

SENTENCING

SS TERBLANCHE*

GENERAL PRINCIPLES AND PROCEDURE

General principles

S v RO 2010 (2) SACR 248 (SCA) is important as far as sentencing is concerned, despite its deceptive brevity. The majority judgment by Heher JA contains a number of phrases dealing with general sentencing principles.

The case involved charges of rape and indecent assault against two brothers. The victims were a four-year-old girl and a six-year-old boy (for the facts, see 'Rape' below). The court begins its restatement of sentencing principles with the following:

'Sentencing is about achieving the right balance (or, in more high-flown terms, proportionality). The elements at play are the crime, the offender and the interests of society or, with different nuance, prevention, retribution, reformation and deterrence. Invariably there are overlaps that render the process unscientific; even a proper exercise of the judicial function allows reasonable people to arrive at different conclusions.' (para [30]).

The different elements of this dictum as they relate to general sentencing principles justify the following comments:

In the first instance, the right balance requires equilibrium between (by necessary inference) the crime, the criminal, and the interests of society. These are the trite triad of factors from *S v Zinn* 1969 (2) SA 537 (A) or, as often abbreviated, the triad of *Zinn*.

Secondly, the above triad appears to be equated with the purposes of punishment, being prevention, retribution, reformation, and deterrence. The quotation appears to state that the only (or main) difference between the triad and the four purposes of punishment is one of nuance. Such an equation has not, as far as I know, been made before and it is more common practice to add the purposes of punishment to the triad of *Zinn* as considerations to be considered in determining an appropriate sentence (SS Terblanche *A Guide to Sentencing in South Africa* 2 ed (2007) 155). The court also assessed the sentences that were the

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subject of the appeal, mostly against these purposes, despite briefly mentioning that the 'crime was loathsome and despicable' (para [31]). It is possible to account for the seriousness of the crime with reference to the purposes of retribution and general deterrence, and to include some of the personal characteristics of the offender under prevention or reformation. However, many personal factors cannot be accounted for with reference to any of the purposes of punishment. An additional problem is that these purposes are abstract in nature, which makes a balancing thereof virtually impossible.

Thirdly, proportionality is considered a pompous term for 'the right balance'. This is a somewhat sad assessment for a term that is commonly used with respect to sentencing principle and policy discussions (see, for example, A von Hirsch & A Ashworth *Proportionate Sentencing: Exploring the Principles* (2005)). It is also fairly simple English to say that the sentence should be in proportion to something else. The main problem is that it remains unexpressed what this 'something else' actually is or should be. A mere statement that the sentence should be in proportion to the seriousness of the offence, as proposed by the (then) South African Law Commission (*Report: Sentencing (A New Sentencing Framework)* (2000) paras [2.35], and [3.1.3]–[3.1.5]), is already of use.

Fourthly, it is not so much the overlap between the various elements that results in the process being 'unscientific'. Rather, different combinations of these elements often point towards different outcomes. For example, a focus on the person of the offender and his potential reformation may require a very different sentence to that demanded purely by the seriousness of the crime. What does render the process unscientific is that individual sentencers have such a wide discretion about which factors to include and which to omit, and that in most instances there are no starting points to guide this discretion towards a predictable outcome.

Fifthly, there is no doubt that 'even a proper exercise of the judicial function' permits different conclusions regarding a proper sentence to be reached by reasonable people (*S v Pieters* 1987 (3) SA 717 (A) at 734G–H). The value judgements involved in the process of sentencing guarantee that similar conclusions will remain largely unachievable. As stated by the court, achieving a balance is particularly difficult in the case of crimes that result from a 'combination of psychological problems, sexual assaults

and young victims' (para [30]), which results in right-thinking members of society reacting with outrage (para [31]).

Sixthly, the Supreme Court of Appeal referred to the need to assess the offender's moral blameworthiness (para [34]). This reference is unexceptional, but the judgment does not explain where such blameworthiness should be included in the balancing process. Again, it is submitted, the correct answer is provided by the proposals of the Law Commission, namely that the blameworthiness of the offender influences the seriousness of the crime committed by that individual offender (*Report* para [3.1.4]).

Seventhly, the court's treatment of the purposes of deterrence and rehabilitation (paras [38]–[39]) indicate that the influence of such purposes on a specific case should be based on the facts of that case. In other words, deterrence and rehabilitation cannot simply be assumed. In this case the court considered deterrence to be 'fanciful' and expressed doubt whether rehabilitation was at all possible (para [39]; see also *S v De Klerk* 2010 (2) SACR 40 (KZP) para [12], where the court stressed that imprisonment is not the only sentence that will serve as a deterrent; this may also be achieved by correctional supervision).

Two further judgments considered rehabilitation as a purpose of punishment. Both are reminders that the traditional views on the purposes of punishment are often not supported by the facts. *S v De Klerk* 2010 (2) SACR 40 (KZP) (by Gorven J, Swain J concurring) found, following evidence by an expert witness, that D was a candidate for rehabilitation (see 'Indecent assault' below). The expert testified that studies had shown that paedophiles do not respond well to incarceration and that some such prisoners turn violent. Paedophilia cannot be cured, but such offenders can be rehabilitated. Those paedophiles who feel remorse and who can show compassion towards others have the best prognosis (para [8]). Although imprisonment has the short-term advantage of protecting society while the offender is in prison, the incarceration might result in D becoming a greater threat to society in the long term. However, if the offender attends and cooperates with treatment programmes, the likelihood of recidivism is reduced. Additional elements increasing the chances of success are support from family members and being employed. All these elements were present in this case (para [9]). The second reminder came from *S v MM* 2010 (2) SACR 543 (GNP), although from a different perspective. Counsel for the defence had argued that the appellant was a candidate for

rehabilitation. The appellant had been convicted of raping one of his co-workers at Lovelife, 'an organization devoted to the propagation of appropriate sexual conduct in the community' (546g–j). As he was a teacher on the topic, instruction on proper sexual behaviour could not be a 'primary object' of an appropriate sentence.

Rehabilitation of offenders has been described by our courts as a purpose of punishment for decades, but it has not been established authoritatively what is meant here by 'rehabilitation'. As a result, magistrates and judges referring to rehabilitation during sentencing often give differing contents and meanings to the word, without knowing, understanding, or possibly caring. For many, the mere fact that a paedophile cannot be cured means that rehabilitation is impossible. In their minds rehabilitation equals cure. However, it is submitted, *De Klerk* is correct in focusing rehabilitation measures on a reduction of the risk of offending, in a situation where a psychiatric disorder was the primary cause of the crime.

