Sentencing

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In this contribution judgments reported in the second half of 2014 are reviewed.

1 Sentencing procedures and general principles

1.1 General Principles

1.1.1 Factors affecting sentencing

There is no absolute line between culpability and non-culpability (CR Snyman *Criminal Law* 5ed (2008) 176). This is confirmed by the existence of the concept of diminished responsibility, (a 'tussenposisie', according to A Kruger and VG Hiemstra *Hiemstra: Suid Afrikaanse Strafproses* 7ed (2010) 245), which is not a defence, but provides for reduction in sentence. The offender's mental and emotional state at the time of the commission of an offence may be affected by a variety of either pathological or non-pathological factors (S Terblanche *Guide to sentencing in South Africa* 2ed (2007) 198-199). In the latter instance factors such as provocation, rage or jealousy may influence the offender to the extent that his or her power of restraint or self-control, compared to a normal person, is substantially reduced. In such a case the offender can rely on **diminished responsibility** as a weighty mitigating factor. In *S v Mathe* 2014 (2) SACR 298 (KZD) at paras [16]-[26] the court, with reference to precedent, highlighted important principles guiding an enquiry about diminished responsibility. Firstly, because diminished responsibility is not a definite condition but a state of mind varying in degree, each case will be determined on its own facts (at para [16]). The essential question is the extent, or degree, to which the particular circumstances reduced the powers of restraint and self-control of an offender. Gorven J noted as follows (with reference to *S v Mnisi* 2009 (2) SACR 227 (SCA) at para [5]):

> 'Whether an accused acted with diminished responsibility must be determined in the light of all the evidence, expert or otherwise. There is no obligation upon an accused to adduce expert evidence. His *ipse dixit* may suffice provided that a *proper factual foundation* is laid which gives rise to the reasonable possibility that he so acted. Such evidence must be carefully scrutinised and considered in the light of all the circumstances and the alleged criminal conduct viewed objectively. The fact that an accused

> acted in a fit of rage or temper is in itself not mitigatory. Loss of temper is a common occurrence and society expects its members to keep their emotions sufficiently in check to avoid harming others. What matters for the purposes of sentence are the circumstances that give rise to the lack of restraint and self-control.' (author's emphasis).

In *Mathe* M pleaded guilty and relied on his written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977. He simply stated that he was 'severely emotionally overwrought' and 'emotionally disintegrated' by his lover's repeated infidelity and decision to end their nine-year-long relationship. Yet, he also stated that he was able to appreciate between right and wrong and able to act in accordance with such appreciation (at para [17]). Despite the court's acceptance that M's emotions were running high his statement was criticised for failing to show that his actions of shooting the deceased 'were the product of emotional stress' (para [22], with reference to *Mnisi* at para [5]). In distinguishing *Mathe* from *Mnisi* (in which case diminished responsibility was accepted), some important pointers were highlighted namely, time to reflect *versus* an immediate shock reaction; goal directed actions *versus* loss of control of inhibitions; murder with direct intention *versus* murder with *dolus eventualis*; and acting out of jealousy and frustration *versus* actions based on rage (at para [22]).

Further, the criterion for assessing moral blameworthiness where diminished responsibility exists is subjective. A court 'must look solely at what an accused believed and intended when deciding for purposes of sentence whether moral blameworthiness has been reduced' (at para [24], with reference to *S v Ferreira* 2004 (2) SACR 454 (SCA) at para [44]). Being emotional and jealous about a lover's infidelity does not, however, establish diminished responsibility (at para [26]). M shot the deceased because he did not want to die alone and leave the deceased with her lover (at para [18]). See *Sentencing for selected offences – Murder* below.

A **proprietorial attitude towards women** was rightly recognised in *Mathe* (supra) as an important aggravating factor. Gorven J emphasised that the interests of society demands that women should be able to make free and unfettered choices without fearing reprisal (at para [33]). He further held that

> 'whilst he [M] was able to control his actions, the accused treated a defenceless woman as a chattel who existed purely for his benefit. He did not accord her the dignity of choice concerning her life. She had clearly told him that she wished to terminate their relationship. She had accompanied him when he requested it but we do not know why she did so and whether or not this may have been under duress. He did not accept that she was entitled to send text messages to anyone whom she chose without being answerable to the

> accused. He regarded it as his right to know who she was communicating with and to bar her from communicating with her lover.' (at para [28]).

