Sentencing

ANNETTE VAN DER MERWE
University of Pretoria, Pretoria

Sentencing procedures and general principles

General principles

Factors affecting sentencing

When sentencing **cases with a racial connotation,** it is of particular importance to take **public interest** into account. In *S v Combrink* 2012 (1) SACR 93 (SCA) it was highlighted that the sentence in such a matter should not incense the public with 'an appearance to favour a particular group in society' (at para 24). This matter involved the conduct of a farmer (C) who fired two shots in the direction of the deceased, the second shot being fatal. C did this as the deceased – a farm worker – was walking through his mealie fields, and created

suspicion, as he did not respond to C's repeated calls. The court *a quo's* view was accepted that this case was one more in a series of disturbing events negatively impacting on race relations in the country (at para 25). Furthermore, the public interest demanded that the court acknowledges historic racial tensions and that it should address the issue of people who view others as different or inferior to themselves (para 25). The public interest caused the Supreme Court of Appeal to increase the sentence in (see *Murde*r below). Kruger *Hiemstra: Suid-Afrikaanse Strafproses* (2010) 727, referring to *S v X* 1996 (2) SACR (W) at 289*c-d*), explains that the public interest broadly means that the accused should be properly punished for his crime and that the sentence should be properly implemented, for everybody to see. While the principle is clear, he argues that the integrity, objectivity and fairness of the sentencer will determine its application in practice. Furthermore, although the community's outrage is taken into consideration, it cannot simply be followed. As held in *S v Makwanyane* 1995 (2) SACR 1 (CC) it is not the community's wishes but rather their interests that serve as the overriding principle. The community's interests in this matter are that we should be living in a society where everybody is valued equally and treated with dignity, and this the overriding principle.

The **prevalence of the offence** may lead to a more severe sentence. Terblanche (*A Guide to Sentencing in South Africa* (2007) 192, citing *S v Seegers* 1970 (2) SA 506 (A) at 511*f*), however, cautions that prevalence should be taken as a material aggravating factor only in conjunction with other aggravating factors, such as the type of crime and the circumstances under which it was committed. In *S v Nkosi* 2012 (1) SACR 87 (GNP) the court had to consider the weight to be attached to the prevalence of (attempted) stock theft. The state led evidence on the losses suffered by stock owners through stock theft. The court accepted that stock theft was a very serious crime that disrupted farming communities, that it was difficult to track down offenders and that the farming community had a legitimate expectation that appropriate sentences would be meted out on those convicted of the offence (at para 29). In addition, N was a police informer attached to the Stock Theft Unit, who in all likelihood used his inside knowledge to plan and commit the offence, which introduced an element of abuse of trust (ibid). Yet, despite all these aggravating factors, the prevalence of the offence was not considered material, because it was found that the trial court neglected to properly balance the interests of society, the nature of the offence and the offender: 'Aggravation of sentences to combat increasing prevalence of a particular crime must not lead to an inevitable negation of the accused's personal circumstances' (at para 30; see *Stock theft* below). The need for a proper balance was also noted in *S v Moswathupa* 2012 (1) SACR 259 (SCA). The court held that,

despite the need to communicate to society that people who commit crimes (in this case housebreaking) will be dealt with severely by the courts, deterrence and retribution should not become the exclusive purposes of sentencing (at para 9).