Our courts, especially the lower courts, frequently confuse the interests of society with the demands of society. The reviewing judge in *S v Chipape* (2010 (1) SACR 245 (GNP) para [11]) had to remind the magistrate that permitting society to dictate what sentences should be imposed on offenders is more likely than not to bring the administration of the criminal justice system into disrepute. It is, for example, not acceptable to 'sacrifice the individual entirely' in order to protect society (para [13]). In fact, society expects of the courts to take mitigating circumstances into consideration (para [14]). Effectively, what the court said was that society expects the courts to impose fair sentences, based on all the considerations of the case. This notion is also evident from *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA):

'The sentence imposed on the accused is in my view inappropriate and distorted in favour of the accused without giving sufficient weight to the gravity of the offence and the interests of society. For a sentence to be appropriate it must be *fair to both the accused and society*. Such a sentence must show a judicious balance between the interests of the accused and those of society' (para [13], emphasis added).

Comparison with other cases

Our courts struggle to decide whether the sentences imposed previously for crimes similar to that currently before them, should

be considered when determining an appropriate sentence, and this is an issue that is not applied consistently at all levels. The main cause of inconsistencies is sentencing principles that are at odds with one another: (a) that each sentence should be individualized, in other words, each case should be dealt with on its own facts; and (b) that sentences imposed for similar crimes should be consistent (Terblanche *op cit* (*Guide*) at 126–7). In earlier times individualization was the undisputed frontrunner. However, the need for greater consistency in sentences has in recent times come to the fore. Based on judgments such as *S v Jimenez* 2003 (1) SACR 507 (SCA), *S v Xaba* 2005 (1) SACR 435 (SCA), *S v McMillan* 2003 (1) SACR 27 (SCA), and *S v Nyathi* 2005 (2) SACR 273 (SCA), I concluded as follows elsewhere (Terblanche *op cit* (*Guide*) 129):

‘The current position . . . is that a sentencing court must consider sentences imposed for similar offences in the past, and must consider those judgments as *guidelines* for the imposition of its own sentence. Still, in so far as a current case might involve greater or lesser culpability than the case against which it is being compared, the current sentence will have to be comparatively more or less severe.’

A number of cases reported during 2010 employed comparable cases as guidelines (alternatively called ‘guides’ or ‘guidance’) for the sentences under consideration (such as *S v Coetzee* 2010 (1) SACR 176 (SCA) paras [16] et seq; *S v Mapipa* 2010 (1) SACR 151 (ECG) para [14]; *S v De Klerk* 2010 (2) SACR 40 (KZP) paras [18]–[26]; *S v PN* 2010 (2) SACR 187 (ECG) at 193–4; *S v Vika* 2010 (2) SACR 444 (ECG) paras [21]–[26] (contravention of s 1(1) of the Criminal Law Amendment Act 1 of 1988); *S v MN* 2010 (2) SACR 225 (KZP) paras [15]–[18]; *S v GL* 2010 (2) SACR 488 (WCC) paras [33]–[34]. In *De Klerk* (*supra* para [16]), the court even went as far as specifically requesting the parties to provide supplementary written argument dealing with comparable cases.

One judgment that appears recessive, is *S v Naidoo* 2010 (1) SACR 369 (KZP). The appellant was caught in a police trap, selling ‘loops’ of heroin on three different occasions (for the facts, see under ‘Drugs’ below). The appellant’s argument that comparable sentences were imposed in a number of cases involving much larger amounts of drugs fell on deaf ears. Steyn J aligned herself with the views of Van den Heever JA (in *S v Sinden* 1995 (2) SACR 704 (A)) that ‘. . . it is an idle exercise to match the colours of the case at hand and the colours of other cases with

the object of arriving at an appropriate sentence.’ This view is, of course, at odds with the trend in the 21st century.

Not every comparison of previous sentences is equally useful. As most South African crimes show wide differences in actual severity (or the harm that is caused in the particular instance), it serves little purpose to simply compare crimes and sentences without considering what the criminal in a comparable case really did. Unfortunately, this is what happened in *S v Coetzee* (2010 (1) SACR 176 (SCA) paras [16] et seq; see ‘Indecent assault’ below). The court referred to various cases involving indecent assault (for example, *S v R* 1993 (1) SA 476 (A); *S v D* 1995 (1) SACR 259 (A); *S v K* 1995 (2) SACR 555 (O); *S v R* 1995 (2) SACR 590 (A); *S v V* 1994 (1) SACR 598 (A); *S v McMillan* 2003 (1) SACR 27 (SCA); *S v O* 2003 (2) SACR 147 (C); and *S v Egglestone* 2009 (1) SACR 244 (SCA)). However, throughout this comparison reference is made only to the fact that an indecent assault was committed, generally the age of the victim, as well as the eventual sentence. Almost no assessment is made of what the criminal actually did, with the result that the judgment only reflects the sentences and that they were imposed for indecent assault, but none of the crucial elements that determine how serious the indecent assault had been in that particular instance. By contrast, the court in *S v De Klerk* (2010 (2) SACR 40 (KZP) paras [18]–[26]) compared other cases properly. It highlighted, for each comparable case, the core elements of the crime and a summary of the offender’s personal factors, ending with the sentence imposed in that instance. It is only with the inclusion of these details that the comparison with other sentences becomes a useful exercise.

Young offenders

The sentencing of young offenders often presents sentencing courts with particular difficulty. The reasons are not difficult to find and have been attested to in a number of judgments.

In *S v IO* 2010 (1) SACR 342 (C), the court repeated the conclusion reached previously in influential judgments that the constitutional era has brought considerable changes in the approach to the sentencing of children, especially with respect to imprisonment (para [8] (this judgment dates from January 2008)). Section 28 of the Constitution of the Republic of South Africa and the international instruments on which it is based required a change in sentencing principles (para [11]). This conclusion was

based primarily on the authority of cases such as *S v Nkosi* 2002 (1) SA 494 (W), *S v Brandt* [2005] 2 All SA 1 (SCA), and *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA). In particular, imprisonment should be a last resort but, if inescapable, then be limited to the shortest appropriate duration (para [12]). The court also acknowledged that the Constitution requires 'a degree of change in judicial mindset', and then highlighted the fact that the 'real difficulty is how to appropriately and on a case-by-case basis balance the factors enumerated in *Zinn* . . . without disregarding the peremptory provisions of s 28 of the Constitution. . .' (para [13]). However, the children's rights in section 28 are not absolute but subject to limitation in appropriate situations. In the present instance, a long term of imprisonment was inevitable (para [17]), in view of the seriousness of the crime, the fact that it was connected to gang retaliation, and the interest of society. That left only the question of the appropriate term of imprisonment to be imposed (for the facts, see 'Murder' below).