Referring to research showing that, of every two women who are murdered, one is killed by her partner, the judge pointed out that it showed that the proprietorial attitude of men towards women had reached extremely serious proportions in our society and eroded the constitutional rights of woman:

> 'This attitude makes a mockery of the right to life accorded by the Constitution to all within our borders. If a person kills another, this is the ultimate negation of the right to life. This set of attitudes also fundamentally undermines, during life, many of the other rights of women, including the right to equality, the right to human dignity, the right to freedom and security of their person, the right not to be subjected to servitude, the right to privacy and the right to freedom of association contained in the Bill of Rights. This proprietorial attitude is inimical to a democratic society based on values of human dignity, equality and freedom. It is clear that, in addition to depriving the deceased of her right to life, the accused infringed at least some of these other rights afforded to the deceased by our Constitution.' (at para [29]).

It is noteworthy that in *Mathe* the court's sensitivity to the above mentioned constitutional values led to the consideration and recognition of an aggravating factor often overlooked by courts in the past. For example, in *S v Abrahams* 2002 (1) SACR 116 (SCA) at 122*g* the attitude of the father towards his daughter, whom he regarded as a chattel, not merely to be used at will but, once the first entitlement had been exercised, to be discarded for similar use by others, was recognised and accorded substantial aggravating weight only on appeal by the State, when the sentence was increased.

The **period of imprisonment awaiting trial** always influences the final determination of the accused's sentence. The court in *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala* 2014 (2) SACR 337 (SCA) clarified the approach that courts should take in these matters and found the use of any mechanical formula inappropriate. It held (at para [18]) that

> 'in all cases where a court is considering the justness of the sentence to be imposed: the sentencing court should consider in all cases whether the period of imprisonment proposed is *proportionate* to the crime committed, taking into account, for that purpose, the period spent in custody awaiting trial.' (author's emphasis).

See *Mandatory and minimum sentences in terms of Act 105 of 1997 – Substantial and compelling circumstances* below.

1.1.2 Sentencing aims

Deterrence as part of the justification and objective of sentencing may have either a personal or a general dimension (SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 161). In *Mathe* (supra) the court chose to incorporate both (together with retribution) into the sentencing judgment (at para [31]):

> 'The question arises as to the deterrent effect of any sentence, both on the accused and in respect of others who may find themselves with similar urges. Since the accused could appreciate the consequences of his actions, deterrence is an appropriate factor to take into account. The accused has given no indication that he has come to realise that his attitude to the deceased was inappropriate. He may well constitute a danger to future fiancées or lovers. In addition, men within society in general can benefit from the deterrent effect of a sentence passed on the accused if they encounter situations where they are consumed by jealousy or cannot accept their rejection by a woman they claim to love.'

As far as individual deterrence is concerned the court hoped that the sentence of imprisonment would teach M a lesson to change his attitude in future relationships. With regards to general deterrence, it is clear that the court, in light of the prevalence of intimate partner violence, thought that an exemplary punishment should be meted out on M to suppress the incidence of husbands or boyfriends killing their wives or lovers. The theory behind general deterrence is thus that persons threatened with punishment will abstain from committing crimes (JM Burchell *Principles of Criminal Law* 3ed (2010) 75). It is however cautioned that it must always be kept in proportion to the moral blameworthiness of the accused. In M's case, it appears that, by implication, this requirement was adhered to when the court remarked that the prescribed sentence would be unjust (at para [33]). Perhaps the most valid objection to general deterrence is illustrated in this particular type of offence. Unlike assassination, where planning is involved in the act of murder, someone who would kill under the same conditions as M, namely out of jealously and a proprietal attitude towards his girlfriend, would always have his reason clouded by emotion and would not think about the possible legal consequences before taking action. This reality raises questions about the value of general deterrence in matters such as *Mathe* (Burchell op cit 77; Snyman op cit 17). Snyman op cit 16 further highlights that the effectiveness of general deterrence does not only depend on the severity of punishments but also on the probability that an offender will be caught, convicted and serve out his sentence (see also *S v Nkambule* 1993 (1) SACR 136 (A) at 146*b*).