Courts have become increasingly aware of the importance of **information about the victim(s)** for sentencing purposes. The trial court in *S v Combrink* 2012 (1) SACR 93 (SCA) (at para 22) was faulted for its unbalanced approach to the sentencing factors, in virtually ignoring the personal circumstances of the deceased. Shongwe JA, however, disagreed with the trial court that direct evidence was required about the effect of the deceased's death on his family. He was satisfied that the loss of life *per se had a general negative impact* (ibid). This approach is in stark contrast with an earlier judgment from the same court, in *S v Matyityi* 2011 (1) SACR 40 (SCA), where the court reiterated that victims' voices should be heard. There the court highlighted that an enlightened and just penal policy requires not only the consideration of a broad range of sentencing options, but also that a victim-centred approach be followed (at para 16). Ponnan JA further held in *Matyityi* that the constitutional value of human dignity is reaffirmed when victims are accommodated more effectively within the criminal justice system: 'It enables us as well to vindicate our collective sense of humanity and humaneness,' he said. Instead of being a simply crime statistic, in murder cases an impact statement prepared by the deceased's family about him or her as a person and the impact of the death on the family, the employer and community, could assist the court to obtain a more holistic picture of the crime. It is submitted that the presentation of this kind of information could play an important role to enable the court to properly value the life of the deceased. Such an approach could also be of particular importance in a case such as *Combrink* 2012 (1) SACR 93 (SCA) (see above), where the sentence also aims to address the perception that some people are inferior to others (also see Müller and Van der Merwe 'Recognising the Victim in Sentencing; The Use of Victim Impact Statements in Court' (2006) *SAJHR* 647, for an example of a concise impact report prepared and presented by the deceased's mother; *S v Kriel* 2012 (1) SACR 1 (SCA) at paras 5-6). One can further not rule out the possibility that the appellant, on hearing such an impact statement from the family, might have become aware of the harm he had caused, which could give rise to some empathy and the promotion of reconciliation with the family of the deceased (see Roberts 'Victim Impact Statements and the Sentencing Process: Recent Developments and Research Findings' (2003) 47 *Criminal Law Quarterly* 376). In serious cases such a restorative outcome is recognised as a parallel process to the imposition of imprisonment, with the primary aim to give victims a

sense of vindication (Umbreit *et al* 'Victim-offender dialogue in violent cases: A multi-site study in the United States' (2007) *Acta Juridica* 23).

Unlike the lack of remorse, which would carry little weight as a sentencing factor (see *S v Nkosi* 2012 (1) SACR 87 (GNP); *S v Combrink* 2012 (1) SACR 93 (SCA); *S v Njikelana* 2003 (2) SACR 166 (C) at 175*d*), the presence of **remorse** is often considered mitigating. Remorse should not be confused with the accused feeling sorry for himself for getting caught, nor should it simply be accepted from what is said in court. A plea of guilty is also not *per se* indicative of remorse, as there might be other reasons for pleading guilty, such as not wanting the court to hear all the details of the case. Sincere remorse is a factual question and much may be gained from the accused's actions after commission of the crime (Terblanche *A Guide to Sentencing in South Africa* (2007) 190). In *S v Truyens* 2012 (1) SACR 79 (SCA) the court accepted the following conduct to be indicative of T's remorse: he changed his plea during the trial; he did not put up a false version in an attempt to evade responsibility; he wrote a letter to his employer before his first appearance in court, confessing to the crime and expressing the hope that he would now get the chance to change his life; he promised to compensate his employer for the loss and succeeded in paying R20 000 in two instalments (at para 13). The forensic criminologist who compiled a pre-sentence report testified that this conduct was consistent with remorse, because it demonstrated T's insight into the harm that he had caused (ibid). Cachalia JA found the presence of remorse to be an important distinguishing factor from the comparative precedent cited by the High Court (at para 23). See also *Stock theft* below.

Although a laudable motive does not prevent an accused from being convicted of a crime (Burchell *Principles of Criminal Law* (2005) 464), courts have taken it into account during sentencing (*S v Hartmann* 1975 (3) SA 532 (C); *S v Ferreira* 2004 (1) SACR 454 (SCA)). The morality of the conduct, despite its legal consequences, becomes relevant in determining the blameworthiness of the accused in respect of the offence – the extent to which he or she deserves to be punished (see South African Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000) at 38, for its proposal that the sentence should always be proportionate to the seriousness of the offence, which in turn should be determined according to the harm caused and the culpability of the offender). In *S v Truyens* 2012 (1) SACR 79 (SCA) the trial court grappled with the question of **reduced moral blameworthiness due to personal economic necessity**. Cachalia JA emphasised that 'the motive for the crime – what the accused believed and intended – is the central enquiry when deciding, for the purposes of