A factor that inevitably complicates the sentencing of young offenders is that a person is only a 'child' until the day he or she is eighteen years old. From that day such young offender can no longer claim the constitutional rights contained in section 28. However, it is a matter of simple logic that a person is not immature and easily influenced the one day, but adult and fully culpable the next. How young offenders, those aged eighteen, nineteen, and in their early twenties, should be treated, was the problem that faced the court in *S v PN* 2010 (2) SACR 187 (ECG). The full bench referred to the judgment of the Constitutional Court in *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC), where it was held that —

' . . . there is no intrinsic magic in the age of 18, except that in many contexts it has been accepted as marking the transition from childhood to adulthood. The Constitution's drafters could conceivably have set the frontier at 19 or at 17. They did not. They chose 18. . .' (para [39]).

The court in *PN* clearly focused on the latter part of this quotation, instead of the fact that the number eighteen is necessarily somewhat arbitrary, when it continued as follows (at 195a–c):

'The appellant, although youthful, is no longer a child. He cannot be said to be more "vulnerable or susceptible to negative influences and outside pressures" or that his character (like children under 18) is not yet fully formed and he therefore is "uniquely capable of rehabilitation", as put in paras [34] and [35] of the *Centre for Child Law* case

(supra). Had the appellant been two years younger, he could have been sentenced differently, but he is not. He was 19 when he raped B. Whereas his relative youth may be a mitigating factor, it does not, in my view, constitute a circumstance which would justify the imposition of a lesser sentence [in terms of the minimum sentences legislation]. The seriousness of the offence far outweighs the fact that he is a youthful first offender.'

It is submitted that this is not the way to approach this problem. There has to be a progressive lessening of the effect of youthfulness, especially when the crime is not committed with a substantial amount of violence. Before 1994, the age of eighteen was not a dramatic cut-off point, where the youthfulness of the offender suddenly lost all mitigating effect (*S v Nkosi* supra at 142–4: '... the common law has recognized the youthfulness of an offender as a weighty factor in consideration of the moral culpability of such an accused', and, '[t]he appreciation that juvenile delinquency does not necessarily lead to adult criminality and that it is frequently part of a phase of adolescent development has therefore been a consistent theme in the development of judicial policy on child sentencing'). And although the court in *IO* conceded that the appellant's 'relative youth may be a mitigating factor' it shirked its responsibility to actively consider this aspect. By imposing life imprisonment it clearly gave no weight whatsoever to the youthfulness of the appellant.

Accused primary caregiver for children

Following the judgment in *S v M (Centre of Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC), it was inevitable that 2010 would see more case law in which the principles established by the Constitutional Court required discussion and application.

In *S v GL* 2010 (2) SACR 488 (WCC), Bozalek J supplied a useful summary of the Constitutional Court guidelines in *M*:

'The first such guideline was that a sentencing court should determine whether an accused was a primary caregiver wherever there were indications that this might be so. Secondly, the court should ascertain the effect on the children of a custodial sentence when such was being considered. Thirdly, if the appropriate sentence was clearly custodial and the accused was a primary caregiver, the court should apply its mind to the question of whether it was necessary to take steps to ensure that the children would be adequately cared for while the caregiver was incarcerated. Fourthly, where the appropriate sentence was clearly non-custodial, it must be determined bearing in mind the interests of the children. Fifthly, if there was a range of appropriate sentences, the court must use the paramountcy principle

as an important guide in deciding which sentence to impose. The court held, further, that the two competing considerations, the importance of maintaining the integrity of family care and the State's duty to punish criminal misconduct, had to be weighed by the sentencing court' (para [18]).

Generally, this issue was raised by an appellant during an appeal against sentence. Invariably the court found that the offence was so serious that imprisonment was clearly the only appropriate sentence (for example, *S v Langa* 2010 (2) SACR 289 (KZP) para [11]; *S v EB* 2010 (2) SACR 524 (SCA) para [13]). Nevertheless, as specifically mentioned in *S v Naidoo* (2010 (1) SACR 499 (GSJ) para [22]), the court has to take into account that when sentencing an offender who is a primary caregiver, 'the form of punishment imposed should be the least damaging to the interests of the children, and that the best interests of the children are important guides in deciding which sentence to impose'. However, it is not clear how this 'guide' influenced the eventual sentence (for the facts, see *Theft* below).

A finding that incarceration is inescapable still leaves the sentencing court with the responsibility to ensure that the children are looked after. This problem is generally addressed with the assistance of probation officers or other experts. Thus, in *S v Langa* 2010 (2) SACR 289 (KZP), the court 'requested' the registrar to approach the Department of Social Development to investigate the circumstances of the six minor children and to ensure that they are properly cared for, that they remain in touch with the appellant as often as possible and that they are reunited with one another (presumably) after completion of the sentence.

Both in *S v GL* 2010 (2) SACR 488 (WCC) and in *S v EB* 2010 (2) SACR 524 (SCA) the courts were satisfied that the children were looked after by the other parent or close family members. In fact, in *GL*, the court was not convinced that the children would suffer more if the appellant was incarcerated than if he were sentenced to an alternative sentence (paras [31] and [38]–[39]). Despite this situation, the court ordered that the implementation of the sentence could be postponed by up to four weeks, if so requested by the appellant, to ensure that the necessary arrangements were made for the care of the children (para [40]). Whether this was a proper order is considered below (see *Procedure*).

Remorse

Remorse as a mitigating factor was addressed in a number of cases. Sometimes the mitigating effect of remorse was linked to

an increased probability of rehabilitation when the offender shows real remorse (*S v PN* 2010 (2) SACR 187 (ECG) at 194a–b and 195d–f: the appellant showed no remorse, he persisted with a ridiculous defence, and the possibility of rehabilitation is remote where the perpetrator does not take responsibility for his actions). It is useful to take a wider view in this regard, as ‘a truly remorseful offender is unlikely ever to repeat the crime’ (Terblanche op cit (*Guide*) at 204). When this is the case rehabilitation becomes irrelevant.

Appellants often claim that their pleas of guilty indicate their remorse. The main difficulty when a court is faced with such a submission is to determine whether the accused is not simply feeling sorry for himself (*S v Martin* 1996 (2) SACR 378 (W) at 383g–h; *S v Dembe* 2010 (1) SACR 360 (NCK) para [15.4]) — the appellant’s plea of guilty, after he had been caught in an undercover operation, indicated remorse only for himself). The courts, generally, do not give much credence to a plea of guilty when the evidence against the accused is strong and almost irrefutable (*S v Michele* 2010 (1) SACR 131 (SCA) para [7]). However, in *S v Chipape* (2010 (1) SACR 245 (GNP) para [17]), the court was satisfied that the accused took the court into his confidence with his plea of guilty.

Often, actions speak louder than words. A mere offer to repay unlawfully obtained money counts for very little, whereas immediate repayment is a strong indication of real remorse. In *S v Michele* 2010 (1) SACR 131 (SCA), the appellant had not repaid such money, although the appeal was heard six years after the offence had been committed. The court accepted counsel’s ‘suggestion’ that the appellants received bad legal advice from their previous legal representative not to repay the embezzled money (para [7]). However, by implication, it is the task of the offender to satisfy the court of his or her true remorse. It becomes all the more difficult when, several years after obtaining the money, it has not been repaid (ibid).