1.2 Sentencing procedures

1.2.1 The use of expert witnesses and pre-sentence reports

In less complicated cases the court can and will make decisions according to its own knowledge of psychology, knowledge that is available to a lawyer and that draws on life experience, without the participation of a psychologist. However, one must not confuse the court's knowledge of psychology with psychological knowledge available only to someone with a specialised degree (LK Paprzycki 'The status of an expert psychologist in Polish criminal proceedings' in A Czerederecka, T Jaskiewicz-Obydzinska and J Wojcikiewicz (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 3 at 8). It appears from the judgments on diminished responsibility compared in *S v Mathe* 2014 (2) SACR 298 (KZD) that in the majority of them **expert evidence** was presented to secure such a finding (at paras [22]-[25]). The mere statements in M's written plea of guilty did not satisfy the court that the shooting of the deceased could be attributed solely to his emotional condition (at para [22]). Since the sentencing phase has been described as 'a new trial' with separate issues (Mullins & Da Silva *Technique in litigation* 6ed (2010) 398), it is submitted that expert evidence should as a rule be presented when diminished responsibility is averred. Though the South African Law Commission (*Report on Sentencing (A New Sentencing Framework)* (2000) 860 indicated that there is no strict onus on either party during the sentencing phase, the court nevertheless has to be satisfied or convinced of the existence of such an important factor (also Terblanche op cit 93). This need for sufficient information is even more acute when there is a plea of guilty (A van der Merwe 'The use of expert evidence in the sentencing of paedophiles' (2005) 68 *THRHR* 417), as was the case in *Mathe*. M pleaded guilty and handed in a written statement in terms of s 112(2) of the Criminal Procedure Act 51 of 1977. He did not testify under oath before sentence, but instead two reports were submitted by consent – one sketching his personal circumstances compiled by the social worker whom he had seen on several occasions (with and without the deceased) and the other (related to the suitability of correctional supervision) by a probation officer employed in the Department of Correctional Services (at para [10]). See *General principles – Factors affecting sentencing* above.

When an expert witness is called upon, he or she should be aware, depending on the matter at hand, what type of information the sentencing court is looking for. In a recent matter a forensic criminologist was faulted for providing insufficient information in her report (*Piater v S* (743/13) [2014] ZASCA 134 (25 September 2014) at para [7]). P was convicted of stealing money from her employer and

the questions of why P stole the money and what she did with it, remained unanswered (at para [11]). Since P elected not to testify the court was left with a 'lacuna', which caused P's appeal against her custodial sentence to be unsuccessful. See 'Recent cases: Sentencing' (2013) 26 *SACJ* at 405 for a discussion of this judgment.

The value of **pre-sentence reports**, in that they provide only hearsay information on the personal circumstances of the accused, in lieu of him or her testifying, has, on occasion, been questioned in the past (E Du Toit et al *Commentary on Criminal Procedure* (2014) 28-6D). The court in *S v Trichart* 2014 (2) SACR 245 (GJ) (in a similar vein as in *S v Ngomane* 2007 (2) SACR 535 (W)), however, unequivocally, confirmed the value of pre-sentence reports to judicial officers and held that the roles performed by the role-players involved is a symbiotic relationship (at para [10]):

> 'The judicial officer considers factors such as the interests of the convicted individual, the nature and gravity of the crime(s) of which he or she has been convicted and the interests of society. In considering the interests of the individual the judicial officer receives invaluable information gathered by the probation officer and has the benefit of the probation officer's expertise regarding the psycho-social and other conditions and circumstances concerning the offender. She places the offence in the context of these conditions and circumstances.'

It was further held that the recommendations contained in the probation officer's report should not be rejected without giving rational reasons for doing so (ibid). See *Specific offences – Declaration as an habitual criminal in terms of s 286 of the Criminal Procedure Act 51 of 1977* below.