sentence, whether the moral blameworthiness of an accused has been reduced' (at para 11, with reference to *Ferreira* at para 44). T's motive for the stock theft in this matter was to meet the medical costs and to ameliorate the difficult circumstances experienced by his children, who were suffering from a rare genetic defect. The trial court accepted that the money obtained from the sale of the cattle was not spent on luxuries (as stated in the criminologist's assessment) and that 'this crime was one of need and not of greed' (at para 10). The trial court had thus correctly found that T's personal circumstances provided a compelling case for mitigation of sentence (at para 11; see *Theft* below). Cachalia JA highlighted that the motive of personal economic necessity, T's having to meet high medical expenses, cannot condone theft or fraud of some magnitude when committed by design over a period (at para 12, with reference to *S v Lister* 1993 (2) SACR 228 (A) at 233*e-f*), but confirmed that it can be a mitigating factor which would reduce the extent of appropriate censure. It should be noted that personal economic necessity has not always been accepted as mitigating or as an indication of reduced blameworthiness during sentencing. In *S v Kearns* 1999 (2) SACR 660 (SCA) at 663*g-h* it was found that, in the absence of any information tendered by K on the precise disposal of the large amounts of money stolen from her employer, the court was justified to infer that it had not only been spent on her sick mother, younger brother or the household, but that a degree of greed was also involved.

Interference with sentence by court of appeal

A court of review or appeal is not authorised to simply replace the sentence of the trial court with its own (Terblanche *A Guide to Sentencing in South Africa* (2007) 410). The decision to interfere with the sentence of the trial court should be justified (see Terblanche 410-412, citing *S v Pieters* 1987 (3) SA 717 (A); Kruger *Hiemstra: Suid-Afrikaanse Strafproses* (2010) 885-888, citing *S v Pillay* 1977 (4) SA 531 (A), for analyses of leading appellate judgments in this regard). Several recent judgments dealt with this issue. *S v Truyens* 2012 (1) SACR 79 (SCA) serves as an example of unjustified interference with the trial court's sentence by the High Court. Cachalia JA reiterated the principles meriting interference (at paras 19-20, with reference to *S v Barnard* 2004 (1) SACR 191 (SCA) at para 9): The trial court did not exercise its discretion judicially or properly and the misdirection is not trivial but is of such nature, degree or seriousness that it shows that the court did not exercise its discretion at all or exercised it improperly or unreasonably; in the absence of a clear misdirection, such a striking disparity exists between the sentence passed by the trial court and

the sentence the court of appeal would have passed (or where the sentence appealed against appears to be so startlingly or disturbingly disproportionate) that it warrants interference with the trial court's exercise of the sentence discretion (with reference to *S v Whitehead* 1979 (4) SA 424 (A)). The High Court found the sentence imposed by the trial court to be shockingly light, being totally disproportionate to the gravity of the offence. It therefore considered itself at liberty to interfere with the sentence. In evaluating the grounds underlying this view, Cachalia JA rejected both such grounds (at paras 21-23): (1) T's previous convictions dating back 30 years should not have been taken as an indication of a propensity to steal; (2) the comparison with the case of *S v Lephoro* (case no CA 28/2006, unreported (B)), where several accused were sentenced to between seven and ten years' imprisonment for stock theft, was inappropriate, as T's circumstances were fundamentally different. In addition, because of T's unique circumstances, no comparison with typical stock cases (where a tougher sentencing approach had been followed) would be warranted – T was not a cattle rustler but stole the cattle to meet the medical needs of his children. Secondly, the cattle were not the main source of income of the owner (T's employer) (at paras 24-25). The trial magistrate's reasoning was found to have been sensitive and careful (at paras 17, 26). Thus, despite possible divergent views on whether a sentence in terms of s 276(1)*(i)* was too lenient or not, the High Court was not justified to interfere based on misdirection, neither was the sentence shockingly inappropriate or unduly light (ibid). See *Specific sentences* below.

In *S Nxopo* 2012 (1) SACR 13 (ECG) the court of appeal refused to interfere with the trial court's sentence. It was held that the disparity between the sentence which it would have imposed, had it been the court of first instance, and the one actually imposed by the magistrate was not so disparate as to justify interference, and the appeal was dismissed (at para 11). In *S v BF* 2012 (1) SACR 298 (SCA) interference with the sentence of the trial court (as confirmed by the court *a quo*) was found to be justified but, compared to *Truyens,* the approach of the Supreme Court of Appeal appears to be rather 'unscientific', as the grounds for the decision seem to be less clear (at paras 7 and 14; cf also *S v Moswathupe* 2012 (1) SACR 259 (SCA) at para 4).

