

REMORSE THE “X” FACTOR

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This Research Project is submitted in partial fulfilment of the regulations for the LLM
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DECLARATION

This research has not been previously accepted for any degree and is not being currently considered for any other degree at any other university.

I declare that this dissertation contains my own work except where specifically acknowledged. I further declare that I have obtained the necessary authorisation and consent to carry out this research. This work may be made available for photocopying and for inter-library loan.

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‘It always seems impossible until it’s done.’ (Nelson Mandela)

‘Keep your dreams alive. Understand to achieve anything requires faith and belief in yourself, vision, hard work, determination, and dedication. Remember all things are possible for those who believe.’ (Gail Devers)

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CHAPTER 1 INTRODUCTION

1.1 *Background*

Remorse! Remorse! Remorse! What is this concept that our courts keep referring to in the sentencing judgments? It rears its head in a number of important court decisions in South Africa and appears to have some kind of effect on the final sentence. The next question which came to mind was how a judicial officer identifies remorse and what weight is then attached to this particular factor. The writer's curiosity was piqued on this subject by the recent case of Oscar Pistorius.¹

The case deserves special mention as it has been a precedent-setting case, it being the first to be broadcast live in South Africa and throughout the world. It is a current case that has received both international and national attention as the accused is a well-known sports figure, famous for his athletic talent around the world. The accused is a double amputee who runs on prosthetic blades and is better known as the 'Blade Runner'.² The facts briefly were as follows:³ On the 14 February 2013 Oscar Pistorius shot and killed his girlfriend, Reeva Steenkamp. He was charged with her murder, as well as two counts of contravening section 120(7) of the Firearms Control Act 60 of 2000, relating to the unlawful discharge of a firearm in a public place. He was further charged with contravening section 90 of the Firearms Control Act 60 of 2000, being in unlawful possession of ammunition without having a license or permits to possess the said ammunition. Pistorius was convicted by Judge Masipa on the 12 September 2014 in the Pretoria High Court of culpable homicide and of contravening section 120(3) (b) of the Firearms Control Act 60 of 2000, reckless endangerment with a firearm, which was unrelated to the main count. Judge Masipa handed down her sentence on the 21 October 2014 and sentenced Pistorius to Five years imprisonment in terms of section 276 (1) (i) of the Criminal Procedure Act 51 of 1977⁴ for culpable homicide and three years' imprisonment for the reckless endangerment with a firearm, to run concurrently. Whilst

¹ *S v Oscar Leonard Carl Pistorius* (GNP) case no CC 13/2013 11& 12 September 2014 unreported.

² 'Oscar Pistorius' *Wikipedia* available at http://en.wikipedia.org/wiki/Oscar_Pistorius, accessed on 29 November 2014.

³ *Pistorius* (note 1 above).

⁴ 276 (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

(i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board

[Para. (i) added by s. 41 (a) of Act 122 of 1991 and substituted by s. 20 of Act 87 of 1997.].

testifying, and furthermore intermittently during the trial the accused cried and retched.⁵ The writer waited patiently to hear the judge's finding in respect of the issue of remorse. Would she have considered his demeanour and behaviour in court as a sign of remorse? What about his apology in open court to the deceased's family? What about the shocking evidence that was led during the sentencing process, that he had been paying money to Steenkamp's parents for a while after the incident? There was also the evidence of his behaviour immediately after the incident. The writer will attempt to answer the above questions in the conclusion of this paper after having discussed the remorse factor, with an analysis of the *Pistorius* judgment on sentence.

1.2 Aim of the study

The remorse factor is intriguing. 'Because of moral condemnation after a crime we ask for punishment and expect some kind of remorse.'⁶ The nexus between morality and punishment is where the aspect of remorse finds its root. The main aim of this paper is to determine how remorse is identified by a judicial officer and then to evaluate the X factor, that is, the role it should play, if any, in the sentencing process. The trend which will be evaluated in further discussion in this paper is that the presence of remorse is regarded as a mitigating factor. At the same time the counter-argument becomes a point of contention. Does the absence of remorse weigh against the accused as an aggravating factor? How do our courts interpret the definition of remorse? The writer's research summarised below, focuses on an examination of the case law and the courts' interpretation of this particular factor as well as various academic views of this concept.

1.3 Objectives

The objective of this paper is to understand the meaning of remorse and its application in the sentencing process. The sentencing process clearly has the potential to be inconsistent due to the wide discretion afforded to a judicial officer. The study embraces the problems with inconsistencies and recommendations for possible solutions.

⁵ "As a result of the case being televised, the accused's emotional distress was broadcast to all viewers."

⁶ T. Vandendriessche, 'Should we punish a remorseful offender? Punishment within a theory of symbolic restoration' (2014) 33 (2) *SAJP* 113

1.4 Synopsis of Chapters

This study has been developed through five chapters. Chapter one sets out the background in terms of the decision to broach this topic. It then clarifies the aims and objectives of the paper. Chapter two is a discussion of punishment generally and the sentencing principles. There is further discussion of specific legislation and judicial precedent which provide key boundaries in the sentencing process. I then proceed to identify and analyse the various definitions of remorse. Remorse is then viewed from a psychological perspective. Discussions on empirical studies conducted by Proeve, Tudor and Zhong (refer to chapter two) assist the writer in understanding the significance of remorse. An analysis of their work provides viable solutions in understanding the application of remorse and the role it plays in the criminal process. Chapter three examines the notion of remorse as interpreted in various cases. I undertake a study of remorse by looking at the dicta in relevant South African cases. This process has enabled the writer to determine how judges identify remorse and what actions are regarded as constituting remorse. Chapter four begins with an analysis of the remorse factor. The writer then begins to apply the various definitions and arguments in respect of remorse to the interpretations applied in the case law. The case law is discussed in depth and various arguments proffered as to the role of remorse in the sentencing process, if any. The writer takes a brief look at some international cases and the views of judges and jurors in other jurisdictions. There are views by Ward⁷ and Du Toit⁸ who argue that the application of remorse is subjective and should therefore not play any role in the process. The writer endorses these views in terms of the strong arguments postulated by them. Chapter five encompasses the conclusion and begins with understanding the role of remorse and its application. A clear pattern emerges in respect to the application of remorse in our case law, including the Pistorius decision. The difficulties with the interpretations and application of remorse are highlighted. Possible solutions are advanced in terms of academic views. These views are highly recommended as ultimately they will lead to more consistent sentences. Remorse is further discussed in terms of its role in the restorative justice process. The Department of Justice and Constitutional Development state in their publication '*Restorative Justice the road to healing*' (2011) that the 'restorative justice programmes should create space for remorse, the expression of shame, apology, forgiveness, mercy and compassion, but should not force these responses to occur.'⁹

⁷ Ward, BH 'Sentencing Without Remorse' (2006) 38 *Loyola University Chicago Law Journal* 131-167.

⁸ Du Toit, P 'The role of remorse in sentencing' (2013) 34(3) *Obiter* 558-564.

⁹ 'Restorative Justice the road to healing' issued by the Department of Justice and Constitutional Development, (2011), 6.

CHAPTER 2

HOW DOES REMORSE FUNCTION IN THE SENTENCING PROCESS?

2.1 Punishment and sentencing generally

Punishment is described in the Shorter Oxford English Dictionary as the infliction of a penalty, or of suffering, on a transgressor.¹⁰ In the legal context it is what is inflicted on an accused in a criminal case after he or she has been found guilty of an offence(s). The determination of punishment takes place during the sentencing process by a court. The aim of sentencing is to punish the wrongdoer. A sentence is any measure applied by a court to the person convicted of a crime and which finalises a case.¹¹ Section 276 (1) of the Criminal Procedure Act¹² sets out what types of sentences may be imposed. In terms of this section punishment takes many forms including imprisonment, fines, correctional supervision, suspended sentence, forfeiture, payment of compensation and community service.¹³ The list is however incomplete as it does not take into account orders such as caution and discharge and postponed sentences which also finalise cases.¹⁴ The courts may combine the different types of punishment when arriving at an appropriate sentence. Our sources of the law of sentencing are the common law, statute and judicial precedent.¹⁵

The main purposes of punishment that the court will take into account are namely; deterrence, prevention, reformation and retribution.¹⁶ Deterrence has been said to be one of the most important of the purposes of punishment.¹⁷ The deterrence factor is twofold. It is aimed at not only discouraging the offender, but also other like-minded people, from committing crimes. Prevention is aimed at protecting the public from further criminal conduct on the part of the offender. This may arise as a result of being incarcerated. Reformation aims at rehabilitating the offender and making a better person out of him or her.¹⁸ Ultimately reformation is aimed at making the offender into a law abiding citizen.

¹⁰ SS Terblanche *Guide to Sentencing in South Africa* 2 ed (2007) 3.

¹¹ T Geldenhuys *et al Criminal Procedure Handbook* 11ed (2014) 325.

¹² Act 51 of 1977 Hereinafter referred to as 'the Act'.

¹³ Terblanche (note 10 above, 4).

¹⁴ *Ibid* 3.

¹⁵ JR Lund 'Discretion, principles and precedent in sentencing (part one)'(1979) 3 *SACC* 204

¹⁶ *S v Rabie* 1975 (4) SA 855 (A) at 862 A-B; *M v The State (Centre for Child Law Amicus Curie)* 2007 (12) BCLR 1312 (CC) para 109.

¹⁷ Terblanche (note 10 above, 138).

¹⁸ *Ibid* 163.

Retribution is society's condemnation of the offence.¹⁹ Society at large is adversely affected by crime and it is for this reason that they want to see the offender punished for what he has done. The penalty imposed must reflect the seriousness of the offence and promote a respect for the law.²⁰

The South African judiciary enjoys a wide discretion when it comes to the sentencing process.²¹ Innes CJ held in *Mapumulo*²² 'The infliction of punishment is pre-eminently a matter for the discretion of the trial court.'²³ It is trite law that the principles known as the 'Zinn triad'²⁴ are applied in exercising this discretion.²⁵ The triad consists of taking into account the personal circumstances of the accused, the crime that has been committed and the interests of society. Terblanche submits that theoretically the 'purposes of punishment should be dealt with as part of the interests of society component of the Zinn triad.'²⁶ These principles do not 'solve the complex task of weighing, balancing and somehow reconciling the often contradictory principles and goals contained in the triad.'²⁷ These principles were extended further in the case of *S v Rabie*²⁸ where it was held that 'Punishment should fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances.'²⁹ In *S v Isaacs*³⁰ it was stated that the triad laid down in *Zinn* reflects an outmoded view of punishment in that it neglected to take into account the specific interests of the victim which might well differ from those of society.³¹ The courts discretion must not be exercised arbitrarily.³² The courts have to act within the limits prescribed by the legislature and in accordance with the guidelines laid down by higher courts. In this process the personality of the sentencing official also plays an important role.³³ 'Judges are human beings who have their own perceptions and value systems.'³⁴ The facet of

¹⁹ Ibid 167.

²⁰ *S v Di Blasi* 1996 (1) SACR (A) 10 e-g.

²¹ Lund (note 15, 203).

²² 1920 AD 56.

²³ *Mapumulo* above at 57.

²⁴ *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539, 549 d-e.

²⁵ *S v Zinn* 1969 (2) SA 537, 540.

²⁶ Terblanche (note 10 above; 155).

²⁷ Lund (note 15 above, 212).

²⁸ *S v Rabie* 1975 (4) SA 855 (A).

²⁹ *Rabie* para 862G.

³⁰ *S v Isaacs* 2002 (1) SACR 176 (C).

³¹ *Isaacs* above 177 B-C.

³² Geldenhuys *et al* (note 11 above, 326).

³³ Ibid 325.

³⁴ SJ Morse 'Commentary: reflections on remorse' (2014) 42(1) *J Am Acad Psychiatry Law* 54.

considering the personal circumstances of the accused allows for individualisation.³⁵ ‘It further allows the court to carefully consider the aggravating and mitigating factors which influence the sentence accordingly. This process of individualised justice cannot take place without the sentence discretion.’³⁶ Aggravating factors are factors that weigh against the accused and may result in a more severe sentence. Examples of aggravating factors are, namely, the escalated seriousness of the offence, premeditation, prevalence, previous convictions, abuse of trust and, according to some, even a lack of remorse. Mitigating factors on the other hand tip the scale in favour of the accused and may result in a less severe sentence. Examples of mitigating factors are youthfulness, first time offender, ill health, dependants, plea of guilty and remorse. The court has to weigh and balance all factors both mitigating and aggravating in arriving at an appropriate sentence.

The court clearly sets out the sentencing principles in *S v Samuels*³⁷:

It is trite that the determination of an appropriate sentence requires that proper regard be had to the well-known triad of the crime, the offender and the interests of society. After all, any sentence must be individualised and each matter must be dealt with on its own peculiar facts. It must also in fitting cases be tempered with mercy. Circumstances vary and punishment must ultimately fit the true seriousness of the crime. The interests of society are never well served by too harsh or too lenient a sentence. A balance has to be struck.

