Sentencing

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Sentencing primary caregivers of young children

Traditionally a judicial officer was not required to consider the effects of the imposed sentence on the children of the offender, even if the offender was a primary caregiver of young children. The Court in *S v M (Centre for Child Law as* Amicus Curiae*)* 2007 (2) SACR 539 (CC) [2007 (12) BCLR 1312] (discussed in detail in Mujuzi (2011) 2 *SACJ* 164–177) held that, in sentencing primary caregivers of young children, courts should inquire into the effects the sentence will have on such children and, where possible, impose a non-custodial sentence to ensure that the children are not deprived of the care and support of the primary caregiver.

In *MS v S (Centre for Child Law as* Amicus Curiae*)* 2011 (2) SACR 88 (CC) the Constitutional Court dealt with the question of imprisoning a primary caregiver of young children. Mrs S pleaded guilty and was convicted by the regional court of forgery, uttering and fraud (at para 4). She pleaded in mitigation that she had committed the offences as 'a result of paying for her daughter's medical fees' as 'her children require special care' (at para 5). A pre-sentencing report prepared for the state after interviews with Mrs S's previous employer and her husband's

family portrayed her as 'manipulative, dishonest, greedy, sly and as a troublemaker, who drank alcohol in excess. It also presented her as being irresponsible in the management of her finances.' The report also found that 'should a custodial sentence be imposed, there would be an adequate family support system to care for the children, and that Mrs S's mother-in-law would assist Mr S to care for the children' (ibid). On the counts of forgery and uttering she was sentenced to two years' imprisonment, conditionally suspended for five years. On the count of fraud she was sentenced to five years' imprisonment in terms of s 276(1)*(i)* of the Criminal Procedure Act (at para 7). This means that the Commissioner or the parole board had the discretion to place Mrs S on correctional supervision. 'In determining her sentence, the court took into account that Mrs S's mother-in-law had agreed to assist Mr S to look after the children' (at para 7). Mrs S's appeal to the Supreme Court of Appeal was dismissed. It should be noted that the High Court and Supreme Court of Appeal also considered the evidence of Mrs S's social worker, whose report portrayed Mrs S as 'a loving and caring mother who maintained gainful employment in order to provide for the family' (at para 12). Mrs S's argument before the Constitutional Court was that (at para 23; see also para 30 for other arguments):

> '…the courts did not consider the interests of the children when they considered her sentence… [T]hat the regional court did not take heed of the best interests of the minor children in terms of s 28 of the Constitution, in that no inquiry was conducted to establish if Mrs S was a primary caregiver. Had this inquiry been conducted … a custodial sentence would not have been imposed, as its imposition would render the children without a caregiver…'.

Counsel for the state argued that this case was distinguishable from *S v M* in a sense that Mr S was available to take care of the children should Mrs S be imprisoned (at para 26; see also para 33). However, counsel for Mrs S submitted that the evidence of Mrs S's social worker 'had established that Mr S was prevaricating about shouldering the responsibility of caring for the children, that his mother was no longer available and willing to assist in the care of the children, and that incarcerating Mrs S would be so traumatic as to deleteriously affect the interests of the children' (at para 32). At the request of the *amicus curiae* (at para 27) the Constitutional Court appointed a *curator ad litem* whose report showed, inter alia, that Mrs S's daughter was 8 years old and in Grade 3 and that the son was 5 years old and Grade R. The curator's report also showed that the educational psychologists and the school headmistress had informed her that 'Mrs S is the primary source of the children's emotional security and attends to their day-to-day activities, such as preparing them for school and collecting them from school.' The report also indicated that Mrs S's imprisonment would 'have a deleterious effect' on the children's 'emotional and material

development' (at para 42). Critically, the curator's report concluded that (at para 43):

> 'Mrs S's mother-in-law, who used to take care of the children periodically, has indicated her inability to do so because she now suffers from osteo-arthritis and back pain. In the meantime, Mrs S has improved her position in life since she committed the crime, and has become a valued employee and devoted parent. Her employer has indicated that it would not be able to keep open her position in the event of her incarceration. Mr S earns R8 500 per month. He is unable on his own, and without the additional income of Mrs S, to pay for the children's tuition fees, medical expenses and daily necessities. Although he reportedly loves his children, he cannot pay someone to assist him with the care of the children. He works long hours, from 05h00 until 19h00, from Monday to Friday. Mr S's employer has advised that he cannot alter the working hours of Mr S. Mrs S has also recited the health problems of her children and their special needs arising from their illnesses. Following the withdrawal of their paternal grandmother, there is no one to take care of the children, if Mrs S is incarcerated.'

Khampepe J, who wrote the minority judgment, had 'grave difficulties with whether the regional court, being convinced that the custodial sentence was the only appropriate sentence to impose, gave due consideration to the adequacy of care the children would receive while Mrs S is incarcerated' (at para 35). Responding to the state counsel's submission that 'Mr S and his family also undertook to care for the children' (at para 35) she was of the view that (at para 36)

> '[a]ccepting that the court's attention was drawn to the need to provide alternative care for the children…, the court was required to investigate the effect the sentence would have on the children. The court did not fully investigate the quality of alternative care the children would receive.'