Sentencing more than one offence

When an accused is convicted of multiple offences, sentencing courts have the authority to impose a separate sentence for each offence. However, it can easily "give a false picture of the totality of the offender's

criminal conduct, to the point where the total punishment is more than is required by his blameworthiness" (Terblanche *A Guide to Sentencing in South Africa* (2007) at 179). This cumulative effect of multiple sentences was addressed in *S v Moswathupa* 2012 (1) SACR 259 (SCA). The failure of the trial court, as well as the court *a quo*, to consider the cumulative effect of the sentences imposed on M for two counts of housebreaking, resulted in an effective sentence of 25 years' imprisonment. Theron JA found such sentence to be shockingly inappropriate (at para 8). She emphasised three points that should serve as guidelines in sentencing multiple offences. First, the principle that mercy (and not a sledgehammer) is the concomitant of justice (ibid, citing from *S v Harrison* 1970 (3) SA 684 (A) at 686). The court highlighted that an appropriate sentence must be seeked for all offences taken *together* and that the aggregate penalty must not be too severe (ibid). Secondly, despite acknowledging that the message needs to go out to the community that people who commit crimes of housebreaking will be dealt with severely by the courts, deterrence and retribution should not be the exclusive purposes of sentencing (at para 9). The court reiterated that 'wrongdoers must not be visited with punishments to the point of being broken' (referring to *S v Skenjana* 1985 (3) SA 41 (A) at 54I-55E and *S v Sparks* 1972 (3) SA 396 (A) at 410G, as cited in *Skenjana*). Thirdly, an effective period of 25 years' imprisonment is a very severe punishment which should be reserved for particularly heinous offences and in which category the two charges of housebreaking clearly did not fall (at para 10; see *Housebreaking* below). Reference to the category of 'particularly heinous offences' as being deserving of a sentence of 25 years' imprisonment, by implication, reiterated the ground principle of proportionality in sentencing. On the other hand, it recalls the much-criticised 'worst category'-test in rape cases (see *S v Abrahams* 2002 (1) SACR 116 (SCA); *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA)). However, though the test of a 'particularly heinous offence' remains subjective, it might not necessarily lead to more inconsistency than that already in existence.

Mandatory and minimum sentences in terms of Act 105 of 1997

Substantial and compelling circumstances

The importance of *S v Malgas* 2001 (1) SACR 469 (SCA) has been reiterated in *S v Combrink* 2012 (1) SACR 93 (SCA) at para 21, emphasising that the important aspects of this judgment remain the following: the prescribed sentences should ordinarily be imposed; the court should not deviate for flimsy reasons; all the factors that would normally be considered in the process of determining an appropriate sentence, should still be taken into account; only after considering

the cumulative effect of all the mitigating and aggravating factors and concluding that the minimum prescribed sentence is disproportionate in the sense that an injustice would be done by imposing that sentence, would a court be entitled to impose a lesser sentence; and in the absence of such a finding the prescribed minimum sentence must be imposed (*Combrink* at para 26) – see also *Murder* below.

Shongwe JA emphasised that, for a finding that substantial and compelling circumstances are present, not only should the factors be placed on record as required by the Criminal Law Amendment Act 105 of 1997 (*Combrink* at para 20), but all the factors should be balanced with one another (at para 22). Apart from focusing exclusively on the personal mitigating factors, the trial court also failed to recognise certain aggravating factors and wrongly took another into account. It should be added that is it important to have a uniform judicial approach towards the recognition of relevant sentencing factors, and also in connection with its interpretation and weight (see *S v Abrahams* 2002 (1) SACR 116 (SCA) at 121*a*). Not adhering to such principles causes unjustified disparity in sentences (South African Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000) 3). It further makes the sentencing process unbalanced and, as in *Combrink*, results in the sentencing decision being overturned on appeal (Van der Merwe 'In search of sentencing guidelines in child rape: An analysis of case law and minimum sentence legislation' (2008) 71 *THRHR* 589 at 595).