2 Mandatory and minimum sentences in terms of Act 105 of 1997

2.1 Substantial and compelling circumstances

It has long been clarified in *S v Malgas* 2001 (1) SACR 469 (SCA) at para [9] that all factors traditionally relevant to the sentencing stage should be taken into account in order to determine the existence of substantial and compelling circumstances warranting a deviation from the prescribed sentence (in terms of s 51(3) of the Criminal Law Amendment Act 105 of 1997). It is trite that the **period of imprisonment awaiting trial** is one such mitigating factor influencing the determination of the accused's sentence (Terblanche op cit 205). However, the way in which this factor has been given effect varied. The court *a quo* in *Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala* 2014 (2) SACR 337 (SCA) used the 'rule of thumb' from a Canadian case (*Gravino* (70/71) 13 Crim LQ 434 (Quebec Court

of Appeal), applied in *S v Brophy* 2007 (2) SACR 56 (W), cited also in *S v Stephen* 1994 (2) SACR 163 (W) at 168*e-g*). This rule provides that 'imprisonment while awaiting trial is the equivalent of a sentence of twice that length', and resulted in the trial court subtracting eight years (four years x 2) from the 20-year period that was deemed to be appropriate for the murder, leaving the accused with an effective sentence of 12 years' imprisonment. The Supreme Court of Appeal for the first time spoke clearly on this matter in *S v Radebe* 2013 (2) SACR 165 (SCA) (three weeks after leave to appeal had been granted in *Gcwala*) and ruled this approach to be inappropriate. Lewis JA wrote the judgments in both *Radebe* and *Gcwala* and reiterated her earlier reasoning (*Gcwala* at para [16]):

> 'In my view there should be no rule of thumb in respect of the calculation of the weight to be given to the period spent by an accused awaiting trial … A mechanical formula to determine the extent to which the proposed sentence should be reduced, by reason of the period of detention prior to conviction, is unhelpful. The circumstances of an individual accused must be assessed in each case in determining the extent to which the sentence proposed should be reduced …'

Lewis JA then suggested a better approach emphasising proportionality as the primary aim:

> 'T]he period in detention pre-sentencing is but one of the factors that should be taken into account in determining whether the effective period of imprisonment to be imposed is justified: whether it is proportionate to the crime committed. Such an approach would take into account the conditions affecting the accused in detention and the reason for a prolonged period of detention. And accordingly, in determining … whether substantial and compelling circumstances warrant a lesser sentence than that prescribed by the Criminal Law Amendment Act 105 of 1997, … the test is not whether on its own that period of detention constitutes a substantial or compelling circumstance, but whether the effective sentence proposed is proportionate to the crime or crimes committed: whether the sentence in all the circumstances, including the period spent in detention prior to conviction and sentencing, is a just one.'

It is submitted that the above ratio in *Gcwala*, dictating that the period of imprisonment awaiting trial should be treated as merely one of the factors to be weighed together with all the other relevant factors, and not to calculate its weight separately, should be welcomed as it removes all earlier doubt and inconsistent practices in this regard. It further continues to confirm the constitutional principle of proportionality in our minimum sentence regime, as advocated in *Malgas* (supra) and *S v Dodo* 2001 (1) SACR 594 (CC). The sentence imposed in the court *a quo* (based on the inappropriate Canadian rule of thumb) was overturned as being too lenient and inappropriate, thus disproportionate to the particular offence of planned murder (see also D Van Zyl Smit

'Sentencing and punishment' in S Woolman et al *Constitutional Law of South Africa* 2ed (2010) 49-14–49-15).

In *S v Mathe* 2014 (2) SACR 298 (KZD) the court indicated that a finding of diminished responsibility can in itself give rise to substantial and compelling circumstances. In the absence of such a finding, substantial and compelling circumstances have to be assessed with an **accused's emotional state** as but one of the relevant factors. Other relevant factors include 'the nature and circumstances of the offence, the characteristics of the offender and his circumstances and the impact of the crime on the community, its welfare and concern' (at para [26] with reference to *S v Banda* 1991 (2) SA 352 (B) at 355A-C, as approved in *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) at para [10]; these factors are otherwise known as the *Zinn* triad).

3 Specific sentences

3.1 Declaration as an habitual criminal in terms of section 286 of the Criminal Procedure Act 51 of 1977

Two decisions dealt with decisions from regional courts where the accused had been declared as habitual criminals in terms of section 286 of the Criminal Procedure Act 51 of 1977. In both instances these orders were set aside on appeal. In *S v Trichart* 2014 (2) SACR 245 (GSJ) the court reiterated that, despite this sentencing option having been declared constitutionally compliant in *S v Niemand* 2001 (2) SACR 654 (CC), by emphasising the preventative aspect of punishment, the section has far-reaching implications. Vally J pointed out that this is particularly so when the offender had already been punished for the previous offences. For this reason precedent has emphasised that a declaration to the effect that the offender offends out of habit must only result after all the facts have been carefully scrutinised. The court provided a useful summary of the law applicable to this section as it had emerged from cases scrutinising the section. It is worth being repeated here (at para [20]):