Each case has to be dealt with in terms of its own merits and its own unique factors. The weight attached to every factor and balancing of the sentencing principles will inevitably lead to diverse outcomes. Section 274 (1) of the Act³⁸ provides:

A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed.

The court has the power to request all relevant information in order to arrive at an appropriate sentence.

³⁵ *S v Scheepers* 1977 (2) SA 155 (A) 158 G-H.

³⁶ Terblanche (note 10 above; 120).

³⁷ 2011(1) SACR 9 SCA.

³⁸ note 12 above.

2.1.1 Minimum sentence legislation

Section 51 to 53 of the Criminal Law Amendment Act³⁹, which came into effect on the 1st May 1998, prescribe the minimum sentence a judicial officer must impose in serious offences for example murder, robbery and rape. This legislation was amended again in 2007 by the Criminal Law Amendment Act.⁴⁰ The court must act within the limits prescribed by the Legislature if the accused is convicted in terms of those specific sections. The enactment of the minimum sentence legislation was in effect addressing society's attitude towards serious offences. For instance, if convicted of premeditated murder or rape where aggravating factors, as set out in the section, are involved, life imprisonment is prescribed.⁴¹ Section 51(3) (a) sets out the approach the court has to adopt when passing sentences prescribed by the minimum sentence legislation. It reads as follows:

‘(a) If any court referred to in subsection (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 proceedings and may thereupon impose such lesser sentence’.

In *S v Abrahams*⁴² the court held:

The prescribed sentences the Act contains play a dual role in the sentencing process. Where factors of substance do not compel the conclusion that the application of the prescribed sentence would be unjust, that sentence must be imposed. However, even where such factors are present, the sentences the Act prescribes create a legislative standard that weighs upon the exercise of the sentencing court's discretion. This entails sentences for the scheduled crimes that are consistently heavier than before.⁴³

The approach that the courts have to adopt is that the prescribed minimum sentences ought to be imposed. However the courts must take into account the personal circumstances of the accused as well as the circumstances present during the commission of the offence in the search for substantial and compelling circumstances which would justify the court imposing a lesser sentence than the one prescribed by the act. The court has a duty to consider all circumstances both mitigating and aggravating cumulatively and then consider if it justifies a departure from the prescribed minimum sentence. In *S v Malgas*⁴⁴ the Supreme Court of

³⁹ 105 of 1997 Hereinafter referred to as the ‘minimum sentence legislation’.

⁴⁰ Act 105 of 2007.

⁴¹ Section 51 (1) Part 1 of Schedule 2.

⁴² 2002 (1) SACR 116 (SCA).

⁴³ *Abrahams* above 126.

⁴⁴ 2001(1) SACR 469 (SCA).

Appeal held that the specified sentences should not be ‘departed from lightly and for flimsy reasons.’⁴⁵ Terblanche argues that the ‘current minimum sentence legislation has worsened the disparities and inconsistencies’ in the sentencing process.⁴⁶ In *S v Dodo*⁴⁷ the Constitutional Court confirmed the constitutionality of the minimum sentence legislation. The court found that proportionality between the seriousness of the offence and the extent of the punishment goes to the ‘heart of the inquiry as to whether punishment is cruel, inhuman or degrading.’⁴⁸ This was with reference to section 12 of the Constitution⁴⁹ which provides:

- (1) Everyone has the right to freedom and security of the person which includes the right -
 (e) not to be treated or punished in a cruel, inhuman or degrading way.

Our Constitution accordingly protects the rights of an offender not to be punished or sentenced in a way that would amount to ‘cruel, inhuman or degrading’ punishment. When passing sentences judicial officers should ensure that they refrain from infringing on this right. If the courts apply the proportionality test as set out in the dictum of the *Dodo* case it will minimise unjust sentences.

2.1.2 Judicial precedent

The court must also be guided by the decisions of higher courts. The Supreme Court of Appeal in the case of *S v Xaba*⁵⁰ held that the sentences imposed in previous cases, namely judicial precedent provide useful guidelines. Conradie JA added in *Xaba* ‘It has often been pointed out that no two cases are alike and this is self-evidently true, but the fact remains that courts must strive for some consistency in punishment....’⁵¹ However the court in *S v Jimenez*⁵² confirmed that the circumstances of each crime vary and that other sentences can be no more than ‘guides’, it nevertheless stressed that these guides should be used, in conjunction with other relevant considerations, to determine an appropriate sentence.⁵³

⁴⁵ *Malgas* above para 25.

⁴⁶ SS Terblanche ‘Sentencing guidelines for South Africa: lessons from elsewhere’(2003) 120 (4) *SALJ* 881.

⁴⁷ 2001 (1) SACR 594 (CC).

⁴⁸ *Dodo* para 37-38.

⁴⁹ Constitution of the Republic of South Africa, 1996 (hereinafter referred to as the Constitution).

⁵⁰ 2005 (1) SACR 435.

⁵¹ *Xaba* above para 15.

⁵² 2003 (1) SACR 507 (A).

⁵³ SS Terblanche ‘Rape sentencing with the aid of sentencing guidelines’ (2006)XXXIX *CILSA* 31.

In *R v Karg*⁵⁴ Schreiner JA observed that ‘while the deterrent effect of punishment has remained as important as ever, the retributive aspect has tended to yield ground to the aspects of prevention and correction.’⁵⁵ It is apposite to remember that when a court imposes punishment the task is somewhat different to the one which is exercised when dealing with the merits of the matter. It was stated by Beyers JA in *Ex Parte Minister of Justice: In Re R v Berger and another* ‘It is rightfully said that after conviction the judge is in another sphere where the imposition of the punishment must be accompanied by judicious mercy and humanity in accordance with the facts and circumstances of the case.’⁵⁶

In the case of *S v Martin*⁵⁷ Flemming DJP held the following:

A Court of law is not a court of perfection. As the word ‘judgment’ indicates, the Court’s order represents an evaluation. It is not a scientific calculation. Sentence cannot be objectively measured and then snipped off in correct lengths. It can never have perfect concurrence from all members of the community. But if confidence is not reposed in the Court, if it’s image is tarnished in the mind of the public, if the role of the court as the community’s own arm dedicated to the making of assessments is not brought home to the public, the country will be brought even closer to the chaos to which it is already so close. It is a matter of regret that so many influential people, and no occupation is excluded, often show inadequate insight into the need to build confidence in the Courts. They do their country a disservice.⁵⁸

This judgment aptly confirms that the duty of the court is to evaluate all the evidence and then apply the sentencing principles, namely, the crime, and the personal circumstances of the accused and the interests of society in arriving at an appropriate sentence. There is no mathematical calculation or formula that would lead to the perfect sentence. The court takes into account factors that may mitigate or aggravate a sentence. Sometimes a factor may have no effect on the final sentence. ‘The effect of every relevant factor is determined by the judicial officer in the exercise of his sentence discretion.’⁵⁹ A judicial officer uses intuitive synthesis in determining an appropriate sentence. What is important is trying to attain a balance of the principles in the triad as Miller JA held in *S v Khulu*.⁶⁰

⁵⁴ 1961 (1) SA 231 (A).

⁵⁵ *Karg* above 263 A.

⁵⁶ *Berger* 1936 (AD) 334, 341 “(my translation)”.

⁵⁷ 1996(2) SACR 378.

⁵⁸ *Martin* 382 para E-G.

⁵⁹ Terblanche (note 10 above; 185).

⁶⁰ 1975 (2) SA 518 (N).

just as a court should not, in an excess of compassion or pity, show a criminal convicted of a serious or prevalent type of crime, undue leniency at the best interests of society, so it should not by over-zealous protection of society denigrate the concepts of justice and fairness in relation to the individual offender.⁶¹

In this dictum the judge confirms the importance of balancing the triad and not over-emphasizing any one principle in favour of another.

2.2 Identifying remorse

Remorse is defined in the *New Oxford Dictionary of English*⁶² as ‘deep regret or guilt for a wrong committed’. The online *Your Dictionary* sets out examples of sentences using the word remorse:⁶³

- He had remorse for the death of his former friend, and later came here on a pilgrimage.
- There was no remorse in his face or tone.
- Why doesn't he show more remorse for the murdered, innocent Iraqis?
- Another held him accountable, with remorse causing him to take his own life.
- Similar to Brady, there was no remorse in his admittance, and her throat tightened.
- All the piled up stress and remorse bubbled up and she was suddenly and thoroughly consumed with seething rage.
- Haunted by remorse and jarred by rumours of his wife's infidelities, Justin surprises himself by plunging headlong into a dangerous odyssey.
- It was that night, in deep remorse, Van Gogh famously cut off part of his own ear.

Wikipedia defines remorse as:

An emotional expression of personal regret felt by a person after they have committed an act which they deem to be shameful, hurtful or violent. Remorse is closely allied to guilt and self-directed resentment. When a person regrets an earlier action or failure to act, it may be because of remorse or in response to various other consequences, including being punished for the act or omission.⁶⁴

Remorse may be defined as moral or emotional distress resulting from past transgressions.⁶⁵

⁶¹ *Khulu* above 522.

⁶² *New Oxford Dictionary of English* 1998.

⁶³ <http://sentence.yourdictionary.com/remorse>, accessed on the 21 October 2014.

⁶⁴ ‘Remorse’ *Wikipedia* available at <http://en.wikipedia.org/wiki/Remorse>, accessed on 7 November 2014.

⁶⁵ EP Corwin *et al* ‘Defendant remorse, need for affect, and juror sentencing decisions’ (2012) 40 (1) *J Am Acad Psychiatry Law* 41.

How do our courts interpret the definition of remorse? In assessing the case law in South Africa it has been noted that remorse is a factor that the court considers in the sentencing process. In *S v Seegers*⁶⁶ Rumpff JA held that ‘remorse, as an indication that the offence will not be committed again, is an important consideration, in suitable cases, when the deterrent effect of a sentence on the accused is adjudged.’⁶⁷ Some courts link the presence of remorse with the prospect of the rehabilitation of the offender.⁶⁸

The sentencing process is not an easy task and to alleviate the issues of inconsistency the South African Law Commission recommended that a Council be established which would provide some guidance for our courts.⁶⁹ Sentencing guidelines are ultimately aimed at consistency⁷⁰ and its effect will be to reduce disparities. One of the important recommendations is the assessment of the seriousness of the offence. This must be determined by the ‘degree of harmfulness (or risk of harmfulness) of the offence and the degree of culpability of the offender.’⁷¹ Despite their recommendations these guidelines have not been made into law as yet. Many States in America have prescriptive sentencing guidelines that ensure that sentences handed down by the courts are consistent.⁷²

Section 9 of our Constitution sets out the right to equality:

(1) Everyone is equal before the law and has the right to equal protection and benefit of the law⁷³

It is therefore the duty of our courts to ensure that factors like remorse if they are going to be weighed into the equation should be applied consistently in accordance with the principles of justice and fairness. The court held in *Director of Public Prosecutions v Mngoma*:⁷⁴ ‘For a sentence to be appropriate it must be fair to both the accused and society. Such a sentence must show a judicious balance between the interests of the accused and those of society.’⁷⁵

⁶⁶ 1970 (2) SA 506 (A).

⁶⁷ *Seegers* 511 G-H.

⁶⁸ Du Toit (note 8 above, 558).

⁶⁹ Report: Sentencing (A new sentencing framework): Project 82 (2000).

⁷⁰ Terblanche (note 46 above, 859).

⁷¹ Clause 3 (2) (note 69 above).

⁷² Example Minnesota guidelines, Terblanche (note 46, 861.)

⁷³ The Constitution.

⁷⁴ 2010 (1) SACR 427 (SCA).

⁷⁵ *Mngoma* above Para [13].

2.3 Remorse in a psychological context

Proeve and Tudor⁷⁶ examine remorse and the emotions related to remorse, namely: regret, guilt and shame.⁷⁷ The authors state that the ‘scholarly discussion of this emotion suggests that remorse is relatively difficult to distinguish from other emotions, as remorse is commonly described in terms of other emotions.’⁷⁸ Studies done by Proeve in 2001 have been able to verify that there is clearly a relationship between remorse, regret and guilt.⁷⁹ When an individual confesses, thereby accepting full responsibility and blame, the adverse actions directed towards that person are reduced.⁸⁰

Two studies on apologizing are "The Five Languages of Apology" by Gary Chapman and Jennifer Thomas, and "On Apology" by Aaron Lazare. These studies indicate that effective apologies that express remorse typically include a detailed account of the offense; acknowledgment of the hurt or damage done; acceptance of the responsibility for, and ownership of, the act or omission; an explanation that recognizes one’s role. As well, apologies usually include a statement or expression of regret, humility or remorse; a request for forgiveness; and an expression of a credible commitment to change or a promise that it will not happen again. Apologies may also include some form of restitution, compensation or token gesture in line with the damage that you caused.⁸¹

Most psychologists regard remorse as a primary component of the guilt experience.⁸² The emotions of shame and guilt may be an important stepping stone in the rehabilitation process.⁸³ Zhong et al⁸⁴ have conducted studies by interviewing twenty three judges to examine their views on remorse.