The Court should have enquired into whether there was a person that would look after the children's daily needs during their mother's incarceration. This was so especially in the light of the fact that Mrs S's mother was not staying in the same house as the children. The court should also have investigated whether there was someone who would take the children to school and who would fetch them from school and also how the children would remain in contact with their mother should she be imprisoned. There was also evidence that Mr S was not the suitable person to provide the care that the children needed. Examples were given which showed that there had been cases where he had neglected his family. He had for example neglected his family and even when he was at home his role with regard to maintaining the children was insignificant (see paras 36–38).

Khampepe J considered the following factors to hold that a sentence of correctional supervision should be imposed on Mrs S: Mr S would not be available to take care of the children appropriately (due to his work-related commitments and the fact that he was not known to

have been involved in taking care of the children); Mrs S had been employed gainfully and her employer had made it clear that she would lose her job if she was to be incarcerated; that Mrs S's mother-in-law was no longer available to take care of the children (she was suffering from ill-health); that Mrs S had not committed a violent crime; and that South African prisons were overcrowded and therefore unsuitable for rehabilitation (at paras 49–52).

The majority judgment was written by Cameron J with whom eight other judges concurred. The majority pointed out that Mrs S was a recidivist who had continued re-offending while under the threat of suspended sentences (at paras 55 – 56). The majority pointed out that because of Mrs S's recidivist nature and personal circumstances, the regional court was correct in imposing the sentence in terms of s 276(1)(*i*), because that court considered imprisonment to be 'essential' but at the same time the circumstances pointed 'away from an extended sentence' (at para 57). The majority held that the reports submitted by the probation officer and Mrs S's social worker established that the incarceration of Mrs S 'would be hard' on her children (at para 60). The majority held (at para 63) that unlike in *S v M*,

> Mrs S is not the children's sole caregiver. She is not 'almost totally responsible' for their care. Despite heartache and turbulence, well captured in her evidence and in the social workers' reports, Mrs S is united with the father of her children. He is their co-resident parent. And he is willing to care for them during her incarceration. Although he works long hours, there is nothing to indicate that he will not be able to engage the childcare resources needed to ensure that the children are well looked after during his absence at work. A non-custodial sentence is therefore not necessary to ensure their nurturing. And a custodial sentence will not inappropriately compromise the children's best interests. The sentencing court … properly balanced out the constitutional interests at stake.

The majority also found that the reports did not suggest that 'the fundamental needs of the basic interests of the children will be neglected if their mother is incarcerated' (at para 64; see also para 65). In dismissing the appeal, the majority held that '[t]o mitigate the possibility of the children enduring hardship during their mother's absence, … this court should order the Department for Correctional Services to ensure that a social worker visits them regularly, and that he or she provides the department with reports on their wellbeing during their mother's absence' (at para 66). It is against that background that the majority ordered that (at para 68):

> '[t]he National Commissioner for Correctional Services is directed to ensure that a social worker in the employ of the Department for Correctional Services visits the children of the applicant, Mrs S, at least once every month during her incarceration, and submits reports to the office of the National Commissioner as to whether the children of the applicant are in need of care

and protection as envisaged in s 150 of the Children's Act 38 of 2005 and, if so, to take the steps required by that provision.'

The majority judgment could easily be understood as having paid insufficient attention to some of the evidence that was adduced in the case. In the first place it seems to have totally ignored the fact that there was compelling evidence to show that Mr S would not be in a position to appropriately take care of the children. This is because of his inflexible work schedule and his history of taking an almost passive approach in matters concerning his children. Mr S's income could also not enable him to employ someone to take care of the children. The majority also seems to have totally ignored the fact that Mrs S's mother-in-law was no longer available to take care of the children. The order by the majority that a social worker should be appointed by the Commissioner of Correctional Services to visit the children at least once every month is based on at least one assumption: that there will be a readily available social worker to undertake that task. This means that such a social worker would have to put aside his/her core duty – of ensuring that prisoners take part in rehabilitation programmes – and visit Mrs S's children to write a report for the Commissioner.

Both the majority and the minority judgments did not call for evidence to throw more light on the extent to which the Commissioner or the parole board has in practice used section 276(1)(*i*). Information or data on how many offenders on average are released every year in terms of section 276(1)(*i*) would have helped the court to understand how the provision is used in practice and whether Mrs S is in fact likely to benefit from that provision. It would also have been helpful for the court to hear evidence from, for example, the Department of Correctional Services, on what is expected of a prisoner to benefit from section 276(1)(*i*).

Although the Commissioner of Correctional Services has the discretion to place Mrs S on parole, that can only happen after she has served at least 10 months of the sentence (s 73(7)(*a*) of the Correctional Services Act). This means that even if the Department's social worker informs the Commissioner that Mrs S's children are suffering as a result of the absence of their mother, the Commissioner would not be able to place her on correctional supervision before the expiry of the stipulated period.

Restorative justice

It is well-known that many South Africa's prisons are overcrowded and therefore not conducive for rehabilitation. As has been illustrated elsewhere (Terblanche *A guide to sentencing in South Africa* (2007) 174–178), South African courts, including the Constitutional Court,

have recognised the importance of restorative justice. The issue in the case of *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) was whether the sentence of restorative justice that had been imposed on the respondent for rape was appropriate. The respondent had been convicted of raping a girl of 15 years and 10 months old. The complainant was the respondent's girlfriend's daughter and all three lived in the same house.