> '*Wayi* [1994 (2) SACR 334 (E) at para 335*i*-336*a*] counsels that the sentencing court should examine why the previous offences were committed "for it is a matter of concern that a step so drastic as the present should be taken without a detailed and full enquiry in all the circumstances of the case". This is endorsed by the majority judgment in *Stenge* 2008 (2) SACR 27 (C). In *Van Eck* 2003 (2) SACR 563 (SCA) at 567*c* the Supreme Court of Appeal reminds judicial officers that when applying this section, they should be "satisfied (in the sense of convinced)" that the crimes were committed out of habit and that the crimes were of such a nature that society required protection from the offender for a period of at least seven years. They are further reminded that even if these two requirements are met they still retain a discretion

> not to declare the offender a habitual criminal if they find that the other traditional considerations (nature of offence, interests of the offender and interests of society) lead to the conclusion that a declaration as habitual criminal is inappropriate. Thus a long list of previous convictions does not automatically result in the offender being declared a habitual criminal.'

Vally J adds to this that it is necessary to also give careful attention to the nature of the actual crime of which the offender has been convicted before the offender is declared to be a habitual criminal. He shares the concern, highlighted in *S v Stenge* (above), that such a declaration can lead to an unduly harsh punishment for a minor misdemeanour. (The matter in *Trichart* involved the theft of a piece of cheese with a value of R66.33).

In irrationally dismissing the probation officer's report, the court *a quo* in *Trichart* failed to give due recognition to the severity of T's longstanding drug dependency, and further drew unwarranted and unjustifiable conclusions about the previous sentences imposed by other judicial officers (at para [18]). The court made an order to the effect that the time already served by T equated the new sentence imposed and that T should be housed at a drug dependence centre for three months, with the option of applying for an extension if necessary (at para [24]). See *The sentencing process – Expert witnesses and pre-sentence reports* above.

In *S v Smith* 2014 (2) SACR 190 (FB) the court held that the facts in the matter did not justify the inference by the court *a quo* that the appellant habitually committed crimes and that the community needed to be protected against him, or that a declaration was justified without a proper warning having been given (at para [32]). The magistrate had failed to exercise his discretion properly and in these circumstances the sentence had to be set aside and replaced with a sentence of eight years' imprisonment, of which two years were to run concurrently with the sentence that the appellant was already serving for theft (at paras [35], [45]).

4 Sentencing for selected offences

4.1 Murder

Several judgments dealt with incidents of murder, some coupled with other offences such as rape or housebreaking with intent to rob and robbery. In *S v Makatu* 2014 (2) SACR 539 (SCA) M was convicted of murder (and rape). He and the deceased were both on their way home from a drinking spree when he made sexual advances towards her. She resisted and a struggle ensued. In order to subdue her, he used force aimed at her neck and pressed her down to have sexual intercourse with her. Only afterwards did he realise that she was motionless. She

died later on the same day from her injuries. The pathologist testified, in contrast to the explanation in his section 112(2) statement, that M must have used a rope to strangle her and definitely not his hands. The offence(s) were, no doubt, of a very serious nature. Other aggravating features referred to the fact that the deceased was M's aunt and that it therefore was a further abuse of trust on M's side. M was 23 years old at the time of the offence(s), a first offender, was remorseful, unschooled and unemployed and in custody while awaiting trial. He was also under the influence of liquor, yet still able to distinguish between right and wrong. The sentence of life imprisonment was set aside and a term of imprisonment of 15 years was imposed as the appropriate sentence. The effective sentence was, however, one of 20 years' imprisonment (5 of the 10 years imposed for the rape were to run concurrently with the 15 years imposed for murder).

In *Makatu* Bosielo JA reiterated the increasing wave in crimes of violence and that 'vulnerable and defenceless people live in fear', all against the backdrop of our 'new and fledgling constitutional democracy which ironically promises a better life for all' (at para [30]). He further highlighted the futile efforts from civic society, NGO's, the legislature and government to win the war against this scourge of crimes (at para [31]). Courts are important partners in the fight against crime and should not be seen as 'supine and unmoved' by these crimes (at para [32]):

> 'Our courts must accept their enormous responsibility of protecting society by imposing appropriate sentences for such crimes. It is through imposing appropriate sentences that the courts can, without pandering to the whims of the public, send a clear and unequivocal message that there is no room for criminals in our society. This in turn will have the salutary effect of engendering and enhancing the confidence of the public in the judicial system. Inevitably this will serve to bolster respect for the rule of law in the country.'