The results showed that the judges varied widely in their opinions on the way remorse should be assessed and its relevance in judicial decision-making. They agreed that the relevance of remorse varied by type of crime and the stage of the proceedings. The indicators of remorse for some judges were the same as those that indicated the lack of remorse for others.⁸⁵

⁷⁶ M Proeve & S Tudor ‘Remorse Psychological and Jurisprudential Perspectives’ (2010).

⁷⁷ Ibid 51.

⁷⁸ Ibid 52.

⁷⁹ Ibid 53.

⁸⁰ GJ Gold and B Weiner ‘Remorse, confession, group identity, and expectancies about repeating a transgression’ (2010) 22(4) *Taylor and Francis Online: Basic and Applied Social Psychology* available at http://www.tandfonline.com/doi/abs/10.1207/S15324834BASP2204_3, accessed on 18 October 2014.

⁸¹ ‘Remorse’ (note 64 above).

⁸² JP Tangney *et al* ‘Shame, guilt and remorse: implications for offender populations’ (2011) 22(5) *J Forens Psychiatry Psychol* available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC/3328863/>, accessed on the 8 November 2014.

⁸³ Ibid 1.

⁸⁴ R Zhong *et al* ‘So you’re sorry? The role of remorse in criminal law’ (2014) 42 (1) *J Am Acad Psychiatry Law* 39-48.

⁸⁵ Ibid 39.

The judges were given a definition of remorse adapted from Proeve and Tudor⁸⁶:

Remorse may be defined as a distressing emotion that arises from acceptance of personal responsibility for an act of harm against another person. Often, with further reflection, the remorseful individual may desire that the act had never occurred at all and wish to make restitution toward the victim.⁸⁷

In summarizing Zhong's research, the judges were asked their opinion of the above definition and further questions on their legal experience with the remorse factor. They were also asked to evaluate 'genuine versus feigned remorse'.⁸⁸ The analysis of the data was done using qualitative methodology. Beyond that the study was a clear indicator that the application of remorse in the sentencing process is inconsistent. Some judges even regarded remorse as irrelevant. The judges also had diverse views on the absence of remorse and its effect in the sentencing process. Many of the judges agreed that a guilty plea was indicative of remorse. Some judges discussed the difficulty they had in distinguishing the genuine remorse from the feigned remorse. There were clear differences as to the indicators they used to identify real remorse from the fakers.

2.4 The significance of remorse as a factor in sentencing

The researchers concluded from the above exercise that all the participants recognized the relevance of the study in trying to assess the role of remorse. The judges were also keen on the idea of 'forensic psychiatric assessments'⁸⁹ where skilled psychiatrists would evaluate the accused and be able to professionally assess the aspect of remorse. Zhong has conceded in his article that the study was limited in terms of the method used and that the research was only conducted in one state.

Stephen J Morse⁹⁰ writes an interesting commentary on Zhong's article above. He commends the authors for accepting the limitations in respect of their research methodology but reiterates the importance of evaluating the concept of remorse. He states that 'remorse is a distinctively moral reaction.'⁹¹ He further states that Zhong's definition of remorse reflects

⁸⁶ Proeve & Tudor (note 76 above).

⁸⁷ Zhong (note 84 above, 41).

⁸⁸ Ibid 41.

⁸⁹ Ibid 46.

⁹⁰ Morse (note 34 above).

⁹¹ Ibid 49.

the ‘desire to make restitution,’⁹² which would be the natural outcome of the feeling of remorse. However he says that restitution ‘does not seem to be part of the remorse itself.’ He is accordingly critical of the definition given to the judges by Zhong and others and submits that this may have accounted for the varied responses. Morse goes on to state that the only justification for remorse in Anglo-American penal law is ‘general deterrence, specific deterrence and incapacitation.’⁹³

The question concerning the effect of remorse on consequential justifications is empirical. Does remorse or its absence validly predict whether the offender is less or more dangerous and thus should receive a lesser or greater sentence (holding every other variable constant)? When remorse is used for mitigation, the consequential goals may lead to inconsistent results. Remorse that leads to lesser sentences because remorseful defendants are less likely to recidivate may also have the effect of undermining general deterrence, because the criminal law may be seen as soft or easy to manipulate by faked emotions. If lack of remorse is associated with enhanced danger of recidivism, then general and special prevention would both be achieved by lengthening the sentences of such offenders. [A]ssuming that we can accurately judge when remorse is genuine and what its depth and quality are, as Zhong *et al.* rightly note, the consequential outcomes of using remorse are almost entirely speculative.⁹⁴

He proceeds to submit that the inability to conclusively judge the role of remorse is largely due to a lack of research and data. Emily Corwin⁹⁵ confirmed that ‘despite the importance of remorse in sentencing, there are minimal empirical data on the nature of remorse and the mechanisms by which it is linked to sentencing.’ Morse suggests that currently there is no justification for remorse to be considered in the meting out of punishment.⁹⁶ He agreed with Zhong that if remorse is going to be a factor to be taken into account then there would be a need for the use of forensic psychiatrists. The psychiatrists would be able to ‘identify whether an offender is in fact remorseful’ and to conduct research ‘to determine whether remorse is a valid indicator of one or more of the consequential justifications of punishment’.⁹⁷ However forensic psychiatrists would have to tread carefully as they are not specifically trained to evaluate remorse.

⁹² Ibid 50.

⁹³ Ibid 51.

⁹⁴ Ibid 52.

⁹⁵ Corwin (note 65 above, 41).

⁹⁶ Morse (note 34 above, 53).

⁹⁷ Ibid 53.

It is abundantly clear from his article that the role of remorse varies and results in inconsistencies in its application. What is required is further study that would assist the judiciary in making informed decisions in respect of the presence or absence of remorse. Morse concedes that because discretion plays a huge part in the sentencing process sentences will be individualised. Research and studies like the above could make a difference in determining the significance of remorse and its role in the legal system.

CHAPTER 3

UNPACKING REMORSE AS THE X FACTOR: WHAT IT IS AND HOW THE COURTS APPLY THE FACTOR GENERALLY

A study of the case law revealed to the writer that our courts identified remorse as a factor under the following broad categories, namely, full disclosure and openness, conduct of an accused and pleading guilty. An understanding of the counter argument expressed in other cases allowed the writer to categorise cases in which the court found there was an absence of remorse. This has allowed for a holistic perspective in understanding the role of remorse in the sentencing process.

3.1 Full disclosure and openness

In S v Seegers, the appellant was convicted in the Northern Cape Division of being in possession of 605 uncut diamonds, to the value of R7574. He was sentenced to a fine of R5000 or two years' imprisonment and, in addition, to five years' imprisonment of which two years were suspended on conditions. The Appellate Division held that where an accused pleads guilty to the crime and has made a full disclosure of details and there has been openness on his part, that 'such conduct can demonstrate penitence and remorse which in the circumstances of the case is an important consideration and does justify a more lenient sentence than usual.'⁹⁸ The appeal court has accordingly indicated that a guilty plea together with 'openness' and 'full disclosure' is a sign of remorse. The appeal court further held that the appellant's admission of guilt was only made when he saw that the detectives were going to arrest not only him, but Zahlan and Sloof, his associates.

*In S v Morris*⁹⁹ the appellant, a British national, had pleaded guilty to and been convicted on three counts of purchasing rough and uncut diamonds in contravention of Section 84.¹⁰⁰ He was sentenced by the High Court to nine months imprisonment on each count. He appealed his sentence. During his mitigation of sentence he did not testify himself but called two witnesses. One of them was his father, who testified that the accused was filled with remorse. Wessels JA quoted the dictum of Rumpff JA in *Seeger's* case in respect to the remorse factor. The court held:

⁹⁸ *Seegers* (note 66 above, 511 G-H).

⁹⁹ 1972 (2) SA 617 (A).

¹⁰⁰ Precious Stones Act 73 of 1964.

The appellant's plea of guilty is equivocal on the question of contrition - the case against him was so overwhelming that, even if he did not appreciate that it was so, he would most certainly have been advised by his counsel that that was indeed the case. The appellant chose not to enter the witness-box and neglected the opportunity of taking the Court *a quo* fully into his confidence, so as to have enabled that Court to assess the sincerity of his show of penitence and remorse. It was not sufficient for him to have satisfied his father that that was so; it was his plain duty to satisfy the Court by himself giving evidence, which could be tested by cross-examination.¹⁰¹

The court was unable to determine the degree of remorse as the appellant failed to testify and take the court fully into his confidence.

In *S v Martin*¹⁰² the facts were that the appellant was charged with four counts of murder and two counts of attempted murder and one count of contravening section 2 and section 36 of the Arms and Ammunition Act¹⁰³ for possession of the firearm and ammunition used to commit the murders. He pleaded guilty to all counts and was accordingly convicted. On the day of the offences he had gone to his in-laws house to see his children with the intention to see them and then commit suicide. He was in a depressed state and under the influence of alcohol. He was well aware that he was not allowed in the house. He was confronted by his father in law who smacked him. He shot and killed his father-in-law. He thereafter killed three more people and attempted to murder his two sisters-in-law. The accused was thirty years old and a first offender, who had acted without self-control. In assessing the seriousness of the offence the judge correctly stated that an important question that needed an answer was 'Why did you do it?'¹⁰⁴ The court is only able to test the degree of 'moral reprehensibility'¹⁰⁵ if the accused himself testifies and answers that question. Counsel for the appellant argued that by pleading guilty the accused showed remorse for his actions. The appellant's section 112 plea stated that the accused regretted his actions. The court held:

For the purposes of sentence, there is a chasm between regret and remorse. The former has no necessary implication of anything more than simply being sorry that you have committed the deed, perhaps with no deeper roots than the current adverse consequences to yourself. Remorse connotes

¹⁰¹ *Morris* above, 620 G-H.

¹⁰² 1996(2) SACR 378 (W).

¹⁰³ Act 75 of 1969.

¹⁰⁴ *Martin* above, 383 para A.

¹⁰⁵ *Ibid.*

repentance, an inner sorrow inspired by another's plight or by a feeling of guilt, e.g. because of breaking the commands of a higher authority.¹⁰⁶

The degree of contrition on the part of the accused is accordingly relevant in the meting out of punishment.¹⁰⁷ The court clearly distinguishes between 'regret' and 'remorse' and finds that many people may "regret" their actions, but this is far from remorse.¹⁰⁸ The court accepted that in terms of the expert's evidence there was a 'component of true remorse' but was unable to quantify this factor as the accused did not testify. The court held that the sentence of life imprisonment was inappropriate and cruel and sentenced the appellant to an effective 25 years' imprisonment on all counts.

In the case of *S v Kgantsi*¹⁰⁹ the appellant was convicted and sentenced on charges of murder, robbery with aggravating circumstances, kidnapping, unlawful possession of a firearm and unlawful possession of ammunition. The facts briefly were as follows: The main witness for the State had been travelling with another person ('the deceased') at night, when they stopped to give a hitchhiker, namely, the appellant a lift. At some point during the journey, the appellant asked to alight from the vehicle and, in the process of alighting, the appellant drew a firearm and shot the deceased in the head. He took certain items from the person of the deceased, and released the State witness after the latter begged to be freed. The court granted leave to appeal against the sentence in respect of the murder, robbery with aggravating circumstances and kidnapping. The appellant pleaded guilty to the robbery and unlawful possession of firearm and ammunition. The court found in respect of the issue of remorse as follows:

There is a distinct absence of remorse on the appellant's part, notwithstanding his plea of guilty on some of the offences. His lack of contrition is manifested by his untruthful plea explanation and testimony in respect of the murder – both directly at odds with his confession before the magistrate. I am of the view that the appellant should be afforded the benefit of remorse as mitigating factor only to a very limited extent on the aggravated robbery charge, to which he had pleaded guilty. Genuine remorse in respect of this and the other charges would have entailed the appellant taking the trial court into his confidence so that it could have: "... a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked [his]

¹⁰⁶ Ibid G-H.

¹⁰⁷ RM Marais, 'Plea of guilty: effect on sentence' 1959 *SALJ* 145.

¹⁰⁸ Terblanche (note 10 above, 204 footnote 201).

¹⁰⁹ 2012 JOL 29402 (SCA).

change of heart and whether [he] does indeed have a true appreciation of the consequences of those actions.”¹¹⁰

Despite pleading guilty the court was only able to attach limited weight to the remorse factor. The appellant had lied in his plea explanation and failed to take the court fully into his confidence. Genuine remorse is assessed in terms of the enquiry as laid out in the dictum of *Matyityi's* case.¹¹¹

3.2 Conduct of the Accused

In *S v Brand*¹¹² the court held that genuine remorse must be distinguished from self-pity and unavoidable acknowledgement of guilt.¹¹³ The facts briefly were as follows. The appellant pleaded guilty to 200 counts of fraud in the magistrate’s court. He was duly convicted and the matter was referred to the Regional Court for sentence. The appellant was employed by a bank. He fraudulently forged the signatures of his clients and withdrew their money. The sum of R240 675, 24 was fraudulently withdrawn by the appellant to the loss and prejudice of his employer. The mitigating factors were inter alia; the accused was 35 years old and he had a dependant, nine year old daughter; he had no previous convictions and had a stable employment history; he had lost his employment after the incident; and he had done everything in his power to pay the money back to the bank and even sold off assets. The appellant testified in mitigation of sentence that he was remorseful for what he had done. The magistrate dismissed his remorse as mere self-pity. The appellant was sentenced to seven years’ imprisonment, two years of which was suspended for a period of five years. In addition, the appellant was ordered in terms of section 300 of the Criminal Procedure Act 51 of 1977 to repay the amount of R240 675, 24, plus interest, to the bank.

