

Crime and sentencing in the 'new' South Africa: A brief perspective

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That crime in South Africa is reaching alarming perhaps even epidemic - proportions cannot be doubted. Everyday new 'statistics' are added to the already long list of the victims of murder, rape, armed robbery, assault with intent to do grievous bodily harm and other types of serious violent crimes - without even taking into account the victims of crimes such as housebreaking, theft, fraud and the like. Unless something drastic is done to curtail crime, we are facing anarchy and chaos. In *S v Matalo and Another* 1998 (1) SACR 206 (OPD) at 211 the court had the following to say in this regard: 'Ons land gaan tans onder 'n ongekende, onbeheersde en onaanvaarbare laag van geweld, moord, doodslag, roof en verkragting gebuk. Daar heers 'n blatante en flagrante gebrek aan respek vir die lewe en/ of besittings van 'n medemens.' See also *S v Maseko* 1998 (1) SACR 451 (TPD) at 460.

There is an inherent right in every state (government) as indeed in every individual, to use all the means at its disposal to defend itself when its existence is at stake, when the force upon which the courts depend and upon which the Constitution is based, is itself challenged. Under such circumstances the state may be compelled by necessity to disregard for a time the ordinary safeguards of liberty in defence of liberty itself, and to substitute for the careful and deliberate procedure of the law a machinery more drastic and speedy in order to cope with an urgent danger. Such a condition of things may be brought about by war, rebellion, or civil commotion - to name but a few (*Krohn v the Minister of Defence of the Union of South Africa and the Special Court under Martial Law Regulations, Pretoria* 1915 AD 191 at 197. See also *S v Mokgoje* 1999 (1) SACR 233 (NC) at 237). Let us pray that crime does not get so far out of hand that such drastic measures are necessary. We already have very stringent, almost Draconian-like, bail legislation. We do not need more legislation of this kind.

It is against this background that I wish to express a few remarks on the topic of sentencing. As will be appreciated, this is a very complex issue and cannot be dealt with adequately in the space of a few paragraphs. Although this discussion will of necessity be very brief, I will nonetheless endeavour to touch upon the most important aspects.

At the outset it must be said, as already indicated, that sentencing is a complex and difficult issue. An American lawyer, Tudor Rees, once said: 'No more responsible duty can be entrusted to any man than that of having to decide over the liberty of his fellows. In his hands is not only the liberty, but may be the career, the future, the human destiny of the man who appears before him in the dock.'⁽¹⁾ In the same vein an Australian judge, Justice Mc Clemens, stated: 'In practice proper sentencing is the hardest thing that any judge ever has to do. To look from the Bench at an accused in the dock, is really looking at an inhabitant of another planet.'⁽²⁾

When assessing what an appropriate sentence will be, a court

has to consider a so-called triad of factors, to wit the crime that has been committed, the personal circumstances of the particular offender and thirdly the interests of society (*S v Zinn* 1969 (2) SA 537 (AD)). Then there is also the element of mercy. As has been stated by Holmes, JA, in *S v Harrison* 1970 (3) (SA) 684 (AD) at 686: 'Justice must be done, but mercy, not a sledge-hammer, is its concomitant.' However, the element of mercy must not lead to the condonation or minimisation of serious crimes (*S v Van der Westhuizen* 1974 (4) SA 64 (CPD) at 66).

When it comes to the crime, the court will look at the nature and seriousness of the particular offence. If it is of a serious nature, for instance armed robbery, and seems to be on the increase at an alarming rate, the court will not hesitate to impose severe, perhaps even harsh, sentences. In *S v Valley* 1998 (1) SACR 417 (WLD) at 420 the court put it thus: 'The crimes which the appellant committed are extremely serious. We live in a society which is becoming increasingly lawless; firearms are frequently used in robberies and victims are not uncommonly shot to death or badly wounded. Persons who perpetrate such crimes must be punished severely. Society demands this and it is absolutely necessary that the message goes out to the world that people who commit these sorts of crimes will be punished severely.'

Similar sentiments were expressed by the Supreme Court of Appeals in *S v Chapman* 1997 (2) SACR 3 (SCA) at 5:

'Rape is a very serious offence, constituting as it does a humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim. Women in this country are entitled to the protection of their rights. They have a legitimate claim to walk peacefully on the street, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives. The courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall show no mercy to those who seek to invade these rights.'