In *S v Makhakha* 2014 (2) SACR 457 (WCC) M was convicted of two counts of murder, one count of rape, one count of attempted rape, one count of robbery with aggravating circumstances and one count of attempted murder. The crimes had been committed over a period of four years and involved a similar modus operandi in each case. He targeted vulnerable young women whom he attacked and dragged into bushes. At the time of the first crime the accused was 21 years of age. The court held that he showed no remorse and denied the commission of the crimes (at para [14]). After considering all the circumstances, including the interests of society, the seriousness of the crimes (inter alia the brutality and callousness of the deeds at para [13]), the impact of the crime on the various victims (at paras [20]-[22]), M's personal circumstances (his relative youthfulness, his clean record and length

of time awaiting trial), the court came to the conclusion that there were no substantial and compelling circumstances that warranted a deviation from the minimum sentences in respect of the counts of murder, rape and robbery with aggravating circumstances. M was accordingly sentenced to three terms of life imprisonment on the murder and rape counts, and to terms of imprisonment on the other counts which were ordered to run concurrently with the sentences of life imprisonment (at paras [25]-[29]).

Director of Public Prosecutions, North Gauteng: Pretoria v Gcwala 2014 (2) SACR 337 (SCA) dealt with a politically-motivated murder committed by G and two others. They had common purpose to kill the deceased who was the mayor of a town. She had cancelled tenders that had been awarded to one L in a corruptive way. The latter was angered by the cancellation and arranged for the respondents to kill the deceased for reward. L pleaded guilty, was convicted in a separate trial of murder and was sentenced to 20 years' imprisonment (at paras [2]-[3]). Evidence was led at the trial of the respondents as to the deceased's standing in the community and the adverse consequences of her death for the community and her family (at para [23]). The aggravating factors were that the respondents were motivated by financial greed, that violence in the community is politically motivated and endemic, that the deceased was murdered precisely because she was fighting against corruption, and that they showed no remorse (at para [27]). The mitigating factors were that all three accused had been in custody for four years awaiting trial, that there was no evidence as to who shot the deceased, that G and accused 3 were first offenders, and that all three were candidates for rehabilitation (at para [8]). The sentence imposed by the court *a quo* was an effective term of 12 years' imprisonment. The state appealed against it. The Supreme Court of Appeal found that the court *a quo* misdirected itself on the calculation of the weight of the awaiting trial period (at paras [19], [26]), and in not properly considering the context in which the murder was committed as well as the evidence about the after-effects of the murder (at para [24]). Taking into account all the factors, it was found that the sentence of 12 years' imprisonment was far too lenient and inappropriate. Yet, life imprisonment was disproportionate. The court held that the fact that a person's life was taken for financial gain should be severely punished and a sentence of 20 years' imprisonment was imposed on all three (at para [28]). See *Mandatory and minimum sentences in terms of Act 105 of 1997 – Substantial and compelling circumstances* above.

Intimate partner violence was the subject in *S v Mathe* 2014 (2) SACR 298 (KZD). Unlike the scenario in so many such instances, in *Mathe*'s case there had been no history of violence but one of repeated infidelity

on the deceased's part with one of M's colleagues. M had a child with the deceased, had paid a portion of the *ilobolo* and had been in a relationship with her for almost ten years (at para [21]). After a phone call from the deceased during which she ended their relationship, M fetched her from work and demanded that she should accompany him, using public transport. They stopped at some point for the purpose of him attending a lecture. Some of his colleagues confronted him and demanded his service pistol. A shooting ensued, during which M believed that he was going to die and he chose to shoot the deceased, who sat at the back of the taxi, in order to prevent her from sharing a life with her lover (at para [18]). Despite him warning the other passengers to lie down while shooting, he also shot one of them. M was convicted of murder and attempted murder. Regarding mitigating factors the court found the following (at para [27]):

