

Judgments on sentencing: Leaving a lasting legacy

SS Terblanche

B Juris LLB LLD

Professor, Department of Criminal and Procedural Law, University of South Africa

OPSOMMING

Uitsprake aangaande vonnisse: 'n Blywende nalatenskap

Dit word algemeen aanvaar dat vonnisoplegging 'n besonder moeilike deel van die strafprosedure is. Regterlike diskresie speel 'n groot rol by vonnisoplegging. Verskeie regstelsels het dus ontwikkel om die uitvoering van die diskresie te lei. In Suid-Afrika is dit as gesaghebbend aanvaar dat vergelding as basis vir strafoplegging ondergeskik was aan voorkoming en rehabilitasie. In tussentyd het verskeie ander jurisdiksies terugbeweeg om vergelding ten volle as sentraal tot strafoplegging te sien. Ons gesag het grotendeels hierdie ontwikkeling tot op hede geïgnoreer. Regter Harms het egter gesorg dat ons gesag ook van hierdie moderne benadering spreek. Sy uitsprake, wat deurgaans na 'n wye verskeidenheid internasionale en plaaslike gesag verwys het, het beide die Bank en Akademici op hul tone gehou. Ten aansien van die huidige ontwikkeling van die Suid-Afrikaanse reg aangaande strafoplegging, was Regter Harms se uitsprake hulle tyd vër vooruit.

1 INTRODUCTION

It is widely accepted that sentencing is a particularly difficult part of the criminal justice process.¹ In South Africa, sentencing is considered to be heavily dependent on the exercise of a judicial discretion. This discretion is not the worst kind of foundation for the sentencing process. The legal training that all judicial officers have to undergo is supposed to support their ability to be analytical, and to separate the wheat from the chaff. The downside is that the wider the discretion, the greater the role that is also played by the personality and world view of the individual judicial officer. This problem has given rise to some substantial development in sentencing policy across the world. To a large extent the development was precipitated in the United States of America where, in many states, the sentence discretion was almost completely unlimited, causing Marvin Frankel, a federal court judge, to comment as follows: "As to the penalty that may be imposed, our laws characteristically leave to the sentencing judge a range of choice that should be unthinkable in a 'government of laws, not of men.'"²

¹ See eg *S v Kok* 1998 1 SACR 532 (N) 551 (deciding on an appropriate sentence is always difficult).

² Frankel *Criminal sentences: Law without order* (1972) 5.

It was during this era that one of the most enduring judgments in South African sentencing jurisprudence saw the light of day. In *R v Karg*³ Schreiner JA wrote the following words, which have since been quoted in countless decisions since:

“While the deterrent effect of punishment has remained as important as ever, it is, I think, correct to say that the retributive aspect has tended to yield ground to the aspects of prevention and correction. That is no doubt a good thing. But the element of retribution, historically important, is by no means absent from the modern approach. It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that Courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands. Naturally, righteous anger should not becloud judgment.”

There is no quarrel with the statement that, in 1961, retribution had yielded to “prevention and correction”, but this is no longer true. In fact, internationally this started to change by the late 1970s and the change accelerated through the 1980s.⁴ As a result, for the last two to three decades, most jurisdictions with a sentencing system worth emulating are once again solidly based on retributive principles. The sad thing is that our jurisprudence appears to be rather unaware of this development, with the result that *Karg* is still frequently cited as authority for the idea that retribution is outmoded and that deterrence is the main object of punishment.⁵

Fortunately, not all judges are aware of developments that can truly be described as “the modern approach” to sentencing theory and practice. This essay considers the contribution that was made in this regard through the judgments of Judge Harms, until recently the deputy president of the Supreme Court of Appeal.

2 GENERAL PRINCIPLES OF SENTENCING

2.1 An overview of the principles

Our law attempts to ease the sentencing process through the establishment of general principles. These principles are trite. They consist of the triad of *Zinn*,⁶ as augmented by the four so-called purposes of punishment. These principles are so trite that attempts to check whether they are still relevant today are very rare indeed. Often the courts, even to the highest level, will do nothing other than quote a few well-established sources.

3 1961 1 SA 231 (A) 236A–C.

4 For a useful summary of these developments in the United States of America, see Zimring “Sentencing reform in the States: Lessons from the 1970s” in Tonry and Zimring (eds) *Reform and punishment: Essays on criminal sentencing* (1983) 101–121.