Although, as already indicated, the prevalence of an offence is a very relevant factor to be taken into account when assessing sentence, the court must guard against the tendency to overemphasise this. It has been stated that the prevalence of an offence and the difficulties of its detection are objective elements which must always be taken into account in assessing punishment. But they must not be taken too far and must not be allowed to obscure the fact that the subjective elements, particularly the moral blameworthiness of the offence, are equally important if not more important elements to be considered. The moral blameworthiness of an offence is not affected by its prevalence or by difficulties of detection, and this element is perhaps the most important element to be taken into account (*R v David, Alfred, Clever and Thomas*, 1962 (2) PHH 176 (SR)).

In *S v Matoma* 1981 (3) SA 838 (AD) at 842 the court expressed the following sentiments:

'Die geleidelike en geregverdigde verswaring van strawwe om die vermeerderende voorkoms van 'n bepaalde misdaad met afskrikking, retribusie en verwydering van die oortreder uit die gemeenskap in belang van die gemeenskap te bekamp, moet by straftoemeting nie lei tot 'n noodwendige negering van 'n besonder beskuldigde se eie persoonlike omstandighede wat moontlik tot strafvermindering kan lei nie.'

As far as the particular offender is concerned, the court will take all relevant factors into account. The court will, for example, look at the age of the offender, his standard of education, his family ties,

health, previous convictions (if any) - to name just a few. The list is obviously not exhaustive. As a general rule, first offenders will not be sent to prison lightly, but this will naturally depend upon the circumstances of the particular case (*S v Victor* 1970 (1) SA 427 (AD); *S v Wood* 1973 (4) SA 95 (RAD)). Similarly, a court will endeavour to keep juvenile offenders as far as is humanly possible out of prison, but once again it will depend upon the circumstances (*S v Willemse and Others* 1988 (3) SA 836 (AD) at 847)). In *S v Pledger* 1975 (2) SA 244 (ECD) at 248 the court held: 'The court is required, when assessing sentence, to have regard, in the case of a youthful offender, to the frailty, deficiencies and limitations of youth.'

The situation is the same with regard to old-age and health (*R v D* 1960 (1) SA 152 (CPD); *S v Du Toit* 1979 (3) SA 858 (AD)). In *S v Berliner* 1967 (2) SA 193 (AD) it was stated at 199: 'While a convicted person's health may, depending upon the circumstances, sometimes afford a good reason for not sentencing him to imprisonment, there is certainly no general rule that ill-health automatically relieves a criminal from being imprisoned. Medical and hospital facilities are, of course, available for convicts.' See also *R v Milne and Erleigh* 1951 (1) SA 791 (AD).

It must always be kept in mind that conditions in prison are not what they should be, due to the large prison population (some prisons are indeed 'hopelessly' overcrowded). Prison is therefore, for obvious reasons, hardly a place where offenders can be rehabilitated. See the remarks by the court in *S v Nel* 1995 (2) SACR 362 (WLD) at 366. In his annual report for the period 2003/2004 the Inspecting Judge of Prisons (Judge Fagan) had the following to say in this regard: 'Our prisons are bursting at the seams. With space for 114 787 prisoners, 187 640 are crammed in. The result is at best problems with food, health, exercise, stress levels and rehabilitation. At worst prisoners are dehumanised, develop a grudge against authority and turn prisons into universities of crime ... We have to drastically reduce the number of prisoners so that meaningful rehabilitation programmes can be implemented. For a start there is the appalling number of awaiting-trial prisoners - 53 876 out of our total of 187 640 prisoners. These prisoners remain in prison waiting to be tried for an average of about 3 months, some for years. About 60% of them will not be convicted. Until their court appearance they just lie or sit all day in overcrowded cells without any instruction that could improve them. Unnecessary arrests by the police, unaffordable bail and delays in completing cases are the main causes. As regards the sentenced prisoners, use of alternatives to incarceration such as correctional supervision should be encouraged.'

The situation remains unchanged!

