THE PUNISHMENT MUST FIT THE CRIME: 
ALSO WHEN THE OFFENDER HAS PREVIOUS CONVICTIONS?

SS Terblanche
BJuris LLD
Professor, Department of Criminal and Procedural Law, UNISA

1 Introduction

The influence that previous convictions should have on the determination of an appropriate sentence is a feature that highlights the flaws of the South African sentencing system as well as, if not better than, any other aspect thereof. Most people appear to agree instinctively that heavier punishment is justified for an offender who repeatedly commits crime, especially when the repeated crime is of a similar kind. However, the extent of such increase and the principles on which such increase should be based are murky, at best. As a result there is no agreement on the extent to which previous convictions should increase the imposed sentence. Courts follow varying practices and long prison sentences are often imposed for what appears, at face value, to be a petty offence.

In this contribution I will consider the current South African practise and the reasons that are offered for increased sentences, and will follow that with a discussion of a more appropriate theoretical framework. In conclusion a submission is made containing a number of steps that should be taken in order to improve the current situation.

2 The South African practice regarding previous convictions

2.1 Introduction

The effect that previous convictions have on the sentence in any given case is largely determined by the discretion of the sentencing court. Little exists in our law by way of legislative guidance. If anything, the Criminal Procedure Act 51 of 1977 contains even less guidance than its predecessor. Some of the


2 This article is partly based on my paper “Reforming Sentencing in order to increase Sentence Consistency” delivered at the SLTSA Conference held in Pietermaritzburg, 16-07-2009.
principles established by the Criminal Procedure Act 56 of 1955, in particular that a previous conviction should lose its aggravating effect after ten years, continue to play a substantial role in current practice, despite the fact that it was not re-enacted.  

In this part I will consider current legislative provisions affecting the role of previous convictions in sentencing, as well as certain general principles that are intended to guide the sentencers’ discretion. A selection of recent cases is then considered, in an attempt to distil yet further principles that might assist in guiding this discretion.

2.2 Legislative guidance

Section 271(4) of the Criminal Procedure Act 51 of 1977 requires of the sentencing court to take into account any previous convictions that the accused might have. It says nothing of the weight that the court should attach to this factor. Consequently, courts generally simply repeat that the relevant factor was taken into account. In essence the extent to which previous convictions increase the sentence is purely within the discretion of the sentencer, based on the circumstances of the case.

The previous Criminal Procedure Act 56 of 1955 had a similar provision, but also included provisions related to previous convictions that were not repeated in the current Act. For example, section 303ter provided that previous offences should, in general, not be held against the offender after ten years without further convictions. Although this provision was not re-enacted, it did result in the general approach that previous convictions lose their relevance if a substantial period, usually ten years and beyond, have passed without any further crimes being proved against the offender.

The legislature has at times passed various other provisions related to previous convictions. From the 1960s to 1980s penalty clauses often distinguished between first offenders and those with previous convictions. For example, the Stock Theft Act 57 of 1959 provided for a maximum term of

---

5 See the discussion that follows below.
7 See S v Mqwathi 1985 4 SA 22 (T) 25. The details of this provision were not as simple as stated here, but they are not of current importance. Although s 271A of the Criminal Procedure Act 51 of 1977 provides that certain previous convictions fall away, it is limited to lesser offences (see Terblanche Guide to Sentencing 84-85). In addition, s 271B-271E contains extensive provisions on, and conditions for, the expungement of criminal records, including a long list of offences related to former apartheid legislation, offences based on race in other legislation, and offences that would now be considered unconstitutional. None of these provisions provides basic principles regarding how previous convictions should affect sentencing.
8 S v Mqwathi 1985 4 SA 22 (T) 25. The cases specifically referred to in this regard are S v Van der Poel 1962 2 SA 19 (C); S v Makhu 1974 1 SA 578 (O).
imprisonment for a second or subsequent offence of three years, whereas the maximum for a first offender was two years.\(^9\) Other examples could be found in the Arms and Ammunition Act 75 of 1969, where section 39(2) provided for a maximum of a fine or imprisonment not exceeding three years, but for a second or subsequent conviction the maximum imprisonment increased to five years.\(^10\)

Further indications of the effect of previous convictions can be seen in the Criminal Law Amendment Act 105 of 1997,\(^11\) which prescribes specific increases for more previous convictions. For example, in the case of Part II offences,\(^12\) a first offender should be sentenced to at least fifteen years’ imprisonment, while a second offender has to be sentenced to at least twenty years’ imprisonment (a 33% increase). Two or more previous convictions raise the minimum sentence to 25 years’ imprisonment (an additional 25%).\(^13\) These increases are the highest in the case of Part III and Part IV offences, where double the sentence prescribed for a first offender is prescribed for a person with two or more previous offences. It is not possible to explain where the specifics regarding these increases come from. It is unlikely that they are based on firm principle.\(^14\)

### 2.3 Judicial pronouncements on previous convictions

There is no doubt that our courts consider relevant and recent previous convictions to be an aggravating factor.\(^15\) In fact, apart from the seriousness of the current crime, the presence or absence of previous convictions is possibly the most important determinant of the eventual sentence.\(^16\) Therefore, it is not surprising that it is frequently said that the presence of previous convictions is a strongly aggravating factor.\(^17\)

---

\(^9\) S 13 (before its repeal by the Judicial Matters Amendment Act 62 of 2000). See, for example, \(S \ v \ M b o y o\ 1986 1\) SA 420 (O) 423.

