Sentencing

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1 Sentencing procedures and general principles

1.1 General principles

1.1.1 Factors affecting sentencing

A number of judgments highlighted the **after-effects of the crime of rape** as an important aggravating factor affecting sentence. In *S v Tuswa* 2013 (2) SACR 269 (KZP) 'the accused's conduct has reduced the complainant from an independent farming woman and a leader in her community to someone [who is] … "mentally disturbed, forgetful and frightened with no self-confidence"' (at para [60]). The court

attached substantial weight to this factor, particularly in the light that the complainant was theoretically old enough to be the accused's great-great grandmother (at para [61]). The court took a wide approach to the after effects of the crime in this matter and included the ripple effect on the complainant's family and on the community where she had lived all her life. These cumulative after-effects, on their own, were found to be compelling reasons to punish T severely (at para [62]). In *S v PB* 2013 (2) SACR 533 (SCA) the court accepted that the rape by the biological father of the 13-year-old complainant left her with a 'distorted understanding of love' (at para [11]) and her 'whole life in tatters', and that the impact of the incident was devastating and far-reaching, thus making the matter heinous and different from precedent cited by the defence (at para [12]). In *S v GK* 2013 (2) SACR 505 (WCC) the court distinguished between behaviour of others after the incident and direct negative emotional and psychological effects, and interpreted the described impact of oral rape on the 7-year-old victim as significant, but not extreme or debilitating (at para [21]). The resilience of the victim was further, in contrast to *S v M* 2007 (2) SACR 60 (W), found to have a bearing on the enquiry into the existence of substantial and compelling circumstances. The court in *GK* held that the fact that a perpetrator must take his victim as he finds him or her, cuts both ways and illustrated it with reference to the different consequences an act of assault may have on different victims (at para [22]):

> 'An assault which a robust victim might survive might lead to the death of a victim with a frailer constitution; in the one case the perpetrator will be convicted and punished for assault (or assault with intent to cause grievous bodily harm) while in the other case he may be convicted and punished for murder'.

Vulnerability of victims as an aggravating factor and the duty of the court to protect them were recognised with regards to both children and elderly people: 'They are both soft targets and they both require, expect and deserve … equal protection' from the courts, and this should be reflected in sentences imposed for the rape of such people (*Tuswa supra* at para [55]).

Abuse of a position of trust in the commission of an offence can occur in many scenarios but such an offender is always viewed as deserving more censure (Du Toit *Straf in Suid-Afrika* (1981) 91). **Stealing from employers** was reiterated as an important aggravating factor in *S v Wiggil* 2013 (2) SACR 246 (ECG) (at para [22]) and *S v Piater* 2013 (2) SACR 254 (GNP) (at para [42]). W's abuse of trust as the bookkeeper in the complainant's business, stealing a large amount of money, was found to be a pattern of her repeated dishonest behaviour. P, as an administrative clerk at the local magistrates' office, placed

in a position of trust by her employer, misappropriated numerous social grant payments that were destined for the needy. Abuse of trust was recognised as aggravating in instances where **sexual abuse of children** took place within the **family context** (*S v PB* 2013 (2) SACR 533 (SCA) – PB being the biological father of the victim (at para [10]), *S v SMM* 2013 (2) SACR 292 (SCA) – SMM being an uncle entrusted with assisting the girl with school application forms (at para [27]) or was committed by a **trusted neighbour** (*S v GK* 2013 (2) SACR 505 (WCC) (at para [13]).

Whether **remorse** can be taken into account as a valid mitigating factor remains problematic and featured in many judgments. In *S v Piater* 2013 (2) SACR 254 (GNP) Makgoba J held that the fact that P had pleaded guilty was not of itself an indication of remorse, but in order for it to be taken into account as a valid factor, it had to be sincere and an accused should take the court completely into his or her confidence (at para [39]). The state had a very strong case against P and a plea of guilty was unavoidable. Furthermore, her decision not to testify in mitigation of sentence meant that she had not demonstrated her candour, by subjecting her statements of being needy to the scrutiny of cross-examination ((at para [40]); see also *S v Wiggil supra* (at para [16]); *Tuswa supra* (at para [52) and *S v SMM* 2013 (2) SACR 292 (SCA) (at para [27])).

Generally a court of appeal only considers those factors known at the time of sentencing (Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 186). In *S v Malgas and others* 2013 (2) SACR 343 (SCA), however, the issue was whether an eight-year **delay**, from the imposition of sentence by the magistrate in the court below to the hearing of the appeal, in and of itself, **justified a lighter sentence** (at para [13]). Willis AJA held that there could be no automatic alleviation of sentence merely because of the long interval of time between the imposition of sentence and the hearing of the appeal for accused persons on bail, pending the appeal. Further, after having distinguished the matter from earlier judgments where this factor justified interference on appeal (at paras [15]-[17]), he emphasised that it was only in truly exceptional circumstances that this should occur and each case should be decided on its own facts (at para [20]). Willis AJA found that the appellants had adopted a 'supine attitude' to the hearing of their appeals and that they were to blame for the long delay in bringing the matter to finality, and that their predicament was largely of their own making (at para [21]). He concluded that, if the court were to regard this case as yet another exception, it would undermine the administration of justice (at para [22]). Ultimately, the appellants were, at the time, police officers who committed offences within the precincts of a police station which, in a democratic state,

serves as one of the symbols of law and order (at para [23]). The appeal was dismissed.