Specific sentences

Imprisonment from which the accused may be released and placed under correctional supervision at discretion of Commissioner of Correctional Services – s 276(1)*(i)*

The question whether a sentence under s 276(1)*(i)* of the Criminal Procedure Act 51 of 1977 is a softer option than an ordinary sentence of direct imprisonment, was given prominence in *S v Truyens* 2012 (1) SACR 79 (SCA). The court reiterated that it was not and emphasised that 'it merely grants the commissioner the latitude to consider an early release under correctional supervision – after a sixth of the sentence is served – and only if the personal circumstances of the offender warrant it' (at para 27). This provision supplements the authority of the commissioner in terms of s 276A(3)(a) to apply to the sentencing court to reconsider a sentence of imprisonment when the date of release is less than five years away (ibid). Cachalia JA spelled out the court's approach in imposing s 276(1)*(i)*-imprisonment as a sentencing option: once the trial court is of the view that a custodial sentence is the only appropriate sentence, but that a sentence in excess of five

years was not called for, the court had to consider whether s 276(1) *(i)* should be applied (at para 26). He, however, conceded that there may be divergent views on whether this sentencing option was too lenient an option in this matter involving theft of 28 head of cattle (ibid). Nevertheless, the sensitive and careful reasoning of the trial magistrate in this unusual case made the interference by the High Court unwarranted (at paras 6-18, citing guidance from the Supreme Court of Appeal). The sentence of four years' imprisonment in terms of s 276(1)*(i)*, imposed by the regional court, was accepted as not unduly light (ibid) – see *Stock theft* below.

Sentencing for selected offences

Murder

In *S v Combrink* 2012 (1) SACR 93 (SCA) the facts were as follows: The deceased was walking through a mealie field on the farm where he was employed and where C farmed, together with his father. C claimed not to have recognised the deceased as one of the workers at that time. Because he looked suspicious C called out to him repeatedly in an attempt to draw his attention, but in vain. He then fired a shot with his .308 calibre Parker Hale hunting rifle, apparently with the purpose to warn or intimidate the person. He thereafter called out again and when the person did not respond, he fired the second shot. The person turned slightly in the direction of C and fell face down. According to C he noticed at that point that it was one of his employees. Regardless, he next went to fetch other farm workers, who were working some distance away. On his return C found the deceased already dead, fatally shot in his back below the left shoulder. C phoned the police to report that he had shot a suspicious person. C was convicted in the Circuit Court of murder, the intent being *dolus eventualis*. This conviction was confirmed by the majority of the court *a quo* and the Supreme Court of Appeal. The trial court sentenced C to 15 years' imprisonment, of which five years were suspended. The court a quo set this sentence aside and imposed 10 years' imprisonment. In dealing with the current appeal against sentence the trial court was criticised by the Supreme Court of Appeal for overstating C's personal mitigating circumstances and therefore approaching the sentence in an unbalanced way. Firstly, the court found that C's military background did not qualify as a mitigating factor. In addition to the aggravating factors found by the trial court, namely that C lacked remorse (gathered from his steadfast denial that he had committed the offence) and that he failed to immediately assist the deceased after realising that he had shot him, Shongwe JA found the use of the hunting rifle 'most callous' in dealing with a 'suspicious' person walking in the mealie

field without posing any danger to anybody (at para 23, quoting from *S v Salzwedel and Others* 1999 (20 SACR 586 (SCA) para 12, as authority for taking cognisance of the country's political history and legitimate expectations of communities). Secondly, the gravity of the offence of murder was accepted by highlighting that the deceased's life, as his most valuable asset, had been taken away from him. The impact felt by those left behind would also always be negative (see also *Factors affecting sentence* above). Thirdly, Shongwe JA emphasised the public interest as an essential consideration (as part of the *Zinn*-triad, though not explicitly stated). Though no racial motive was implied, he called for the bench to be sensitive in matters which 'on the facts appear to have a racial or discriminatory connotation' as the 'public is incensed with sentences that appear to favour a particular group in society' (at para 24). After weighing up all the mitigating circumstances against the aggravating factors no substantial and compelling circumstances were found. The prescribed sentence of 15 years' imprisonment was imposed, thereby increasing the sentence of the court *a quo* in terms of s 322(6) of the Criminal Procedure Act 1977.