Both the complainant (who was 17 years old at the time) and her mother testified on sentence. The court also heard the evidence of a probation officer on the question of the appropriate sentence to be imposed. The probation officer informed the court that 'the complainant had outgrown the incident and that she had 'forgiven and reconciled with the respondent.' The probation officer added that the complainant was no longer either angry with the respondent or afraid of him. The respondent and the complainant had 'repaired and mended their relationship.' The complainant did not want the respondent to be imprisoned because he was 'playing a useful role in maintaining her and her family' (at para 6). Although the complainant's mother wanted the respondent to be imprisoned, she testified that the respondent and the complainant appeared to have mended their relationship and were friendly with each other. She also informed the court that without the respondent, who was the breadwinner, life would be difficult (at para 7). The social worker testified that through the victim-offender conference that she arranged, the complainant and the respondent were afforded an opportunity to engage each other and that the two had reconciled. The social worker also testified that the respondent had rejoined the family and was remorseful. She 'recommended that the respondent be sentenced to correctional supervision in terms of s 276(1)(*i*) of the Criminal Procedure Act' (at para 8). A psycho-social report on the impact of the offence on the complainant that was submitted to the High Court showed that as a result of the rape her academic performance at school had deteriorated (at para 9). The High Court found 24 factors that constituted substantial and compelling circumstances that justified the imposition of a sentence less than the prescribed minimum sentence of life imprisonment. Some of these factors were: the accused was remorseful, the rape had 'occurred on the spur of the moment', the victim was not physically injured, the rape was 'not one of the worst kinds of rape', the accused supported the family including the victim, the accused and the complainant's mother had resumed their relationship, 'the family was entirely dependent on the accused', the victim was of the view that 'it would not be in the family's interests that the accused be incarcerated', 'the accused and the victim participated in a successful victim/offender program', it was not in the interests of society to create secondary victims by

the imposition of punishment upon the accused that would leave at least five indigent persons dependent upon social grants, and that the accused was 'a good candidate' for rehabilitation and was able to render community service (at para 11).

Counsel for the state argued, *inter alia*, that 'the sentence based on restorative justice is not appropriate for such an offence as it failed to reflect the gravity and seriousness of rape, particularly the rape of a 15 year old girl … [and that] the sentence imposed by the court below had the effect of trivialising the offence.' On the other hand, counsel for the respondent argued that the circumstances of the case were 'so exceptional' that they justified the court to depart from the prescribed minimum sentence and to impose a sentence based on restorative justice. They added that this sentence had 'enabled the family of the complainant to reunite with the respondent, thus achieving reparation and reconciliation'; that the complainant had accepted the respondent's apology and had forgiven him; that the respondent's apology had resulted in the healing of the wound that had been inflicted on the family by his conduct; and that the family was also willing to forgive the respondent and reconcile with him (at para 14).

The *amicus curiae* before the High Court made submissions on the importance of restorative justice, although it conceded that rape was a serious crime. She submitted that restorative justice requires that in determining a suitable sentence, the court should not only hear the victim's voice but that that voice should be 'accorded appropriate weight.' The *amicus curiae* added that although the victim deserves to be heard in determining a suitable sentence, it is the court with the responsibility to determine the sentence (at para 15). The court, after highlighting the seriousness of rape (at paras 16–19), held as follows (at para 20):

> 'Although restorative justice received a somewhat lukewarm reception by the judiciary starting tentatively in *S v Shilubane* 2008 (1) SACR 295 (T) it has in the last few years grown in its stature and impact that it has even received the approval of the Constitutional Court in *Dikoko v Mokhatla* 2006 SA 235 (CC), *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), *The Citizen 1978 (Pty) Ltd v McBride (Johannesburg and others, Amici Curiae)* 2011 (4) SA 191 (CC). Restorative justice as a viable sentencing alternative has been accorded statutory imprimatur in the Child Justice Act 75 of 2008, in particular s 73 thereof. I have no doubt about the advantages of restorative justice as a viable alternative sentencing option provided it is applied in appropriate cases. Without attempting to lay down a general rule I feel obliged to caution seriously against the use of restorative justice as a sentence for serious offences which evoke profound feelings of outrage and revulsion amongst law-abiding and right-thinking members of society. An ill-considered application of restorative justice to an inappropriate case is likely to debase it and make it lose its credibility as a viable sentencing option. Sentencing officers should be careful not to allow some overzealousness

> to lead them to impose restorative justice even in cases where it is patently unsuitable. It is trite that one of the essential ingredients of a balanced sentence is that it must reflect the seriousness of the offence and the natural indignation and outrage of the public.'

The court added that there is no doubt that in matters of sentencing the victim's voice deserves to be heard as this gives the court an opportunity to know how the victim was affected by the crime (at para 21). However, the Court cautioned that the fact that the victim's voice deserves to be heard in determining an appropriate sentence 'does not mean however that his/her views are decisive' (at para 21). The court concluded that, although there were substantial and compelling circumstances, such circumstances did not justify the imposition of a sentenced based on restorative justice. The court added that a sentence should not only deter the accused from committing crime but that it should also deter like-minded people from committing crime. Imposing lenient sentences for serious crimes could erode public confidence in the criminal justice system (at para 22). The court upheld the appeal and sentenced the respondent to ten years' imprisonment.

