

Sentencing: Changes and effect since 1994

by

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Setting the scene in 1994

At the dawn of democracy in 1994 the sentencing scene had been fairly constant for some time. Capital punishment was available for the most heinous of crimes, even if a moratorium had prevented any executions since 1989. Imprisonment was the mainstay of the sentencing of most serious offences. On 1 January 1994 South African prisons held 114 047 prisoners, whereas the official capacity was 87 815. Overcrowding thus stood at about 30 per cent. Fines have, for a long time, been the most commonly imposed sentence but, of course, limited to less serious offences.¹ Many juvenile offenders were sentenced to corporal punishment, limited to 7 cuts with a 'light' cane. Another favourite on the sentencing front was suspended sentences, mainly subject to negative conditions related to the non-repetition of specified offences, but with the power to include all kinds of positive conditions, such as compensation, community service, treatment, training, etc.²

The most recent innovation in sentencing law had been the incorporation of correctional supervision. It came into operation through a pilot project in Pretoria in 1991, and was thereafter gradually implemented throughout the country. Correctional supervision has house arrest and community service as main punitive measures, but includes various other programmes aimed at the training and improvement of the offender, and of restoring relations between offender and victim as well. By 1994 correctional supervision was held in high regard by many of the judiciary, and elicited many very favourable comments, especially from the Appellate Division.³ Kriegler AJA explained that, '[i]n particular, it should be realised that appreciable punishment can now be inflicted without imprisonment, with all its well-known disadvantages for both the prisoner and the broad community.'⁴

But already, in 1994, the alarm bells started ringing. Official crime rates had been rising sharply since 1990, particularly in the case of violent crime, such as murder and rape.

This then, the position that was inherited by the first democratically elected government in South Africa's history.

First changes

The effect of the interim Constitution⁵ was felt almost immediately, and in two judgments following closely on one another, both capital⁶ and corporal punishment (in respect of juvenile offenders)⁷ were declared unconstitutional by the Constitutional Court. The decision on corporal punishment was simple, and generally expected. The death penalty judgment is a massive judgment, well known as *S v Makwanyane*. It is impossible to consider the details of this judgment in the course of this paper, because then there will be time for nothing else. And yet, being the first judgments related to sentencing, both contained useful dicta on sentencing in general, and I will mention some in the course of this paper. Shortly afterwards the Criminal Procedure Act⁸ was amended, removing all references to the death penalty⁹ and corporal punishment (also for adults)¹⁰ from the statute book.

In the meantime concerns with the rising crime rates increasingly affected the courts, and longer and more severe sentences were gradually being imposed. Some judicial officers dabbled with extraordinarily long, American style-sentences of 75 years and longer.¹¹ The Appellate Division quickly expressed itself in strong terms against such sentences.¹² The invalidation of the death penalty and concerns about high crime rates, nevertheless resulted in an understandable reconsideration of previous judgments on the maximum terms that sentences of determinate imprisonment should normally extend to. Whereas previously it was held that sentences of longer than 25 years should only rarely be imposed, sentences of 35 to 40 years imprisonment now became quite common.¹³ Life imprisonment became accepted as the most severe sentence available to the courts.¹⁴ However, this means life imprisonment *with* the possibility of parole – the Namibian Supreme Court found that life without parole would be unconstitutional, and our Constitutional Court agreed, although obiter.¹⁵

The legislature steps in

The concern about high crime rates caused the legislature to become more involved in the sentencing process. In 1997 it passed the Criminal Law Amendment Act¹⁶, often referred to as the 'minimum sentences' Act. The Act prescribes minimum and compulsory terms of imprisonment for many of the more serious crimes. At the upper level murder and rape, when accompanied with specifically described aggravating factors, must be sentenced to life imprisonment.¹⁷ For other offences specifically mentioned in Schedule 2, such as the remaining rapes and murders, aggravated robbery, various economic offences, dealing in drugs, etc, various minimum terms of imprisonment are prescribed, with specific increases for offenders with previous convictions.¹⁸ Children under the age of 16 are exempted from the Act's provisions¹⁹, and an escape clause is provided, in that the court is absolved from having to impose the prescribed sentences if it is satisfied that there are 'substantial and compelling circumstances' for departing from them.²⁰

The 'minimum sentences' Act has kept our courts and law reports very busy. A good three-quarters of all reported judgments dealing with sentencing since 2000 have dealt with one or the other aspect of the legislation. I have been critical of the scheme from the very beginning²¹ and will explain this when I attempt to assess the current state of our sentencing laws.