\(^10\) Other current examples include the following: Plant Breeders’ Rights Act 15 of 1976 (s 44(3): maximum six months for a first offender, maximum twelve months for a second or subsequent conviction); Agricultural Pests Act 36 of 1983 (s 13(1): a fine of not more than R4 000 or maximum imprisonment of five years for certain first offenders, double that for a second or subsequent conviction); Genetically Modified Organisms Act 15 of 1997 (s 21(2): maximum two years for a first offender, double that for a second or subsequent conviction); Telegraph Messages Protection Act 44 of 1963 (s 2(1): a fine of not more than R100 for first offenders, double that for a second or subsequent conviction).

\(^11\) Hereafter referred to as “the minimum sentences legislation”.

\(^12\) Examples include aggravated forms of robbery, economic offences involving more than certain specified amounts, certain drug offences, and so on.

\(^13\) Since these prescribed sentences are minima, the sentencing court would be entitled, within its discretion, to increase its sentence for offenders with more than two previous convictions.

\(^14\) They were not discussed during the legislative process – see SS Terblanche \textit{Research on the Sentencing Framework Bill (Report 4)} (2008) 23-24.

\(^15\) This statement is almost trite – cf \(S \ v \ H o k a p e\ 1961 3\) SA 13 (N) 16; \(S \ v \ C o e t z e r\ 1970 2\) SA 228 (N) (where a previous conviction was thought to present an “overwhelming difficulty” to the appeal against a sentence).

\(^16\) Cf \(S \ v \ M o j a z a\ 2006 2\) SACR 296 (T) 297f; Terblanche \textit{Guide to Sentencing} 81.

\(^17\) See also VG Hiemstra \textit{Suid-Afrikaanse Strafproses} 4 ed (1987) 598.
However, one explores the case law in vain for a principled discussion as to why previous convictions should raise the sentence and, in particular, by how much. Our courts sometimes give reasons for their increased sentences, but these reasons do not provide principles or guidelines that could be employed by other courts during sentencing. The standard judgment in this regard is *R v Zonele*:\(^{18}\)

“Generally speaking, previous convictions aggravate an offence because they tend to show that the accused has not been deterred by his previous punishments, from committing the crime under consideration in a given case.”

Therefore, the offender should now be punished more severely.\(^{19}\) Additional reasons for increased punishment include that the previous convictions show that the offender has a bad character or criminal propensity,\(^{20}\) or that the offender did not heed the warning implicit in the previous sentence.\(^{21}\) All these reasons are firmly grounded in the trite utilitarian theories of punishment.

As to how previous convictions should affect the sentence, judicial pronouncements fall roughly within one of two categories. Some sentencers will emphasise that the offender did not learn the requisite lesson and therefore needs to be punished more severely. This approach often leads to heavy sentences even for petty crimes.\(^{22}\) It also appears to permit a more severe punishment to be imposed for every subsequent offence.\(^{23}\) Again, this foundation is clearly utilitarian.

The other approach is that the offender should primarily be punished for the committed crime and that the sentence has to be in proportion to the committed crime, even if this sentence might be (somewhat) higher as a result of the previous conviction.\(^{24}\) According to the latter approach, which is retributive in nature, the eventual sentence for a petty offence should still

---

\(^{18}\) *R v Zonele* 1959 3 SA 319 (A) 330D. See also, for example, *S v Machinga* 1991 1 SACR 348 (Nm) 349; *S v Mars* 1992 2 SACR 567 (A); *S v Marske* 1992 1 SACR 667 (A) (in the latter cases it was only quoted by state counsel, but clearly applied by the court).

\(^{19}\) Cf *S v Mahachi* 1993 2 SACR 36 (Z) 44.


\(^{21}\) Cf *S v Morebudi* 1999 2 SACR 664 (SCA) 668; *S v Coetzee* 1970 2 SA 228 (N) 229.

\(^{22}\) For older examples, see *S v Terblanche Die Boete as Strafvorm* (1991) 62-63. See also *S v Chakanetsa* 1981 1 SA 876 (ZAD) 877 (magistrate’s sentence focused too heavily on previous convictions); *S v Dickson* 1981 2 SA 807 (E) 809 (magistrate sentenced D to ten years’ imprisonment for selling one zol of dagga); *S v Beja* 2003 1 SACR 168 (SEC) (eighteen months’ imprisonment for theft of an electric cord worth R85); the examples discussed below following n 25.

\(^{23}\) See the case law discussed below from n 26. Some judgments stress that the subsequent sentences need not necessarily be more severe: *S v Mogara* 1990 2 SACR 9 (T) 15; *S v Kalane* 1988 2 SA 206 (D) 208, where the court stated that many magistrates believe that the punishment should be increasingly severe with each subsequent conviction, but this belief is a serious misdirection; *S v Williams* 1993 2 SACR 674 (A) 677g (where the court stated that the repeated imposition of imprisonment, when it did not have the desired effect on the offender, may serve no purpose). However, these are relatively rare.