This case raises several issues that are relevant to sentencing but the most important points to note for the purposes of this analysis is that restorative justice should not be emphasised in serious cases such as rape. The case also shows that a court does not have to impose a sentence based on restorative justice where such a sentence would be inappropriate irrespective of the fact that the victim forgave and reconciled with the perpetrator. It has to be recalled that restorative justice aims at restoration and reconciliation (Terblanche at 174–178). It is unclear why the High Court emphasised restorative justice when there was evidence that the respondent reconciled with the complainant. The Supreme Court of Appeal also did not point out this fact in its judgment. Even if there had not been reconciliation between the respondent and the complainant, the imprisonment of the respondent did not mean that reconciliation could not have taken place (see Stamatakis and Van der Beken 'Restorative Justice in Custodial Settings: Altering the Focus of Imprisonment' (2011) 24(1) *Acta Criminologica* 44–66). The case also shows that much as the victim has a say in as far as the issue of imposing an appropriate sentence is concerned, the victim cannot dictate to the court which sentence should be imposed. The court has to maintain its independence and impartiality at all levels including at the sentencing and ensure that the sentence impose fits not only the criminal but also the crime. One should also not lose sight of the fact that although in the Criminal Law (Sentencing) Amendment Act 38 of 2007 specifically provides that in the case of rape an 'apparent lack of physical injury to the

complainant' (s 51(3)(*Aa*)(*ii*)) shall not be considered as a substantial and compelling circumstance, the High Court considered the fact that 'the victim was not injured physically' to be one of the substantial and compelling circumstances. It was held in *S v Nkawu* 2009 (2) SACR 402 (E) that s 51(3)(*aA*)(*ii*) would be unconstitutional if it compelled courts, irrespective of the circumstances of the offence, to ignore the effect of the rape on the victim in determining the appropriate sentence, as it would be against the doctrine of separation of powers for the legislature to prescribe to the judiciary factors that must be adhered to sentencing. In the author's view, although *Nkawu* raises a valid constitutional issue, whether *Nkawu* was correctly decided or not will have to be determined by the Constitutional Court at an appropriate time. This is especially because of the fact that it raises the issue of separation of powers and the independence of the judiciary but does not deal with drafting history of the amendment.

Globular sentences

A court has the discretion to determine which sentence to impose on the offender depending on the relevant applicable legislative provisions (Terblanche at 113–136). In cases where a person has been convicted of one offence a court will have two important tasks – (1) assessing the mitigating or aggravating factors to determine the appropriate sentence; and (2) highlighting the objective or objectives that the sentence that has been imposed on the offender aims at achieving. These objectives include deterrence, rehabilitation and retribution. However, the situation is different in a case where a court has to sentence a person who has been convicted of more than one offence – for example aggravated robbery and the possession of an unlicensed firearm. In a case like that a court has to decide at least four issues at sentencing: (1) the mitigating or aggravating factors to determine the appropriate sentence; (2) the objective or objectives that the sentence that has been imposed aims to achieve; (3) the question whether the sentences imposed on each of the offences of which the offender has been convicted should run consecutively or concurrently; and (4) whether to impose a globular sentence. Although the law does not bar courts from imposing globular sentences (Terblanche at 182) the Appellate Division cautioned against the practice of imposing globular sentences (see *S v Immelman* 1978 (3) SA 726 (A) at 728–9). In *S v Ngabase and another* 2011 (1) SACR 456 (ECG) the regional court convicted each of appellants of robbery with aggravating circumstances (two counts) and possession of a dangerous weapon (two counts). The High Court, after acquitting the accused of possession of dangerous weapons, noted that (at para 22)

> '[t]he magistrate treated all the offences of which the appellants had been convicted as one, and sentenced them to terms of imprisonment of 18 and 15 years, respectively. The setting-aside of the appellants' convictions on the dangerous-weapons charges must result in the composite sentences being set aside. It is apparent…that the magistrate intended imposing punishment in respect of each conviction, but was influenced to impose a globular sentence by the first appellant's attorney's plaintive cry for mercy. The Supreme Court of Appeal has repeatedly emphasised that separate counts may be taken together for purposes of sentence only in exceptional cases. This is precisely the type of case where a globular sentence presents problems on appeal.'

The first appellant was sentenced to 15 years' imprisonment for each of the two convictions of robbery with aggravating circumstances and the court ordered that the 12 years of the second sentence should run concurrently with the 15 year sentence. The second appellant was sentenced to 12 years' imprisonment. What is emerging from the above judgment is that although in practice courts are not prevented from imposing globular sentences, these types of sentences are rarely imposed and even when they are imposed the appellate court could set the sentence aside and impose a specific sentence for each of the offence of which the offender has been convicted.