5 See eg *S v Dyantyi* 2011 1 SACR 540 (ECG) para 21; *S v Gardener* 2011 1 SACR 570 (SCA) para 67; *Director of Public Prosecutions, North Gauteng v Thabethe* 2011 2 SACR 567 (SCA) para 20; *S v De Klerk* 2010 2 SACR 40 (KZP) para 14; *S v Jimenez* 2003 1 SACR 507 (SCA) para 20.

6 From the judgment in *S v Zinn* 1969 2 SA 537 (A) 540G–H.

Judge Harms, however, in but a small number of judgments, provided much material for any sentencing scholar and judicial officer to think about. These judgments were notable for the extent to which he referred to a wide range of local and international sources on sentencing. Undoubtedly, the most influential judgment is that of *S v Mhlakaza*.⁷ It also reflected the culmination of Judge Harms's views on sentencing. These views were expressed first in a minority judgment in *S v Mafu*,⁸ when he was still an acting judge of appeal. Still in the same capacity, his views found their way into a majority judgment in *S v Nkam-bule*.⁹ This was one "of the few decisions of the 1990s to view from a fundamental perspective the [sentencing] considerations that have become trite".¹⁰

2.2 The interests of society

There is no indication that Judge Harms ever intended the judgments noted above to amount to a radical departure from the standard principles. With regard to the triad of *Zinn*, they mainly affected an understanding of the third element, namely the interests of society. Without breaking new ground, Judge Harms focused on re-establishing "the interests of society" as a separate ingredient of an appropriate sentence and not simply as an expression of society's revulsion or abhorrence of the crime.¹¹

There are quite a few important reasons for this emphasis. To begin with, it was evidently never the intention of *Zinn* to equate the interests of society with the views of society. Furthermore, the interests of society can usually be established objectively. Conversely, public opinion is transient, causing Harms JA to warn that¹²

"[t]he object of sentencing is not to satisfy public opinion but to serve the public interest. (Compare Ashworth & Hough 'Sentencing and the Climate of Opinion' [1996] *Crim LR* at 776; *S v Mafu* 1992 (2) SACR 494 (A) at 496g-j.) A sentencing policy that caters predominantly or exclusively for public opinion is inherently flawed. It remains the court's duty to impose fearlessly an appropriate and fair sentence even if the sentence does not satisfy the public".¹³

7 1997 1 SACR 515 (SCA). This judgment received wide support in academic writings. See Lidovho "A critical look at the past and current release policy of the Department of Correctional Services" 2003 *SACJ* 163 163–177; Bekker "The maximum length of imprisonment imposed by South African courts after the constitutional abolition of the death penalty: A comparative note on the position in the United States of America" 2000 *CILSA* 136 136–157; Reddi "Sentencing" 1997 *SACJ* 350 354.

8 1992 2 SACR 494 (A).

9 1993 1 SACR 136 (A).

10 Terblanche *A guide to sentencing in South Africa* (2007) 143.

11 See also *S v Makwanyane* 1995 3 SA 391 (CC) 431C–D and Cloete "Sentencing: Public expectations and reaction" 2000 *SALJ* 618 622: "But public expectation is not synonymous with public interest. It is the duty of the courts to serve the public interest."

12 *S v Mhlakaza* 1997 1 SACR 515 (SCA) 518e–g. This dictum has subsequently been cited repeatedly: see eg *S v Maseola* 2010 2 SACR 311 (SCA) para 13; *S v MM*; *S v JS*; *S v JV* 2011 1 SACR 510 (GNP) para 12; *S v Langa* 2010 2 SACR 289 (KZP) para 9; *S v O* 2003 2 SACR 147 (C) 157h–j; *S v Mphala* 1998 1 SACR 654 (W) 658f–i.

13 See also Cloete "Sentencing: Public expectations and reaction" 2000 *SALJ* 618 622.

Why would such a policy be inherently flawed? As Judge Harms noted in *Mafu*, “the public can often be rather vindictive and vengeful”.¹⁴ A court is not permitted to take such an approach.