The intervening years

At the end of 2000 the SA Law Commission published its report on the fairly lengthy inquiry into the South African sentencing system.²² It summarised the 'perceived shortcomings' of our sentencing system as being, on the one hand, the inconsistent sentences in general and unimaginative sentences for less serious crimes and, on the other hand, insufficient weight given to serious crimes and inadequate release policies and processes.²³ Incidentally, these perceived shortcomings reveal the different points of view in this regard – differences that are often irreconcilable. The Law Commission found²⁴ that an ideal sentencing system

...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 term.

The best way of achieving such an ideal system, the Commission further found, is, first, to clearly state the basic sentencing principles in legislation and, secondly, to set up a sentencing council to provide sentencing guidelines.²⁵ The Law Commission's report closed with a Sentencing Framework Bill, giving content to its recommendations. Little meaningful progress have been made since the report was submitted to the Minister of Justice.

The scene in 2004

Compared to 1994 the sentencing system is hardly in a better position today. Although it has rid itself of a couple of questionable sentencing options, the same problems that dogged it in 1994, and which led to the inquiry by the Law Commission, are still in place. The minimum sentencing legislation added a substantial number of problems. The current focus on imprisonment as the cure for all criminal social ills has exacerbated the crisis of overcrowding to intolerable levels. It is not going to help that prisoners sentenced in terms of the Criminal Law Amendment Act have to serve at least 80 per cent of their sentences before they can be considered for parole.²⁶ Although a large number of non-custodial measures are available to sentencing courts, the perception has been that society considers nothing less than imprisonment to be appropriate, even in the case of less serious offences. As a result, correctional supervision has largely fallen out of favour and is, compared to 1994, imposed in much reduced numbers.

This brings me to an assessment of the minimum sentencing legislation.

Assessment of minimum sentencing scheme

The intention of the legislature with its minimum sentence provisions seems quite clear, namely to serve as a deterrent.²⁷ In *S v Malgas*²⁸ the Supreme Court of Appeal declared:

In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such [serious] crimes ...

Why this response was thought to be appropriate is also quite apparent, namely to reduce the numbers of these crimes through general deterrence. The fact that it was intended as a temporary measure, limited to two years only, strengthens this conclusion. It was evidently planned as a short, sharp shock. Perhaps, if introduced with much fanfare and implemented immediately, some short-term effect could have been achievable. As it happens, it was not, and could not. Apart from deterrence, retribution and the need for consistency have also been suggested as possible purposes of the Act.²⁹

It is my submission that the Act has not met any one of these purposes. They could not reasonably be expected either. As far as deterrence is concerned I don't know of anybody who even claims (never mind being able to prove) that the minimum sentences have actually reduced serious crime at all. The number of reported murders had been dropping even before the promulgation of the Act³⁰, but none of the other serious crimes have shown any meaningful decrease – far from it, in fact.³¹ If the legislature was interested to investigate, local experience would have shown that minimum sentences have not reduced criminality in the past. In its assessment of the minimum sentences that were in place in the 1970s, the Viljoen Commission came to the conclusion that minimum sentences gave no room for the balancing effect of retribution, that these sentences increased the prison population substantially, and yet produced no observable reduction in crime rates.³² This is also the international experience. Michael Tonry, one of the most prominent sentencing experts of the last decade or two, has commented in some detail on mandatory sentencing schemes. In one of these assessments, he wrote.³³

The evidence is clear and weighty, that enactment of mandatory penalty laws has either no deterrent effect or a modest deterrent effect that soon wastes away. Equally clear and consistent are findings that mandatory minimum laws provoke judicial³⁴ and prosecutorial stratagems, usually by accepting guilty pleas to other non-mandatory penalty offences or by diverting offenders from prosecution altogether, that avoid their application.

The irony is that our government does not have to appear 'strong on crime' in order to stay in power.

It is useful to remind ourselves again of the true deterrent to crime, as expressed by the Chaskalson P in *S v Makwanyane*:³⁵

The need for a strong deterrent to violent crime is an end the validity of which is not open to question...³⁶ The greatest deterrent to crime is **the likelihood that offenders will be apprehended, convicted and punished**. It is that which is presently lacking in our criminal justice system; and it is at this level and through addressing the causes of crime that the State must seek to combat lawlessness.³⁷

The Criminal Law Amendment Act also does not result in retribution, if this is understood in the sense of 'just deserts' or 'proportionality'.³⁸ For example, the Supreme Court of Appeal have consistently held that rape that does not fall within the

worst category of rape should not attract the prescribed life imprisonment.³⁹ The result is that the prescribed sentence for rape falling within Part I of Schedule 2 is normally not imposed. The courts really had no choice in this matter. They are compelled by the Constitution to ensure that sentences are proportionate to the gravity of the offence.⁴⁰ Only one further example (there are many more): There is no proportionality in the fact that an off-duty correctional official, wearing civilian clothes, who sells one zol dagga to a passer-by who asks for the drug, should ordinarily be sentenced to a minimum of 15 years imprisonment.⁴¹