With reference to the issue of remorse, the appeal court held that true remorse was an important factor in the imposition of sentence, as it suggested an offender who, firstly, realised that he had done wrong, and, secondly, undertook not to transgress again. True remorse led to accommodating punishment by our courts. The court held further, that the conduct of the appellant in casu, who had reinforced his protestations of contrition by his actual deeds, suggested true remorse. This appeared from his attempts to increase his income

¹¹⁰ *Kgantsi* (note 108 above para 11, the court quoted the dictum in *Matyityi's* referred to below).

¹¹¹ *S v Matyityi* 2011 (1) SACR 40 (SCA) See further discussion on page 23.

¹¹² 1998 (1) SACR 296(C) (at 304 a-d).

¹¹³ A Kruger ‘*Hiemstra's Criminal Procedure*’ Service Issue 7 (May 2014) 28-4.

in order to more quickly discharge his obligation to the bank, from the sale of his assets to pay the bank, and from his plea of guilty. The court went on to find that the trial court had erred in doubting the genuineness of the appellant's remorse and in not according it sufficient weight. Accordingly the court of appeal was at liberty to interfere with the sentence imposed. The appeal court imposed a sentence of five (5) years imprisonment subject to the provisions of 276 (1) (i) of the Act.

In the case of *De Sousa v S*¹¹⁴ the appellant pleaded guilty to 13 counts of fraud and was sentenced to seven and a half year of imprisonment in the trial court. The appeal court found that the following factors were a sign of genuine remorse; once discovered she immediately undertook to repay the money and signed an acknowledgement of debt; she co-operated fully with the police from the outset and gave a detailed statement outlining her involvement with her co-perpetrator. At the time of the sentence she had settled all monies that she was liable for to the complainant. The Supreme Court of Appeal set aside the sentence of the trial court and substituted it with a sentence of four (4) years imprisonment.

*S v De Klerk*¹¹⁵ is an example of facts where the court accepted that the appellant was really remorseful. The facts briefly were as follows: The accused was 39 years old and a first offender. He pleaded guilty to three (3) counts of indecent assault on young girls. He was convicted in the Regional Court and sentenced to an effective thirty (30) years' imprisonment. The appeal court accepted the evidence of a clinical psychologist, an expert witness called by the defence. Dr R testified that the appellant understood that what he had done was wrong and that he felt remorse and a strong sense of guilt for his behaviour. The court held that the appellant had shown remorse and had acted on his remorse and taken steps to seek help. The appeal court further criticized the regional magistrate's decision as he showed a bias towards the punitive and deterrent aspects of sentencing. The expert's testimony clearly showed that the appellant was capable of rehabilitation. The sentence of the regional court was set aside and replaced with a sentence of three years' correctional supervision in terms of section 276 (1) (h) of the Act¹¹⁶ on conditions and a further five

¹¹⁴ (2009) 1 All SA 26 (SCA).

¹¹⁵ 2010 (2) SACR 40 (KZP).

¹¹⁶ 276. Nature of punishments

(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely –

(h) correctional supervision;

years' imprisonment wholly suspended for five years, on condition that the accused is not convicted of the offence of rape or indecent assault committed during the period of suspension.

In the case of *M v S (Centre for Child Law as amicus curiae)*¹¹⁷ the facts were as follows: The appellant was thirty five years old, single and a mother of three boys aged 16, 12 and 8. She had two previous convictions for fraud and was charged again with fraud. While out on bail after having been in prison for a short period she committed a further fraud. In 2002 she was convicted in the Wynberg Regional Court on 38 counts of fraud and four counts of theft. The court took all the counts together for purposes of sentence. The total amount involved came to R29 158, 69. She was sentenced to four years' direct imprisonment. After an appeal to the high court her sentence was converted to imprisonment in terms of section 276 (1) (i) of the Act. The Constitutional Court granted her leave to appeal her sentence only. The main issue the court had to deal with was how section 28 of the Constitution¹¹⁸ affected the triad and whether the sentencing of a caregiver required an isolated enquiry. The court held that although the best interests of the child are paramount, this did not mean that they are absolute, and could be limited by balancing them against other rights in the Bill of Rights. With regards to the factor of remorse the court held the following:

[T]he level of remorse of an accused has been recognised as one of the many factors to be considered by a sentencing court. The court in *Hamilton*¹¹⁹ looked at the manner in which the accused demonstrated real remorse when deciding upon a sentence. Notably this can be compared to the case before us where the applicant has adopted a supercilious attitude without any sign of remorse whatsoever and continued to commit further offences whilst on bail with the full knowledge of the impact that such callous action would have on her children. It is remarkable that even when she was in prison, the applicant continued to plan further acts of fraud. The applicant's lack of remorse in this case arises from her recidivism.¹²⁰

In *S v Truyens*¹²¹ the appellant was convicted of theft of 48 head of cattle from his employer. He was sentenced in the Regional Court to four years imprisonment in terms of section 276(1) (i). He appealed his sentence and the High Court increased same to twelve years'

¹¹⁷ [2007] JOL 20693 (CC).

¹¹⁸ Section 28(2) of the Constitution provides that '[a] child's best interests are of paramount importance in every matter concerning the child'.

¹¹⁹ *R v Hamilton* (2003) 172 CCC (3d) 114.

¹²⁰ *M v S* above para 115.

¹²¹ 2012 (1) SACR 79 (SCA).

imprisonment of which four years were conditionally suspended. He then appealed to the Supreme Court of Appeal against the further increase of sentence. It was held:

the court accepted the following conduct to be indicative of T's remorse: he changed his plea during the trial; he did not put up a false version in an attempt to evade responsibility; he wrote a letter to his employer before his first appearance in court, confessing to the crime and expressing the hope that he would now get the chance to change his life; he promised to compensate his employer for the loss and succeeded in paying R20 000 in two instalments (at para 13). The forensic criminologist who compiled a pre-sentence report testified that this conduct was consistent with remorse, because it demonstrated T's insight into the harm that he had caused. Cachalia JA found the presence of remorse to be an important distinguishing factor from the comparative precedent cited by the High Court.¹²²

3.3 Plea of Guilty

In *S v Assante*¹²³ the appellant was convicted of 108 counts of fraud to the loss of R345 million. He was a 50 year old divorcee and the father of two daughters. He had no previous convictions. He did not directly benefit from the fraud. The court a quo sentenced him to 15 years' imprisonment on each count, all except one to run partially concurrently. His sentence was an effective 24 years' imprisonment. The appellant appealed his sentence on the basis that it was startlingly inappropriate. The appeal court held that the court a quo had generously taken into account that the appellant's guilty plea was a sign of remorse. The appeal was accordingly dismissed.

In the case of *S v Bercensie*¹²⁴ the appellant had pleaded guilty to the offences of robbery with aggravating circumstances and rape, and had been convicted on the basis of his plea. He was sentenced to 15 years' imprisonment in respect of the robbery and life imprisonment in respect of the rape. It was argued on appeal that his personal circumstances and the remorse that he expressed were substantial and compelling circumstances to justify less severe sentences than those prescribed by the Criminal Law Amendment Act.¹²⁵

All that is left of the personal circumstances relied upon by the appellant is remorse, expressed in three forms. First, in his Section 112 statement, the appellant said that he was sorry for what he had done. Secondly, it is argued that his plea of guilty was a sign of his remorse. Thirdly, it is also

¹²² A van der Merwe 'Sentencing procedures and general principles' 2012 *SACJ* 154.

¹²³ 2003 (2) SACR 117 (SCA).

¹²⁴ 2011 JOL 26696 (ECG).

¹²⁵ 105 of 1997.

argued that his willingness to testify against his accomplice is also a sign of remorse. I accept that the appellant has shown that he is remorseful but that on its own does not necessarily mean that a deviation from the prescribed sentences is justified. The appellant's remorse must, like every other factor relevant to sentence, be considered in the light of all of the facts. It must also be viewed in the light of why remorse is a mitigating factor: its relevance lies in it being an indication that the offender has the potential for rehabilitation because a truly remorseful offender is unlikely ever to repeat the crime.¹²⁶

The court held that the 'remorse expressed by the appellant paled in its significance' when viewed in the context of all of the factors relevant to sentence, particularly the seriousness of the offences. The appeal was dismissed and the sentences were confirmed.

In *S v Matyityi* the court held that there must be some factual basis for a court to make a finding of remorse. The facts briefly were that the respondent was convicted of one count each of murder and rape, and on two counts of rape. He was sentenced to 25 years' imprisonment on each of the first two counts and to 13 years' on each of the rape charges. The sentences were ordered to run concurrently. The state appealed the sentences on the first two counts on the basis that they were too lenient. Ponnann JA held as follows:

[R]emorse was said to be manifested in him pleading guilty and apologising through his counsel.... It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused is a neutral factor. (*S v Barnard* 2004 (1) SACR 191 (SCA) 197) The evidence linking the Respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him, and his positive identification at an identification parade. There is, moreover a chasm between regret and remorse. Many accused persons might well regret their conduct, but that does not without more translate to genuine remorse. [*S v Volkwyn supra*] In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. [*Seegers supra*] Until and unless that happens, the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of, inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions.¹²⁷

¹²⁶ *Bercensie* (note 124 above, para 10).

¹²⁷ *Matyityi* (note 111 above, para 13).

In the case of *S v Thole*¹²⁸ the appellant was convicted in a Regional Court of rape and murder and was sentenced to life imprisonment on each count. He had pleaded guilty and his written statement in terms of section 112(2) of the Criminal Procedure Act¹²⁹ indicated that he stabbed the deceased after he had raped her. Counsel for the appellant argued that the following were substantial and compelling circumstances which would allow the court to deviate from the prescribed sentence. These factors had to be viewed cumulatively, namely, the appellant was 26 years of age at the time of commission of the offences; he was single and had no children; his highest level of education was a standard six; he was raised by his grandmother; that he was remorseful for what he had done; that he had been drinking before the incident; and that he was a first offender.¹³⁰ The court found that the court a quo had properly taken into account these factors and had further carefully applied the principles laid down in the triad in considering the seriousness of the offence and the interests of the community. The court had correctly found that the aggravating factors far outweighed the mitigating circumstances. In his plea the accused had failed to provide reasons for killing the deceased. The evidence against the accused was overwhelming and included DNA evidence. ‘A plea of guilty under such circumstances cannot, without more, be considered to be indicative of his contrition.’¹³¹ Molemela J held that ‘genuine contrition cannot be assumed, it must be demonstrated.’ The accused’s guilty plea was insufficient and the court could not test the degree of his remorse as he had failed to testify in mitigation of sentence. On appeal the accused was sentenced to ten years’ for the rape and life imprisonment for the murder, both counts to run concurrently.

In *Borole v S*¹³² the appellant appealed his sentence of twelve years’ imprisonment for robbery with aggravating circumstances. Counsel for the appellant argued that the court a quo did not attach enough weight to the mitigating factors, including the fact that he pleaded guilty and in doing so showed remorse.¹³³ The court was of the opinion that the appellant’s guilty plea was a neutral factor in the light of the fact that he was arrested shortly after the robbery in possession of the stolen goods. The dictum in *Matyityi’s* case was quoted with reference to the distinction between regret and remorse.

¹²⁸ 2012 (2) SACR 306 (FB).

¹²⁹ 51 of 1977.

¹³⁰ *Thole* (note 128 above, 310 para12).

¹³¹ *Ibid* 310 para 13.

¹³² [2014] JOL 31533 (FB).

¹³³ *Ibid* para 5.

In *S v Mashinini*¹³⁴ the accused were charged with rape. They pleaded guilty to the charge and the Regional Court referred them to the High Court for sentencing. They were sentenced to life imprisonment in terms of the minimum sentence legislation.¹³⁵

The mitigating factors submitted on behalf of the appellants are the following: Both appellants were first offenders and have the capacity to be rehabilitated. They were relatively young, as at least one of them was 26 years of age when the offence was committed. They pleaded guilty and did not waste the court's time. Their plea of guilty should be regarded as a sign of remorse for their deeds. The complainant did not suffer severe physical injuries, albeit the incident would have traumatised her. Both appellants had spent 18 months in custody pending the finalisation of the trial.¹³⁶

The court held that the appellants did not 'verbalise' any remorse. It was clear to the court that the evidence against both the appellants was 'overwhelming' and hence they had no choice but to plead guilty. The court went on to find that a plea under those circumstances cannot be interpreted as remorse. The aggravating factors were namely, that the complainant was fifty-four years old and she was gang-raped in her home; one of the appellants was a family member and known to her. Due to an error on the charge sheet in respect of the minimum sentence legislation the majority held that the appeal was upheld. The sentence of life imprisonment was replaced with a sentence of ten years' imprisonment.