Another reason why too much emphasis should not be placed on the views of society is that it is difficult for any individual to know what the views of society are. Just like every other person who works a full day, judges have limited exposure to the views of members of society. “The views of the majority of right-minded persons are not known to me,” Harms AJA noted quite correctly.¹⁵ Certain reactions might be picked up from newspaper reports, and some cases attract sufficient interest from interest groups to result in demonstrations outside the court. But even then the extent to which such reactions could be said to reflect that of “society” remains doubtful, at best. In the end, the sentencing judge will have to,

“in the words of Nienaber JA in *S v Majosi and Others* 1991 (2) SACR 532 (A) at 541, take into account the ‘perceptions, sensibilities and interests of the community’ (insofar as he can surmise what they are) but, in dispensing penal justice he is not only obliged to protect society against the accused but also to protect the accused against society. Cross *The English Sentencing System* 3rd ed at 201 pointed out that ‘(t)he position of the Judges is certainly a little ambivalent, for they claim to be the mouthpiece of the public and yet there are instances in which their views are probably more moralistic than those of a considerable sector, if not a preponderance, of the public’”.¹⁶

This does not mean that the views of society are of no consequence to the sentencing of offenders.¹⁷ However, Harms JA noted,¹⁸ the Constitutional Court’s approach in *S v Makwanyane*¹⁹ also applied in this instance:

“[P]ublic opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the court; the court cannot allow itself to be diverted from its duty to act as an independent arbiter by making choices on the basis that they will find favour with the public.”

It is acceptable for the court to take account of public feelings, as was expressed in *R v Karg*.²⁰ It is permissible to have the permanent removal from society of an offender as the main aim of sentencing, as long as a sentence is not grossly in excess of a sentence which would otherwise have been fair, merely for the sake of the deterrence of others.²¹ Fairness also demands a judicious approach, without anger; courts should, in the words of the classic English case *R v Sargeant*,²² “lead public opinion” instead of merely reflecting it.²³

14 *Mafu* 497a.

15 496h.

16 496h–497a.

17 See also *S v O* 2003 2 SACR 147 (C) 159a–b.

18 *Mhlakaza* 518g–h.

19 1995 2 SACR 1 (CC) paras 87–89.

20 See also *S v Gardener* 2011 1 SACR 570 (SCA) para 67; *S v Crossberg* 2008 2 SACR 317 (SCA) para 108; *S v Ncheche* 2005 2 SACR 386 (W) para 37.

21 *Mhlakaza* 519j–520b.

22 (1974) 60 Cr App Rep 74.

23 *Mhlakaza* 518i–j.

2 3 The purposes of punishment

Judge Harms also provided a valuable reassessment of the purposes of punishment.

2 3 1 Retribution

He noted that retribution should not be disregarded and that it did not have only a subsidiary role to play in the sentencing process.²⁴ As noted above, the view in *Karg* that retribution had yielded to deterrence is no longer the modern view. Still, courts are hesitant to embrace retribution, as in *S v Makwanyane*,²⁵ where Chaskalson P expressed the concern that moral outrage at serious crime could easily become a call for vengeance. Of course, nobody wants to justify a sentence based on the notion of “an eye for an eye”, Harms AJA noted in *Nkambule*.²⁶ For the kind of retribution that remains important he referred to his earlier assessment in *S v Mafu*, where he had noted that:²⁷

“[I]t may be useful to recall that retribution in this context means requital for evil done (*The Concise Oxford English Dictionary* (1990) *sv* ‘retribution’; Stockdale and Devlin *Sentencing* at 23), or, in the terminology of Du Toit *Straf in Suid-Afrika* at 102-5, ‘vergelding in verhewe sin’.”

2 3 2 Deterrence

Our courts often describe deterrence as the most important aim of sentencing.²⁸ In *Nkambule* Harms AJA reassessed the source²⁹ for this conviction. Effective deterrence, if this could be achieved through imposing a punishment, would definitely be “in the interests” of society.³⁰ However, he concluded that it is an oversimplification to state that deterrence is always the most important purpose of punishment.³¹ He also noted that criminologists have found that certainty of punishment, rather than its severity, is the main deterrent to crime.³²

Subsequently, in *Mhlakaza*, Harms JA accepted that, in light of the high levels of violence and serious crimes in South Africa, the focus of more severe sentences must inevitably be on retribution and deterrence,³³ rather than on, for example, rehabilitation. Despite acknowledging that general deterrence may not be effective, he accepted it as “according to judicial precedent, an important consideration”.³⁴ Still, he repeated the warning from *S v Skenjana*³⁵ that the deterrent effect of imprisonment is not always proportionate to its length.³⁶

24 *S v Nkambule* 1993 1 SACR 136 (A) 147c.