On occasion a prominent American criminologist had the following to say about the prison situation:

'Absorption into prison is complete in all material respects; the outside world carries on as before, but the prisoner has no part of it, no influence over it, a greatly reduced awareness of it and very little contact with it. Prison is a legitimate curtailment of civil rights, and therefore by definition and purpose a basically unpleasant experience. The reality of prison life is that the internal system dominates the waking moments of virtually every prisoner's existence. It is corrupting because of the purposelessness and dehumanization that appear to be the characteristics of the prison experience. Many men survive it, but those who are the least resilient in the outside world are often also the most damaged both by the mental and at times physical brutality of the prison culture and by the upheaval that is effected in their social situation.'

There are few who would deny that the reality of imprisonment is harsh, potentially soul-destroying and at times brutal' (4)

In view of what has been said, summary imprisonment should only be resorted to in extreme cases - cases where the court really has no other alternative, due to the nature and seriousness of the offence. This is also applicable to cases where the offender has a long list of previous convictions, thereby showing a propensity to commit crime. Such a person is a menace to society and should be kept behind bars.

It is important to note that provision is made in the Criminal Procedure Act 51 of 1977, for the imposition of minimum sentences in the case of certain types of crime, (see section 51 a.f. of the Criminal Law Amendment Act 105 of 1997). In such cases the court is obliged to impose the prescribed sentence, unless it finds that there are so-called substantial and compelling circumstances warranting a lesser sentence. There is no pertinent guidance by the Legislature by way of definition or otherwise as to what the aforementioned circumstances entail - see *S v Malgas* 2001 (1) SACR 480 (SCA). The question therefore arises: What are 'substantial and compelling circumstances'?

In *S v Blaauw* 1999 (2) SACR 295 (W) at 311 the court came to the conclusion:

'... a Court is, in my view, still able to have regard to all the factors which would traditionally have been considered in imposing sentence. Moreover, in my view, a Court should not consider each factor in isolation but view them cumulatively and if, on doing so, the Court forms the view that, bearing in mind all the factors, aggravating as well as mitigating, a sentence of life imprisonment would be grossly disproportionate to the crime committed or, to put it differently, startlingly inappropriate or offensive to its sense of justice, then it should find that substantial and compelling circumstances exist for departing from the prescribed sentence ...'

Similar sentiments were expressed in *S v Boer and Others* 2000 (2) SACR 114 (NC), *S v Montgomery* 2000 (2) SACR 318 (NPD), *S v Dodo* 2001 (1) SACR 594 (CC) and *S v Shongwe* 1999 (2) SACR 220 (OPD). See also *S v N* 2000 (1) SACR 209 (WLD).

Remorse, as an indication that the offence will not be committed again, is obviously an important consideration, in appropriate cases, when the deterrent effect of a sentence on the accused is adjudged. But, in order to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his confidence. Unless that happens the genuineness of contrition alleged to exist cannot be determined (*S v Seegers* 1970 (2) SA 506 (AD) at 511; *S v Morris* 1972 (2) SA 620 (AD); *S v Brand* 1998 (1) SACR 296 (CPD) at 304)). In the latter case the court held:

'Ware berou is belangrike faktor in die proses van strafoplegging aangesien dit eerstens dui op oortreder wat besef dat hy verkeerd gedoen het en tweedens wat onderneem om nie weer in die toekoms te oortree nie. Ware berou lei tot tegemoetkomende bestraffing deur ons howe.'

The third factor that a court is called upon to consider when assessing sentence, is the interests of the society. In *R v Karg* 1961 (1) SA 231 (AD) at 236 the court had the following to say in this regard: 'It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgement.'

In *S v Schietekat* 1998 (2) SACR 707 (CPD) at 715 the court expressed the following sentiments: 'Courts must stand aloof from public hysteria. We must guard against perverting justice in the

service of public passion while, on the other hand, being alive to the critical need that society be kept safe. Law and order are synonymous with the very notion of community. They are the glue which welds it. Nonetheless we must approach our task dispassionately. The interests of justice require rigorous and clinical analysis. Law rules equally with order. Neither can operate unjustly. If they do, society fails.'