Children of perpetrators have been recognised as a separate category of affected persons in the criminal justice system whose rights need protection (Skelton and Courtenay 'The impact of children's rights on criminal justice: Recent cases' (2012) 25 *SACJ* 180). Consequently, the **best interest of children in sentencing primary caregivers** has, since the judgment of *S v M* (*Centre for Child Law as Amicus Curiae*) 2007 (2) SACR 539 (CC) (at para [39]), been elevated to an independent factor in the consideration of an appropriate sentence. In none of the matters reviewed for this contribution did the evaluation of this factor influence the court to impose a non-custodial option. It appears that the seriousness of the offences (murder in *S v Mgibelo* 2013 (2) SACR 559 (GSJ); theft from employers in both *S v Piater* 2013 (2) SACR 254 (GNP) and *S v Wiggil* 2013 (2) SACR 246 (ECG)), tipped the scales towards the imposition of imprisonment. Despite children's rights to family care, this outcome is justifiable in severe matters where a non-custodial option would be entirely inappropriate (Skelton 'Children of incarcerated parents' at the Committee on the Rights of the Child Day of General Discussion 2011, available at *http://www2.ohchr.org/english/bodies/crc/docs/Discussion2011_%20submission%20A_SKELTON_CRC_%20DGD_2011.pdf,* accessed on 20 December 2013). After highlighting the guidelines developed in *S v M* (*supra* at para [36]), Makgoba J in *Piater* summarised the responsibilities of a sentencing court when a custodial sentence for a primary caregiver is in issue (at paras [22]-[23]). Section 28(2), read with s 28(1)*(b)* of the Constitution, requires the court, firstly, to establish whether there will be an impact on the child; secondly, to consider independently the child's best interests; thirdly, to attach appropriate weight to the child's best interests; and, lastly, to ensure that the child will be taken care of if the primary caregiver is sent to prison. In *Piater,* the mother of two minor children, a boy aged 15 and a girl aged 12, had to be sentenced on conviction of having misappropriated social grant money. Unlike in *S v M* (*supra*), P was not found to be 'almost totally responsible' for their care because her husband was a 'co-resident parent' (at para [25]). Though it was conceded that imprisonment would have a negative impact on the children, the court held that their father, despite long working hours, would be able to engage the childcare resources needed to ensure that the children are well-looked after during his absence (*ibid*). Makgoba J (at para [26]) found that application of *S v M* (*supra*) in P's matter 'would lie beyond the court's decision' (with reference to the warning in this regard in *MS v S (Centre for Child Law as Amicus Curiae)* 2011 (2) SACR 88 (CC) at para [62]). In an effort to ensure the welfare of the children, the court added an additional monitoring arrangement

via the State machinery, namely, that the National Commissioner for Correctional Services should send a social worker in the department's employ to visit the children of P, at least once every month during the first three months of her incarceration, and 'submit a report to the office of the National Commissioner as to whether the children of the appellant 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 reasonable steps required by that provision' (at para [48]). Similar orders were made in *Wiggil* (*supra* at para [1]) and *Mgibelo* (*supra* at para [15]), thereby following the trend in prior judgments, of making suitable alternative arrangements *re* the welfare of incarcerated mothers' children (see Carnelley and Epstein 'Do not visit the sins of the parents upon their children: Sentencing considerations of the primary caregiver should focus on the long-term best interests of the child' (2012) 25 *SACJ* 106 at 109–110). The court in *Piater, Mgibelo* and *Wiggil* could, however, have taken further guidance from those earlier judgments, such as *S v Prinsloo* 2010 JDR 1234 (GNP) (at para [67]) and *Langa v S* 2010 (2) SACR 289 (KZP) (at para [13]), in that proper and meaningful contact between the children and the parent during her incarceration, should also have been addressed. It is submitted that Carnelly and Epstein (*supra* at 116) are correct in their assertion that each case requires a factually-based and detailed enquiry, which ensures that the focus remains on the impact of the parent's incarceration on the children while simultaneously seeking to satisfy the retributive, restorative and rehabilitative aims of criminal justice, insofar as the parental offender is concerned.

1.1.2 Sentencing in terms of the Child Justice Act (CJA) 75 of 2008

Several judgments dealt with compulsory residence in child and youth care centres (previously known as reform schools) as a sentencing option (s 76 of the CJA). In two of the matters it was emphasised that this is a severe sentencing option only suitable for sentencing repeat offenders for serious offences, and consequently set aside in all instances, except for one child in *S v CKM and others* 2013 (2) SACR 303 (GNP) at paras [15], [26] and [32]; *S v CS* 2013 (2) SACR 323 (ECG) at paras [15], [17] and [22]). See Skelton and Courtenay (2012) 25 *SACJ* 188-190 *supra* for a discussion of *CKM* (unreported at the time).

CS was a first offender, pleaded guilty to using his mother's car without permission and housebreaking with intent to steal (to obtain money for drugs), showed remorse (at para 10) and all parties were in agreement on the sentence during trial. The magistrate was, however, faulted for not having considered the relevant guidelines in s 69(3) and

(4) of the CJA and using the child and youth care centre to address his mother's unwillingness to care for him and also to provide CS the opportunity to finish school and to receive services to overcome his drug addiction (at para [20]). Roberson J held that he should not have been regarded in the same light as a person who had been given opportunities to rehabilitate through previous sentences but had failed to take advantage of such opportunities (at para [16]).

What is evident from the above judgments is that troubled children in conflict with the law who are in need of care and protection, should, instead of being sentenced to compulsory stay in a child and youth care centre, be dealt with in terms of s 64 of the CJA by referring them to the children's court (ibid). It is essential that presiding officers in child justice courts, unlike the trial magistrate in *CS* (at para [21]), correctly interpret s 50 of the CJA (to include children involved in all types of offences) and be familiar with the grounds on which a child may be identified as a child in need of care and protection (ibid, with reference to s 150 of the Children's Act 38 of 2005). Notwithstanding, with CS in the meantime turned 18, his absconding from the centre and relatives who were at the time of the appeal prepared to take care of him and provide a supportive environment, Roberson J held that it was, similar to *CKS* above, appropriate that the sentence be replaced with one of caution and discharge (at para [23]). It is of import to note that, in the event of s 76 of the CJA being an appropriate sentence, the period of residence should be a definite period and not described as a minimum term (at para [18]).