Courts are not easily satisfied by allegations of remorse, as is clear from the judgment by the court of appeal in *S v GL* 2010 (2) SACR 488 (WCC). Here, the court listed various factors that indicated that the appellant was not really remorseful (see *Culpable homicide* below). Despite claiming during the appeal that he had intended all along to write a letter of apology to the family of the deceased (his wife), he was only prepared to do so at the conclusion of the case against him (para [27]). However,

during the trial he persisted with a defence of self-defence, despite the fact that his life was clearly never in danger. Also, he falsely claimed, initially, that the family were the victims of a robbery, and went to considerable trouble to orchestrate this deception (para [28]).

S v De Klerk 2010 (2) SACR 40 (KZP) presents an example of the facts that brought the court to accept that the appellant was really remorseful. The appellant had been convicted of indecently assaulting young girls (see *Indecent assault* below) but, apart from pleading guilty (para [6]), he voluntarily entered into a treatment programme for paedophiles at his own expense (para [9]), he had informed the mother of the victims of his offence, and he voluntarily stepped out of the situation that gave rise to the offences (para [28]).

Effect of delays in finalizing the case

The general principle is that appeal courts normally decide appeals based on the facts as they were at the time of sentencing, unless justice requires that exceptional or peculiar later circumstances be taken into account (for example, *S v Roberts* 2000 (2) SACR 522 (SCA); *S v Karolia* 2006 (2) SACR 75 (SCA); *S v Michele* 2010 (1) SACR 131 (SCA) para [13]; *S v Jaftha* 2010 (1) SACR 136 (SCA) para [15]; *S v Le Roux* 2010 (2) SACR 11 (SCA) para [37]). A number of judgments by the Supreme Court of Appeal considered whether long delays in the finalization of an appeal are a factor that could be considered exceptional in terms of the abovementioned general principle. The court accepted as relevant the delays in *S v Michele* 2010 (1) SACR 131 (SCA) and *S v Jaftha* 2010 (1) SACR 136 (SCA), but found in *S v Le Roux* 2010 (2) SACR 11 (SCA) that the mere fact of long delays was not a reason to interfere with the sentence imposed by the trial court. As the outcomes of these judgments are not the same, there is a need to attempt to reconcile these differences.

In *Michele*, a delay of five years occurred, after the lodging of an application for leave to appeal, before the appeal was heard. The delay occurred when the application got lost in the 'administrative morass in the office of the registrar' (para [2]). The result was that the appellants were left in uncertainty about their futures for a period of six years, and it would have been unacceptable not to take this delay into account for the purpose of sentencing (para [13]; see also *Procedure* below).

In *Jaftha*, the delay was even longer. The appellant appealed against a prison sentence for drunken driving (see *Drunken*

driving below), which appeal was dismissed in 1999. However, neither the local magistrate's court nor the appellant was informed of this dismissal, and it was only in 2008 that the police arrived with a warrant for his incarceration. It was assumed on the appellant's behalf that he was in no way to blame for the delay (paras [6]–[7] and [16]–[17]). Even the State accepted that the ten-year delay was exceptional (para [16]). It also did not contest the appellant's evidence that, subsequent to his conviction, he realized that he had a drinking problem, stopped drinking, and created a successful business and a stable family life (para [19]). Under these circumstances, the court found, no purpose could be served by a prison sentence (para [20]).

In *Le Roux*, it took six years from the commission of the offence before the appellants were convicted and sentenced, and another seven years before the appeal was heard by the Supreme Court of Appeal. However, the appellants did not explain the last delay (of seven years), nor did they allege that their rights to a fair trial had been infringed in the process. As a result, the court found (para [37]) that it could not be said that the appellants provided any new facts (let alone exceptional facts) to justify a finding that the sentence should be reconsidered. This finding, the court held (para [39]), was supported by *S v Pennington* (1999 (2) SACR 329 (CC)), in which it was held that a delay in the hearing of a criminal appeal of itself does not infringe the right to a fair trial to the extent that the sentence should be set aside.

After discussing *Michele* and *Jaftha*, Reddi ('Recent cases: Criminal procedure' (2010) 23 SACJ 278–80) raised the following concerns:

'An analysis of the abovementioned two cases points to the possibility of a trend emerging in instances of appeals against sentences where lengthy periods of time intervene between the original sentencing and the hearing of the appeals. Based on these decisions it would seem that such a delay, especially where the sentence involves imprisonment, may be regarded as a factor warranting a departure from the general rule that only facts known to the court at the time of sentencing should be taken into account when deciding an appeal against the sentence imposed. If this is in fact the emerging trend then the impact on our criminal justice system is likely to be serious as it is a trite fact that lengthy delays in matters being heard in our courts are a daily occurrence especially where appeals are concerned. It is submitted that based on the precedent set in the abovementioned cases, increasing numbers of appellants who are sentenced to imprisonment can now argue that the undue delay in their matters being heard on appeal together with the uncertainty of knowing whether they will, at

the end of it all, face incarceration, justify the imposition of a more lenient sentence than that of the trial court.'

It is clear that the duration of the delay is not the main difference between these judgments, but rather whether the delay could be explained. If the delay was caused by the appellant, that factor that would certainly count against the appellant. Clearly, it would be a mistake for an appellant not to explain any delay, but it is notable that there did not appear to be any request by the Supreme Court of Appeal for the appellants in *Le Roux* to explain the delay.

Other factors affecting sentencing

Some attention was given in *S v Ndzima* (2010 (2) SACR 501 (ECG) paras [24]–[30]) to provocation (for the facts, see *Murder* below). Plasket J indicated that provocation is a mitigating factor, as acts performed under severe provocation are understood by ordinary human beings as understandable human reactions. Such actions are, to a certain extent, excusable (para [30]). The appellant fired a first shot in self-defence, and then shot the second attacker in anger while this person was running away. The court accepted that both these acts resulted from the 'severe' provocation. However, the appellant then basically executed both his attackers while they were lying helpless on the ground. This cold-blooded and vicious attack made 'the provocation, as a mitigating factor, pale to a significant degree' (para [25]). Actually, executing the deceased could not be regarded as 'excusable human reaction to the provocation' (para [30]).

Some attention was given in *S v Barendse* (2010 (2) SACR 616 (ECG) at 619) to the role of advanced age. Jansen J, writing for the full bench, explained that advanced age, like youth, is a factor that should be taken into account (at 619c–d). However, old age is a relevant factor for different reasons. The judgment quoted from *S v Heller* (1971 (2) SA 29 (A) at 55C–D), that old age 'evokes a note of compassion in considering the bleak recompense of imprisonment in the afternoon of his years'. In *Heller*, the appellant was 62 years old. In *Barendse* and the case referred to there (*S v HN* case nr CC5/08, unreported (ECP)), the offenders were in their 70s. For a person of that age a sentence of twenty years' imprisonment would be tantamount to a sentence of life imprisonment. The implication is that such a sentence should not be imposed unless it is the sentencer's actual assessment that life imprisonment is appropriate.