Objectives of punishment

Once a person has been convicted of an offence, the court has to decide not only the kind of punishment to be imposed but also the objective of that punishment. The court will have to decide, for example, whether the punishment will help in the rehabilitation of the offender or will deter the offender or other people from committing the offence or offences of which the offender has been convicted. There are cases in which an offender or offenders have been sentenced to lengthy prison terms and the court has not stated the objective that the sentence imposed will serve. In *S v Ngabase* 2011 (1) SACR 456 (ECG), for example, the two appellants were convicted of robbery with aggravating circumstances and sentenced to 15 and 12 years' imprisonment respectively. The High Court held that '[g]iven the seriousness of the offences … a lengthy term of imprisonment is imperatively called for.' This was a retributive sentence. The court did not inform the offenders that they had been sentenced to be rehabilitated or to deter them from committing other offences or to deter others from committing offences of that nature. Similarly in *S v Nkosi* 2011 (2) SACR 482 (SCA) the appellants were convicted of attempted robbery, attempted murder, unlawful possession of two AK47 rifles, unlawful possession of six 9mm pistols and possessions of ammunition (at para 4). The appellants were 'each sentenced to an effective term of 22 years' imprisonment' (at para 5). For reasons not relevant to this analysis, the first appellant's appeal

succeeded and his sentence and conviction were set aside. However, the second appellant's appeal was dismissed. In upholding the sentence imposed by the High Court, the Supreme Court of Appeal held that the High Court 'carefully considered all the factors relevant in the enquiry — the second appellant's personal circumstances, the nature of the offences involved and the interests of society' (at para 35). The Supreme Court of Appeal concluded that '[t]he offences committed in this case count among the most violent and, unfortunately, prevalent in this country. The harshest form of punishment is undoubtedly warranted' (at para 36). It is evident that the court emphasised the fact that the offences committed were very violent, in upholding the sentence that had been imposed by the High Court.

In *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) the respondent was convicted of raping a 15-year and 10-months-old girl and sentenced to ten years' imprisonment, conditionally suspended for five years. The High Court emphasised restorative justice. In setting aside the High Court's sentence and replacing it with one of ten years' direct imprisonment, the Supreme Court of Appeal held that (at para 22)

> '[i]t is trite that in addition to deterring an accused person from committing the same offence in the future, a sentence must also have the effect of deterring like-minded people. Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.'

It is clear that the Supreme Court of Appeal emphasised the following in sentencing the offender: specific deterrence when it said that the sentence will deter 'an accused person from committing the same offence in the future'; general deterrence when it held that a 'sentence must also have the effect of deterring like-minded people' and the interests of the society – the protection of the society from people like the accused. The Supreme Court of Appeal also appears to have highlighted the role of public opinion when it said that a lenient sentence 'have the effect of eroding the public confidence in the criminal justice system.' There are at least two points to note about the Supreme Court of Appeal holding above: (1) a court can impose a sentence aimed at achieving more than one objective of punishment. In this case,

the court emphasised deterrence and protection of the society; (2) it is doubtful whether the Supreme Court of Appeal holding that a 'sentence must also have the effect of deterring like-minded people' from committing the offence or offences of which the offender has been convicted is applicable in all cases. It has been demonstrated that deterrence has not been proved to deter people from committing crime (cf the sources referred to in Terblanche 156–163). It is submitted that the above approach is only applicable in a case or cases where a court has emphasised general deterrence as the objective of punishment.

In *S v Ncube and other* 2011 (2) SACR 471 (GSJ) the appellants were convicted of robbery with aggravating circumstances and sentenced to 12 years' imprisonment. In dismissing their appeal against both sentence and conviction, the High Court held as follows (at 480):

> 'The crime is an extremely serious one and is recognised as such by reason of, inter alia, the obvious features of the crime, but also the fact that a minimum period of imprisonment has been considered appropriate by the lawmaker, namely 15 years. That is indicative of the order of the period of imprisonment which the public expects courts to impose upon persons who commit offences of this nature …The needs of society are such that frequently perpetrated crimes, and particularly serious crimes of this nature, must be met with an appropriate sentence of a sufficiently severe nature to deter other persons from becoming embroiled in this type of activity… This type of offence is a prevalent one in our present society and steps are being taken to stamp it out, hence the minimum sentence legislation and the serious efforts made by the police force of this country to arrest, detain and deal with perpetrators. The effect of a lengthy period of imprisonment also has the added salutary purpose of removing the persons from society, thereby preventing them from committing further crimes.'

It is evident that the High Court highlighted the following in upholding the sentence: the seriousness of the crime; public opinion (expectation); the needs of society; general deterrence; the prevalence of the crime; and specific deterrence. This case also illustrates that in imposing a sentence, a court can emphasise both specific and general deterrence and other factors. Where courts have imposed lengthy prison terms, deterrence and/or retribution or both has been emphasised. However, as will be illustrated shortly, there are cases that have mentioned the fact that by being sentenced to a lengthy prison term, the offender will get an opportunity to be rehabilitated while serving his sentence. This is so even if courts are aware that many prisons in South Africa are overcrowded which makes it difficult or impossible for offenders to be rehabilitated.

In a case in which rehabilitation was considered, albeit in passing, as the objective of punishment, the Supreme Court of Appeal did not impose a custodial sentence. In *S v Romer* 2011 (2) SACR 153 (SCA) the respondent was convicted of a count of murder and two counts

of attempted murder and sentenced to ten years' imprisonment that were wholly suspended for five years, plus three years' correctional supervision, because he acted with diminished responsibility. The state argued that the sentence was 'disturbingly lenient' (at para 3) and that the 'trial court over-emphasised the personal circumstances of [the respondent] at the expense of the gravity of the crimes committed, the interests of society and the interests of the victims' (at para 24). The state argued further that the respondent should have been sentenced to 15 years' imprisonment (at para 25). The state added that the sentence of correctional supervision 'had the effect of trivialising the gravity of the crimes committed by [the respondent] – with no deterrent effect on both [the respondent] himself and other would-be offenders' and that given the gravity of the offences of which the respondent was convicted 'the retribution element of punishment should have been brought to the fore' (at para 27). In disagreeing with the state, the Supreme Court of Appeal held (at para 27) that

> '[m]ore than a decade ago this court recognised the utility of a sentence of correctional supervision. In *S v R* 1993 (1) SACR 209 (A) Kriegler AJA was at pains to point out that the statutory dispensation introduced by s 276(1)*(h)* of the Criminal Procedure Act (viz correctional supervision) was intended to distinguish between two types of offender, namely those who ought to be removed from society and imprisoned, and those who, although deserving of punishment, should not be removed from society. He exhorted judicial officers to take advantage of this statutory provision in appropriate cases.'