In *S v IJ* 2013 (2) SACR 599 (WCC) the offences were of a serious nature. IJ was convicted of 3 counts of anal rape of young boys (at para [2]) and one of assault with the intent to do grievous bodily harm, where he had stabbed a 12-year-old girl with a knife (at para [3]). He sniffed petrol, abused alcohol, had no family structure and had a previous diversion order into a sexual offence programme. He was sentenced to a child and youth care centre for a period of five years (s 76(1) of the CJA) on the first 3 counts and to six months' imprisonment suspended for a period of three years on the usual conditions, for count 4 (at para [6]). In addition, IJ was sentenced to three years' imprisonment after the completion of the five years' compulsory residence, in terms of s 76(3) of the CJA (at para [5]). Unlike the above matters, the proceedings were found to be in accordance with justice (at para [136]). *IJ* is the first reported matter where this additional term of imprisonment is imposed. It should be noted that the trial court should later re-consider the desirability of implementing the further term of imprisonment. The report obtained from the head of the child and youth care centre will be of cardinal importance (Regulation 44, *GG* 33067, 2010/3/31), in terms of the CJA). It is submitted that if this

option is approached in the right way by the court and the centre, by ensuring that the child has a proper understanding of how his or her own conduct can influence the court's future decision, it might serve as a motivation to ensure the child's co-operation while being in the centre, and thereby avoid further custody.

The judgment dealt mainly with the constitutionality of the mandatory entry of names of child sex offenders into the sex offender register and was found to be unconstitutional, since it eliminated the court's discretion in this regard.

1.2 Sentencing procedures

1.2.1 Statements from the bar

Kruger (*Hiemstra's Criminal Procedure* (loose-leaf) (2013) 28-7) highlights that despite the clear distinction between evidence and argument in the sentencing phase, judicial officers should display flexibility and common sense in this regard. In some cases information could simply be given from the bar or the dock, and the prosecutor's silence could be accepted as agreement, but, in other more serious matters, evidence under oath would, as a rule, be required (*ibid*). For example, where the nature of the offence is one of theft or fraud involving large amounts of money, the court will need an explanation from the accused *re* the reason for the offence (*S v Martin* 1996 (1) SACR 172 (W)). Precedent shows that a motive of need, opposed to greed or furnishing a lavish lifestyle, is a material mitigating factor during sentencing (*S v Truyens* 2012 (1) SACR 79 (SCA) at para [10]). In *S v Piater* 2013 (2) SACR 254 (GNP) one of the main issues on appeal revolved around the question whether the trial court had misdirected itself in disregarding this mitigating factor placed on record by P's counsel from the bar (at para [17]). The reason forwarded by counsel for P's misappropriation of more than R400 000 of social grant payments, was that her husband had been retrenched and that, despite new employment, the combined family income was not sufficient to meet the expenditure (at para [14]). Though it appears that the prosecution accepted this *ex parte* submission (at para [15]), the trial court lamented the fact that neither P nor her husband testified as to the reasons for the theft and how the money was used, and found counsel's explanation insufficient and untested (at para [16]). Makgoka J reiterated that statements from the bar by a practitioner were normally no more than argument and if they were to receive greater weight they had to be admitted by the state or accepted as fact by the court. If this happened, they acquired, for the purposes of sentencing, the weight of facts proven in evidence and the court was bound to consider them as though they had been proved in evidence.

They could not simply be ignored by the court (at para [18]). It was held further, that, where a presiding officer was not prepared to accept facts stated on behalf of an accused in mitigation of sentence, he or she should require the defence to lead evidence to establish his or her statements. Notwithstanding, it was desirable that facts in mitigation should be proved in the ordinary manner so that the state could be in a position to cross-examine if necessary (at para [19]). In the circumstances of *Piater* the magistrate was obliged to accept the *ex parte* statements of P's counsel and failure in this regard amounted to a misdirection. There was no doubt that such non-acceptance had a direct influence as to how he approached the sentence. It was held that this type of misdirection justified interference and the court was therefore at large to consider sentence afresh (at para [20]). See *Sentencing for selected offences – Theft from employers* below.

The above scenario should be distinguished from the situation where the state clearly objects to allegations made by the accused's counsel. In such a case the accused will have been made aware that a failure to testify will be accompanied by the risk of having any allegations rejected (*S v Khumalo* 2013 (1) SACR 96 (KZP) at para [13]-[16], with reference to *S v Caleni* 1990 (1) SACR 178 (C) at 181e-f and *S v Olivier* 2012 (2) SACR 178 (SCA) at para [16]). It is submitted that these rules governing submissions from the bar will certainly not infringe any principle of fairness towards the accused (also du Toit et al *Commentary on the Criminal Procedure Act* (loose-leaf) (2013) 28-5). It should be noted that in *Piater supra* (at para [18]) the impression is wrongly created that *Olivier* above had a different viewpoint on the same scenario.