Finally, the Act had little chance of achieving greater consistency in sentencing. It raised the ceiling to which sentences could reasonably be imposed for many of the offences. I just referred you to two examples. The reality of severe and lenient judges were accepted in *S v Makwanyane*.⁴² It is inevitable that the severer judges would be inclined to impose even very high minimum sentences, whereas the more lenient judges would feel unease with the prescribed sentences much sooner, and deviate from them, as they are entitled to do in terms of the judgment in *S v Malgas*.⁴³ Here are two examples of what I mean: In *S v Ferreira*⁴⁴ the trial court sentenced Ms Ferreira to life imprisonment for the murder of her abusing partner. On appeal the minority considered eight years imprisonment appropriate, but the majority would have imposed a non-custodial sentence. In *S v Thebus*⁴⁵ the reverse happened: the trial judge imposed the non-custodial sentence: eight years' imprisonment, totally suspended, with a community service condition. In the Supreme Court of Appeal one judge thought that the prescribed sentence of life imprisonment should be imposed, but the majority imposed 15 years' imprisonment. *Thebus* involved the murder of an innocent bystander during vigilante action. Both these cases exhibit extraordinary ranges of sentences, despite, one has to remind oneself, the fact that each judge applied the same legal principles. But any acceptable inconsistency was exacerbated by the fact that the ceiling of punishment was raised to life imprisonment, a sentence which would otherwise never have been contemplated in either of these examples.

The Act impacts our criminal justice system negatively in a number of other respects too. Its complicated and sometimes non-sensical wording has been complained about in numerous cases.⁴⁶ Some of these problems have been relieved by amendments in 2000⁴⁷, but many remain.⁴⁸ The other problem is that the High Courts are totally overloaded because of the requirement that all murder and rape cases that fall within the ambit of s 51(1) has to be committed to the High Court, as the only court that can impose life imprisonment. Regional courts may only try these cases; they may not even consider whether 'substantial and compelling circumstances' are present. As a result the records of all these trials have to be transcribed, the High Court must be satisfied that the conviction was regular (which just about amounts to a duplicate trial) before it will find the accused guilty again.⁴⁹ This has given rise to massive increases in the number of sentences that have to be imposed in the High Courts – sentences that often are within the jurisdiction of regional courts anyway.

The Act is currently in its seventh year. One should not be fooled into believing that it is anything but an exorbitantly expensive tool. Just consider the many thousands of judicial officer hours that have been consumed in trying to make sense of its provisions, or trying to get around those provisions that turned out to be patently unfair. But the Act is costly on another front as well. It creates a false sense of

security, a false sense that something effective is being done against the high crime rates.

The Criminal Law Amendment Act of 1997 was enacted as an emergency measure. It is time for it to go, before it does lasting damage to the criminal justice system. Already it will be a major struggle to return to the system we had, which, although flawed, was at least more affordable, consistent and fair. And in time a real improvement of the sentencing of criminals will only be possible if the Law Commission's recommendations are taken seriously.

Notes:

¹ Kotze "Boetevonnisse as alternatief tot gevangesetting" (1983) 18 *The Magistrate* 206 at 209. But at the time, 63% of all prisoners admitted into prison were fined, could not afford the fine and therefore had to serve the alternative imprisonment.

² In terms of s 297 of Act 51 of 1977. See Terblanche "Aanwending van a 297 en 300 van die Strafproseswet 51 van 1977" (Part 1 and 2) (1988) 23 *The Magistrate* 99-116: 15% of all sentences were suspended; of these 92% contained negative conditions only.

³ See, eg, *S v R* 1993 (1) SACR 209 (A), *S v Potgieter* 1994 (1) SACR 61 (A), *S v D* 1995 (1) SACR 259 (A).

⁴ *S v R* 1993 (1) SACR 209 (A) 221*h-i*.

⁵ The Constitution of the Republic of South Africa, Act 200 of 1993.

⁶ *S v Makwanyane* 1995 (2) SACR 1 (CC).

⁷ *S v Williams* 1995 (2) SACR 251 (CC).

⁸ Act 51 of 1977.

⁹ Section 1 of the Criminal Law Amendment Act 105 of 1997.

¹⁰ Abolition of Corporal Punishment Act 33 of 1997.

¹¹ See, e g, *S v Nkosi* 1993 (1) SACR 709 (A).

¹² Cf *S v Mhlakaza* 1997 (1) SACR 515 (SCA).

¹³ *S v Nkosi* 1993 (1) SACR 709 (A); *S v September* 1996 (1) SACR 325 (A); *S v Smith* 1996 (1) SACR 250 (E).

¹⁴ Cf *S v T* 1997 (1) SACR 496 (SCA).