The Supreme Court of Appeal referred to earlier decisions to hold that this was not an appropriate case for the imposition of a deterrent sentence because the offender was unlikely to repeat what he did, the nature and personal circumstances of the accused did not warrant his removal from society, and that the respondent was not a danger to society at large (at paras 28–30). After agreeing with the High Court's finding that a non-custodial sentence would help the respondent in his rehabilitation (at para 20), the Supreme Court of Appeal concluded that it was 'satisfied, after much anxious consideration, that deterrence of [the respondent] or others is not an overriding consideration, regard being had to "the concatenation of circumstances" which were of a highly unusual, if not bizarre, nature and which are unlikely to recur' (at para 31). The following are some of the points that one can distil from the above judgment. First, the state seems to have phrased its submissions in a manner that blurred the distinction between deterrence and retribution. Although it submitted that the imposition of the sentence of correctional supervision would trivialise the seriousness of the offence and a deterrent message would not be sent out to the offender and the would-be offenders, it concluded by arguing that the failure by the High Court to emphasise deterrence

meant that the 'retribution element' of punishment was not brought to the fore. Secondly, the Supreme Court of Appeal seems to hold the view that in cases where it is unlikely that the offender will repeat the offence of which he has been convicted and where the offender poses no threat to society, it serves no purpose to impose a deterrent sentence. However, that finding contradicts the conclusion arrived at by the same court in *DPP, North Gauteng v Thabethe* 2011 (2) SACR 567 (SCA) where the High Court had imposed a suspended sentence for rape after being convinced that it was unlikely that the respondent would have committed rape again and after finding that the respondent did not pose any danger to society. Thirdly, the decision also highlights the fact that there are some prosecutors who still hold the view that correctional supervision is not an appropriate sentence irrespective of the circumstances in which the offence was committed. It is against that background that the Supreme Court of Appeal emphasised the fact that correctional supervision is an appropriate sentence depending on the circumstances of the offence and the offender.

A similar conclusion was reached in *S v Dumba* 2011 (2) SACR 5 (NCK), where the accused was convicted of the murder of his wife. In sentencing him to eight years' imprisonment, three of which were suspended for a period of five years (at para 15), the court held that the 'accused is a first offender and is unlikely to commit another violent offence' (at para 12). However, in what could be considered as having taken into consideration both public opinion and general deterrence, the court concluded that 'the community – particularly the San community – must not be left with the impression that the court condones heinous crimes like murder, by them or anyone else' (at para 13).

There are cases in which courts have expressed the view that sentencing an offender to imprisonment would help in his rehabilitation. In *S v Makhaye* 2011 (2) SACR 173 (KZN) the appellant, who had a previous conviction, was convicted by the regional court of the theft of a motor vehicle and sentenced to five years' imprisonment. He appealed against conviction and sentence. His appeal against conviction was dismissed but his appeal against sentence was upheld and the High Court imposed a sentence of five years' imprisonment of which one year was suspended for three years. The High Court held that '[t]he fact remains that the appellant has been convicted of a serious offence and the imposed sentence, while allowing him to rehabilitate himself, must also serve as sufficient deterrence not to engage in this type of conduct in the future … [A] suitable sentence would be one that is subject to the provisions of s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977' (at para 11). The High Court expressed the view that the sentence imposed on the appellant would serve two objectives –

rehabilitation and deterrence (specific deterrence). This is indicative of the High Court's understanding that these seemingly conflicting objectives of punishment are not mutually exclusive, especially in the context of a sentence imposed in terms of section 276(1)(*i*) because for the Commissioner of Correctional Services or the parole board to place a prisoner on parole, one would expect that prisoner to have been rehabilitated or for the Commissioner and the Parole Board to be of the view that his release with facilitate his rehabilitation.

In *S v Makena* 2011 (2) SACR 294 (GNP) the accused and his co-accused were convicted of murder, robbery and housebreaking with intent to steal and theft. The cumulative effect of the different sentences that were imposed on the appellant was 50 years' imprisonment (at para 3). The High Court emphasised retribution, deterrence and the interests of society in imposing the sentence (at para 6). On appeal to the full bench, the Court observed that the state counsel had correctly conceded that the sentence imposed on the appellant 'did appear to run counter to the judicial trend to strive after rehabilitation and reformation as opposed to retribution and prevention' (at para 11). The Court added that one should not overlook 'the fundamental independence of [the Department of] Correctional Services which … does not operate from the premise that those convicted by the courts and channelled to it are incorrigible and beyond redemption from a life of crime, and beyond rehabilitation' (at para 12). The Court also added as follows (at para 13):

> 'What has been said about rehabilitation and reformation applies to the period of the appellant's rehabilitation, viewed from the appropriateness or otherwise of the imprisonment for 50 years. It is my considered view, based on the sentences emanating from the Supreme Court of Appeal, that effective sentences exceeding 25 years' imprisonment are not confirmed lightly. Again, the basis for this may be the emphasis on reformation and rehabilitation, based, inter alia, on the constitutional precept that punishment should not be cruel or be deemed to be such. This statement is made with the full knowledge and appreciation of the gravity and devastating effects that the loss of the victim's life has inevitably inflicted on his family, society and the country.'