25 1995 2 SACR 1 (CC) para 129. See also Steytler *Constitutional criminal procedure* (1998) 408.

26 147c–e.

27 497c–e.

28 Cf the quote from *Karg* fn 3 above.

29 *R v Swanepoel* 1945 AD 444.

30 *Nkambule* 145d ff.

31 At 146d–e. See also Steytler *Constitutional criminal procedure* (1998) 408 (deterrence cannot be pursued “unbridled”).

32 *Nkambule* 146h.

33 *Mhlakaza* 519d.

34 519f–g.

The main issue in *Mhlakaza*, namely “whether sentences of imprisonment which are cumulatively far in excess of 25 years, are proper”,³⁷ was resolved based mainly on Harms JA’s assessment of deterrence. After the abolition of the death penalty in 1995, some judges started to impose ridiculously long sentences.³⁸ The judgment in *Mhlakaza* was instrumental in curbing this trend. In considering the appeal against the sentences of 47 and 38 years’ imprisonment imposed on the two appellants respectively, Harms JA found that a sentence of life imprisonment³⁹

“would have been fully justified not only in relation to the combined crimes, but also on the murder count alone (cf *S v Tcoeib* 1991 (2) SACR 627 (Nm); *S v Mhlongo* 1994 (1) SACR 584 (A) at 589–90). And, as was pointed out by Hefer JA in *S v Nkosi* 1993 (1) SACR 709 (A) 717g-i, such a sentence is more realistic and subject to more safeguards than extraordinarily long sentences of imprisonment”.

Importantly, he added that the courts must impose realistic sentences that are “not . . . open to the interpretation that they have been designed for public consumption or controlling the executive.”⁴⁰ A sentence of 47 years’ imprisonment exceeded “acceptable limits”.⁴¹

2 3 3 Rehabilitation

Rehabilitation (or reformation) is also one of the standard aims of punishment, and courts do hold, from time to time, that this is possible even with a long prison sentence.⁴² Judge Harms attended to rehabilitation in both *Nkambule* and *Mhlakaza*. In particular, he pointed out that rehabilitation becomes less important when the seriousness of the crime demands a long term of imprisonment, amongst other things in order to remove the offender from society.⁴³ The court is simply not in a position to predict the likely outcome of a long sentence.⁴⁴ Although the rehabilitative effect of long-term imprisonment has been doubted,⁴⁵ whether or not this is the case is not really important, as it is permissible to

35 1985 3 SA 51 (A) 54I–55A.

36 *Mhlakaza* 519g.

37 516f–g.

38 See eg *S v Nkosi* 2003 1 SACR 91 (SCA) para 9, referring to “Methuselah” sentences, being longer than the offender’s life expectancy.

39 523g–j.

40 524a–b.

41 524e–f. See also Steytler *Constitutional criminal procedure* (1998) 418: Just like a life sentence without parole, a long term of imprisonment “in excess of the prisoner’s life expectancy in order to preclude any prospect of parole” would be unconstitutional.

42 Eg *S v Nombewu* 1996 2 SACR 396 (E) 407; also *S v Ngongo* 1996 1 SACR 557 (N) 559.

43 *Nkambule* 147h; *Mhlakaza* 519h–i.

44 *Mhlakaza* 519h–i.

45 See also *S v Johaar* 2010 1 SACR 23 (SCA) para 21, with reference to *Mhlakaza*. Also, in the same vein, *S v MM*; *S v JS*; *S v JV* 2011 1 SACR 510 (GNP) para 12, referring to *S v Khumalo* 1984 3 SA 327 (A) 331F: “It is the experience of prison administrators that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of the prisoner.”

downgrade the purpose of rehabilitation when sentence is imposed for a really serious crime.⁴⁶

Despite what has been said above, rehabilitation remains an important sentencing consideration, *if* the sentence has the potential to achieve it.⁴⁷

3 THE POSSIBILITY OF PAROLE MAY NOT INFLUENCE THE SENTENCE

3.1 The general principles

All prisoners are entitled to be released from prison at the expiry of their sentences.⁴⁸ The detention and release of prisoners is a function of the Department of Correctional Services and is executed in terms of the legal framework provided by the Correctional Services Act 111 of 1998, which also provides for release on parole, in other words, release before the sentence is completed. Since parole is part of our criminal justice system, sentencers cannot ignore the possibility that the offender before them might be released on parole at some point in the future.