It appears as if the Supreme Court of Appeal accepted that C perceived the farm worker with disregard or as inferior, but the grounds for this finding is not clear. These are serious issues to be addressed and a court needs proper information in this regard before any finding can be made. Surely a court cannot simply take judicial notice of a history of racial tension, draw general inferences from it and then make the accused pay for the past.

Housebreaking

Mention has already been made of *S v Moswathupe* 2012 (1) SACR 259 (SCA), in which the court criticised the sentence of 25 years' imprisonment imposed on M for two counts of housebreaking (see *Sentencing for more than one offence* above). Both offences were committed in the same month (6 days apart) and in the same suburb, with M and his co-accused entering the bedrooms of the complainants at night. In one case they tied the hands and feet of the complainants when the complainants woke up while they continued to search the home for items of value. One of them allegedly indecently assaulted Mrs K by touching her private parts (at para 2). The total value of the stolen household items was R20 000. In the other case Mrs B shot at one of the intruders and then gave the firearm to her husband, who was being attacked by another of the intruders. Mr B emptied the magazine of the firearm which caused the intruders to flee. Mr B, however, sustained multiple stab wounds in the process. A watch, leather jacket and radio were

stolen (at para 3). The sentences imposed were 15 and 10 years' imprisonment respectively. Theron JA reiterated the proper approach to the exercise of the sentencing discretion. Courts should strive for a judicious balance between all relevant factors 'in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others' (at para 4, with reference to *S v Banda* 1991 (2) SA 352 (BG) at 354E-G). Theron JA found that the trial court committed the classic error of merely reciting the well-established principles applicable to determining the appropriate sentence, but without properly applying these principles to the circumstances of the matter (at para 6). The process entails recognition of, as well as the balancing of, all relevant factors (ibid, referring to *S v Blignaut* 2008 (1) SACR 78 (SCA) at para 6 and *S v Van de Venter* 2011 (1) SACR 238 (SCA) at para 15). The trial court was found to have misdirected through its failure to have regard to the fact that the M was a first offender and had spent 34 months in custody awaiting trial. Instead, it over-emphasised the seriousness of the crime of housebreaking and the interests of society (at para 6). This justified the court of appeal to interfere with the sentence (ibid). No justification was found, firstly, for the five year difference between the sentences imposed in respect of the two counts (at para 7), and secondly, the effective sentence of 25 years was found to be inappropriate (at para 8). On each of the counts of housebreaking M was then sentenced to a period of 10 years' imprisonment. Four years of the 10 years imposed on the second count were ordered to run concurrently with the sentence on the first count. The effective term of imprisonment imposed by the court of appeal was thus 16 years (at para 11). This judgment again highlights the need to recognise and develop clear guidelines relating to sub-categories of common law offences so that the determination of the seriousness of the offence could become more certain (South African Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000) 58).

Theft

The next two cases concerned the same crime, being attempted theft, but in sentencing the offenders the court followed very different approaches. In *S v Nkosi* 2012 (1) SACR 87 (GNP) the case dealt with a sensitive issue in farming communities, namely stock theft. N appealed against his conviction of stock theft, the sentence of five years' imprisonment and the forfeiture order in respect of the motor vehicle in the regional court. The conviction was set aside and replaced with a conviction of **attempted stock theft** (N was found in the early hours of the morning, stuck in mud with a vehicle and