\(^{24}\) Cf *S v Baartman* 1997 1 SACR 304 (E) 305d-f (where the court stated that a petty crime remains so regardless how often it is repeated; while it may be justifiable to impose escalating sentences on offenders who keep offending, this can be done only up to a certain point); *S v Beja* 2003 1 SACR 168 (SEC) 171 (where the magistrate attempted to justify the sentence on the basis of its prevalence and the accused’s seven previous convictions, the High Court stressed that the sentence must always be proportional to the crime). Also Du Toit “Previous Convictions” in *Commentary on the CPA* 27–2:

“Although previous convictions play an important role in the imposition of sentence, it should not be [overemphasised] at the expense of the seriousness of the offence for which the accused is to be sentenced and the circumstances under which it was committed.”
reflect the fact that the offence was petty. In order to determine which of these approaches dominate the current legal position, it is instructive to consider some recent case law.

In *S v Matlotlo* the accused was convicted, on his plea of guilty, for shoplifting an item worth R50. Owing to his five similar previous convictions the trial magistrate sentenced him to three years’ imprisonment. On review Bosielo J found that his criminal record showed that the offender needed suitable rehabilitation to help him overcome the problem of kleptomania. As a result half of the sentence was suspended, on condition that the offender submitted himself to appropriate treatment.

In *S v Mzazi* the magistrate sentenced the 60-year-old accused to three years’ imprisonment for theft of mutton worth R19 from a butchery. The offender had a long list of previous convictions, stretching over a period of 36 years. The magistrate accepted that the crime was relatively petty, but expressly attached no weight to the small value of the stolen goods or the nature of the crime. On review the High Court emphasised that every sentence must be fair and just, also taking the seriousness of the crime into account. It then imposed eight months’ imprisonment, half of which was conditionally suspended.

In *S v Scheepers* the appellant did not have a long criminal record, but she reoffended within about six months after being given suspended imprisonment for a range of similar offences (she was now convicted on two charges of theft). The trial court and the court a quo reasoned that Scheepers had been given a previous chance, and that now neither another suspended sentence nor correctional supervision was appropriate. In view of the proximity of the previous conviction, the Supreme Court of Appeal essentially agreed. Nevertheless, Cameron JA held, three years’ imprisonment was severe, avoidable and “shocking in its disproportion to the thefts”. The Court corrected this disproportionality by imposing the imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, and by ordering the concurrent running of the sentences, resulting in an effective term of two years’ imprisonment.

In *S v N* the trial magistrate sentenced N to eight months’ imprisonment for the theft of one white bread. N was only 15 years old at the time, but he had three previous convictions for theft and one for housebreaking. Plasket J criticised the sentence, saying that “[i]t should have been obvious to the magistrate that in these circumstances direct imprisonment, even for

---

25 2004 2 SACR 549 (T).
26 2006 1 SACR 100 (E).
27 Para 3.
28 Para 4 (referring to *S v Baartman* 1997 1 SACR 304 (E)).
29 2006 1 SACR 72 (SCA). For the details of the offence, see also S Terblanche “Case Reviews: Sentencing” (2006) 19 SACJ 378 386.
30 *S v Scheepers* 2006 1 SACR 72 (SCA) para 11.
31 Para 12.
32 2007 2 SACR 398 (E).
a boy with behavioural problems manifested by the accused, was entirely inappropriate and disproportional to the crime.\textsuperscript{33} The offender in \textit{S v Stenge}\textsuperscript{34} was convicted of stealing two packets of chicken, worth R34, from a supermarket. After conviction in the district court (he pleaded not guilty), he was committed to the regional court for sentencing, where he was declared a habitual criminal.\textsuperscript{35} This sentence resulted directly from his list of previous convictions: over twenty years from 1982 he was convicted on fifteen occasions for nineteen offences involving dishonesty. On appeal the \textit{Stenge} majority found this sentence to be unjust and absurd,\textsuperscript{36} and replaced it with two years’ imprisonment, wholly suspended.\textsuperscript{37} Clearly, the previous convictions still resulted in a lengthy prison sentence, even if it was suspended. Allie J wrote as follows in this connection:\textsuperscript{38}

> “The appellant spent 21 months in prison. It is inconceivable that a person should have spent \textit{any time in prison} for the commission of such a petty offence. The number of times that the offence is being committed does not make it less petty ... If the appellant had not filed a notice of appeal, he may have spent a minimum of seven years and a maximum of 15 years in prison for stealing chicken to the value of R33,81. That, with respect, can never accord with justice ... \[T\]he appellant is effectively being punished for his previous convictions as well as for the present one ... “.

The minority had a different take on these requirements.\textsuperscript{39} Murray AJ accepted that the sentence must fit the crime and that previous convictions could not serve to justify a sentence totally disproportionate to the crime.\textsuperscript{40} However, he claimed, this principle does not always apply. Whether it does depends on the facts of the case, and in the present case it did not apply.\textsuperscript{41} He added that the seriousness of the crime should not only be determined by the value of the stolen goods – a low value does not mean the punishment must always be light.\textsuperscript{42} It appears as if these principles had to bow to a different need, as Murray AJ explained that the offender is not really punished for the new offence, but is removed from society in order to incapacitate him and for the protection of society.\textsuperscript{43}

In \textit{S v Oktober}\textsuperscript{44} the offender was sentenced to twelve months’ imprisonment for selling a bottle of Black Label beer without the necessary licence.\textsuperscript{45} It was her third offence of this nature, with the second preceding the current offence by only a few months. Bozalek J pointed out that this sentence was in