Sentencers are not permitted to attempt to influence this process. Nevertheless, from time to time it appears that a particular sentence has been increased in order to ensure a longer stay in prison for the prisoner. In other instances, the judicial officer has expressly ordered that the prisoner may not be released before a certain point in time.⁴⁹ Harms JA disapproved of such an approach in clear terms in *Mhlakaza*,⁵⁰ where he authoritatively restated the roles of the judiciary and the executive with respect to sentencing. In particular, he noted as follows:⁵¹

“The function of a sentencing court is to determine the maximum term of imprisonment a convicted person may serve. The court has no control over the minimum or actual period served or to be served . . . The lack of control of courts

46 See also Mujuzi “Life imprisonment in South Africa: Yesterday, today, and tomorrow” 2009 *SACJ* 1 20. In *S v Janssen* 2010 1 SACR 237 (ECG) para 17 the court noted the overcrowded situation in prisons and the lack of rehabilitative programmes; see also *S v Chipape* 2010 1 SACR 245 (GNP) para 36.

47 *S v Nkambule* 1993 1 SACR 136 (A) 147f; Terblanche *A guide to sentencing in South Africa* (2007) 165.

48 S 73(3) read with s 73(1) of the Correctional Services Act 111 of 1998.

49 See *S v Botha* 2006 2 SACR 110 (SCA) para 25.

50 520c–523b. See also, in connection with the fact that the judiciary is not the only branch of government with an interest in the sentences imposed on offenders, *S v Dodo* 2001 1 SACR 594 (CC) paras 23–24.

51 521d–e. See also, mostly with specific reference to *Mhlakaza*, *S v Matlala* 2003 1 SACR 80 (SCA) para 7 (Howie JA confirmed that a sentencing court “does not grade the duration of its sentences by reference to their conceivable pre-parole components but by reference to the fixed and finite maximum terms it considers appropriate, without any regard to possible parole”); *S v Nkosi* 2003 1 SACR 91 (SCA) para 9; *S v Bull*; *S v Chavulla* 2001 2 SACR 681 (SCA) para 22; *S v Siluale* 1999 2 SACR 102 (SCA) 106–107; *S v Mhlongo* 1994 1 SACR 584 (A) 589f–h; *Sevenster v S* [2002] JOL 9575 (C). Also *S v Williams*; *S v Papier* 2006 2 SACR 101 (C) para 8; Mujuzi “Unpacking the law and practice relating to parole in South Africa” 2011 *PELJ* 204 215–219; Steytler *Constitutional criminal procedure* (1998) 426.

over the minimum sentence to be served can lead to tension between the Judiciary and the Executive because the executive action may be interpreted as an infringement of the independence of the Judiciary (cf Blom-Cooper & Morris *The Penalty for Murder: A Myth Exploded* [1996] *Crim LR* at 707, 716) This question relating to the judiciary's true function in this regard is probably as old as civilisation (Windlesham 'Life Sentences: Law, Practice and Release Decisions, 1989-93' [1993] *Crim LR* at 644). Our country is not unique. Nevertheless, sentencing jurisdiction is statutory and courts are bound to limit themselves to performing their duties within the scope of that jurisdiction. Apart from the fact that courts are not entitled to prescribe to the executive branch of government as to how and how long convicted persons should be detained (see the clear exposition by Kriegler J in *S v Nkosi (1)*, *S v Nkosi (2)*, *S v Mchunu* 1984 (4) SA 94 (T)) courts should also refrain from attempts, overtly or covertly, to usurp the functions of the executive by imposing sentences that would otherwise have been inappropriate."