2 Mandatory and minimum sentences in terms of the Criminal Law Amendment Act 105 of 1997

2.1 The prescribed sentences

Where the act of rape involves the infliction of grievous bodily harm it is singled out as one of those aggravated instances where the accused, on conviction, would be subjected to life imprisonment as a starting point during sentencing (Part I of Schedule 2). In *S v Tuswa* 2013 (2) SACR 269 (KZP) T pleaded guilty to rape *simpliciter* (a term used by the trial court for those acts of rape falling within Part III of Schedule 2, for which a sentence of 10 years' imprisonment is prescribed) and denied that his act involved the infliction of grievous bodily harm. The court held that it is not necessary for such a finding that the accused indeed had the intention to cause grievous harm (at para [24]). Even if *mens rea* were required for such finding, in the circumstances and particular facts of the *Tuswa* case, it could hardly be argued on the probabilities,

that it was not present (at para [28]). Furthermore, it was viewed as illogical to require that there must be separate sets of injuries, namely, those inflicted during the act of sexual intercourse, normally in the area of the genitalia, versus those inflicted by something other than a body part of the accused on other parts of the complainant's body, for the court to find that the rape involved the infliction of grievous harm (at para [25]). Physical injuries should never be evaluated in isolation but rather within the broader context of all the facts and circumstances of a particular case (at para [26]). Physical injuries further symbolise the measure of violence the perpetrator unleashed on the victim and therefore impacts on his moral blameworthiness, that should, in turn, be reflected in meting out sentence (at para [28], with reference to *S v Mabitse* 2012 (2) SACR 380 (FB) 380d-f). The decision of categorising a rape case within the minimum sentence legislation should therefore involve the careful consideration of the degree of violence and brutal force used by the accused, coupled with the vulnerability of the victim. In the matter of *Tuswa* T knew the complainant as his neighbour, a petite and frail 83-year-old woman upon whom he, in the middle of the night, unleashed himself while she was asleep and then abandoned her lying in a pool of blood (at paras [26] and [29]). The meaning of the term 'involving' was clarified to mean '… include something as a necessary part *or result* of an activity …' (with reference to the Oxford English Dictionary and the incomplete explanation in *S v Thole* 2012 (2) SACR 306 (FB) at para [31], where the stabbing of the victim after the rape act did not qualify as rape *involving* the infliction of serious injuries). Based on the report and testimony of a medical doctor, the court found that the complainant's severe injuries (at para [18]) that required major surgery under general anaesthetic, must have been caused by the virile 24-year-old T's repeated and excessively forceful penetration while raping her (at para [30]). T was accordingly convicted of rape involving the infliction of grievous bodily harm.

2.2 Substantial and compelling circumstances

Determining whether substantial and compelling are present in order to justify a deviation from life imprisonment as the prescribed sentence (section 51(3)(*a*) of the Criminal Law Amendment Act 105 of 1997), remains one of the most difficult tasks for sentencing courts (*S v PB* 2013 (2) SACR 533 (SCA) at para [21]). Bosielo JA was of the view that the **approach to an appeal on sentence imposed in terms of the Act** should be different to an approach to other sentences imposed under the ordinary sentencing regime. Because the minimum sentences to be imposed are ordained by the Act and they cannot be departed from lightly or for flimsy reasons, a proper enquiry on appeal whether the

facts which were considered by the sentencing court are substantial and compelling, or not, is the crux of the court's task (at para [20]). The term was described as so elastic that it can accommodate even ordinary mitigating circumstances and involves a value judgment on the part of the sentencing court (at para [21]). Rogers J in *S v GK* 2013 (2) SACR 505 (WCC) agreed with Bosielo JA but emphasised that, on appeal, the court may take into account and examine not only those factors considered by the trial court, but *all* the circumstances bearing on the question, in order to determine the correctness of the trial court's finding *re* the presence or absence of substantial and compelling circumstances (at para [7]). Rogers J further concluded that an appellate court can thus form its own view as to the correct answer to that question and that there is, unlike in ordinary sentencing appeals, nothing in the Act which fetters an appellate court's power to reconsider the matter of substantial and compelling circumstances. It was argued that the values of the Constitution are better served by an interpretation which does not fetter the appellate court when it comes to the question of the presence or absence of substantial and compelling circumstances. Allowing an appellate court to make its own value judgment on appeal provides accused persons with greater safeguards against the imposition of disproportionate punishment (at para [7], with reference *S v Dodo* 2001 (1) SACR 594 (CC) (at paras [35]–[41]). This power to depart from prescribed sentences (thereby ensuring that justice is done), is coupled with a duty to investigate all relevant circumstances, taking the circumstances of the offence into account as proved by the state (at para [17]). The court is not bound to impose the prescribe sentence in the absence of the accused proving mitigating circumstances. Thus, the accused bears no onus in this regard.

In *S v PB* 2013 (2) SACR 533 (SCA) the court pronounced itself strongly on **the role of precedent** with regard to minimum sentences (with particular reference to child rape and the deviation from life imprisonment). Bosielo JA held that they should not be slavishly followed, as a court would be acting improperly and abdicating its duty and discretion to consider sentencing untrammelled by sentences imposed by another court, albeit in a similar case (at para [16]). Refusal by the Supreme Court of Appeal in earlier judgments to refuse life imprisonment does not constitute a benchmark or precedent binding other courts (at para [19]). The peculiar facts of each case should always be properly considered (at para [16]). The dictum of Van den Heever JA in *S v D* 1995 (1) SACR 259 (A) (at 260*e*), that decided cases on sentence provide 'guidelines not straightjackets' was cited with approval (at para [17]). Illustrating the utility of a comparative approach, Bosielo

JA further cited from *S v Malgas* 2001 (1) SACR 469 (SCA) (at para [21]) where Marais JA said the following:

> 'It would be foolish of course, to refuse to acknowledge that there is an abiding reality which cannot be wished away, namely, an understandable tendency for a court to use, even if only as a starting point, past sentencing patterns as a provisional standard for comparison when deciding whether a prescribed sentence should be regarded as unjust … . *As long as it is appreciated that the mere existence of some discrepancy between them cannot be the sole criteria and something more than that is needed to justify departure, no great harm will be done*.' (Bosielo JA's emphasis, at para [16])