\textsuperscript{33} \textit{S v N} 2007 2 SACR 398 (E) para 5 (again, reference is made to \textit{S v Baartman} 1997 1 SACR 304 (E)).
\textsuperscript{34} 2008 2 SACR 27 (C).
\textsuperscript{35} A declaration as a habitual criminal means incarceration of at least seven years before release on parole can even be considered. JJ Joubert (ed) \textit{Criminal Procedure Handbook} 8 ed (2007) 292. It would normally be the same in the case of someone sentenced to fourteen years’ imprisonment (Joubert (ed) \textit{Criminal Procedure Handbook} 290).
\textsuperscript{36} \textit{S v Stenge} 2008 2 SACR 27 (C) para 23.
\textsuperscript{37} Para 3.
\textsuperscript{38} Paras 22-24 (emphasis added).
\textsuperscript{39} Paras 44-48.
\textsuperscript{40} This is clear from the quotation in \textit{S v Beja} 2003 1 SACR 168 (SE) para 59; as well as Murray AJ’s reaction thereto in \textit{S v Stenge} 2008 2 SACR 27 (C) para 60.
\textsuperscript{41} \textit{S v Stenge} 2008 2 SACR 27 (C) para 60. The judge did not explain what it was about the facts of this case that made the principle inapplicable.
\textsuperscript{42} Paras 61-62.
\textsuperscript{43} Para 64; the need to protect society against the appellant is reiterated in para 66.
\textsuperscript{44} 2009 1 SACR 291 (C).
\textsuperscript{45} A contravention of s 154(1) of the Liquor Act 27 of 1989.
conflict with reported judgments on this kind of offence,\(^\text{46}\) and expressed the view that “it does not necessarily follow that in cases of repeated convictions the accused must be visited with a sentence of direct imprisonment”.\(^\text{47}\) The triad of Zinn has to be applied and all three elements brought “into account”. Considering all the factors in this case the imposed sentence was considered “entirely disproportionate, if not misplaced”.\(^\text{48}\)

2.4 An assessment of the current position

The preceding examination of our case law at random gives clarity on one point only, namely that the sentences that are likely to be imposed on offenders with previous convictions are completely unpredictable. Even when the presiding officer stressed the importance of a sentence that is in proportion with the crime, many petty crimes still resulted in substantial sentences of imprisonment. Even if part or the whole of such a sentence is suspended,\(^\text{49}\) this does not change the fact that the imposed sentence was imprisonment.\(^\text{50}\)

When the sentencers emphasise utilitarian purposes of punishment, such as deterrence or the protection of society, they appear to be of the opinion that there could be no upper limit to such sentence.\(^\text{51}\) However, when principles of proportionality and desert are emphasised, an upper limit is reached very quickly. As is clear from the discussion above, the two approaches lead to very different sentences.

The court in S v Oktober stressed that the general principles of sentencing, in the form of the triad of Zinn, must be used to determine an appropriate sentence, also in the presence of previous convictions.\(^\text{52}\) In what follows an assessment is made whether such an approach will result in more consistent sentences.

2.4.1 The seriousness of the crime

Most commentators in South Africa appear to accept that the crime as such does not actually become more serious because of any previous convictions. The majority in S v Stenge specifically said the pettiness of an offence is not affected by the number of times it is repeated;\(^\text{53}\) the court in

---


\(^{47}\) S v Oktober 2009 1 SACR 291 (C) 294b-c.

\(^{48}\) 294f.

\(^{49}\) Case law regularly stress that the softening effect of the suspension of a sentence does not permit a sentence out of all proportion to the crime. Cf S v Slabbert 1998 1 SACR 646 (SCA) 647; S v Ndaba 1993 2 SACR 633 (A) 638. At most a sentence on the heavy side of the spectrum of appropriate sentences is permitted. Cf S v Setnoboko 1981 3 SA 553 (O) 558; Terblanche Guide to Sentencing 351 for a more complete discussion.

\(^{50}\) For example, S v Matloola 2004 2 SACR 549 (T) still resulted in three years’ imprisonment for theft of an item worth R50; the court in S v Mzazi 2006 1 SACR 100 (E) still imposed eight months’ imprisonment (of which half was suspended) for a small amount of meat.

\(^{51}\) The main objection against utilitarian aims of punishment is exactly that it does not place an upper limit on punishment (A von Hirsch & A Ashworth Proportionate Sentencing: Exploring the Principles (2005) 15 132-133).

\(^{52}\) S v Oktober 2009 1 SACR 291 (C) 294. See also S v Muggel 1998 2 SACR 414 (C) 421.

\(^{53}\) S v Stenge 2008 2 SACR 27 (C) para 22. The minority disagreed, but provided no alternative standard.
\textit{S v Baartman} expressed a similar point of view;\textsuperscript{54} and the South African Law Commission discussed the presence or absence of previous convictions as a factor “beyond the seriousness of the offence”.\textsuperscript{55} In addition, of all the reasons that courts normally advance for the increase in sentences because of previous convictions, not one includes that the crime as such had become more serious.\textsuperscript{56} In principle, this approach appears to accord with common sense. Not one of the offenders in the examples discussed above did anything different with their umpteenth offence than they would have done as a first offender. Stenge still stole two packets of chicken from a supermarket; N still stole a loaf of white bread; Matlolo still took mutton from a butchery without paying. In each case the immediate loss to the victim stayed the same. Not one court found that the criminal’s \textit{modus operandi} had changed based on his previous experience or expertise, with the result that not even that argument could support a claim that the subsequent crimes are more serious than it would have been for a first offender.