Harms JA also noted the "commendable and correct approach" by Erasmus J in *S v Smith*,⁵² where the latter stated that

"[d]ie bevoegdheid ten aansien van parool en begenadiging setel in die uitvoerende gesag. As dié dan nie na openbare wense geskied nie, dan moet die saak ministerieel of departementeel reggestel word; óf die Wetgewer moet ingryp. 'n Hof kan nie aan die uitvoerende of wetgewende gesag voorskryf nie; óf met die uitoefening van dié se bevoegdhede inmeng nie, tensy dit op onwettige wyse geskied. Ons kan wel waar paslik kommentaar lewer en selfs kritiek uitspreek. Die konstitusionele skeiding van uitvoerende en regterlike gesag moet egter eerbiedig word".⁵³

The fact is that no one knows in advance whether a specific prisoner will be released on parole and, if so, when.⁵⁴

I have noted elsewhere that the legislation and policies with respect to parole changes constantly, with the result that it is almost impossible for sentencing officers to obtain sufficient current knowledge for an informed decision of the sentences to impose, and that the "chances are excellent that the release policy when the prisoner is considered for release will differ from what it was when the sentence was imposed".⁵⁵ Harms JA gave an indication of these difficulties and changes in *Mhlakaza*.⁵⁶ But this judgment had hardly appeared in print when parliament replaced the applicable legislation through the Correctional Services Act 111 of 1998. This Act has already been amended several times since coming into operation.⁵⁷ On every occasion the amendments were complicated by the fact that different provisions came into operation on different dates, and often long after the relevant Act was promulgated.⁵⁸

52 1996 1 SACR 250 (E).

53 255e–g.

54 Terblanche *A guide to sentencing in South Africa* (2007) 216.

55 *Ibid* 216–217.

56 520h–521c.

57 See, specifically involving parole, the Correctional Services Amendment Act 25 of 2008 and the Correctional Matters Amendment Act 5 of 2011.

58 The amendments to s 73 effected by Act 25 of 2008 never even came into operation before they were amended by Act 5 of 2011: cf *S v Stander* 2012 1 SACR 537 (SCA) para 18 fn 17. For a good sense of the complicated nature of this legislation, see *Van Vuren v Minister of Correctional Services* 2012 1 SACR 103 (CC) paras 24–32.

Clearly then, parole should not influence the severity of the sentence.⁵⁹

3 2 Ordering a non-parole period

Since the judgment in *Mhlakaza*, the Criminal Procedure Act 51 of 1977 has been amended with the addition of section 276B,⁶⁰ in terms of which it is possible for regional and high courts to fix a non-parole period under certain conditions. This non-parole-period may “not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter”.⁶¹

One of the main difficulties with this provision is that it gives no indication when it might be appropriate for a court to fix a non-parole period. Several judgments on the issue referred to Harms JA’s exposition of the law and the division of powers in *Mhlakaza* in an attempt to find an answer to this problem.⁶² The difficulty is obvious: when a court decides on an appropriate sentence, based on the general sentencing principles, on what basis would it then decide also to fix a non-parole period? In particular, why would it make such an order only in some cases and not in all of them? No clear answer has yet presented itself, with the result that most judgments on the issue have held that a non-parole period should be fixed only in “exceptional circumstances”.⁶³ It remains unclear what such exceptional circumstances might be. In *S v Pakane*⁶⁴ the court noted that it had to that point “balked at fixing non-parole periods”, but it then succumbed to the temptation to do so. However, there was nothing in *Pakane* to justify keeping those offenders in prison for longer than any of the earlier or later cases that also involved extremely serious crimes, and where a non-parole period had not been fixed.⁶⁵ Not surprisingly, it has been held that “*Pakane* is most certainly no authority for an approach that sentencing courts should as a matter of routine determine non-parole periods as provided for by s 276B”.⁶⁶

The Supreme Court of Appeal subsequently also held in *S v Stander*⁶⁷ that despite the power granted by section 276B, “it remains generally desirable for a court *not* to exercise that power. . . . [G]enerally, courts are not equipped to make decisions about the parole of a prisoner at the time when sentence is imposed,” Snyders JA noted, having quoted *Mhlakaza* quite extensively.⁶⁸

59 See also *S v S* 1987 2 SA 307 (A) 313H–J; *S v Khumalo* 1983 2 SA 540 (N) 542A; Steytler *Constitutional criminal procedure* (1998) 378.

60 In terms of the Parole and Correctional Supervision Act 97 of 1997, which came into operation only on 1 October 2004, see Du Toit *et al Commentary on the Criminal Procedure Act* (1987, Service 48 of 2012) 29–10T.