The above views were supported by the court in *S v Tuswa* 2013 (2) SACR 269 (KZP) (at paras [69]–[70]) and *S v GK* 2013 (2) SACR 505 (WCC). In the latter case, Rogers J interpreted Bosielo JA's finding that prior cases cannot be allowed to become binding precedents as justification for his distinction between legal principles to be deduced from authoritative judgments and the detailed application of those principles to the facts of particular cases (at para [8]). Lower courts should thus, without examining the minutiae of leading cases, concern themselves mainly with the legal principles. One may also need to accept that, even on appeal, there is a human element which causes some factors to be accorded greater weight by some judges than by other (at para [8]). In contrast, it appears that the court in *S v SMM* 2013 (2) SACR 292 (SCA), in order to show that the court a quo erred in not finding substantial and compelling circumstances, deemed it necessary (and helpful) to give a detailed exposition of the Supreme Court of Appeal's recent judgments in sexual abuse matters (mostly) within the family context (at paras [13], [20]-[23]).

The court in *S v PB* 2013 (2) SACR 533 (SCA) relied on *S v Malgas* 2001 (1) SACR 469 (SCA) at para [16], for the guidance that a court should, in order to avoid an injustice, be led not merely by the presence of a sense of an unease about imposing the prescribed sentence, but by a conviction that an injustice will be done or, differently put, that the prescribed sentence will be disproportionate to the crime, criminal and legitimate needs of society (at para [21]). Though there were no physical injuries, the complainant in *PB*, his 12-year-old daughter, displayed anxiety, fear and a sleeping disorder. A strong argument presented by the state (and accepted by the court) during PB's appeal, was that, unlike in the cases presented by PB's counsel (at para [6]), the serious psychological and emotional impact caused by the rape incident, calls for life imprisonment as mandated by the legislature (at para [9]). Bosielo JA was not persuaded that PB's personal circumstances met the threshold of substantial and compelling circumstances (at para [24]).

In *S v Tuswa* 2013 (2) SACR 269 (KZP) the court found that the serious aggravating factors present in the matter (at para [50]), the adverse impact on the victim and community, and the fact that the victim was old enough to be T's great-great-grandmother (at para [61]) outweighed T's prospects to be integrated back into society (at para [61]). Guidance was taken from two Supreme Court of Appeal judgments. *S v Matyityi* 2011 (1) SACR 40 (SCA) (at para [17]) was authority for the more pro-active role of judicial officers in sentencing serious matters, the need for a victim-centred policy in this regard and the fact that the prescribed sentence of life imprisonment should serve as the starting point (with reference to *S v Malgas* 2001 (1) SACR 469 (SCA)). *Bailey v S* unreported case, case number (454/2011) [2012] ZASCA 154, (1 October 2012) (later reported as *S v PB* 2013 (2) SACR 533 (SCA)) was cited for Bosielo JA's emphasis that the proper consideration of the facts in each case is required (at para [69]) and that the guidance in *Malgas supra*, should be followed. The court in *Tuswa,* in the absence of feeling any sense of unease, and the fact that *not* imposing life imprisonment in this matter would induce a sense of shock, rather than the other way round, found, similarly to *PB supra*, that T's personal circumstances or any other mitigating factors, did not meet the threshold of substantial and compelling circumstances (at para [72]).

The court in *PB* (and *Tuswa*) found the above **guideline in *Malgas*** to be illuminating and helpful (at para [21] and para [72] respectively). The *Malgas* case has, however, been criticised for lack of more concrete guidance regarding the interpretation of the term 'substantial and compelling circumstances' and the dangers inherent therein. Terblanche ('Die praktyk van vonnisoplegging onder minimum vonniswetgewing: *S v Malgas* 2001 (1) SASV 469 (HHA)' (2002) 15 *SACJ* 353 at 365) points out that, even where reasonable people are concerned, the concept of justice differs from one person to another, and from one case to another. Consequently, to link the discretion to deviate from the prescribed sentence to an individual sentencer's recognition of 'an easily foreseeable injustice', would be a recipe for disparate sentencing (also D van Zyl Smit 'Mandatory sentences: A conundrum for the New South Africa?' (2000) 1 *Punishment and Society* 197 at 208). This criticism seems justified and is clearly highlighted in the discussion of rape judgments in this contribution, specifically those involving child complainants. Some disparity is inevitable in sentencing, but unjustifiable disparity is unacceptable (South African Law Commission *Sexual offences: Process and procedure* (Discussion paper 102 Project 107) (2001) 732). It has been argued that the main reason for that is the mere fact that the legislature interfered in the discretion of courts to determine the appropriate sentence (du Toit

et al *Commentary on the Criminal Procedure Act* (loose-leaf) (2013) 28-18D). In rape matters, particularly, it is caused by the legislature's creation of 'sentencing cliffs' in the illogical categorisation of rape scenarios and its prescribed sentences (Terblanche 'Recent cases: Sentencing' (2013) 26 *SACJ* 118). For example, the aggravated incidents of rape listed in Part 1 of sch 2 (such as rape of a child under 16) are deserving of life imprisonment (25 years minimum in practice), while rape *simpliciter* (in analogy of the term used by Stretch AJ in *Tuswa* above), including incidents where the complainant is 16 years and older, falls under Part 3, with the prescribed sentence as 10 years' imprisonment.