And yet, as is discussed below, in international sentencing theory there appears to be agreement that repetition does actually increase the seriousness of the crime.\textsuperscript{57}

\subsection*{2.4.2 The personal circumstances of the offender}

As indicated above our courts usually consider the offender to be deserving of increased punishment following repeated offending. This is particularly evident in reasons such as that the offender has a bad character or a criminal propensity,\textsuperscript{58} or that the offender did not heed the warning implicit in the previous sentence.\textsuperscript{59} In sentencing theory these are hardly sufficient reasons for increased punishment. However, someone who regularly offends society’s norms can rightly be considered more blameworthy for the crimes they commit. At least, they can no longer argue that they merely succumbed to human frailty or that their offence was a once-off transgression.\textsuperscript{60}

\subsection*{2.4.3 The interests of society}

Mostly, the arguments for increased punishment rest in the failure of previous sentences to actually deter the offender from further crime. This purpose is eventually aimed at the protection of society against repeat offenders. Unfortunately, the protection of society through the employment
of imprisonment is neither as predictable nor as effective as one might think at first.\footnote{See text at n 79 below.} In fact, deterrence is at its weakest in case of repeat offenders, who have already proved that they are not deterred by punishment.\footnote{See S v Fredericks 1994 1 SACR 651 (C) 653 (imprisonment had not worked in the past, so why should it be imposed again?).} It also becomes problematic when society has to pay as much as \text{R}314 000, at the current value of money,\footnote{The average cost of incarceration in October 2010 was calculated at \text{R}123 per prisoner per day: see Department of Correctional Services “Incarceration Levels as on the Last Day of 2010/10” (2010) \textit{Statistical Information \langle http://www.dcs.gov.za/AboutUs/StatisticalInformation.aspx \rangle} (accessed 08-02-2011), and a habitual criminal has to be detained for at least 7 years (s 73(6) of the Correctional Service Act 111 of 1998).\footnote{S v Muggel 1998 2 SACR 414 (C) 421f; S v GN 2010 1 SACR 93 (T) para 12; S v Blignaut 2008 1 SACR 78 (SCA) para 6; S v Shasí 2007 1 SACR 247 (SCA) para 223.} for protection against one petty thief, such as Mr Stenge.

### 2.4.4 Other considerations

Of course, the triad of elements from \textit{Zinn} do not exist in isolation, but have to be balanced with one another.\footnote{Cf the magistrate in S v Mzazi 2006 1 SACR 100 (E); the minority view in S v Stenge 2008 2 SACR 27 (C) paras 61-62.} This principle by itself makes untenable arguments that the pettiness of the crime is (or should be) disregarded.\footnote{S v Rabie 1975 4 SA 855 (A) 863A-B; S v Holder 1979 2 SA 70 (A) 75A; S v De Kock 1997 2 SACR 171 (T) 197g-h; S v Banda 1991 2 SA 352 (B) 335A-B.} There is no room in the current sentencing principles that any of the three elements of the triad may be completely disregarded – each much always be given an appropriate weight in the sentencing process.\footnote{MA Rabie & MC Maré Rabie & Strauss: \textit{Punishment: An Introduction to Principles} 5 ed (1994) 21 (the debt to society is said to be paid); EM Burchell, JRL Milton & JM Burchell \textit{Burchell and Hunt: South African Criminal Law and Procedure I} 2 ed (1983) 68 (retribution is found \textit{inter alia} in “[c]espiation or atonement, which aims at wiping clean the offender’s own moral slate”).}

The triad of \textit{Zinn} are not, of course, the only considerations that are of importance in connection with the determination of an appropriate sentence. Other considerations include the foundation of retribution, as a requirement of just and fair punishment and the constitutional requirement of proportionality.

### 2.4.5 Retribution or desert

In every case involving previous convictions it has to be assumed by the court imposing the latest sentence, that the offender received a sentence appropriate to the wrongdoing for each of the previous convictions. From a retributive (just deserts) perspective, his slate of wrongdoing had been wiped clean after serving each previous sentence, or put differently, his debt to society has been paid.\footnote{S v Muggel 1998 2 SACR 414 (C) 421f; S v GN 2010 1 SACR 93 (T) para 12; S v Blignaut 2008 1 SACR 78 (SCA) para 6; S v Shasí 2007 1 SACR 247 (SCA) para 223.} To impose increasingly severe sentences for the subsequent offences could be
argued to amount to double punishment for what lies in the past and to objections based on double jeopardy.68

2.4.6 Proportionality

The requirement of proportionality between the sentence and the crime has gained constitutional importance since 1994, but its finer details have not yet become settled in our law.69 An early version of this requirement read that the punishment must fit the crime.70 The main question, within the current context, is whether the proportion should exist between the sentence and the crime itself (the strict sense), or whether it should exist between the sentence and every aspect of the crime, the criminal and the interests of society (the wider sense). It could be argued that such differentiation is normally of no consequence. However, if the proportionality is required only with respect to the crime, then a severe sentence, such as a number of years’ imprisonment, for a petty crime would be in breach of the proportionality requirement; if proportionality is required with respect to the crime in the wider sense, then factors outside the crime itself (such as repeated offending) could result in a more severe sentence based on the interests of society or the offender’s propensity for crime. The fact is that one cannot state that our law follows one approach or the other. Proportionality as a constitutional principle related to sentencing has so far been addressed most directly in relation to the minimum sentences legislation.71 Importantly, the Constitutional Court stated in S v Dodo, that