3.4 Absence of Remorse

In *S v Sesing*¹³⁷ the facts briefly were as follows. The appellant was a thirty-year-old first offender and had been convicted in the court a quo of murder and sentenced to death. The appellant and another person had attacked the deceased, a sixty eight-year-old lady and her husband in their home in Parys. They had robbed the couple and then abducted them to their farm where the deceased was shot and killed by the appellant. The court found that the murder had been committed during the course of a well-planned and ruthlessly executed robbery. It was aggravating that the appellant had throughout treated his victims in a cruel, brutal and callous manner. The murder had been committed deliberately and cold-bloodedly. The court did not accept remorse as a mitigating factor as the accused had misled the police and lied during his plea procedures. The only mitigating factors present were the age of the

¹³⁴ 2012 (1) SACR 604 (SCA).

¹³⁵ Note 39 above.

¹³⁶ *Mashinini* (note 134 above, 612 B-C).

¹³⁷ 1991 (2) SACR 361 (A).

appellant and that he was a first offender. The court after a consideration of the objects to be achieved in the assessment of sentence, namely retribution, deterrence, prevention and rehabilitation held that the matter had to be regarded as an extreme case where the elements of prevention and retribution were decisive and the death sentence was the only proper sentence. The appeal was dismissed. The actions of the accused namely lying to the police and lying during the plea procedures was held to be a lack of remorse.

In *S v W*¹³⁸ the facts briefly were as follows: The appellant, a public prosecutor, was convicted in a regional magistrate's court of obstructing the course of justice and was sentenced to five years' imprisonment, of which two years' imprisonment were suspended on certain conditions. The appellant had undertaken to withdraw a charge against an accused in a criminal case on condition that the accused had sexual intercourse with him. The appellant withdrew the charge and later handed the case docket to the accused, who tore it up. The appellant however did not have sexual intercourse with the accused.

It appeared further that the appellant was 30 years old and was estranged from his wife. He was a first offender. His first appeal to the high court succeeded to the extent that his sentence was reduced to four years' imprisonment of which half was suspended. In a further appeal against the sentence only, the Court remarked that obstructing the course of justice was a serious offence. It was more so in the instant case where the appellant had abused a responsible position of trust in order to satisfy his own selfish urges. The court doubted the accused's remorse as he had lied during his evidence in mitigation of sentence.¹³⁹ The court accordingly dismissed the appeal.

In *S v GL*¹⁴⁰ the appellant was charged for killing his wife and obstruction of justice. He was convicted on the lesser charge of culpable homicide and obstruction of justice in the Regional Court. He was sentenced to 10 years' imprisonment for culpable homicide, of which four years' imprisonment was suspended for a period of five years on condition that he was not convicted of culpable homicide deriving from an assault upon another person, committed during the period of suspension. On the charge of defeating the ends of justice the appellant was sentenced to one year's imprisonment, to run concurrently with the sentence imposed for

¹³⁸ 1995 (1) SACR 606 (A).

¹³⁹ Ibid 608 g-h.

¹⁴⁰ 2010 (2) SACR 488 (WCC).

culpable homicide. The court listed various factors that indicated that the appellant was not really remorseful. He had initially lied to the police about the crime saying that it was an intruder who killed his wife. He pleaded not guilty to murder and contended throughout the trial that his defence was one of self-defence. Despite a lapse of more than five years, the appellant had not apologised to the family of the deceased.

*In S v Stanley*¹⁴¹ the appellant was charged with theft of a motor vehicle. He pleaded guilty and was convicted in the Regional Court. He was sentenced to six years imprisonment and appealed to the Supreme Court. His sentence was set aside and replaced with a sentence as follows:

1. A period of eight months' imprisonment suspended for one year on condition that within the period of suspension the appellant pays compensation to the complainant of R10 000 in terms of the provisions of Section 297 of the Criminal Procedure Act.
2. Four years' imprisonment from which the appellant may be placed under correctional supervision in his discretion by the Commissioner in terms of the provisions of section 276(1) (i) of the Criminal Procedure Act.¹⁴²

With leave of the court a quo the appellant appealed to the Appellate Division. The court found that the magistrate had carefully balanced the seriousness of the offence with the personal circumstances of the accused. The trial court had taken into account that the appellant was a first offender and all the character evidence led in mitigation, including a glowing testimonial from Gary Player who knew the appellant. They also considered the expert evidence of Professor Beyers who testified that he acted out of character and that it is unlikely that he will recidivate. The fact that the appellant wanted to compensate the complainant for some of his loss was also considered a mitigating factor. The magistrate also took into account that the appellant showed true remorse. The court had however found the following as aggravating: the prevalence of the offence and that society looked to the courts for protection; the offence was premeditated and carefully planned; the appellant had impersonated a police officer; his motive was to convert the vehicle for his own benefit. The court found that his motive for the theft, namely to impress his parents, was rejected as false. Oliver JA stated that 'He now says that he has remorse, but he did not utilise the opportunity

¹⁴¹ 1996(2) SACR 570 (A).

¹⁴² Ibid 572 B-C.

to show regret or contrition until he was arrested by the police.’¹⁴³ What the court found in essence is that if an offender shows remorse only once caught, it may diminish any mitigating influence. The appeal was dismissed and sentence merely reformulated to avoid any technical issues raised.

In the case of *Opperman and another v S*¹⁴⁴ the appellants were twin brothers convicted of two counts of indecent assault and rape. The offences were perpetrated on their six-year-old nephew and three-year-old niece. The appeal to the Supreme Court of Appeal was in respect of the sentences of the rape convictions only, handed down in the High Court. The majority of the court held that sentencing is about proportionality. The court referred to the relevant factors that must be considered, namely the *Zinn* triad and prevention, retribution, reformation and deterrence. The court had to display sensitivity towards both the victims and the accused. The court took into account that the accused had themselves been abused as children and the majority opinion was that this accounted for their lack of remorse and insight into their offences. The appeal was upheld and their sentences were reduced from twenty five years’ for the first appellant and twenty years’ for the second appellant to twelve years’ and seven months’. The court took into account the time they had already spent in prison in arriving at the appropriate sentence.

In the case of *Fakude and others v S*¹⁴⁵ the court had to deal with the disparity in the sentences handed down on all the accused. The accused were convicted in the court a quo of the murder of the husband of the first appellant. The first appellant was sentenced to thirty five years’ imprisonment, the third and fourth to twenty five years’ and the fifth appellant to twenty three years’. The first appellant had conspired to murder her husband and the rest of the appellants executed the plan. The deceased was hacked and stabbed to death outside his home. The appeal court confirmed that the trial court had taken the *Zinn* triad into account and all the relevant factors thereto. It was argued by the appellants counsel that the absence of any kind of remorse was taken as an aggravating factor by the court a quo. Marais JA disagreed and stated that ‘[g]enuine remorse is a factor which may mitigate punishment. To

¹⁴³ Ibid 577 h.

¹⁴⁴ (2010) 4 All SA 267 (SCA).

¹⁴⁵ [1999] JOL 5786 (A).

remark upon its absence means no more than that, it cannot operate as a mitigating factor.’¹⁴⁶ The absence of remorse had no effect on the ultimate sentence handed down.

In the case of *Ngada v S*¹⁴⁷ it was argued on behalf of the appellant ‘that it was not proper to take into account in aggravation of sentence that the appellant showed no remorse for what he had done.’¹⁴⁸ The High Court found that the dicta in *S v Mpite*¹⁴⁹ and *S v Makhudu*¹⁵⁰ do not say that lack of remorse can never be considered in aggravation of sentence. Jones J went on to hold that the Supreme Court of Appeal in *Makhudu’s* case above acknowledges that lack of repentance may be relevant to sentence:

[7] 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.

[8] A court should be slow to jump to conclusions regarding an accused’s character and reaction to punishment when such conclusions are based solely upon the accused’s demeanour and behaviour in court.

The judge went on to say in *Ngada’s* case:

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 *Makhudu’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 *Makhudu’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

¹⁴⁶ Ibid para 6.

¹⁴⁷ [2009] JOL 24359 (ECG).

¹⁴⁸ Ibid para 8.

¹⁴⁹ 1969 (1) SA 298 (T) at 299 D-E.

¹⁵⁰ 2003 (1) SACR 500 at 501.

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.¹⁵¹

The High Court found that a lack of remorse was indicative of the indifference the appellant showed to the victim.

In the case of *S v Combrink*¹⁵² the facts briefly were that the appellant was a farmer who had fired two shots at the deceased, a farm worker, believing him to be a trespasser. The second shot was fatal. The appellant did not immediately go to assist the deceased. The trial court sentenced the accused to 15 years' imprisonment, of which five years was suspended. The appeal court held that the trial court had placed too much emphasis on the mitigating circumstances and erred in not balancing them with the aggravating circumstances. The appeal court could find no substantial and compelling circumstances to deviate from the minimum sentence of 15 years' imprisonment. The trial court had found that the appellant had failed to show any remorse as throughout the trial he denied having committed the offence. It further found that the appellant's failure to assist the deceased after shooting him was aggravating. Shongwe JA however stated that the appellant's behaviour was callous in having to use a .308 hunting rifle to deal with a 'suspicious' person merely walking on the farm without posing a threat to anyone.¹⁵³

In the case of *S v SMM*¹⁵⁴ the appellant was convicted in the high court for the rape of his thirteen-year-old niece. He was sentenced to life imprisonment. The appeal against the conviction was dismissed and the court dealt only with the appeal against the sentence. The court took into account the aggravating and mitigating factors in the appeal. The appeal court held that it was aggravating that the appellant had abused his position of trust. Specifically in respect of remorse, the court held that he showed none by denying in court that the incident had taken place. Instead of taking responsibility for his actions, he sought to make the child a liar. In effect he victimised her again. After balancing all the principles of sentencing the appellant was sentenced to fifteen years' imprisonment.

¹⁵¹ Ibid.

¹⁵² 2012 (1) SACR 93 (SCA).

¹⁵³ Ibid para 23.

¹⁵⁴ 2013 (2) SACR 292 (SCA).

In *Hatting v S*¹⁵⁵ the appellant, an attorney, was convicted on multiple counts of fraud, one count of theft and one count of money laundering. He was sentenced to an effective twenty years' imprisonment in the Regional Court and appealed his sentence. The court held that the trial court had 'adequately profiled and individualised' the appellant. The fact that he had made full disclosure of his criminal activities, assisted the police, cooperated with the prosecution and pleaded guilty to 64 charges were strongly indicative of his genuine remorse. However the appeal court stated (at paragraph 36):

He unwisely tried to trivialise or down-play his powerful position of trust he had with the banks. That, in my view, was not only indicative of his complete disregard and disrespect for the trust the banks had in him and betrayal of his profession but it was also indicative of the lack of genuine remorse. This symbolised his unrepentant stance. Such a stance was telling against him. An offender, who shifts blame to his victims, lacks insight into his wrongs. An offender who demonstrates such unwillingness to accept full responsibility for the consequences of his unlawful actions cannot be regarded as a suitable and [rehabilitative] candidate in the foreseeable future.

The court found that the aggravating factors far outweighed the appellant's alleged remorse and was more an indication of his 'remorselessness'. The court went on to quote the dictum of *Seeger's*¹⁵⁶ and *Matyityi's* case¹⁵⁷ above, which sets out the test to establish genuine remorse.

¹⁵⁵ [2014] JOL 31888 (FB).

¹⁵⁶ *Seeger* (note 66 above, 511 G-H).

¹⁵⁷ *Matyityi* (note 111 above, para 13).

CHAPTER 4

ANALYSING THE REMORSE FACTOR

To acquire a better understanding of the court's interpretation of remorse it is appropriate to analyse the various definitions of remorse and then to relate these to the case law.

4.1 The dictionary meaning

The dictionary meaning of remorse¹⁵⁸ defines it as a feeling. It is closely associated with regret and guilt. It is a feeling that arises after one has committed a 'shameful, hurtful or violent¹⁵⁹' act. The interpretation of the use of the word remorse in the online examples varies. There are clear indications that it is a personal feeling and that expressions of remorse can be deduced from the expressions and actions of the person feeling remorse. The signs of remorse can be determined by facial expressions. The tone of a person's voice can indicate remorse or a lack of it. Remorse is a feeling which arises in response to a particular situation. Taking one's own life, plunging into a dangerous odyssey and cutting off part of one's ear are the resultant actions indicating remorse.¹⁶⁰

4.2 The psychological meaning

Research in respect of remorse confirms the relationship between remorse, regret, guilt and shame. Corwin states that 'individuals feeling and expressing genuine remorse are believed to be enduring emotional pain, usually because of their own behaviour¹⁶¹'. Studies have also indicated that making a full and detailed confession, taking full responsibility for one's actions and acknowledging one's wrong are expressions of remorse. An apology with a request for forgiveness and a sincere commitment to change or a promise that it will never happen again are further indicators of remorse.