In the unreported case of *S v Adriaan de Lange Swart*, case 9974, Cape High Court, 22 April 1974, Steyn J said the following at 5:

'Primêr streef ons deur middel van strafoplegging na die beskerming van die gemeenskap. Hierdie beskerming kan beste bereik word in 'n proses waarin die belange van die gemeenskap met die belange van die oortreder versoen word ... [D]ie hof mag hom by die bepaling van straf nie laat lei deur die onoorwoë retributiewe eise van die oningelgtes in die gemeenskap nie. Indien ons aan hierdie eise sou toegee sal die regsmaasjinerie in tru-rat gesit word en sal ons terugbeweeg na openbare teregstellings en die afkap van ledemate vir minder ernstige misdade soos nietige diefstal.' See also *S v Haasbroek: S.v. November* 1969 (1) SA 356 (ECD) at 360; *S v Hougaard* 1972 (2) SA 70 (CPD) at 74.

A note of caution to courts when considering the 'triad' referred to above would not be amiss. In *S v Gool* 1972 (1) SA 455 (NPD) at 456 Miller J warned: 'The result of over-emphasis of any of the relevant factors (stated in *Zinn*) is often under-estimation or even total disregard of one or more of the other factors. A mind tending to preoccupation with the desirability of deterring others from committing an offence is apt to give insufficient attention to other factors which in the particular circumstances of the case may be more important for the purposes of assessing a just and proper sentence for the accused then standing in the dock. It is necessary always to be alert to that danger.' See also the *Brand* - case (supra) at 306.

Endnotes

¹ Rees as quoted in Vermaak 'Vonnisoplegging : Die dilemma van die regter en landdros in die hedendaagse strafsituasie' 1979 *Die Landdros* Vol 14 (2) 78.

² Mc Clemens 'The control of deviant behaviour: a Judicial approach' in Chappel, and Wilson *The Australian Criminal Justice System* (Butterworths, 1972) 551. See also *S v J* 1975 (3) SA 146 (OPD) at 154.

³ In *Director of Public Prosecutions Kwazulu - Natal v P* 2006 (3) SA 515 (SCA) the Supreme Court of Appeal expressed similar sentiments. The court held, inter alia, at 516D-G that the traditional aims of punishment had been affected by the Constitution of the Republic of South Africa, 1996, and, having regard to ss 28(1)(g) and 28(2) of the Constitution and the relevant international conventions, in every case involving a juvenile offender, the ambit and scope of sentencing had to be widened in order to give effect to the principle that a child offender was 'not to be detained, except as a measure of last resort'. If detention of a child were unavoidable, it should be for 'only the shortest appropriate period of time'. Furthermore, if detention were warranted, the court would have to give directions that the child be detained separately from persons over the age of 18. The court also held that neither the Constitution nor the international conventions forbade incarceration of children, and it was not inconceivable that there might be cases in which incarceration of a child was required. Even in the case of child offenders, the sentence had to be in proportion to the gravity of the offence. If any particular case called for imprisonment, it should be imposed.

⁴ Davies *Prisoners of Society : Attitudes and after care* (Routledge and Paul, London, 1973) 56. See also Roux 'Die Gevangenis: Rehabilitasieverwagtings' *Crime, Punishment and Correction* Vol 2(3) 16.



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Legal Crossword Number 3: Answers

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| <p>1 Plea appealing to the emotions (2, 13)
– ADMISERICORDIAM</p> <p>2 Incarceration through Parliamentary Bills (9)
– ATTAINDER</p> <p>3 Lucrative post box (13) - CORRESPONDENT</p> <p>4 What some employers do to subcontractors (8)
– NOMINATE</p> <p>5 Daily Bread (10) – LITIGATION</p> | <p>1 What courts like to do with rights (7) – BALANCE</p> <p>2 Waiver or acquiescence (11) - ABANDONMENT</p> <p>3 Defraud (3) – CON</p> <p>4 Academic (4) – MOOT</p> <p>5 Pro bono (4) – FREE</p> <p>6 Black swan (4,4) – RARAAVIS</p> <p>7 Sensitive object of cross-examination (6)
– CREDIT</p> <p>8 Prior in tempore _____ in iure (6) – POTIOR</p> <p>9 French Law (5) – DROIT</p> <p>10 Repository of privilege (7) – BASTION</p> |
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