“[t]o attempt to justify any period of penal incarceration, let alone imprisonment for life as in the present case, without inquiring into the proportionality between the offence and the period of imprisonment, is to ignore, if not to deny, that which lies at the very heart of human dignity”.72

Earlier in the judgment the court explained that “offence” should, in the context of the relationship between the offence and the period of imprisonment, be seen as consisting

68 The fact that the offender received appropriate sentences for the previous offences remains a moral argument against increase sentences for subsequent offences. See Australian Law Reform Commission (ALRC) Sentencing (ALRC 44) (1988) para 172. More severe punishment for the second offence means that the offender is punished for the first offence again. However, few, if any, courts have so far accepted the argument that this position amounts to unconstitutional double jeopardy. See Bourne v R (1983) 21 MVR 216 (BCSC); Canadian Legal Information Institute “Section 11(h)” (1996) Canadian Charter of Rights Decision Digest <http://www.canlii.org/en/ca/charter_digest/s-11-h.html> (accessed 03-09-2009), indicating that the increased sentence is “premised on the view that repetition of the offence evidences contempt by the accused for his first conviction”. Cf also L Jordaan Aspects of Double Jeopardy LLD Unisa (1997) 330, where it is stated that the most important value underlying the rule against double jeopardy is the accused’s interest in finality.


70 S v Rabie 1975 4 SA 855 (A) 861; S v B 1996 2 SACR 543 (C) 555c-d; S v Mjiware 1990 1 SACR 388 (N) 389; S v Baartman 1997 1 SACR 304 (E) 305; S v Twala 1979 3 SA 864 (T) 879.

71 Proportionality is often mentioned merely in the general sense of the word, rather than in a sense that could be seen as stating the constitutional principle – cf S v Smith 2003 2 SACR 135 (SCA) para 5; S v Maseko 1982 1 SA 99 (A) 102E-G; S v Mafu 1992 2 SACR 494 (A) 497 (a certain proportionality should exist between the crime and punishment).

72 S v Dodo 2001 1 SACR 594 (CC) para 38, referring to Prinsloo v Van der Linde 1997 3 SA 1012 (CC) para 31.
“of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender”.73

On the face of it this dictum refers to the first two elements of the Zinn triad only. However, in S v Mahomotsa74 the court found that, since the prescribed life imprisonment (for rape)75 “would be disproportionate to the crime, the criminal and the legitimate interests of society,” a departure from the prescribed sentence was justified. This amounts to a direct link between proportionality and all three elements of the triad. And when proportionality is required to an offence in the wide sense, then it means nothing other than that the sentence must be appropriate, considering all the circumstances. As a guideline this is not useful.

3 Considering foreign law as a foundation for improved principles

3.1 International discussion of theory

It is not only in South Africa that the theoretical underpinning for increasing sentences based on previous convictions has long been absent. Most Western legal systems accept that previous convictions result in more severe sentences, but the practical effect of such convictions varies greatly from one jurisdiction to the next.76

It is not the intention to give a full account of all the arguments that have been proposed in theoretical discussions for justifying punishing repeat offenders more severely. That has been done in several contributions. What follows is merely a brief summary of these discussions.77

As in South Africa the commentators’ point of departure directly influence their point of view. Utilitarians have little difficulty justifying increased sentences for persistent offenders. Roberts explained as follows:78

“For the utilitarian purposes of special deterrence and incapacitation, the link between past and future offending is unambiguous: previous criminal conduct is predictive of future offending. Research on the prediction of criminal [behaviour] has repeatedly demonstrated criminal record to be the single best predictor of future offending.”

73 S v Dodo 2001 1 SACR 594 (CC) para 37 (emphasis added).
75 In terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997.
From this perspective the harsher sentence is justified by the fresh offence, since the first sentence was too lenient to achieve its deterrent or preventative purpose. This rationale allows a more severe sentence to be imposed for each subsequent offence, and is also known as the cumulative principle, and it requires that a close link exists between the previous and the current offence.\(^{79}\) The validity of this principle is obviously closely related to the validity of the utilitarian purposes of punishment, such as whether offenders are actually deterred by increasingly severe punishment.\(^{80}\) Studies by the English Home Office show that this approach actually targets lesser crimes and that it results in heavy punishment for such crimes, while sentences for serious crimes are not nearly as heavily affected.\(^{81}\)

The justification is more difficult from the desert perspective, but most modern desert theorists see a limited role for it, usually in the form of the “progressive loss of mitigation” model.\(^{83}\) In terms of this model a first offender’s sentence should be reduced, as being a first offender is seen as a mitigating factor. The mitigation is progressively lost with reoffending, which means that the heavier sentence is not the result of an actual premium added to the sentence of a repeat offender.\(^{84}\) However, the gravity of the latest offence determines the upper limit to which a sentence could be increased and the criminal record cannot raise the sentence above this limit. In determining the gravity of the offence, in terms of international practice, the culpability of the offender represents one of the factors to take into account.\(^{85}\) Roberts shows why previous convictions actually increase such culpability and, therefore, the seriousness of the crime.\(^{86}\)

3.2 Examples of international practice

3.2.1 Introduction

It is not only in South Africa that the way in which the sentencing system deals with previous convictions is open to criticism.\(^{87}\) In fact, it is not easy to find a
jurisdiction that could be showcased as having an ideal solution. Nevertheless, it is useful to consider the way in which a number of foreign jurisdictions deal with the issue.