Despite Morse's criticism of Proeve's and Tudor's definition of remorse, this definition can be useful in trying to define remorse in terms of the psychological context. The definition would also be a useful tool in the legal context. By understanding the definition the courts may come to a more consistent application of the remorse factor.

¹⁵⁸ Chapter 2 para 2.2 above.

¹⁵⁹ Ibid.

¹⁶⁰ Ibid.

¹⁶¹ Corwin *et al* (note 65 above, 41).

Remorse may be defined as a distressing emotion that arises from acceptance of personal responsibility for an act of harm against another person. Often, with further reflection, the remorseful individual may desire that the act had never occurred at all and wish to make restitution toward the victim.¹⁶²

There is clearly the emotional aspect and the personal acceptance of one's wrong. Attached to it is the feeling of regret and the resultant action to put right what one has done wrong. Morse's criticism is that the aspect of restitution is more closely associated with the feelings of regret. He further states that 'remorseful feelings of regret and guilt need not be distressing for the remorse to be genuine.'¹⁶³ Zhong's studies have proven that judges have applied the remorse factor inconsistently.¹⁶⁴ A notable highlight of his research was the difficulties experienced by the judges in distinguishing genuine remorse from feigned remorse. The question that comes to mind is what indicators are used to make this differentiation and are judicial officers in a position to correctly identify remorse? Is a judicial officer in a position to assess an accused's remorse which has been clearly defined as a feeling? The writer hereof tends to agree that more research and studies need to be undertaken in order to avoid glaring inconsistencies. The expert assistance of forensic psychologists would seem to be the answer in assisting courts with an evaluation on the remorse factor. At this stage however the 'role of remorse in the legal system remains unresolved.'¹⁶⁵

4.3 The court's interpretation of remorse: Discussion on the case law

A recurring theme in the case law is that the accused must take the court fully into his confidence in order for the court to assess the sincerity and genuineness of his remorse.¹⁶⁶ In *Seeger's* case the accused pleaded guilty but the court found that his reasons for doing so were not sincere. The court found that 'unless that happens the genuineness of contrition alleged to exist cannot be determined.'¹⁶⁷ The court found in *Morris's* case that remorse was absent due to the fact that the accused did not testify in mitigation of sentence. His failure to testify resulted in him not taking the court 'fully into his confidence' and showed a lack of remorse. His guilty plea was found to be a neutral factor as the evidence against the accused was overwhelming. The court held in *Martin's* case that there was no factual basis for finding

¹⁶² Zhong *et al* (note 84 above, 41).

¹⁶³ Morse (note 34, 50)

¹⁶⁴ Zhong *et al* (note 84 above, 47).

¹⁶⁵ *Ibid* 39.

¹⁶⁶ Du Toit (note 8 above, 559).

¹⁶⁷ *Seegers* (note 66 above, 511 G-H).

true remorse if the accused ‘does not step out to say what is going on in his inner self’.¹⁶⁸ The court will attach very little value to remorse as a mitigating factor even where an accused pleads guilty but fails to make a full disclosure.¹⁶⁹ The court in *Martins* case drew a clear distinction between remorse and regret. The court was also unable to attach weight to the remorse factor as the appellant did not play open cards. *Kgantsi’s* case is an example of the court attaching very little weight to the remorse factor. The conduct of the accused, namely, lying in his plea explanation and failing to take the court into his confidence were the reasons given by the court. It was held that the sentencing court needs to have a proper understanding of what motivated the accused to commit the crime, what has since provoked his change of heart, and whether he does indeed have a true appreciation of the consequences of his actions. The court reiterated the test as set out in *Matyityi*.

Simply saying, ‘I am sorry’ is not a sign of remorse. Jeffrie G Murphy sums up an apology as follows:

For small wrongs, of course, the mere verbal formulae “I apologize” or “I am sorry” or “Forgive me” or even “Excuse me” are generally adequate. What works for small wrongs is likely to be quite unacceptable for wrongs of greater magnitude, however. For grave wrongs, we- both victims and spectators- normally expect more- perhaps nothing as extreme as Stavrogin’s suicide (in Dostoevsky’s *The Devils*) or Father Sergius’s cutting off his finger with an axe (in Tolstoy’s story *Father Sergius*), but we expect something more than an apology. We expect such things as repentance, remorse (what some medieval call the agenbite of inwit)¹⁷⁰ and atonement; and we are generally interested in apologies only to the degree that we believe that they are sincere external signs of repentance and remorse and reliable indicators of future atonement.¹⁷¹

The courts as well should be wary in accepting a mere apology as a sign of remorse. The signs of repentance and remorse as well as an indication of future atonement should be added to the apology.

In *Sesing’s* case the aggravating factors, which included the seriousness and brutality of the offence, far outweighed the mitigating factors. The lack of remorse was attributed to the

¹⁶⁸ *Martin* (note 102 above, 383 G-I).

¹⁶⁹ Du Toit (note 8 above, 559).

¹⁷⁰ ‘Ayenbite of Inwit’ *Wikipedia* available at http://en.wikipedia.org/wiki/Ayenbite_of_Inwit, accessed on 27 November 2014.

¹⁷¹ JG Murphy ‘Well excuse Me!- Remorse, Apology and Criminal Sentencing’ available at <http://ukzn.on.worldcat.org.ezproxy.ukzn.ac.za:2048/atoztitles/link?rft.au=Jeffrie+G+Murphy&rft.atitl...>, accessed on 28 October 2014.

accused's actions of lying to the police during the investigations and during his plea procedures. In *S v W* the court doubted the appellant's remorse because he had lied while testifying in mitigation of sentence. *S v GL* was also an example of the court doubting the appellant's remorse. Among the factors that the court found indicating a lack of remorse, were that the appellant had lied to the police about the details of the crime and had failed to apologise to the deceased's (his wife) family. In *S v Stanley* the appellant did show remorse. He even wanted to compensate the victim partially for his loss. The court found however that his show of remorse came too late, only after his arrest. This kind of remorse diminished any mitigating influence. In *Opperman and another*, the court found that the lack of remorse was due to the appellants being abused as children. In *Fakude's* case the court found that genuine remorse is a mitigating factor to be considered. The absence of remorse is neutral and does not have an aggravating effect on the final sentence. The appeal court overturned the court a quo's finding that an absence of remorse was aggravating. The decision in *Ngada's* case confirms the dictum in *Opperman's* case. Lack of remorse should not be too easily regarded as an aggravating factor. However in quoting the *Makhudu and Mpite*¹⁷² case the High Court in *Ngada's* case acknowledges that a lack of repentance may be relevant in the sentencing process. The High Court in *Makhudu's* case links the lack of remorse with the aspects of rehabilitation, recidivism and the need to protect society from remorseless offenders. The trial court in *Combrink's* case found that the appellant showed no remorse as throughout the trial he denied having committed the offence. The appeal court found that the court a quo had erred in placing too much emphasis on the mitigating factors and not balancing them with the aggravating factors. In balancing all the factors the appeal court could find no substantial and compelling circumstances to deviate from the applicable minimum sentence legislation. In *S v SMM* the accused was found to have no remorse as he denied that the incident had taken place and had failed to take responsibility for his actions. He also sought to make the victim a liar and this led to secondary trauma. In *Hatting's* case the appellant's actions such as making a full disclosure, assisting the police and prosecution and pleading guilty to sixty four charges were signs of genuine remorse. However his downplaying of the offence, abusing his position of trust and placing his profession as an attorney into disrepute was seen as a lack of genuine remorse. He had shifted the blame to his victims and in doing so demonstrated an unwillingness to accept responsibility for his actions. The appeal court saw this as

¹⁷² note 149 & 150 above.

remorselessness. This view is also applied in the case of *S v FV*¹⁷³ where the court held that true remorse requires insight into the seriousness of the crime. ‘In this case F accused the victims of his child rape of placing him in the predicament he finds himself. Clearly he had no true remorse.’¹⁷⁴

Terblanche argues that there has been very little discussion supporting the view that lack of remorse should be regarded as an aggravating factor.¹⁷⁵ The accused, he goes on to say, is entitled to his right to plead not guilty and this should not be held against him in the sentencing process. Wallis J in *S v Mbatha*¹⁷⁶ held that this clearly points to a ‘constitutional problem with our courts’ approach to remorse. He held further that there seems to be substantial dangers in inferring an absence of remorse from the exercise of a constitutional right and treating that as an aggravating factor.¹⁷⁷ Every accused has a constitutional right to plead not guilty and to advance a defence. He or she should not be penalised for exercising that right. *Makhudu*’s case clearly sets out the dangers of a court finding a lack of remorse an aggravating factor.

What actions or conduct do our courts recognise as signs of remorse on the part of the offender? In *S v Volkwyn*¹⁷⁸ the court held that ‘true remorse was deduced from the actions of the accused: when confronted with a suspicion he immediately admitted his involvement, pleaded guilty, paid certain monies back, let go of monies owed to him by the complainant, offered to pay further compensation.’¹⁷⁹ The court accordingly took cognisance of the accused’s actions to determine the level of his remorse. In *S v Xaba*¹⁸⁰ the court held that the accused’s offer to cooperate as well as cooperation already given were factors that were considered as genuine remorse.¹⁸¹ A distinction was drawn in *Brand*’s case where the court held that genuine remorse must be distinguished from self-pity and unavoidable acknowledgement of guilt.¹⁸² The test to arrive at true remorse is whether the offender appreciated his wrongfulness and undertook not to transgress again. The appellant’s actions

¹⁷³ 2014 (1) SACR 42 (GNP) para 22.

¹⁷⁴ S Terblanche ‘Sentencing’ (2014) 27 *SACJ* 104.

¹⁷⁵ Terblanche (note 10 above, 189).

¹⁷⁶ 2009 (2) 623 (KZP) par 31.

¹⁷⁷ Du Toit (note 8 above, 564).

¹⁷⁸ 1995 (1) SACR 286 (A) at 289.

¹⁷⁹ Terblanche (note 10 above, 204 footnote 202).

¹⁸⁰ 1996 (2) SACR 378 (W).

¹⁸¹ *Xaba* (note 50 above, 290 b).

¹⁸² *Kruger* (note 113 above).

in trying to increase his income to pay back the victim in addition to his guilty plea were signs of genuine remorse. In *De Sousa's* case the court took into account the following conduct as signs of genuine remorse, namely, once discovered the appellant immediately undertook to repay the money and signed an acknowledgement of debt; she co-operated fully with the police from the outset and gave a detailed statement outlining her involvement with her co perpetrator. She had also settled all monies to the victim at the time of her arrest. In *De Klerk's* case the court found the appellant remorseful as he had taken steps to seek help. The expert evidence led on behalf of the appellant showed that he was capable of rehabilitation. In *M v S* the appellant's lack of remorse was evident from her recidivism. She continued to commit similar offences while on bail. *Truyens* case explicitly sets out the type of conduct that the court would consider as a sign of remorse. The appellant had changed his plea, accepted responsibility for his actions, wrote to his employer confessing to the crime and he paid his employer for the loss suffered. A forensic criminologist testified that the appellants conduct was consistent with remorse as it demonstrated his insight into the harm he caused.

In the case of *Assante* the court had generously discounted the appellant's guilty plea as a mitigating factor. In *S v Labuschange*¹⁸³ the court held that the mere fact that an accused pleads guilty is not an automatic reflection that the accused is remorseful. In *Bercensie's* case the court accepted the following as signs of the appellant's remorse, namely, he expressed his remorse in his plea statement, and he pleaded guilty and was willing to testify against his accomplice. Despite that finding the court held that remorse on its own does not justify a deviation from the minimum sentence. The court has to look at the totality of the evidence in determining an appropriate sentence. The judge went on to ask a crucial question. Why do we view remorse as a mitigating factor? He answered the question purely from the perspective of the propensity of the offender to rehabilitate. He held that a truly remorseful offender is unlikely to ever repeat the crime.

The leading test to determine remorse is set out in *Matyityi's* case. The court found that there must be some factual basis for the court to make a finding of remorse. A plea in the face of an open and shut case against the accused is a neutral factor. (*S v Barnard*)¹⁸⁴ The court found that it was more 'likely that the appellant pleaded guilty in view of the fact that he had been caught red-handed, and that his actions indicated feeling sorry for himself rather than real

¹⁸³ 1997 (2) SACR 6 (NC).

¹⁸⁴ 2004(1) SACR 191 (SCA) 197.

remorse.¹⁸⁵ In order for remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his confidence. To assess whether the accused is genuinely remorseful the court needs to have a proper appreciation of, *inter alia*: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. *Thole's* and *Baroles* case reiterates the view that a plea of guilty is neutral when there is overwhelming evidence against an accused. Genuine contrition cannot be assumed it must be demonstrated. In *S v Mashinini* the court held that the appellants did not verbalise any remorse. The court found that the evidence against the appellants was overwhelming and they did not have any option but to plead guilty. A plea under those circumstances cannot be interpreted into remorse. In *S v Chipape*¹⁸⁶ the court held:

The accused pleaded guilty to the charge and he was convicted on his plea. By this he indicated a sign of remorse, which, he in my view, required an element of mercy to be considered. Remember, mercy in a criminal court means that justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation. (See *S v Van der Westhuizen* 1974 (4) SA 61 (C).) The accused, having pleaded guilty, took the court into his confidence and told the court during plea questioning the circumstances under which the offence was committed.