¹⁵ Cf *S v Tcoelib* 1996 (1) SACR 390 (NmS); *S v Makwanyane* 1995 (1) SACR 1 (CC): it would violate the rights to dignity, and the prohibition against cruel, inhuman or degrading sentences.

¹⁶ Act 105 of 1997.

¹⁷ Section 51(1).

¹⁸ Section 51(2).

¹⁹ Section 51(6).

²⁰ Section 51(3)(a).

²¹ Cf SS Terblanche *The Guide to Sentencing in South Africa* (1999) 71-73.

²² South African Law Commission *Report (Project 82): Sentencing (A New Sentencing Framework)* (2000).

²³ *Discussion Paper 91 (Project 82): Sentencing (A New Sentencing Framework)* (2000) 3.

²⁴ In the Report (n 22) par 1.43 and its preceding discussion paper (n 23) par 2.5.

²⁵ Op cit (n 22) par 1.44.

²⁶ Section 73 of the Correctional Services Act 111 of 1998. Very often the warrant of incarceration does not stipulate that the sentence has been imposed in consequence of Act 105 of 1997, in which case Correctional Services will probably not enforce the four-fifths rule.

²⁷ Cf *S v Mofokeng* 1999 (1) SACR 502 (W) at 526; *S v Khanjwayo* 1999 (2) SACR 651 (O) at 658; *S v Boer* 2000 (2) SACR 114 (NC) at 122; *S v Eadie* 2001 (1) SACR 185 (C) at 187; *S v Arias* 2002 (1) SACR 518 (W); *S v Mugeru* 2004 (1) SACR 371 (T).

²⁸ 2001 (1) SACR 468 (SCA) par 8.

²⁹ See Terblanche 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act, 1997' (2003) *Acta Juridica* 194-219.

³⁰ From 26 832 (1994) to 24 875 (1998) to 21 683 (2000) to 19824 (2003/2004) – South African Race Relations Institute South Africa Survey 1999/2000 (1999) 50, *South Africa survey 2001/2002* (2001) 362 and *Fast Facts* (Nov 2004) 2.

³¹ Rape increased from 42 429 (1994) to 49 280 (1998) to 52 860 (2000) and stabilised there, while robbery with aggravating circumstances rose from 84 900 (1994) to 88 319 (1998) to 110 590 (2000) to 133 658 (2003/2004) – South African Race Relations Institute *South Africa Survey 1999/2000* (1999) 50, *South Africa survey 2001/2002* (2001) 362 and *Fast Facts* (Nov 2004) 3.

³² *Report of the commission of inquiry into the penal system of the Republic of South Africa* (1976) RP 78/76 paras 5.1.4.1, 5.1.4.7.

³³ Michael Tonry in *Sentencing, judicial discretion and training* (1992) 137.

³⁴ This had to happen in South Africa in order to prevent unconstitutional sentences - see n 39 below.

³⁵ Supra (n 6).

³⁶ Par 117.

³⁷ Para 122 (emphasis added). This is in full agreement with the latest analyses of research on deterrence – cf Andrew von Hirsch et al *Criminal deterrence and sentence severity: an analysis of recent research* (1999) 45.

³⁸ Cf the text at n 40 below.

³⁹ *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Abrahams* 2002 (1) SACR 116 (SCA).

⁴⁰ As an 'ingredient' in determining whether a penalty is cruel, inhuman or degrading – *S v Makwanyane* (n 6) para 94. Even if 'proportionality' has not yet been defined in detail – Nico Steytler *Constitutional criminal procedure* (1998) 409-11.

⁴¹ This is the result of s 51(2)(a) ("Notwithstanding any other law ... a regional court or a High Court ... shall in respect of a person who has been convicted of an offence referred to in ... Part II of Schedule 2, sentence the person, in the case of ... a first offender, to imprisonment for a period not less than 15 years") read with Part II of Schedule 2 ("Any offence referred to in section 13(f) of the Drugs and Drug Trafficking Act, 1992 (Act 140 of 1992), if it is proved that ... (c) the offence was committed by any law enforcement officer").

⁴² Supra (n 6) par 54.

⁴³ 2001 (1) SACR 469 (SCA) par 22.

⁴⁴ Unreported case no 245/03, 22 March 2004 (SCA).

⁴⁵ 2002 (2) SACR 566 (SCA).

⁴⁶ Cf *S v Ibrahim* 1999 (1) SACR 106 (C) 114; *S v Mangesi* 1999 (2) SACR 570 (E) 583; *S v Swartz* 2002 (1) SACR 591 (NC) 593e; *S v Sukwazi* 2002 (1) SACR 619 (N) 623g-h; *S v Jimenez* 2002 (2) SACR 190 (W) 192.

⁴⁷ Through the Criminal Law Amendment Act 62 of 2000.

⁴⁸ See, in this connection, Terblanche (n 29) 197 et seq.

⁴⁹ Section 52(2).