In *S v SMM* 2013 (2) SACR 292 (SCA), Majiedt JA emphasised that the advent of minimum sentence legislation had not changed the 'centrality of proportionality' in sentencing. Since life imprisonment is the most severe sentence which a court can impose, the question whether it is an appropriate sentence requires careful consideration (at para [18]). The court held that when a minimum sentence prescribed by law, which, in the circumstances of a particular case, would be unjustly disproportionate to the offence, the offender and the interests of society, it would justify the imposition of a lesser sentence (at para [19]). The matter of *SMM* fell into this category. In respect of the severity of the rape, the medical report did not indicate any serious physical injuries and there was no further violence in addition to the rape. Section 51(3)(*a*A)(ii) of the Criminal Law Amendment Act 105 of 1997 provides that when a court sentences for rape 'an apparent **lack of physical injury** to the complainant' shall not be regarded as a substantial and compelling circumstance. Majiedt JA endorsed the view expressed in *S v Nkawu* 2009 (2) SACR 402 (ECG), that a literal interpretation of that provision would render it unconstitutional, since it would require judges to ignore factors relevant to sentence in crimes of rape, which could lead to the imposition of unjust sentences (at para [26]). The proper interpretation of the provision does thus not preclude a court sentencing for rape to take into consideration the fact that a rape victim has not suffered serious or permanent physical injuries, along with other relevant factors, to arrive at a just and proportionate sentence. Majiedt JA emphasised that it is settled law that such factors need to be considered cumulatively, and not individually (at para [26]).

In the judgments of *SMM* and *GK supra*, the rape complainants were well below the age of 16 years. It should be noted that, in contrast to *PB supra*, the court deviated from the prescribed sentence of life imprisonment in these matters. *SMM* (followed in *GK*) reverted back to the **previous test used by the Supreme Court of Appeal** (before *Matyityi* and *PB supra*). This test entails that in order to determine whether life imprisonment would be appropriate or proportionate to

the particular incident of child rape it should be considered whether the matter falls within the 'worst category of rape" (at para [18]). See Terblanche 'Recent cases: Sentencing' (2013) 26 *SACJ* 118 where it is pointed out that this inconsistent position of the Supreme Court of Appeal leaves the gate open for sentencers to choose precedent that justifies either harsher or proportionately milder sentences.

3 Specific sentences

3.1 Reconsideration of imprisonment (s 276A(3) of the Criminal Procedure Act 51 of 1977)

Section 276A(3) of the Criminal Procedure Act 51 of 1977 departs from the common law rule that a judicial officer is *functus officio* after sentencing an offender (Kruger *Hiemstra's Criminal Procedure* (loose-leaf) (2013) 28-35). In terms of s 276A(3)(*a*) the Commissioner or a parole board, if he or it is convinced that a prisoner is a person fit for correctional supervision, may make an application for the reconsideration of that person's sentence of imprisonment by the court *a quo*. It is, however, of importance that, if the sentence imposed exceeds five years, that, at the time of the application, the *date of release* … is not more than five years in the future. The interpretation of 'date of release' was in issue in *Minister of Correctional Services and another v Johnson NO and others* 2013 (2) SACR 565 (GNP). The full bench (in line with recent precedent cited at paras [17.3] and [17.4]) held that what was contemplated by the 'date of release' in s 276A(3)*(a)*(ii) had to be determined with reference to s 73(4) of the (current) Correctional Services Act 111 of 1998, that came into operation on 31 July 2004 (at para [17.2]). Unlike in the old Correctional Services Act 8 of 1959, the current provision indicates that the relevant date of release has only one meaning – the date upon which the period of imprisonment expires. Section 276A(3)*(a)*(ii) above clearly reads that an application for conversion of a sentence of imprisonment into correctional supervision could not be brought or granted where the prisoner's date of release was more than five years in the future. The date of release of the prisoners, in the matter at hand, was in excess of nine years in the future and thus more than the five-year period contemplated in s 276A(3)*(a)*(ii). The application to set aside the earlier (unlawful) conversion of their imprisonment into correctional supervision, was accordingly granted (at paras [17.3]-[17.4]).

3.2 Parole orders

In *S v Wiggil* 2013 (2) SACR 246 (ECG) the accused was convicted of theft of R1,7 million from her employer and, in the absence of

any substantial and compelling circumstances, sentenced to 15 years' imprisonment. W's appeal against sentence was dismissed but the trial court's parole order was set aside. This order entailed that W would be considered for placement on parole after having served two thirds of her sentence. This order was intended to ameliorate the regional court's sentence at the time, which fell under the provision that offenders sentenced in terms of Act 105 of 1997 should generally only be released on having served four-fifths of their sentence. In light of the amendment of s 73(6)(*a*) of the Correctional Services Act 111 of 1998 (at para [24]-[27]) this order had the opposite effect. This section now provides that all offenders serving a determinate sentence of more than 24 months' imprisonment, and in the absence of a non-parole order, *may* be paced on parole after half of their sentence has been served. Parole *must*, however, be considered after an offender has served 25 years of a sentence (own emphasis).

4 Sentencing for selected offences

4.1 Murder

In *S v Mgibelo* 2013 (2) SACR 559 (GSJ) M was convicted of murder, attempted murder and arson. She set fire to a shack in which the deceased (her former lover) and his girlfriend were sleeping. After two threats earlier on the same day, M finally tracked them down in another shack (with no windows) and made a fire at the entrance. Fuelled by inflammable liquid, the fire spread quickly, leaving the victims defenceless and with no means to escape. Hours later, the deceased (M's former lover) died of his injuries. Though his girlfriend survived, she was scarred for life (at para [5]). The court found the murder not to be one of passion (at paras [9]–[13], on analysis of precedent), but rather pre-planned, callous and brutal (at para [5]). She had time during that day to reflect on her intended actions and, in contrast to a shocking discovery of his infidelity, had been aware of the deceased's relationship with the other victim (at para [9]). M claimed that the deceased had a history of unfaithfulness and showed no remorse for her conduct (*ibid*). The court held that, since they were not married, M could have moved on with her life (*ibid*). She was 33 years-old, HIV-positive and had two minor children. It was found that her personal circumstances had been overshadowed by the gravity of the offences and that no substantial and compelling circumstances existed which justified a deviation from the prescribed sentence of life imprisonment for pre-planned murder. Taking all the relevant factors of the matter into account (with reference to *Malgas supra*) M was sentenced to life imprisonment for murder, 10 years' imprisonment for attempted murder and 5 years' imprisonment for arson, with to sentences to run

concurrently. See *General principles – Factors affecting sentencing -Best interest of children in sentencing primary caregivers* above.