61 S 276B(1)(b).

62 See *S v Pakane* 2008 1 SACR 518 (SCA) para 47; *S v Stander* 2012 1 SACR 537 (SCA) para 9; *S v Pauls* 2011 2 SACR 417 (ECG) para 10.

63 *Pauls* para 14; *S v Williams*; *S v Papier* 2006 2 SACR 101 (C).

64 Para 47.

65 Cf *S v Stander* 2012 1 SACR 537 (SCA) para 11.

66 *Pauls* para 14.

67 2012 1 SACR 537 (SCA) para 12 (emphasis added).

68 Para 9.

WHAT WOULD A MODERN VERSION OF *MHLAKAZA* HOLD?

It is a simple question with a difficult answer: has *Mhlakaza* stood the test of time or would current events and developments have resulted in a different judgment with a different outcome?

As should be clear from the discussion above, two aspects of the judgment are unlikely to be any different: (1) the imposition of very long prison sentences when life imprisonment should be imposed remains unacceptable; and (2) sentencing courts should not attempt to interfere with the release of prisoners.

The following summary of the facts of *Mhlakaza* from *S v Maseola*⁶⁹ is useful for current purposes:

“In *S v Mhlakaza and Another* there was an attack on a police officer involving a machine gun (and the shooting and wounding of members of the public). The two appellants who had been convicted on charges of murder, attempted robbery, possession of firearms, and possession of a machine gun were effectively sentenced to 47 and 38 years’ imprisonment, respectively.”

If the appellants in *Mhlakaza* committed their crimes on or after 1 May 1998,⁷⁰ they would today be sentenced in terms of the minimum sentences contained in the Criminal Law Amendment Act 105 of 1997. As the murder was committed in the course of an armed robbery, the prescribed sentence would be life imprisonment.⁷¹ It is submitted that these would have been the most likely sentences.

As far as the aims of punishment are concerned, *Mhlakaza* was succeeded by the investigation, discussion paper and report on sentencing reform by the South African Law Commission.⁷² I have previously summarised the Commission’s main proposals with regard to the basic principles and it is not inappropriate to repeat that summary here:⁷³

“Overall, the purpose of sentencing is stated as being to punish offenders for the offence of which they have been convicted.⁷⁴ Through this statement the draft legislation takes a clear stand in favour of retribution as dominant sentencing consideration.

The next general principle is that the *seriousness of the crime* should determine the severity of the sentence. The seriousness of a particular offence has to be established in relation to other offences, and not in a vacuum.⁷⁵ Proportionality

69 2010 2 SACR 311 (SCA) para 12. See also *S v Matolo* [1997] 4 All SA 225 (O) 229. Skeen (updated by Hoctor) “Sentencing” 24 *Lawsa* (2010) 510.

70 The legislation did not apply with retrospective authority and came into operation on this date: cf *S v Willemsse* 1999 1 SACR 450 (C); *S v Hlongwane* 2000 2 SACR 681 (W) 682i; Du Toit *et al* 28–18D–6.

71 S 51(1) of Act 105 of 1997, read with Part I of Schedule 2.

72 See South African Law Commission *Issue paper 11: Sentencing: Mandatory minimum sentences* (1997); South African Law Commission *Discussion paper 91: Sentencing (A new sentencing framework): Project 82* (2000); South African Law Commission *Report: Sentencing (A new sentencing framework): Project 82* (2000).

73 Terblanche “Sentencing guidelines for South Africa: Lessons from elsewhere” 2003 *SALJ* 858 859–860 (the footnotes have been partly retained, but renumbered and restyled for this essay; italics in the original text).

74 Cl 2 of the draft legislation.

75 Cl 3(1).

between all offences is, therefore, required. This second principle is refined by directly connecting it to two specific characteristics, namely the *degree of harmfulness* (or risk of harmfulness) of the offence and the *degree of culpability* of the offender.⁷⁶ Roughly speaking, this means taking into account the amount of harm involved (or potentially involved) in the commission of the crime, and the extent to which the offender can be blamed for this harm.