trailer, about 200 meters from nine head of cattle, with two tied to a pole). The court was satisfied that it was justified to interfere with the sentence of the trial court by finding two misdirections, namely the failure, first, to accord sufficient weight to the personal circumstances of the accused and, secondly, to consider other sentencing options (at paras 24-27). The aggravating factors were the following: stock theft is a very serious crime that disrupts farming communities; it is prevalent and the offenders difficult to trace; the farming community has a legitimate expectation that appropriate sentences be meted out to those convicted of the offence; N was a police informer attached to the Stock Theft Unit, who in all likelihood used his inside knowledge to plan and commit the offence (at para 29). Mitigating factors in N's favour were that the complainant did not suffer any damage, N was a first offender (his previous convictions were more than 10 years old), he was gainfully employed, had a family (an unemployed wife, two children and a third on the way), imprisonment would deprive him of the means of earning a living (at para 31; as noted in *S v Scheepers* 1977 (2) SA 154 (A)). The sentence (including the forfeiture order) was set aside and replaced with a fine of R2 500 or three months' imprisonment. Though it is accepted that punishment may be less for an attempt than for the completed crime (Snyman *Criminal Law* (2008) 294), the court appeared not to have appreciated the fact that N was as much a danger to society as someone who completes the stock theft (Snyman 283). Further, had he not gotten stuck (a factor beyond his control), he would have completed the crime (ibid). In distinguishing between acts of preparation and acts of consummation, Snyman argues that the justification for punishment in the latter instance lies in the absence of any possibility that such a person might still change his mind (at 293). Therefore the rationale for punishment of attempt is found in the relative theories of deterrence, prevention and rehabilitation (ibid). Though no harm was suffered by the owner of the cattle, the very serious nature of this crime and the courts' general approach in imposing tougher sentences (usually direct imprisonment: see *Truyens* below at para 24), beg the question whether the imposed sentence was not too lenient. N's personal circumstances were not unusual: although a first offender with a family dependent on his income, he was without contrition and provided no explanation for the crime. In contrast to *Combrink* above, the public interest in this matter (vulnerable cattle farmers having legitimate expectations of appropriate sentences meted out) was not afforded any weight in the court of appeal.

In contrast to *Nkosi*, in *S v Nxopo* 2012 (1) SACR 13 (ECG) Griffith J was of the view that no real distinction should be made between the **attempt** and the actual **theft of a motor vehicle** (at para 8). He

argued that N was only prevented from stealing the vehicle because of the intervention, both by the complainant setting off the alarm, and of the police arriving on the scene by chance while N was trying to start the vehicle (ibid). In addition, a degree of pre-planning was found to be present, as N had to obtain the 'lock breaker' (a specialised tool used for stealing vehicles) from someone else or had to manufacture it himself (ibid). N was also convicted of an additional count of assault on the police man who tried to arrest him (at para 9). The sentence of six years' imprisonment for attempted car theft (and an additional one year for the assault) was confirmed.

In both *Nkosi* and *Nxopo* the accused were prevented by factors beyond their control from completing their thefts. These cases, in my view, illustrate the issue of unjustified disparity in sentencing resulting from not having a uniform approach to the seriousness of different types of offences (attempted theft in this instance), and the role of personal circumstances during sentencing. Like cases are thus not treated alike. In an attempt to address this issue the South African Law Commission (Discussion Paper 91, Project 82 *Sentencing (A New Sentencing Framework)* (2000) 38) suggested that guidelines should be developed where the offence should be the main focus of a sentencing decision. The advantage of this approach is that offences can be weighed and compared in order to advance consistency (ibid). It is submitted that this proposal deserves serious attention and should be taken further.

The facts in *S v Truyens* 2012 (1) SACR 79 (SCA) revealed that the appellant (T) was by no means the average cattle rustler (at para 25). T was convicted of stock theft of 48 head of cattle from his employer (in contravention of s 11 of the Stock Theft Act 57 of 1959). The regional magistrate sentenced him to four years' imprisonment in terms of s 276(1)*(i)*. On T's appeal, the High Court increased the sentence to 12 years' imprisonment of which four years were suspended. Bail was denied and T served just over two years of his sentence when, after petitioning, his further appeal to the Supreme Court of Appeal was heard. Two *aggravating factors* were found: As a foreman on the cattle farm he abused his position of trust (at para 14); the offence was planned and took place on three occasions (ibid). T, however, had three children diagnosed with a genetic disease that prevented them from living normal lives, giving them a life expectancy of 25-30 years, and placed the family under severe financial pressure (at para 8-9). These unusual circumstances gave rise to several *mitigating factors*: the motive for the offence was one of need and not greed (at para 10); T's moral blameworthiness was reduced (at para 11); T showed remorse (at para 13 – see *General Principles, Remorse* above). The High Court's interference with the trial court's sentence was found to

be unjustified and the regional magistrate's sentence was reinstated (at para 26 – see also *General principles, Interference on sentence by courts of appeal* and *Reduced moral blameworthiness* above).