In *S v Dube* (2010 (1) SACR 65 (KZP) para [33]), the appeal court found that there was a 'striking disparity' between the

sentences it considered appropriate and those imposed in the trial court, mainly based on the fact that the accused spent two and a half years in detention awaiting trial.

In *S v Janssen* (2010 (1) SACR 237 (ECG) paras [13]–[15]), the court dealt again with the role of pathological gambling addiction in sentencing. The court followed the ratio in *S v Nel* 2007 (2) SACR 481 (SCA) that the fact that an offender is a pathological gambler cannot by itself be a mitigating nor a substantial or compelling circumstance (see the comments by M Carnelley ('Recent cases: Gambling law' (2010) 23 SACJ 439 at 452–3) on the approach followed in a certain jurisdiction in New York, in terms of which such offenders are diverted from the criminal process for compulsory treatment).

Cumulative effect of sentences

The charges in *S v Maseola* 2010 (2) SACR 311 (SCA) involved a range of offences — murder, unlawful possession of an automatic firearm and its ammunition, and dealing in this firearm. The court quoted (para [12]), with apparent agreement, from *S v Mhlakaza* (1997 (1) SACR 515 (SCA) at 523):

'The several convictions resulted from more or less the same event. It is therefore appropriate to assess what sentence I would have imposed for the murderous armed attack on a police officer involving a machine gun and the shooting and wounding of members of the public. I believe that a sentence of life imprisonment would have been fully justified not only in relation to the combined crimes, but also on the murder count alone. . . .'

Because of the range of offences involved in *S v Johaar* 2010 (1) SACR 23 (SCA), the respective courts found it difficult to ensure that the cumulative effect of the sentences was properly accounted for. Over a period of about five days during June 2001 the offenders (J, accused 2, and X, accused 3) committed a range of crimes that started with the carjacking of Donelly. The victim was robbed at gunpoint and then forced to accompany the accused on a trip from Cape Town to Mossel Bay and back. Several further robberies were committed, mostly at service stations involving the taking of cash. On their return to Cape Town, the offenders returned Donelly's car and the money that they robbed from him. The offenders (now accompanied by accused 1) then hijacked another car, robbed the driver of personal property, and again travelled to Mossel Bay, committing further robberies en route. The trial court (the Cape Town regional

court) convicted the accused on their pleas of guilty. J was convicted on all thirteen counts and sentenced to a total of 58 years' imprisonment, but an order that certain periods of the sentence had to be served concurrently had as result an effective term of 30 years' imprisonment. X, who was not present during all the incidents, was convicted of five counts and sentenced to 26 years' imprisonment, with an effective sentence of sixteen years' imprisonment. An appeal to the Cape High Court was unsuccessful. The only question that really needed to be answered in the Supreme Court of Appeal was whether the effective sentences imposed by the trial court were strikingly different to those that would have been imposed by the court of appeal (para [15]). The trial magistrate employed various mechanisms to counter the cumulative effect of the sentences, including ordering large parts of the sentences to be served concurrently, joining some charges for purpose of sentencing, and imposing much reduced sentences for several of the robbery counts (para [16]; see also JJ Joubert (ed) *Criminal Procedure Handbook* 9 ed (2009) 318). Considering all the circumstances in the case, the Supreme Court of Appeal held that there were no grounds for interfering with the imposed sentences (para [25]).

Procedure

It remains trite law that sentencing 'resides pre-eminently within the discretion of the trial court' (*Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) para [11]). A court of appeal is entitled to interfere with the sentence imposed by the trial court only in the event of a misdirection, or if the sentence induces a 'sense of shock', or if a 'striking disparity' exists between the sentence imposed in the lower court and the sentence which the court of appeal would impose, or the disparity between the sentence imposed and that which would have been imposed by the court of appeal is so marked that it might be described as "shocking", et cetera (*S v Dube* 2010 (1) SACR 65 (KZP) para [32]; *S v Michele* 2010 (1) SACR 131 (SCA) para [11]; *S v Coetzee* 2010 (1) SACR 176 (SCA) para [13]; *S v Janssen* 2010 (1) SACR 237 (ECG) para [11]; *S v Mdlongwa* 2010 (2) SACR 419 (SCA) para [29]; *S v IO* 2010 (1) SACR 342 (C) para [7]; *S v Nnasolu* 2010 (1) SACR 561 (KZP) para [48]; *DPP v Mngoma* 2010 (1) SACR 427 (SCA) para [11];

S v SM 2010 (1) SACR 504 (WCC) para [19] (majority); *S v PN* 2010 (2) SACR 187 (ECG) at 192a–b; *S v Khoza* 2010 (2) SACR 207 (SCA) para [86]; *S v GL* 2010 (2) SACR 488 (WCC) (paras [7]–[8]); *S v Ndzima* 2010 (2) SACR 501 (ECG) paras [11]–[12]; *S v Mqikela* 2010 (2) SACR 589 (ECG) para [3]).

In *S v IO* 2010 (1) SACR 342 (C), the court considered it necessary to repeat that not every misdirection warrants interference with the trial court's sentence. Such misdirection

'has to be material, ie . . . [engendering] "according to the dictates of justice" . . . a clear conviction that an error of such a nature, degree or seriousness has been committed that it shows directly or indirectly that the trial court failed to properly or reasonably exercise its discretion as regards sentencing. . . . It appears to be trite that a misdirection is material if the trial court has misconstrued the facts; has failed to take cognisance of factors that should have been taken into account; or it has over- or underemphasized an accused's personal circumstances in relation to other relevant factors' (para [9]).

It remains uncertain how substantial a difference has to exist between the trial court's sentence and that which would have been imposed by the court of appeal before such difference will be described as 'striking' or 'shocking'. In *S v Dube* 2010 (1) SACR 65 (KZP) the trial court sentenced appellant 4 to eighteen years' imprisonment for housebreaking. All the other offenders were sentenced to fifteen years' imprisonment. The court of appeal found these sentences to be strikingly different from the sentence it considered appropriate and replaced the sentences with fifteen and twelve years' imprisonment respectively. The difference of three years does not appear, on the face of it, to be 'strikingly different'. However, as the appellants had spent two and a half years in detention awaiting trial, the appeal court did say in its judgment that the actual effective sentences amounted to twenty and a half and seventeen and a half years respectively (para [34]), terms that would be more strikingly different from those that the court of appeal considered appropriate. However, since the court of appeal did not antedate its own sentences, these sentences were still only three years (about one sixth) less than those initially imposed.