4.2 Rape

Four judgments dealt with rape matters, of which two were handed down by the Supreme Court of Appeal, showing diverse approaches to the determination of life imprisonment as the appropriate sentence. In *S v PB* 2013 (2) SACR 533 (SCA) a father raped his 12-year-old daughter and was sentenced to life imprisonment by the regional court. After a minority judgment upheld his appeal in the Eastern Cape High court, two arguments were raised unsuccessfully on appeal to the Supreme Court of Appeal. Firstly, that the sentence was out of kilter with earlier judgments from this court (at para [23]). See *Mandatory minimum sentences in terms of Act 105 of 1997 – Substantial and compelling circumstances* above. Secondly, counsel argued that the facts and circumstances adduced by PB amounted to substantial and compelling circumstances which justified a sentence less than life imprisonment. PB's personal circumstances (at para [23]) were, however, outweighed by the serious aggravating factors in the matter (at para [24]), including, PB's previous convictions for theft, fraud, attempted rape and other offences, the age of the complainant, and the fact that the rape was incestuous 'which is found to be morally repugnant by many, if not all, right-thinking people'. In addition, before the rape the appellant had performed improper sexual practices on her twice and the emotional and psychological suffering was serious and far-reaching (at paras [9]-[12]). These aggravating factors were accorded appropriate weight in the consideration of an appropriate sentence and the court was not persuaded, in the light thereof, that PB's circumstances had met the threshold of substantial and compelling circumstances set out in s 51(3)*(a)* of the Act. The appeal against the sentence imposed was dismissed.

In *S v Tuswa* 2013 (2) SACR 269 (KZP), T (aged 24) was convicted of rape, involving the infliction of grievous bodily harm (Part 1 of Sch 2), of his 83-year-old neighbour. The court found a number of aggravating features to this 'heinous offence' (at para [50]). T's conduct was cowardly and opportunistic. After having consumed vodka, he assaulted the elderly complainant in the privacy and sanctity of her own home. There was no evidence that the intake of liquor reduced the accused's moral blameworthiness or his capacity to appreciate fully the gravity of the offence (at para [56]). When he raped her, he was aware of her age and her vulnerability. He did not wear a condom. His victim had been a celibate widow for some 40 years. The degree of force which the accused used on the complainant during the act was

serious and substantial with lasting physical and psychological adverse effects. The mitigating factors presented on behalf of T (at para [49]), upon evaluation (at paras [51]-[54]), were found to be far outweighed by the aggravating circumstances. T's trial attracted significant public interest and members of the public turned up to support the complainant. Stretch AJ referred to three other rape judgments in the process of determining the appropriate sentence for T (at [64], of which two matters also involved rape of elderly members of society (see S v *Mqikela* 2010 (2) SACR 589 (ECG) (a full court appeal judgment, at para [56]) where a sentence of life imprisonment was confirmed for the double rape of a 73-year-old woman in the sanctity of her home; *Director of Public Prosecutions, North Gauteng, Pretoria v Thusi* 2012 (1) SACR 423 (SCA) where the sentence of 18 years imposed by the trial court was replaced by the prescribed sentence of life imprisonment for the rape of a man of 64 years old; *S v Bailey* 2012 ZASCA 154 (later reported as *S v PB* 2013 (2) SACR 533 (SCA) *supra*, where the sentence of life imprisonment imposed by the regional court for the rape of B's 12 year old daughter was confirmed on appeal). A strong argument presented by the state during B' appeal, considered applicable by the court in *Tuswa*, was that, unlike in the cases presented by B's counsel (at para [66]), the serious psychological and emotional impact caused by the rape incident, called for life imprisonment as mandated by the legislature (at para [67]). As the vulnerable members of society, both children and elderly people are soft targets and require, expect and deserve equal protection (at para [55]). T was sentenced to life imprisonment. See *Mandatory and minimum sentences in terms of Act 105 of 1997 – Substantial and compelling circumstances* above.

In *S v SMM* 2013 (2) SACR 292 (SCA), Majiedt JA, recognised that the country was facing a 'crisis of epidemic proportions in respect of rape, particularly of young children' (para [14]), and emphasised that rape is by its nature a 'degrading, humiliating and brutal invasion of a person's most intimate, private space'. Even when unaccompanied by violent assault, it is a violent and traumatic infringement of a person's fundamental right to be free of all forms of violence and not to be treated in a cruel, inhumane or degrading way (para [17]). He, however, repeated the injunction contained in earlier case law, that one should not approach punishment 'in a spirit of anger' and that sentencing must be assessed 'dispassionately, objectively and upon a careful consideration of all relevant factors' (para [13] with reference to *S v Rabie* 1975 (4) SA 855 (A) at 866A). While the public is rightly outraged by the scourge of rape and while there is increasing pressure on the courts to impose harsher sentences, one cannot sentence only to satisfy public demand for revenge — in order to attain a balanced, effective sentence other sentencing objectives should not be discarded

altogether (para [14]). Majiedt JA approved the recognition in earlier judgments such as *Abrahams* 2002 (1) SACR 116 (SCA) at para [20]) and *Vilakazi* 2009 (1) SACR 552 (SCA) at para [20]) that there are categories of severity of rape (para [18]).