The court takes into account that the accused's plea of guilty is a sign of remorse and plainly explains how the element of mercy fits into the sentencing process. The element of mercy allows for a tempered discretion on the part of the judicial officer.

4.4 Further views on remorse

R M Marais in his article states the following:

An accused person who pleads guilty to a charge laid against him may be actuated by a variety of motives in doing so. A genuine sense of repentance and a readiness to take his punishment are but two of many. Conceivably he may plead guilty for no other reason than that he is aware that the case for the Crown is so overwhelming as to render a plea of not guilty futile. In doing so, he may not feel the slightest trace of repentance. Indeed, were it to be accepted that an accused who pleads guilty *ipso facto exhibits* a sense of contrition which entitles a judicial officer to "blend a measure of mercy with the justice of punishment" it would be difficult to assail the logical validity of the

¹⁸⁵ SS Terblanche 'Sentencing' (2011) 2 *SACJ* 229 & *Matyiyi* (note 111 above, para 13).

¹⁸⁶ 2010 (1) *SACR* 245 (GNP).

converse, namely, that he who pleads not guilty *ipso facto* shows a lack of penitence which justifies a judicial officer in imposing a heavier sentence than he would have done had the accused pleaded guilty.¹⁸⁷

Marais's argument aptly points to the fact that an offender may plead guilty for many reasons. One of them may be that he is remorseful on the other hand he may have had no choice because of the overwhelming evidence against him. The court must evaluate the reason that an accused pleads guilty. Due weight must be attached if the accused shows contrition. However if the offender elects to plead not guilty that cannot automatically be regarded as a lack of remorse and hence aggravating which would entail a heavier sentence. He adds that a court should be wary of making judgments in respect of an accused's character based solely on the accused's demeanour and behaviour in court.¹⁸⁸ This view has also been held in the case of *Ngada* quoting the dictum in *Makhudu's* case. 'A court should be slow to jump to conclusions regarding an accused's character and reaction to punishment when such conclusions are based solely upon the accused's demeanour and behaviour in court.'¹⁸⁹ Marais critically analyses the judgment in *R v Mvelase & others*¹⁹⁰ and concludes that 'any suggestion by the courts that an accused who pleads guilty is automatically deserving of leniency is legally and socially undesirable'¹⁹¹

Tine Vandendriessche argues that the punishment of a remorseful offender is justified in certain cases.¹⁹² He analyses the theories of punishment in respect of punishing a remorseful offender and states that some crimes are more serious than others. He states that when someone commits a criminal offence society wishes that person to be punished for what he has done. The important questions that follow are:

[D]o we want the offender to be punished because he broke the law? Do we punish him because he will learn through punishment not to do it anymore? Can we justify our harsh treatment of him because that's the best way to reform him? Or do we just put him in prison so society is protected from further harm?¹⁹³

These are crucial questions in trying to understand a remorseful offender and the manner in which he or she is punished. Although a remorseful offender is sorry for what he has done

¹⁸⁷ Marais (note 107 above, 145).

¹⁸⁸ Ibid 146.

¹⁸⁹ *Ngada* (note 147 above).

¹⁹⁰ 1958 (3) S.A 126 N.

¹⁹¹ Marais (note 107 above, 147).

¹⁹² Vandendriessche (note 6 above, 113).

¹⁹³ Ibid 114.

this is not enough when the damage caused by his actions are severe. An example would be the loss of life in a murder case. The status quo cannot be restored simply because the offender is sorry. Some form of punishment is necessary.¹⁹⁴ Vandendriessche suggests looking at Michael Zimmerman's definition¹⁹⁵ in deciding what punishment would be suitable, namely,

looking for something that (1) harms the punishee and (2) intends to do so, (3) that fits the act, (4) expresses the disapproval of the offence and the offender and (5) acts in some legally official capacity. And maybe the last proposition (5) gives us an answer why the judge's sentence and not that of family and friends has priority, which of course does not mean that it cannot be criticised. In understanding, explaining and – if needed – justifying punishment, the remaining problems will surround issues of proportionality, mitigating circumstances, (degrees of) responsibility, etc. However, I do believe that the theory of symbolic restoration offers us an alternative and plausible understanding of our current practice of punishment, which has to be our starting point.¹⁹⁶

Vandendriessche gives an insightful argument above as to why a remorseful offender should be punished. The restorative theory he correctly submits should be the starting point. He explains this theory as 'symbolic restoration'.¹⁹⁷ Simply put it is trying to restore what was lost by the actions of the offender. Sometimes real restoration is impossible (loss of life) and that is how we arrive at symbolic restoration. Arnold Burms states that this practice can be applied to the 'practice of punishment'¹⁹⁸ and,

He calls punishment a 'forced participation at a ritual that wants to restore symbolically what was damaged in crime and states that punishment is one of the elaborations of symbolic restoration just like remorse is. In fact Burms thinks that remorse is the first form of symbolic restoration after a crime because when a criminal repents his deed he is, by repenting, confirming the worth of his victim.¹⁹⁹

Remorse does undoubtedly have a role to play in the sentencing process in terms of the restorative theory. Genuine remorse, if correctly identified, has benefits for both the accused and the victim.

¹⁹⁴ Ibid 119.

¹⁹⁵ *The Immorality of Punishment* (2011).

¹⁹⁶ Vandendriessche (note 6 above, 119).

¹⁹⁷ Ibid 115, footnote 5.

¹⁹⁸ Ibid 116.

¹⁹⁹ Ibid 116.

4.5 A brief look at some of the international cases

Conrad Black was convicted of defrauding investors in his company of millions of dollars.²⁰⁰ Prosecutors requested the harshest possible sentence because his media interviews indicated a “stunning lack of remorse”.²⁰¹ They argued that his failure to acknowledge the offence was indicative that he would be a repeat offender.²⁰²

Robert Bierenbaum was convicted for the murder of his wife. He had pleaded not guilty and maintained his innocence throughout. The judge said, “I can only look at the defendant’s cold- blooded behaviour after the fact....He is not rehabilitated- which means accepting, admitting and expressing remorse. Only then can one expiate guilt.”²⁰³

Julia Apostle²⁰⁴ states that the enquiry into whether someone truly feels regret and contrition is a subjective one. A person may lack the skill to articulate remorse due to age or racial and cultural backgrounds.²⁰⁵ She quotes a classic example of this in the story of Richard Nygaard, a US appeals judge. He had spent eight years on the criminal bench and said the following about remorse:

The accused were often young black men who appeared sullen and arrogant. “I’d think: ‘Who are you, to look on this court in this way?’” But he later realised that these were often instances of a “person trying desperately to maintain his own dignity, his ‘personhood’, perhaps willing to risk the wrath of the court to maintain it”.²⁰⁶

The danger of inferring remorse merely by demeanour and attitude is abundantly clear from the above example. Apostle concedes in her article, with reference to Anglo-American law, that the remorse factor has ‘little or no impact’ in the cases of violent crimes. Eisenberg et al²⁰⁷ conducted an empirical analysis in capital sentencing cases. Their enquiry was twofold, namely, ‘What makes jurors come to believe a defendant is remorseful?’ and ‘Does a belief

²⁰⁰ J Apostle ‘The role of remorse in court convictions’ *Financial Times* 31 July 2010
<http://www.ft.com/cms/s/2/10a583da-9ab1-11df-87e6-00144feab49a.html>, accessed on the 10 October 2014.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ Ibid.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷ T Eisenberg, SP Garvey & MT Wells ‘But was he sorry? The role of remorse in capital sentencing’ (1998) 83 *Cornell Law Review* 1599-1637.

in the defendant's remorse affect the jury's final judgment of life or death?'²⁰⁸ The study showed that the

more jurors think that the crime is cold blooded, calculated and depraved and that the defendant is dangerous, the less likely they are to think the defendant is remorseful. Conversely, the less they think that the defendant is responsible for the crime, the more likely they are to believe he is remorseful. The defendant's demeanour during the trial also influenced jurors' beliefs about remorse.²⁰⁹

They further discovered that generally remorse does affect a sentence. 'Remorse benefits some defendants, but not others.'²¹⁰ The more serious the crime the less affect remorse had on the sentencing outcome. The British legal system uses Sentencing Guidelines that recognise remorse as a potential mitigating factor.²¹¹ Could this be the answer for South Africa as well?

4.6 Argument against remorse being a factor in sentencing

Bryan H Ward argues that remorse should not be relevant in criminal proceedings because its application is subjective.²¹² He points to the difficulties in assessing whether an offender is truly remorseful. He makes reference to the offender who may not be remorseful but is articulate and proficient in the law and says the right things to convince a judge that he is remorseful.²¹³ Conversely the offender who is 'inarticulate or fails to behave in the manner the judge believes indicates remorse' may be prejudiced and be given a lengthier sentence.²¹⁴ He states that the different definitions of remorse is what creates the 'varying expectations' applicable to a defendant in the criminal process.²¹⁵ There is the further complication 'due to several factors which inherently make it more difficult to assess the presence or absence of remorse: subjectivity, deception, cultural values, developmental limitations and psychological problems.'²¹⁶ It is abundantly evident from his article that the above factors will have a great impact in assessing whether remorse is present or not. An apt question that he asks with reference to deception is 'if remorse is a feeling, how can one prove that a defendant is not

²⁰⁸ Ibid 1600.

²⁰⁹ Ibid.

²¹⁰ Ibid.

²¹¹ Apostle (note 200 above).

²¹² Ward (note 7 above,132).

²¹³ Ibid 131.

²¹⁴ Ibid.

²¹⁵ Ibid 134.

²¹⁶ Ibid 134.

feeling the way he says he is?’²¹⁷ This would indeed provide a conundrum for the sitting judge. Ward provides logical argument as to how the application of the abovementioned factors would inevitably lead to inconsistencies. Even if only one definition of remorse is applied there would still be inconsistencies, due to the abovementioned variables, in determining the absence or presence of remorse.²¹⁸ He further criticizes the jury system that he argues judge everything by appearance ‘because really that’s all they know.’²¹⁹ This he argues is a totally unreliable method in the sentencing process. His solution is that:

[W]hether undertaken by judges or juries, sentencing should be a process in which facts are assessed by the sentencer for purposes of reaching an appropriate sentence ... facts must be weighed....Information implies facts—not suppositions. By its very nature, remorse cannot depend on a factual determination, but rather relies on guesswork and supposition.

Ward makes a sound argument why remorse should be ‘eliminated’ from the sentencing process and shows in terms of his argument that the process of determining remorse is flawed. It is not a factual enquiry and will inevitably lead to prejudice either on the part of the criminal defendant or the prosecution. He concludes by submitting that ‘often remorse has been used as a justification for enhancing or reducing a sentence based on the ‘gut instincts’ of a judge, and nothing more.’²²⁰ He extends his argument further and sums up by concluding:

The failure of remorse is simply the failure of [people] to be able read the innermost thoughts and feelings of other [people]—an age-old problem which plagues many of mankind’s interpersonal relationships. No one really knows what remorse is—and courts certainly don’t seem to know it when they see it. Anything that is so intrinsically unknowable cannot fairly be basis for extended (or reduced) periods of incarceration in any system of justice.²²¹

Du Toit²²² has a similar view as Ward. He states that ‘any endeavour to detect the presence or absence of remorse in surrounding factual circumstances or the genuineness of remorse is fraught with [difficulties].’²²³ He confirms that there are no studies that have proven the link between remorse and rehabilitation or remorse and decreased recidivism. He comments on the accused that is able to feign his remorse by doing all the right things ‘in an attempt to get

²¹⁷ Ibid 136.

²¹⁸ Ibid.

²¹⁹ Ibid 165.

²²⁰ Ibid 166.

²²¹ Ibid 167.

²²² Du Toit (note 8 above, 563).

²²³ Ibid.

a lenient sentence'. He echoes Ward's sentiments that 'psychological, developmental and cultural factors' may affect a remorseful offender from effectively expressing his remorse.

Both authors have set out tangible arguments with respect to the difficulties in assessing the remorse factor and its application in the sentencing process.