> 'The fact that he pleaded guilty is of little moment in the circumstances. He was caught red-handed with a number of eyewitnesses present, although it counts for something that he did not unduly burden the state with the need to prove the charges. He did express remorse and attempted to make some recompense. To that must be added the significant character evidence emerging from the two reports and the personal circumstances mentioned above. He has clearly been a stable, productive member of the community and engaged in uplifting actions over a long period of time. He has supported family and community members and wishes to support his child from the deceased and to take an active role in her life. He is a first offender and does not seem to display a propensity to violence. It seems clear that the accused is a candidate for rehabilitation. Of course, [despite M's plea for diminished responsibility being rejected], the emotional struggle of dealing with the infidelity and lack of honesty of the deceased must also be taken into account.'

However, the court found substantial aggravating factors, namely, the accused's attitude of treating the deceased as a chattel purely for his benefit, the ultimate negation of the deceased's right to life, the interests of society requiring that woman must be able to freely choose their partners and the need for general deterrence and retribution. The court further emphasised the prevalence of domestic violence, the need for severe sentences in that regard and the fact that living in fear negates many fundamental rights such as equality, human dignity and bodily integrity. The well-articulated and often cited passage in *S v Chapman* 1997 (3) SA 341 (SCA) at 345A–B is worth repeating:

> 'Women in this country… have a legitimate claim to walk peacefully on the streets to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquillity of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives.' at para [30] as cited in *Mudau v S* (547/13) [2014] ZASCA 43 (31 March 2014) at para [6]).

However, in light of the fact that M was a candidate for rehabilitation, it was found that imposing the minimum sentence of 15 years would result in an injustice (at para [33]). A sentence of 10 years was imposed for murder and three years for attempted murder, to run consecutively. See *General principles and procedures – Factors affecting sentence* above.

4.2 Rape of children

Two judgments involving the rape of children under the age of 16 years were delivered by the Supreme Court of Appeal. A sentence of life imprisonment was confirmed in both matters. In *S v Munyai* 2014 JDR 0604 (SCA) the complainant (aged 13 years) was raped by M. He was known to her as a member of the community and he had promised her R1 for a school funeral policy. When she went by his house to collect the money he raped her. M hid the victim under the bed when her mother came looking for her, threatening to kill her if she responded to the mother's calls (at para [3]). M claimed that the complainant had consented. The aggravating features in the matter were the following: M deceptively lured the child to his home with a promise to assist her; he took advantage of her and he subjected her to humiliating and degrading treatment; she sustained injuries; he threatened to kill her; and he showed no remorse (at para [9]). It was found that the cumulative effect of M's personal circumstances, weighed against the aggravating factors, did not constitute substantial and compelling circumstances. Life imprisonment was therefore not disproportionate (at para [11]).

In *S v MDT* 2014 (2) SACR 630 (SCA) a father raped his 14-year-old daughter, with the brother sleeping in the room next door. He denied the allegation throughout and thereby caused his children to go through the ordeal of testifying at the trial. The court confirmed the offence and agreed with Cameron JA (in *S v Abrahams* 2002 (1) SACR 116 (SCA) at paras [17]–[23]), that nothing could be considered more heinous than the rape of a child by the father (at para [6]). The court further referred to *S v PB* 2013 (2) SACR 533 (SCA), where interference with a prescribed sentence of life imprisonment imposed on a father who had raped his 12-year-old daughter, was also refused. Acknowledging that this can only serve as a guideline, it also serves to emphasise the necessity to impose heavy sentences in cases such as the present, to prevent young girls from being abused. (See 'Recent cases: Sentencing' (2013) 26 *SACJ* at 408-409 for a discussion of the role of precedent with regard to minimum sentences, and a discussion of *PB* (above)). The court finally held that 'child rape is becoming

prevalent in Limpopo. Indeed, child rape is a national scourge that shames us as a nation' (at para [7]).

The above judgments confirm that the courts' evaluation of the seriousness of child rape, and specifically, intra-familial child rape, has changed over the last two decades. It is not a given anymore that 'the prescribed sentences will ordinarily be departed from', as pointed out earlier by Terblanche ('Mandatory and minimum sentencing: Considering s 51 of the Criminal Law Amendment Act 1997' 2003 *Acta Juridica* 194 at 215). However, despite sentences being more severe, it does not appear to have contributed to curbing the prevalence of child rape.