Subject to this primary principle of proportionality, the draft legislation also provides for an ‘optimal combination’ of aims towards which the sentence should strive. These aims are (1) restoring the rights of victims, (2) protecting society and (3) providing the offender the opportunity for a crime-free life.⁷⁷ Rather than requiring one of these aims to be selected, one should rather attempt to discover an optimal combination.”

These proposals, if accepted, would have a substantial effect on the purposes of punishment and yet they are not very different from Harms JA’s restatements in the cases discussed above.

The basic importance of the seriousness of the crime and finding a sentence in proportion to this seriousness remain unchallenged. However, by relating the seriousness of the offence to “the degree of harmfulness or risked harmfulness of the offence” and “the degree of culpability of the offender for the offence committed” the Commission’s proposals are substantially more specific than the current position. The two elements are also widely used internationally.⁷⁸ As a result, much has been written about “how harm should be understood, how the degree of harmfulness can be assessed, and how this degree of harm should be related to the offender’s culpability”.⁷⁹

The Commission also specifically chose not to include references to deterrence and rehabilitation in the triad of sentencing aims. It remains unproven that increasingly severe sentences reduce subsequent crime.⁸⁰

With respect to rehabilitation, although the proof is very considerable that punishment does not change behaviour, this does not mean that certain

76 Cl 3(2).

77 Cl 3(3). Points (2) and (3) encompass what would traditionally have been referred to as deterrence, prevention and rehabilitation, but with a different focus.

78 See eg *Solem v Helm* 463 US 277 (1983) 293–294; Ashworth *Sentencing and criminal justice* (2005) 102–103; s 718.1 of the Canadian Criminal Code (sentence to be proportionate to the gravity of the offence and the “degree of responsibility” of the offender); Jareborg “The Swedish sentencing reform” in Clarkson and Morgan (eds) *The politics of sentencing reform* (1995) 104–106 (the position in Sweden and Finland).

79 Simester and Von Hirsch *Crimes, harms, and wrongs: On the principles of criminalisation* (2011) 35–88. See also Terblanche *Research on the Sentencing Framework Bill: Report 4* (2008) 14.

80 O’Donovan and Redpath *The impact of minimum sentencing in South Africa* (2006) 30–33; Tonry “Crime does not cause punishment – The impact of sentencing policy on levels of crime” 2007 *SA Crime Quarterly* 13 18 (minimum sentence advocates claim they deter and promote consistency, but this is not supported by available evidence); “Crime rates generally show little responsiveness to changes in sentencing patterns.” Von Hirsch “Proportionality and progressive loss of mitigation: Further reflections” in Roberts and Von Hirsch (eds) *Previous convictions at sentencing: Theoretical and applied perspectives* (2010) 14.

interventions might not assist the offender towards “leading a crime-free life”.⁸¹ The following conclusion remains valid:⁸²

“How, then, could rehabilitation be a meaningful sentencing consideration? If the court is satisfied, through information presented to it, that the offender suffers from some mental illness or that treatment of a criminal’s criminogenic factors might be successful in preventing future crime, this information should impact on the decision about the appropriate sentencing option. Options requiring treatment or education, over which the court has control, should be investigated. However, rehabilitation and prison do not go well together and the court has no control over whether any prisoner might be subjected to any programme or not.”

When the crime is very serious, the aim of assisting the offender to lead a crime-free life can barely inform the court’s sentence and, instead, it could only become the responsibility of the Department of Correctional Services.

In this regard, then, there would be no different outcome in *Mhlakaza* – even if sentenced in terms of the “new” principles, the two appellants’ sentences would probably have been the same. But most cases that come before the courts for sentencing involve crimes that are not nearly as serious. For such crimes the framework proposed by the Law Commission and, to a lesser extent, the assessment of the aims of punishment by Judge Harms, would result in more rational and consistent sentences.

One cannot help but wonder whether Judge Harms might have been tempted to invoke some of the general principles of sentencing recommended by the Law Commission had *Mhlakaza* been written five years later than it actually had.

81 See Cilliers and Smit “Offender rehabilitation in the South African correctional system: Myth or reality?” 2007 *Acta Criminologica* 83 86; Ogloff and Davis “Advances in offender assessment and rehabilitation: Contribution of the risk-need-responsivity approach” 2004 *Psychology, Crime & Law* 229.

82 Terblanche *Research on the Sentencing Framework Bill: Report 4* (2008) 18.