CHAPTER 5

CONCLUSION

5.1 Understanding the meaning and application of remorse

There are noticeable distinctions in the manner in which the definition of remorse is interpreted. The plain dictionary meaning refers to a feeling. The online examples are more indicative of the manner in which one recognizes remorse and they place emphasis on actions and expressions as signs of remorse. The actions referred to in those examples are after the fact and in response to a wrongdoing. The psychological definition is more in depth and once again expresses remorse as a feeling. It then extends the definition to the actions and expressions that help us to identify remorse. Herein rests the difficulty as expressed by Ward. 'If remorse is an inwardly possessed feeling, as implied by the dictionary definition, one might not expect any outward manifestations of it from a criminal defendant.'²²⁴

How do our courts interpret these meanings? The courts interpretations vary and the trend that emerges from the cases discussed above are as follows:

- A plea of guilty together with openness, full disclosure (*Seegers, Assante*), cooperation and compensation being paid (*Brand, De Sousa, Truyens, S v Masielala*,²²⁵ *S v Mushishi* ²²⁶ , *S v Dippenaar*²²⁷) has been found to be a sign of remorse and hence a mitigating factor.
- A plea of guilty with no openness (*Morris, Martin, Thole*) or where the accused lied either to the police(*Sesing*) or during the plea proceedings (*Kgantsi*) or in mitigation of sentence(*S v W*) or shows signs of recidivism (*M v S*), the accused's remorse under these circumstances has been a neutral factor.
- The exceptions: A plea of guilty, where the accused paid compensation and an expert testified that he was remorseful. The court held that remorse was only shown as he had been caught by the police. (*Stanley*) The other instance was where the accused pleaded guilty made a full disclosure and cooperated fully. However his failure to accept responsibility for the offence was found to be a lack of remorse (*Hatting*). Remorse was a neutral factor in the above two cases. A 'genuine, voluntary

²²⁴ Ward (note 7 above, 134).

²²⁵ 2000 (1) SACR 571 (W) 573 B.

²²⁶ 2010 NR 559 (HC) para 8.

²²⁷ 2006 JDR 0966(SCA).

repayment [has been] valued more highly by the courts.’²²⁸ (*S v Gardener*)²²⁹ There are cases where undertakings to pay the accused which have not materialised were held to be of little mitigating value. (*S v Michele*)²³⁰

- It is evident in cases where the accused pleaded not guilty and were convicted that the courts found a distinct lack of remorse. The reasons for same were inter alia; denying the offence (*S v GL, Combrink*), indifference to the victim (*Ngada*) and, a failure to take responsibility for ones actions(*S v SMM*). The courts have been cautious and in these circumstances the remorse factor has been measured as neutral.

‘Sincere remorse is a factual question and much may be gained from the accused’s action after the commission of the crime.’²³¹ The final analysis of the above cases makes it abundantly clear that the court assesses remorse or a lack thereof by the actions of the accused. This is suggestive of the fact that a judicial officer will not be in a position to accurately assess the presence or absence of remorse by judging an inner feeling of the accused. Having found remorse in the above cases the court has held it to be mitigating and thus favourable to a more lenient sentence. Conversely a lack of remorse has clearly been a neutral factor and has had no aggravating effect on the sentence. However the courts have not been willing to exclude the possibility that a lack of remorse may be aggravating. ‘Remorse should not be confused with the accused feeling sorry for himself for getting caught [*Stanley*], nor should it simply be accepted from what is said in court.’²³²

5.1.1 The Pistorius sentence

The long awaited fate of Oscar Pistorius was heard on the 21 October 2014 when the sentence was handed down in the Pretoria high court. Judge Masipa addressed the importance of applying the principles of the *Zinn* triad in arriving at an appropriate sentence. She did not however delve into the remorse factor in great detail. She found the following factors to be mitigating: the accused was a first offender and seems remorseful; she accepted the accused’s apology in open court as genuine, and the accused’s conduct after the incident in wanting the deceased to live and the accused’s vulnerability.²³³ The writer’s opinion is that the judge erred in not explaining how she found that the accused ‘seemed remorseful’. She made no

²²⁸ A Mellon ‘Sentencing white-collar offenders: beyond a one-dimensional approach’ 2009 *SACJ* 339.

²²⁹ case no SS32/06 23 April 2007 unreported para 53.

²³⁰ 2010(1) SACR 131 (SCA) para 7).

²³¹ Van der Merwe (note 122 above, 154).

²³² Ibid.

²³³ *Pistorius* (note 1 above, 14& 15).

comment about his demeanour in court in respect of the sobbing and retching. She further made no reference about the payments that he made to the deceased's parents. Needless to say she accepted his conduct in respect of his apology and his actions after the incident in helping the deceased. Whether these factors were perceived as remorse or whether they were assessed independently as mitigating is unclear. It is further unclear whether the remorse factor played any role in arriving at the final sentence. The accused was sentenced as follows:

1. Count 1- culpable homicide: The sentence imposed is a maximum imprisonment of 5 years imposed in terms of Section 276(1) (i) of the Criminal Procedure Act, number 51 of 1977.
2. On count 3- The contravention of section 120(3) (b) of the Firearms Control Act, number 60 of 2000: the sentence imposed is 3 years imprisonment, wholly suspended for 5 years on condition that within the period of suspension the accused is not found guilty of a crime where there is negligence involving the use of a firearm.
3. The sentence in count 1 and the sentence on count 3 shall run concurrently.²³⁴

The state has appealed the judgment and sentence. It will be very interesting to hear the appeal courts views in respect of the remorse factor. It is evident that clarity is warranted in respect of this particular factor.

5.2 Difficulties with interpreting remorse

Research conducted during this dissertation has shown that there are difficulties that arise from interpreting the true meaning of remorse. The main obstacle in trying to come to grips with remorse was the lack of empirical data and discussion on this topic. There have been no studies or in depth research done specifically in South Africa. Proeve and Tudor's²³⁵ study referred to above, despite its limitations, may have proved useful in assessing our judges' views on remorse. Zhong's conclusions were that despite his study 'and other empirical findings, the relevance of remorse remain controversial in legal reasoning.'²³⁶ Bearing this in mind the writer is of the view that our courts are correct in either accepting remorse as a neutral or mitigating factor. If they were to find it aggravating in cases where the accused pleaded not guilty this would lead to an infringement of the accused's constitutional rights. An accused 'is fully entitled to plead not guilty, to challenge the prosecution to prove his guilt, and to attack in cross examination the witnesses' versions of events. This should never

²³⁴ *Pistorius* (note I above, 26).

²³⁵ Proeve and Tudor (note 76 above).

²³⁶ Zhong (note 84 above, 40).

be held against him when sentence is imposed.²³⁷ The writer is further of the view that the factors which the court identifies as indicative of remorse can be dealt with independently.

5.3 Possible solutions to the 'inconsistency' problem

Terblanche and Roberts²³⁸ criticise the 'current sentencing scheme used in South African law'. Their main objection is that the application of the present principles does not lead to 'consistent outcomes'. They have recommended solutions in order to assist the court achieve consistency in their outcomes. In summary their recommendations are as follows:

1. There must be a separation of the fact- finding phase of the post-conviction trial process from the decision-making stage.
2. Within the limits of the adversarial system the courts should as far as possible obtain all necessary evidence and base it's decisions on facts rather than conjecture.
3. During the sentencing process expert evidence should be accepted as factual information, if it has not been refuted.
4. The seriousness of the offence must be the starting point in assessing the severity of the sentence. The criteria that have been advanced are similar to the ones recommended by the South African Law Commission,²³⁹ namely the harm caused or risked by the offence, and the offender's culpability with respect to that harm.
5. Due to the current conditions of our prisons and the problem of overcrowding there should be a policy of restraint in respect to custodial sentences. Basically recommending that a sentence of imprisonment should be a last resort as a sentencing option as it deprives an offender of his basic right to liberty as enshrined in our Bill of Rights.²⁴⁰

The above recommendations have been well formulated by the authors and provide a viable solution to the glaring inconsistencies in the law of sentencing. In applying these recommendations to the remorse factor one would have to agree with Ward and Du Toit that remorse should have no effect on the sentencing process. Firstly the judicial officer is not in a position to factually determine an offender's remorse. His determination of the absence or presence of remorse would be from a 'gut instinct'.²⁴¹ The expert evidence of forensic psychologists may assist the court in assessing an offender's remorse but they will have to be

²³⁷ Terblanche (note 10 above, 190).

²³⁸ SS Terblanche & JV Roberts 'Sentencing in South Africa: lacking in principle but delivering justice?' 2005 *SACJ* 201.

²³⁹ note 69 above.

²⁴⁰ Terblanche & Roberts (note 238 above, 201).

²⁴¹ Ward (note 7 above).

suitably trained and experienced in this specific field. The seriousness of the offence should be assessed independently of any feelings of remorse that the offender experiences after the wrongdoing. 'At present in South Africa, determining whether imprisonment has become unavoidable is squarely within the discretion of the sentence.'²⁴² Terblanche states that the traditional approach is that the court should ignore prison conditions when it imposes sentence.²⁴³ However '[as] the conditions of overcrowding in the country's prisons [increase] this question is increasingly on the mind of presiding officers.'²⁴⁴ A judicial officer has to be mindful of infringing on accused 'rights to dignity' as enshrined in the Bill of Rights.²⁴⁵

The writer hereof agrees with Du Toit that the following factors per se are mitigating on their own, namely, 'pleading guilty, co-operation with the authorities and paying compensation to a victim'.²⁴⁶ These factors he avers, if present, do result in the 'effective administration of justice and serve the interests of the victim and the community.' In England and Wales courts have to reduce a sentence when an offender pleads guilty.²⁴⁷ The reasons are simple and logical. The courts time is not wasted, the costs are reduced and complainants avoid the trauma of having to testify.²⁴⁸ Du Toit argues further that it is unfair not to regard a guilty plea as a mitigating factor where the evidence is overwhelming as many South African accused choose to plead not guilty despite this fact²⁴⁹, which is their constitutional right to do so. Du Toit elaborating on his argument confirms the situation where a case with overwhelming evidence may turn out to be otherwise and an apparently flimsy case may turn out to be overwhelming.²⁵⁰ He concludes by saying that '[we] simply know too little about the concept of remorse to use it as an indicator of anything.'²⁵¹

The solution to consistency in South Africa's law of sentencing may be the enactment of the sentencing guidelines as recommended by the South African Law Commission. The Commission found that these guidelines:

²⁴² SS Terblanche 'Sentencing a child who murders –DPP, *Kwazulu-Natal v P* 2006 (1) SACR 243 (SCA)' 2007 (2) *SACJ* 250.

²⁴³ Ibid 251.

²⁴⁴ Ibid 252.

²⁴⁵ Ibid.

²⁴⁶ Du Toit (note 8 above, 564).

²⁴⁷ Ibid 563.

²⁴⁸ Ibid.

²⁴⁹ Ibid 563.

²⁵⁰ Ibid 564.

²⁵¹ Ibid.

should be seen to promote consistency in sentencing, deal appropriately with concerns that particular offences are not being regarded with an appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time produce sentencing outcomes that are within the capacity of the state to enforce in the long term²⁵²

Terblanche²⁵³ submits that we could learn a great deal from the guidelines used in other countries. Perhaps the example of Britain, where the aspect of remorse is factored in as a guideline, could be useful in assisting our courts as well. If remorse is going to stay as a factor in the sentencing process it would be imperative that the courts consider the use of experts in the assessment of same. This would alleviate the discrepancies between genuine and feigned remorse and lead to more just sentences.

5.4 The role of remorse in the restorative justice process

Remorse will have a meaningful role to play in the restorative justice process. ‘Restorative justice requires the restoration of victims of crime to the position they were in before the crime was committed’.²⁵⁴ The court in *Matyityi’s* case above reminds us that ‘[by] giving the victim a voice the court will have an opportunity to truly recognise the wrong done to the individual victim.’²⁵⁵ Ponnann JA held that:

In South Africa victim empowerment is based on restorative justice. Restorative Justice seeks to emphasize that a crime is more than the breaking of the law or offending against the state- it is an injury or wrong done to another person.²⁵⁶

By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way approach hopefully a more balanced approach to sentencing can be achieved.²⁵⁷

Restorative justice is a process of mediation whereby all parties including the victim and offender ‘focus on repairing the harm committed against the victim’ and also to assist the offender ‘to identify what needs to change to prevent re- offending.’²⁵⁸ A remorseful offender

²⁵² (note 70 above, para 1.43).

²⁵³ Terblanche (note 46 above).

²⁵⁴ S Terblanche ‘Sentencing’ 2005 *SACJ* 400.

²⁵⁵ *Matyityi* para 16.

²⁵⁶ *Ibid.*

²⁵⁷ *Ibid* para 17.

²⁵⁸ (note 9 above,4).

would take responsibility for his or her actions and this would ultimately aid in the healing process. The process 'must promote healing and restitution.'²⁵⁹

The remorse factor should not be written off in the sentencing process. Further research and studies will enable the courts to understand the concept and interpret it consistently. Applying the 'gut instinct' approach as to whether an accused is remorseful will invariably lead to inconsistent and unjust outcomes. There is the additional problem of an accused being au fait with what a judge may consider being remorse and then attend to act it out in order to receive a more lenient sentence. There is also the scenario where an accused may be truly remorseful but due to cultural or psychological reasons he or she is unable to outwardly display remorse. Ultimately sentencing guidelines will minimise the current position of inconsistencies and this will allow for equal treatment of all offenders.

²⁵⁹ Ibid 6

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