The difference is clearer in *S v Michele* 2010 (1) SACR 131 (SCA) (for the facts see *Fraud* below). The trial court imposed seven years' imprisonment of which two years were suspended, whereas the Supreme Court of Appeal imposed four years' imprisonment, still with two of those years' imprisonment suspended. The court described such difference as of 'sufficient

disparity . . . for this court to interfere' (para [12]). At least in this instance the effective sentence was just more than half of the sentence originally imposed.

The backdating (or antedating) of a sentence following an appeal, in terms of section 282 of the Criminal Procedure Act 51 of 1977, received some attention in *S v RO* 2010 (2) SACR 248 (SCA). Section 282 permits a court of appeal (or review) to backdate any sentence of imprisonment that is imposed in the place of the sentence set aside after appeal, if the appellant has served any part of the original sentence. Such sentence may be backdated 'to a specified date', not earlier than the date on which the sentence was originally imposed (see also *S v Barendse* 2010 (2) SACR 616 (ECG)). In the present case the regional magistrate imposed a sentence of imprisonment, for rape, on 17 September 2002. As life imprisonment was prescribed in this instance, the magistrate did not at the time have the power to impose any sentence, but had to commit the case for sentencing to the High Court. As a result, the regional court's 'sentence' was set aside by the high court on 25 February 2005. The high court then imposed its own sentence and this was the 'original' sentence, the Supreme Court of Appeal held, that is referred to by section 282 (para [44]).

In *S v Senyolo* 2010 (2) SACR 571 (GSJ), the court backdated its sentence to 26 November 2007, the date on which the appellant was arrested. This order is a clear mistake, as the original sentence was imposed on 6 February 2009 (para [6]).

In *S v GL* 2010 (2) SACR 488 (WCC), the court ordered that implementation of the sentence be postponed by up to four weeks, if requested by the appellant, who was the children's primary caregiver. This postponement could be granted to ensure that the necessary arrangements were made for the care of the children (para [40]). A lower court, being a creature of statute, does not have the power to pass such an order. It is clear from *S v Mokoena* 1986 (3) SA 420 (T) 422 that magistrates' courts are limited to those powers explicitly provided by the Criminal Procedure Act. In *Mokoena*, the magistrate postponed the operation of the sentence of nine months' imprisonment in order to allow the offender first to attend an initiation school. There is no statutory provision that entitles any court to order that the implementation of a sentence of imprisonment may be postponed. It is doubtful whether even a high court has such power (cf *S v Visser* 2004 (1) SACR 393 (SCA) para [10]: as no statutory

authority is provided to reduce a period of periodic imprisonment in relation to payment of arrears maintenance moneys, such an order may not be given).

Obtaining information necessary for informed sentencing

The Supreme Court of Appeal revisited the role of the law of evidence during the sentencing phase, and the way in which this role affects the approach that the prosecutor and the defence should follow in presenting relevant information to the court, in *S v Olivier* 2010 (2) SACR 178 (SCA). Majiedt AJA considered it trite that formalism is not required during the sentencing phase, when a more inquisitorial approach is adopted (para [8]). The pre-sentence procedures are aimed at gathering as much pertinent information as possible regarding the offence, the offender and the victims. In this process the prosecutor, the defence and the sentencer all have a duty to ensure that a full picture is obtained. When it comes to uncontested issues, such as the personal circumstances of the accused, submissions from the bar are usually sufficient (para [9]). However, material facts, especially when they relate to the nature and circumstances of the offence, should generally be proved under oath (paras [8]–[9]). It is the duty of the prosecutor to indicate which facts are disputed. Prosecutors must assist the court in placing all aggravating and mitigating factors on record (para [10]). Many prosecutors are careless in this respect, and neglect to respond to *ex parte* statements from the bar that differ from the information in the docket. 'It is a practice which must be deprecated, since it does not serve the interest of the justice system,' the court warned (para [11]).

In the present case the appellant pleaded guilty and provided a substantial plea explanation. In addition (para [5]), his counsel submitted a written 'address on sentence', containing considerable detail on his personal circumstances, as well as a brief description of the crime. However, the appellant did not testify, despite the fact that the prosecutor disputed some of the facts and also called witnesses who contradicted some of the information in the written 'address on sentence'. As a result the trial court disregarded several of the mitigating factors included in counsel's address from the bar and the accused's written address (para [17]). The main problem was that these addresses raised several questions regarding the accused's *modus operandi* and his motives, as well as the degree of complicity of an accomplice

mentioned in the addresses (para [23]). These questions could not be answered as the appellant chose not to testify under oath and could, therefore, not be questioned about them.

Under the constitutional dispensation it is also relevant to enquire whether the accused's right to a fair trial has been violated when the court rejects factual information contained in the address on sentence (para [14]). Such enquiry is determined by considerations of fairness (para [15]). The accused has a right to adduce and challenge evidence, in terms of section 35(3)(i) of the Constitution. However, by electing not to give evidence, the defence cannot now complain that the right to a fair trial has been infringed (para [16]) (see also *S v RO* 2010 (2) SACR 248 (SCA) para [11]; *S v Coetzee* 2010 (1) SACR 176 (SCA) para [16]).

The Supreme Court of Appeal also indicated (para [16]) that the defence would have been fully entitled, after the prosecutor's address on sentence, to adduce evidence on sentence. This approach conforms to section 274(1) of the Criminal Procedure Act, which permits the court, 'before passing sentence, [to] receive such evidence as it thinks fit'. The normal practice is that evidence is received first, followed by the addresses on sentence, first by the prosecutor and then the defence, but fairness demands that a flexible approach be followed. In this respect the following submission by E du Toit et al (*Commentary on the Criminal Procedure Act* (Service 43, 2009) 28–3) bears repeating:

'It is important to note that the sequence of the *address* on sentence is regulated by s 274(2) and not the sequence in which evidence is to be presented. It is therefore submitted that the court will enjoy a discretion . . . to receive not only the evidence it thinks fit. . . , but also to make a ruling in respect of the sequence in which is to be received.'

In the final analysis, however, it always remains the duty of the presiding officer at a trial to ensure that all material facts relating to sentence are obtained, and the sentencer has to play an active role during the sentencing phase (*S v Chipape* 2010 (1) SACR 245 (GNP) paras [19]–[20]).

MANDATORY AND MINIMUM SENTENCES

General

In *S v SM* 2010 (1) SACR 504 (WCC), the court again acknowledged that the Criminal Law Amendment Act 105 of 1997 (in this part referred to as 'the Act') 'has dramatically changed the

sentencing regime for certain categories of offences in our law' (para [3]).