In the matter of *SMM*, the appellant, who was in his late forties, raped his 13-year-old niece whom he had been asked by her mother, to assist in the completion of a school entrance application. He first penetrated her vagina with two fingers and shortly thereafter penetrated her vagina with his penis in an episode lasting about five minutes. He gave her R5 to buy her silence. He denied the rape, 'thereby making the child a liar, and, in effect victimised her again' (at para [27])). The semen found on the child's underwear, in addition to the child's testimony, linked SMM to the crime. The abuse of trust in a family setting was a further aggravating feature. As against this, the rape itself occasioned no serious injury to the victim and there was no additional violence. In the absence of a victim impact report, the psychological trauma could not be assessed. Having weighed the mitigating and aggravating features, the court held that the trial court's imposition of a life sentence was 'grossly disproportionate to the offence'. The life sentence was set aside and replaced with one of 15 years' imprisonment.

In *S v GK* 2013 (2) SACR 505 (WCC) Rogers J (in a majority judgment) approached the matter as if life imprisonment was not the *a priori* just punishment in the matter (at para [14]). Yet, it reminded itself that even in the event of a finding of substantial and compelling circumstances, the discretionary sentence can be expected to be more severe than before (with reference to *Abrahams supra* at para [25]). GK, a 56-year-old man, was convicted of the rape of a 7-year-old girl and sentenced to life imprisonment by the regional court. As he had often done before, GK, as a trusted neighbour, asked her to buy cigarettes for him. On her return he (on the spur of the moment) called her into the house and asked her to perform oral sex on him. The complainant's mother learnt of the sexual assault from one of her daughter's friends, in whom she had confided, three days after the incident. The act of rape was an oral rape, and, because she did not like it, of brief duration. Though the awfulness of the experience was recognised, it was highlighted that this form of rape is far less calculated to injure and cause physical pain to a young girl's body than vaginal or anal rape. Though the girl had to receive six months therapy for the 'significant' trauma caused by the incident, she did not suffer any physical injuries, her virginity remained intact and there was no extraneous violence (at para [15]). GK did not ejaculate and the complainant was therefore spared the 'horrors associated with oral rape' (*ibid*). GK tried to buy the complainants' silence for R5 (as opposed to threats of violence

(*ibid*)). In light of the aforesaid circumstances this incident of oral rape was found to fall short of the most serious type of rape (*ibid*). GK had only one previous conviction, that of attempted rape during 2002. In the light of the dire consequences for GK and some unsubstantiated submissions by him (at para [27]), the court highlighted that the submission of a pre-sentence report would have been of value during sentencing (*ibid*). Mindful of not being numbed by the severity of the sentences currently being routinely passed, 18 years was found to be the appropriate sentence. One year was, however, deducted for the 13 months GK had spent in custody awaiting trial (at para [29]). See *Mandatory and minimum sentences in terms of Act 105 of 1997-Substantial and compelling circumstances* above.

4.3 Theft from employers

In two judgments the court had to address the sentencing of offenders having been convicted of stealing from and defrauding their employers. In *S v Wiggil* 2013 (2) SACR 246 (ECG) the accused was convicted in the regional court of stealing R1,7 million from her employer and, in the absence of any substantial and compelling circumstances, sentenced to 15 years' imprisonment. W appealed against her sentence. Despite two previous convictions and the opportunity to rehabilitate herself (at paras [10]-[12], [14]), W misrepresented her qualifications, won the trust of her employer as the bookkeeper and, within a year of receiving an additional suspended sentence, launched into a new series of theft similar to her previous conduct ((at para [13]). W also did not comply with the terms of her previous sentence of correctional supervision (at para [14]). The nature of the crime and the interest of society outweighed the personal circumstances of W (a history of domestic violence, alcohol abuse and depression (at para [15]), a gambling addiction (at para [19]) and being a primary caregiver of a minor child (at para [8]). W's appeal against sentence was dismissed. The trial court's parole order was, however, set aside. See *Specific sentences – Parole orders* above.

In *S v Piater* 2013 (2) SACR 254 (GNP) the accused was convicted in a regional court of 22 counts of fraud, seven counts of forgery and uttering and one count of theft. She was sentenced to an effective seven years' imprisonment and appealed against the sentence. As an administrative clerk at the magistrates' court, P misappropriated numerous social grant payments amounting in value to some R444 000. P was a 41-year-old woman who was married and had two minor children. The couple was under debt administration at the time of sentence. Although there were a number of mitigating circumstances and there was little likelihood that P would repeat the offences, and

her prospects for rehabilitation looked good, there were a number of aggravating factors. The offences had been committed whilst she occupied a position of trust and over a period of two years. She thus had an opportunity for proper reflection, and to stop. The most important aggravating factor was that after the theft was discovered and an investigation was under way, P tried to cover it up by falsifying bank deposit slips. The court found that there was nothing to suggest that she would have stopped stealing but for being discovered during her sick-leave (at paras [41]–[42]). The contention that P did not deserve to be imprisoned was untenable and the notion that the perpetrators of white-collar crime did not deserve imprisonment was incorrect. In fact, the gravity of P's offences, coupled with the aggravating factors, called for long-term imprisonment. These, and the interests of society, far outweighed P's interests and those of her family. After having considered comparable cases from the Supreme Court of Appeal (at paras [28]-[38]), P's appeal was upheld and the sentence was reduced to four years' imprisonment. See also *Sentencing procedures – Statements from the bar* and *Factors affecting sentence* above.