3.2.2 United States of America

The effect of prior convictions is set out explicitly in American grid style guidelines systems. In these systems a prior criminal record and the seriousness of the crime are the only factors that determine the sentence. A few examples will explain how these systems factor in the previous convictions.

In the federal sentencing system, which applies to a relatively small portion of the criminal cases in the United States, the following position applies. The sentencing grid contains offence severity levels, forming the horizontal rows, numbered in Arabic numerals increasing in severity from Level 1 to Level 43. The other axis, forming the columns, consists of the criminal history scores. The scores are calculated and then grouped into six different groups, numbered in roman numerals, from Criminal History Category I to VI. The presumptive sentence length is given at the intersection of the rows and columns, in a range of months. The first offence level that uses imprisonment even for first offenders is offence level 13. In combination with Criminal History Category I, the presumptive imprisonment is 12 to 18 months, rising to 33 to 41 months with Category VI. At Offence Level 37 a Criminal History Category I gives presumptive imprisonment ranging from 210 to 262 months, increasing to from 360 months to life in Category VI. These increases

---

88 This statement is particularly true of the main historical source of our sentencing law, namely England and Wales. Its criminal justice policies over the last few decades are noted for its inconsistencies and frequent changes (cf M Cavadino & J Dignan Penal Systems: A Comparative Approach (2006) 62-63). Despite considerable experience with sentencing guidelines, whether in the form of guideline judgments or guidelines from the Sentencing Guidelines Council (Ashworth Sentencing and Criminal Justice 33-35), there are no useful guidelines on the treatment of previous convictions and even less of an example to follow in its most recent legislative provision of the topic (s 143(2) of the Criminal Justice Act 2003; Ashworth Sentencing and Criminal Justice 191-201; JV Roberts “Impact of criminal history on sentencing: Recent developments in England and Wales” (2004-2005) 17 Federal Sentencing Reporter 171).

89 Roberts “Role of Criminal record” in Crime and Justice 319. This contribution specifically excludes a discussion of the more common mandatory sentences following previous convictions, such as the so-called “three-strikes-and-you’re-out” provisions. These systems operate completely outside any notion of proportionality and are therefore of no use from a South African perspective. See, in general, J Greene “Getting Tough on Crime: The History and Political Context of Sentencing Reform Developments leading to the Passage of the 1994 Crime Act” in C Tata & N Hutton (eds) Sentencing and Society: International Perspectives (2002) 43 43-64.


94 At lower levels the presumptive sentence for a first offender would be a non-custodial sentence. There are several inconsistencies in the federal grid. For example, the increases are more pronounced in the case of less severe offences than more severe offences. Also, at the lowest and the highest offence severity levels the presumptive sentence remains unaltered through all the criminal history categories.
amount to roughly a doubling of the presumptive sentences for the highest category of previous convictions.

Minnesota employs a much simpler grid, although it now uses a separate grid for sexual offences. The offences are contained in only nine severity levels, numbered in roman numerals. In case of a Severity Level I offence the presumptive sentence is 12 months’ imprisonment for a first offender, rising to 19 months’ imprisonment for someone with a Criminal History Score of 6 or more. In the case of a level IX offence (for example, second degree murder) a first offender’s sentence starts at 306 months, while the sentence of someone with a Criminal History Score of 6 is 426 months (an increase of 39%). In the more punitive grid for sexual offences, the lowest crime level sentence is 12 months for a first offender, rising to 36 months’ imprisonment with a Criminal History Score of 6 or more. At the severest level the corresponding increase is from 144 months to 360 months. Whereas the normal grid provides for increases of up to about 40% for previous convictions, the factor increases to three times in the case of sexual offences.

Kansas has a separate grid for drug and “non-drug” offences. The non-drug offences grid contains ten severity levels, with the most serious offences rated as category I and the least serious category X. Previous criminal history is divided into nine groups ranging from group A to group I. Group I applies to first offenders (although it includes people with one misdemeanour). The presumptive sentence for such first offender for a category X offence is 6 months’ imprisonment, increasing to 8 months’ imprisonment for an offender with “3+ non-person felonies” and 12 months’ imprisonment for an offender with “3+ person felonies”. At the other end of the scale the presumptive sentence for a first offender for a category I offence is 155 months’ imprisonment, increasing to 234 months’ imprisonment for an offender with “3+ non-person felonies” and 620 months’ imprisonment for an offender with “3+ person felonies”. These increases amount to a doubling for less severe offences, increasing to a fourfold increase in the case of the severe offences.

3.2.3 The Netherlands

The Dutch criminal-justice system has developed a rather sophisticated system of sentencing guidelines. I have elsewhere explained the workings of this system:

“The offender’s basic offence is awarded a predetermined number of points (for example, 60 points in the case of breaking into a home). As the next step consideration is given to reducing or increasing this number by a variety of mitigating or aggravating factors affecting the basic offence. Each of these factors has also been assigned a certain number of points. Thereafter a number of factors affecting sentencing in general is taken into account... If the offender has one previous conviction, the number

of points is increased by half, and doubled if there are more previous convictions. The total number of points, called sanction points, determines the sentence. Generally, one sanction point amounts to a fine of €22, or one day’s imprisonment. However, imprisonment should only be requested if it would amount to more than six months’ imprisonment (i.e., if the sanction points are more than 183). Otherwise a non-incarcerative sentence should be requested, such as a fine or community service\textsuperscript{100}.

It is notable that previous convictions are considered separately from other mitigating and aggravating factors. In addition, previous convictions cannot increase the proposed sentence beyond double that for a first offender.