The Court concluded on a positive note that the fact that the accused had pleaded guilty to the offences which was 'the first step to reformation and rehabilitation' and that 'the psychologists and other experts who will plot and vet his future are in place within the Department of Correctional Services' (at para 15). The appellant's sentence was reduced to one of 25 years' imprisonment. The *Makena* decision raises the following important points: first, the Court was of the view that decisions of whether a person is capable or incapable of rehabilitation should not be made by courts but rather by the relevant officials in the Department of Correctional Services; secondly, there is a trend to the

effect that rehabilitation is being emphasised instead of retribution and deterrence; thirdly, any punishment imposed on the offender should not violate his/her constitutional right to human dignity; fourthly, the court assumes that the Department of Correctional Services has enough 'psychologists and other experts' who will put in place programmes for the appellant's rehabilitation; fifthly, that the appellant is likely to participate in such programmes; and, finally, that a lengthy prison term would enable the appellant to be rehabilitated.

The question whether the above assumptions can be substantiated is a difficult one to answer. Although, as indicated above, some courts appear to hold the view that the sentences imposed could deter offenders from re-offending or other people from offending, it has been compellingly argued that deterrence is based on misconceptions and that there is no proof that a sentence imposed on one offender can actually deter other people from offending (see Terblanche 158–163). Although the Department of Correctional Services has taken measures to ensure that inmates are rehabilitated (see Department of Correctional Services *Annual Report 2010/2011* (2011) 19, 20, 22), it is doubtful if the offenders sentenced to imprisonment will be rehabilitated especially in the light of the fact that the Judicial Inspectorate for Correctional Services has reported that many correctional centres in South Africa are not conducive for rehabilitation and have to be refurbished and reconstructed if they are to be used for rehabilitation purposes, that many prisons were overcrowded which made rehabilitation impossible, and that rehabilitation programmes have been suspended in some correctional centres because of the introduction of new staff work shifts (see Judicial Inspectorate for Correctional Services *Annual Report 2010/2011* (2011) 6, 13, 35).

Parole and separation of powers

In *S v Makena* 2011 (2) SACR 294 (GNP), the trial court sentenced the appellant to 50 years' imprisonment and 'recommended that the appellant be considered for parole only after serving 30 years of the term of imprisonment' (at para 3). In setting aside this recommendation, the appellate court held (at para 12) as follows:

> 'Given the doctrine of separation of powers under the present Constitution, … it is best left to the Department of Correctional Services, which forms part of the executive arm of government, to determine when the accused should be released on parole without any suggestion or recommendation in this regard from the court. The Correctional Services Department, which functions under the executive branch of government, may not influence, nor seek to do so, the courts in their pursuit of the administration of justice. Likewise, the courts may not influence Correctional Services in their own duties and functions. It is indeed so, and perhaps only human, that a court

> may view the facts in a case so seriously that it may be of the considered view that its abhorrence and desire to protect society from the accused's conduct should be conveyed to Correctional Services. Whilst that may find favour with the intellect, it overlooks the fundamental independence of Correctional Services which … does not operate from the premise that those convicted by the courts and channelled to it are incorrigible and beyond redemption from a life of crime, and beyond rehabilitation… [A] recommendation along the lines in the sentence on count one should be avoided, and left uninfluenced in the hands of the appropriate department.'

The doctrine of separation of powers has been emphasised by the Constitutional Court not only in the context of sentencing (*S v Dodo* 2001 (1) SACR 594 (CC) at para 26) but also in other areas (recently in the area of institutions that are empowered to investigate and detect serious crimes – *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) at para 80). The question whether a court should or should not impose a non-parole period has attracted different views from South African courts (cf Mujuzi (2011) 14 *PER* 205 at 215–219). It has to be recalled that s 276B(1) of the Criminal Procedure Act 51 of 1977 expressly allows a court to fix a non-parole period and s 73(6)(a) of the Correctional Services Act 111 of 1998 requires a prisoner to serve a non-parole period that has been ordered by the court. A combined reading of s 276B(1) of the Criminal Procedure Act and s 73(6)(a) of the Correctional Services Act means that although the court in *Makena* had fixed a non-parole period of 30 years' imprisonment, the Department of Correctional Services could have placed the offender on parole after having served 25 years. What is not clear from *Makena* is why the full bench did not refer to s 276B(1) of the Criminal Procedure Act in arriving at its conclusion on the question of separation of powers.