The amendments brought about by the Criminal Law (Sentencing) Amendment Act 38 of 2007 were considered in *S v Senyolo* 2010 (2) SACR 571 (GSJ). Considerable weight was given to the inclusion of the word 'discretionary' in the heading of section 51. Van Eeden AJ concluded (para [5]) that —

'... [t]his amendment confirms the discretion that courts have when it comes to sentencing, and that the discretion must be exercised when substantial and compelling circumstances are present. The legislator recognizes that sentence is imposed by a court exercising a discretion, and expressly lays down that no discretionary minimum sentence must be imposed when there are substantial and compelling circumstances not to impose it.'

In connection with the list of factors in the new section 51(3)(aA) that 'shall not constitute substantial and compelling circumstances', the court examined subparagraph (ii), which mentions 'an apparent lack of physical injury to the complainant'. It noted that such lack had never automatically been considered a substantial and compelling circumstance, but found that there was no rational reason why such information should be excluded altogether in the consideration of an appropriate sentence (paras [9]–[10]). I submit that this is correct. See also *S v Nkawu* 2009 (2) SACR 402 (E) (paras [14]–[17]), according to which any of the factors included in section 51(3)(aA) may, *in conjunction with all the other relevant circumstances*, result in a finding that substantial and compelling circumstances are present.

Procedure related to the Act

It is a surprising aspect of our criminal practice how often cases reach an appeal court when the minimum sentences legislation is clearly pertinent to the charge against the accused, but was not mentioned in the charge sheet. How the courts should deal with such an eventuality was first highlighted in *S v Legoa* 2003 (1) SACR 13 (SCA) and *S v Ndlovu* 2003 (1) SACR 331 (SCA). There is no rule that the legislation can never be applied unless mentioned in the charge sheet, although such mention is certainly advisable. Terblanche (op cit (*Guide*) at 46–7) summarized the position, with relation to the requirement that the trial must always be fair, as follows:

'So far two situations have crystallized where there would be a clear indication of unfairness. The first is where the accused is misled by the

charge sheet into believing that the state is relying on a different sentencing regime. The second situation is where the accused is unrepresented.'

This issue arose again in *S v Langa* 2010 (2) SACR 289 (KZP). The majority (per Gorven J) concluded the following from *Ndlovu*:

'Although Mpati JA used the words "pertinently be brought to the attention of the accused" [in *Ndlovu*], I do not understand by that anything more than that the court should be satisfied that, at an appropriate time, the accused was aware of such an intention on the part of the State, however it may have come to his or her attention. This was also the thrust of the approach in *Legoa*. . . . As indicated above, *Legoa's* case gave, as one reason for not requiring the charge-sheet to specify this, that the accused may acquire the requisite knowledge in other ways. Whether this is the position in the case before a court, is clearly a factual enquiry which considers substance and not form. There can, therefore, be no *numerus clausus* of ways in which the accused acquires the requisite knowledge' (para [22]).

In *Ndlovu*, the court also indicated that the State's intention to employ the minimum sentences should ideally be made known from the start, but it did not state such ideal as a rule. In *Langa* (para [23]), the court noted an apparent consensus that if this information is only provided to the defence after conviction, that is too late. An accused needs to make important decisions on how to conduct his defence, such as whether to obtain legal representation, whether to testify, which witnesses to call (see *S v Makatu* 2006 (2) SACR 582 (SCA) para [7]), whether to plead guilty and thus get the advantage of being considered remorseful, and so on. None of these decisions can be made if the information about the minimum sentences has not been made known by the State. Whether the accused had the requisite knowledge depends on the facts of the case (*Langa* para [25]). In the present case the first time any mention was made of the minimum sentences regime was when the presiding officer indicated, after conviction, at the start of argument on sentencing, that life imprisonment might be relevant here (paras [15]-[18]). This was not timeous, and there were no other indications that the State would rely on this legislation (paras [27], [33]).

The court in *Langa* (para [25]) also agreed that the mere fact that the accused is legally represented does not mean that the State is inevitably not required to make it clear that it will be relying on the minimum sentences (see also *S v Chowe* 2010 (1) SACR 141 (GNP) paras [22]-[23]). Had it been different, one would have to question how an accused could properly instruct

his counsel about the way in which the defence should be conducted without proper information regarding the sentencing.

Offences involved

Both the trial court and the court of appeal in *S v Vika* 2010 (2) SACR 444 (ECG) assumed that the minimum sentences apply to contraventions of section 1(1) of the Criminal Law Amendment Act 1 of 1988. This provision criminalizes the commission of 'any act prohibited by law under any penalty', committed while the person's ability to appreciate the wrongfulness of the act is impaired because of the intake of alcohol or other substances with a similar effect. As far as the punishment is concerned, the provision makes the person 'liable on conviction to the penalty which may be imposed in respect of the commission of that act'. In this case the 'act prohibited by law' would have been murder and attempted murder. The minimum sentence for murder is fifteen years' imprisonment and this was the sentence considered as starting point for determining sentence in this case (para [2]).

The question is whether this interpretation is necessarily correct. While it is undoubtedly correct that, for murder, the minimum sentences legislation requires a sentence of at least fifteen years' imprisonment, the wording of the penalty clause in section 1(1) should be heeded. There is nothing compulsory in this wording. In fact, the declaration that the offender is 'liable' to the sentence that 'may' be imposed for murder would normally indicate a purely discretionary situation. The words 'liable to' was examined in *S v Toms; S v Bruce* 1990 (2) SA 802 (A), although in a somewhat different context. The court referred to various dictionary meanings of 'liable to' (at 812–13) and agreed that 'the words "liable to" in a provision such as the one under consideration would normally denote a susceptibility to a burden of punishment and not that the burden in question is mandatory or compulsory. . .' (at 813C; see also at 814C). Section 126A(1)(a) of the Defence Act 44 of 1957 provided that a person who refused to render military service would be 'liable to' certain sentences. The court found that was nothing in these words indicating 'that the legislature intended the imposition of a mandatory sentence'. In fact, the words were 'entirely consistent' with maintenance of the sentence discretion (at 811D–E). The court also explained that, if the legislature had a specific sentence in mind, it could have stated that in clear and unambiguous language (at 812A–E).

It is submitted that the court in *Vika* should have considered this issue more carefully and should not have assumed that

contraventions of section 1(1) of the Criminal Law Amendment Act are to be included within the provisions of the minimum sentences legislation. In the first instance, there is nothing mandatory in the penalty clause of this offence. Secondly, nothing prevented the legislature from including it in any of the parts of Schedule 2. Thirdly, the consistent findings that the statutory offence is less serious than the 'full crime' indicate that the offender should not actually be sentenced to the same sentence, but to a lesser sentence. Finally, these provisions should, if anything, be restrictively interpreted, in favour of rather than to the detriment of offenders (cf *S v Naidoo* 2010 (1) SACR 499 (GSJ) para [16]). In the process of such interpretation it should be remembered that the Act was intended as a temporary measure, covering only a limited number of offences, leaving the remainder within the discretion of the courts.

