legislation will still be compatible with a more restorative approach if courts are particularly cautious of basing the final decision on the impact of the crime. Further, through the recognition of restorative justice in the sentencing process, an appropriate sentence which is able to punish the accused, restore the victim and repair the damages caused by the commission of the crime may be achievable as seen in the *Thabetshe* case.

Thus, though the need for greater consistency in sentencing remains important, after an analysis of the purposes, consequences and effects of mandatory minimum sentences throughout this paper, the conclusion is that the introduction of such sentences in the South African sentencing regime has proven to result in more complications as more guidance as to what amounts to “substantial and compelling circumstances” and this is regardless of the manner in which they are specified or they operate within the law. Mandatory minimum sentences should be approached with a degree of caution, because though there is a discretion to deviate from the prescribed sentences under s 51 (3) (a) of the 1997 Act, courts may easily do so for “flimsy” reasons and where there is a need to deviate from the prescribed sentences, such need may not be recognised by the court. Further, South Africa should opt for the implementation of a more restorative approach, which will result in the restoration of the victim by repairing the damages suffered as a result of the crime. Finally, though a strong deterrent against crime is necessary, consistency will be achieved where courts adhere to the sentencing principles, most importantly the principle of proportionality and where courts decide cases on their own merits.

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