In *Swart v Minister of Correctional Services and others* 2011 (2) SACR 217 (WCC) the court dealt with the meaning of the phrase 'date of release' in section 276A(3)(*a*)(*ii*) of the Criminal Procedure Act 51 of 1977, which provides as follows:

> 'Where a person has been sentenced by a court to imprisonment for a period – (*i*) not exceeding five years; or (*ii*) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, 1959 (Act 8 of 1959), and the regulations made thereunder is not more than five years in the future, and such a person has already been admitted to a prison, the Commissioner or a parole board may, if he or it is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court *a quo* in order to reconsider the said sentence.'

The applicant had brought an application for an order to the effect that his sentence should be converted into one of correctional supervision in terms of section 276A(3)(*a*)(*ii*) of the Criminal Procedure Act. The

applicant had been sentenced to an effective sentence of 15 years' imprisonment for theft and two counts of fraud. Basing his argument on the case of *Price v Minister of Correctional Services* 2008 (2) SACR 64 (SCA) at para 6, in which it was decided that 'the date from which an inmate can be considered to have his sentence converted is the date on which he first becomes eligible for parole, or his date of release, whichever occurs first', the applicant asked the court to declare that (at para 4)

> '…the date of release referred to in s 276A(3)*(a)*(ii) of the Criminal Procedure Act … means, for the purpose of an inmate subject to the provisions of the Correctional Services Act 111 of 1998 … relating to his or her placement under community corrections, the date on which such prisoner may be considered for placement on parole or the date upon which the prisoner may be released upon the expiration of his or her sentence, whichever occurs first…'

Before discussing the issue before it, the court first considered the *locus standi* of the applicant and held that the 'the applicant lacks jurisdiction to bring such an application, which can only be brought by the Commissioner of Correctional Services and Parole Board' (at para 2). The court read s 276A(3)(*a*)(*ii*) of the Criminal Procedure Act with s 73(1)(a) of the Correctional Services Act which provides that 'a sentenced prisoner remains in prison for the full period of sentence' to hold that 'these provisions serve to substantiate the fact that the legislature intended the date of release of an inmate, for the purposes of s 276A(3)*(a)*(*ii*) of the Criminal Procedure Act, to be the date when the term of imprisonment imposed had expired. This is evident from s 73(3) of the [Correctional Services] Act' (at para 22). The court concluded (at para 24) with the caution that

> '[a]n inmate is not as a rule automatically entitled to either the benefit of release on parole or the consideration for placement on correctional supervision. In terms of s 276A(3)*(a)*(*ii*) of the CPA, the commissioner exercises a discretion as to whether to refer a person to a court for consideration of his sentence, and the discretion is dependent on a number of circumstances.'

Some of the factors that the commissioner may put in consideration include 'the length of the sentence and the type of incarceration' (at para 25).

The following are some of the points that can be distilled from the *Swart* decision: first, an inmate does not have standing before court in terms of s 276A(3)*(a)*(ii) of the Criminal Procedure Act. The application must be brought either by the commissioner of correctional services or the parole board. Secondly, the *dictum* in *Price v Minister of Correctional Services*, which was decided in the context of the Correctional Services Act 8 of 1959, is not applicable to those offenders governed by the 1998 Correctional Services Act; thirdly, a prisoner

does not have a right and is not entitled to have his sentence converted to one of correctional supervision. It is within the discretion of the commissioner or the parole board to decide whether or not to make an application for the sentence to be converted. In such an application, the commissioner or the parole board may take into consideration factors that it deems important.

A sentence of imprisonment concurrent with a fine

Section 17(e) of the Drugs and Drug Trafficking Act 140 of 1992 provides that 'Any person convicted of an offence under this Act shall be liable …(e) in the case of the offence referred to in section 13(f) to imprisonment for a period not exceeding 25 years, or to both such imprisonment and such fine as the Court may deem fit to impose.' In *S v Gcoba* 2011 (2) SACR 231 (KZP) the accused pleaded guilty and was convicted by the magistrate of dealing in 13.35 kg of dagga, contrary to section 5(*b*) of the Drugs and Drug Trafficking Act 140 of 1992. The magistrate sentenced her to five years' imprisonment, plus a fine of R4 000 or 12 months' imprisonment (at para 1). On review the issue was whether the sentence imposed by the magistrate was a competent or appropriate sentence. The High Court observed that '[t]he wording of … section [17(e)] is somewhat perplexing and ambiguous, and as a result is often misconstrued' (at para 4). It referred to different decisions in which that provision has been interpreted differently (see *S v Mohome* 1993 (1) SACR 504 (T); *S v Zwane* 2004 (2) SACR 291 (N); *S v Mqikela* 2005 (2) SACR 397 (E); *S v Msusa* D [2009] JOL 23093 (Tk) – holding that it was mandatory for the court to impose a term of imprisonment. The court also referred to the following cases in which courts held the view that imprisonment was not mandatory (at paras 5– 9: *S v Fedani* 2000 (1) SACR 345 (E); *S v Sokweliti* 2002 (1) SACR 632 (Tk); *S v Mahlangu* 2004 (1) SACR 280 (T)) and held that '[f]or dealing in dagga in contravention of s 5*(b)* — on proper construction — the penalty clause makes the imposition of a term of imprisonment mandatory. Though the section also makes provision for a fine, it must be imposed in addition to the sentence of imprisonment, not in substitution thereof' (at para 13). The Court added that '[t]hough the penalty clause makes provision for the mandatory imposition of the sentence of imprisonment for dealing in dagga, it does not preclude the total or partial suspension thereof' (at para 14).