3.2.4 Council of Europe

It is important to take note of the influential guidance provided by the Committee of Ministers from the Council of Europe, in connection with previous convictions. In part, it reads as follows:

\textit{D. Previous convictions}

1. Previous convictions should not, at any stage in the criminal justice system, be used mechanically as a factor working against the defendant.

2. Although it may be justifiable to take account of the offender’s previous criminal record within the declared rationales for sentencing, the sentence should be kept in proportion to the seriousness of the current offence(s).

3. The effect of previous convictions should depend on the particular characteristics of the offender’s prior criminal record. Thus, any effect of previous criminality should be reduced or nullified where:
   a. there has been a significant period free of criminality prior to the present offence; or
   b. the present offence is minor, or the previous offences were minor; or
   c. the offender is still young.\textsuperscript{101}

4. South African Law Commission proposals

The South African Law Commission, in its report on sentencing,\textsuperscript{102} acknowledged that the presence or absence of relevant previous convictions has to be considered “in the primary determination of a proportional sentence”.\textsuperscript{103} The report briefly referred to the current theoretical discussion on previous convictions in international discussions.\textsuperscript{104} However, it did not find it necessary to establish which of the theories to support, arguing that few people are concerned that it would be unfair to increase the proportionate sentence in the case of a repeat offender. In keeping with its main recommendations, the Commission maintained that offence seriousness should be “the primary consideration” in determining an appropriate sentence and that previous convictions “should merely be a modifier of the appropriate sentence”. It then made a pragmatic proposal: previous convictions should be taken into account when they are relevant and then only to a moderate degree.\textsuperscript{105} The moderate increase is intended as a means of limiting the extent to which the sentence should be increased.

\textsuperscript{100} Terblanche (2003) \textit{SALJ} 877.
\textsuperscript{101} Council of Europe Recommendation No R (92) 17: Of the Committee of Ministers to Member States Concerning Consistency in Sentencing (1992) 2.
\textsuperscript{102} SALC sentencing report para 3.1.6. See also Terblanche Sentencing Framework Bill 22-25.
\textsuperscript{103} SALC Sentencing Report para 3.1.6.
\textsuperscript{104} Para 3.1.6.
\textsuperscript{105} SALC Sentencing Report para 3.1.6; Terblanche Sentencing Framework Bill cl 3(4).
5 Conclusion

To a large extent this article barely scratches the surface of the theories and practices surrounding previous convictions. However, it is submitted that it provides a sufficient foundation for proposals towards more predictable, rational and consistent sentencing practices. These proposals are the following:

1. It should be accepted that the effect of previous convictions on the sentence cannot be left completely to the discretion of the sentencer. Some guidance is required. In the short term this guidance should come from an influential judgment that will amount to binding precedent, preferably from the Supreme Court of Appeal, in which it is stated categorically that the constitutional proportionality requirement leaves no room for severe sentences based on utilitarian considerations. Instead, the seriousness of the offence should always be the main determinant of the severity of a sentence. Such judgment should also state categorically that previous convictions could never raise the sentence for a petty offence beyond a level which could still be seen as being in proportion with the pettiness of the crime.

2. In addition, a similarly influential judgment is needed to give effect to the proposals of the South African Law Commission that the seriousness of the crime should be determined by the harm done or risked by the criminal act, combined with the criminal’s blameworthiness for that harm. Such an approach will give clear and practical effect to the statement in *S v Dodo* that proportionality is required between the sentence and all the factors regarding the nature of the offence, as well as the offender’s blameworthiness (or culpability). Although the nature of the offence will usually be the same whether it is a first or repeated offence, the repeat offender’s culpability is greater.

3. Eventually, these principles should be contained in legislation as sentencing principles in case law tends not to be taken as seriously as is the case with legislation.

4. In addition, it should be accepted in principle that only a moderate increase of the sentence appropriate for a first offender should be permitted in the case of previous convictions. There are many examples of increases that are limited, for repeat offenders, to double that which would be appropriate for a first offender. This is a particularly important limitation in the case of people convicted of repeated petty offences. If a greater increase is required, in the interests of the protection of society, that should be limited to more serious crimes, where such protection is clearly a greater imperative.

---

106 SALC Sentencing Report paras 3.1.4-3.1.12.
107 *S v Dodo* 2001 1 SACR 594 (CC) paras 37-38.
SUMMARY

Although there appears to be large-scale agreement that previous convictions, especially for similar crimes, justify the imposition of increased punishment, there are no clear principles on which such increase should be based in South Africa. Although the Criminal Procedure Act requires of the sentencing court to take previous convictions into account, it provides no guidelines regarding the extent of any increase. Nor is case law more specific. The result is wide discrepancies in sentences when the offender has previous convictions. Some judicial officers hold that the seriousness of the offence should still be the main determinant of the extent of the punishment, but in many cases previous convictions result in sentences many times more than what is justified purely by the seriousness of the crime. This happens, in particular, when the offence itself is rather petty. Having dealt with the problem that the presence of previous convictions are not consistently dealt with in our law, the article considers a variety of standards and practices that might be of assistance in addressing this problem. In the process various theories that have been advanced by some of the most knowledgeable theorists on sentencing are referred to, as well as practices as wide-ranging as those in the Netherlands, a few states in the USA and in South African legislation. Finally, the proposals by the South African Law Commission are considered, before a number of proposals are offered in order to improve the current situation.