It was confirmed in *S v MM* 2010 (2) SACR 543 (GNP) that rape is covered by Part I of Schedule 2 when a victim is '... penetrated by the accused twice, with a short intervening interval of time' (at 545b–c), regardless whether the accused has been charged with only one count of rape. (See also *Substantial and compelling circumstances* below.)

Details of provisions

The detail of Part II of Schedule 2 to the Act was considered in *S v Naidoo* 2010 (1) SACR 499 (GSJ). The item under the spotlight was item (v), which includes several economic offences, such as theft, 'involving amounts of more than R500 000' and so on. The court held that the word 'amounts' should be interpreted as amounts of money (paras [7]–[20]), which means that the minimum sentences legislation is not applicable to any economic offence (offences 'relating to exchange control, extortion, fraud, forgery, uttering, theft or [corruption]') involving property other than money, regardless of the value of that property. As far as I am aware this is the first time that this view has been taken on this item (this is confirmed in para [11]), but it was specifically advanced by counsel for the appellant. In the process of coming to this conclusion the court used the following considerations: (1) the ordinary, grammatical meaning of the word 'amounts'; (2) the word 'bedrae' used in the Afrikaans text; (3) the meaning afforded the word 'amounts' in the only other case that could be found on such meaning (*Van Lochen v Associated Office Contracts (Pty) Ltd* 2004 (2) SA 247 (W)); (4) the use of the word 'value' in other

items in the same schedule in the minimum sentences legislation and the indication that the legislature intended 'amounts' and 'value' to have separate meanings (para [16]); (5) the need to interpret this legislation restrictively; and (6) certain anomalies that would arise if 'amounts' were taken to mean 'value'. The court also argued that if the value of any article were included, such interpretation would mean that the state would have to lead expert evidence regarding the value of the article.

One of the anomalies identified is the inherent improbability that the legislature intended to subject a 'youngster who steals a car for a "joy ride"' (para [19]) to the minimum sentence when the car is worth R510 000, but not when it is worth R490 000. However, this anomaly applies equally if this youngster stole an amount of money equal to the amounts mentioned in the example. As an indication of what the legislature intended, such anomaly probably does not take the matter any further, but most of the other considerations appear to be an accurate application of the law of interpretation of statutes. The court did not pose the following question, and so did not attempt an answer: Why would the legislature subject these economic offences to the minimum sentences only if money is involved, but not any other article of value?

Sentences prescribed in legislation

The sentencing court is permitted to impose more than the minimum sentence. This is implied in *S v Mdlongwa* 2010 (2) SACR 419 (SCA) (paras [28]–[29]), where the court confirmed a sentence of five years more than the minimum sentence.

Substantial and compelling circumstances

S v Ntsheno 2010 (1) SACR 295 (GSJ) deals with a further appeal by the accused who was originally involved in the judgment of *S v Mofokeng* 1999 (1) SACR 502 (W). In *Mofokeng* the court found that 'substantial and compelling circumstances' had to be interpreted as 'exceptional' circumstances. This view was, of course, overturned in *S v Malgas* 2001 (2) SA 1222 (SCA). The views in ('the unforgettable judgment of') *Malgas*, that the prescribed sentences should ordinarily be imposed unless there is weighty justification for departing, but that, at the same time all factors that would traditionally play a role in determining an appropriate sentence must still be considered by the court, is quoted in some detail (*Ntsheno* paras [11]–[12]). These dicta

have repeatedly been confirmed, most authoritatively in judgments such as *S v Dodo* 2001 (1) SACR 594 (CC) para [11], *S v Vilakazi* 2009 (1) SACR 552 (SCA), and, most recently, in *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC), where it was stressed once more that the imposition of a clearly disproportionate sentence would also amount to substantial and compelling circumstances not to impose the prescribed sentence (*Ntsheno* para [12]; see also the other two cases in the ‘trilogy’ of which *Ntsheno* is one — *S v Dlamini* 2010 (2) SACR 295 (GSJ) paras [8]–[9] and *S v R* 2010 (2) SACR 295 (GSJ) para [19]; *S v MM* 2010 (2) SACR 543 (GNP) at 549c–d: the mere fact that the prescribed sentence is inappropriate in a certain case can amount to substantial and compelling circumstances, justifying the imposition of a lesser sentence).

It is often claimed that the prescribed sentences should ordinarily be imposed, or that they are the norm. Apart from *Ntsheno*, at least two judgments relied heavily on *Vilakazi* to reject such submission. In *S v Sangweni* 2010 (1) SACR 419 (KZP), the court emphasized the following phrase from *Vilakazi* (para [16]) (original emphasis):

‘The court [in *Malgas*] did not say, for example, . . . that the prescribed sentences “should ordinarily be imposed”. What it said is that a court must approach the matter “conscious [of the fact] that the legislature has ordained [the prescribed sentence] as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances”’ (para [7]).

In addition, *Vilakazi* (para [18]) stressed that it was ‘the essence of *Malgas* and of *Dodo* . . . that disproportionate sentences are not to be imposed and that courts are not vehicles for injustice’. In *S v Mqikela* 2010 (2) SACR 589 (ECG), the full court provided the following summary of the considerations that a court should follow when deciding whether to depart from the prescribed sentences, based on *Malgas* as rephrased in *Vilakazi* (emphasis added):

‘What is required is that the trial court should test the justice and proportionality of the prescribed sentence by weighing and balancing all factors relevant to the nature and seriousness of the criminal act itself (in the light of the legitimate concerns of society), 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. If that exercise shows that a lesser sentence than life imprisonment would be appropriate, it is not only justified, *but bound*, to impose the lesser sentence’ (para [3]).

The crime that remains consistently problematic in this is regard is rape when life imprisonment is prescribed (for rapes described in Part I of Schedule 2), such as when the rape has been repeated, or when the victim is younger than sixteen years. Sapire AJ sums up the problem succinctly in *S v MM* (2010 (2) SACR 543 (GNP) at 547e (emphasis added)):

'The root of the problem is that the minimum sentence prescribed for the offence, of which the appellant was convicted, *is also the maximum sentence* which, since capital punishment has been eliminated, a court in this country can impose. This makes it difficult to apply the Act when it is recognized that there is a gradation of seriousness, even in instances where the perpetration of the offence is within the circumstances contemplated in Part I of Schedule 2.'

The court in *S v Mqikela* 2010 (2) SACR 589 (ECG) also stressed that all rapes are serious, but they are not all equally serious, and 'the most serious are those for which the ultimate sentence [of life imprisonment] is intended' (para [5]). Determining whether a case is the most serious requires a balancing of all the aggravating and mitigating factors. In the present instance the court found that the rape was one of the most serious (see also *Rape* below). These principles were also correctly applied in *S v Senyolo* 2010 (2) SACR 571 (GSJ):

'The correct approach to sentence is to be conscious of the fact that the legislature has ordained a discretionary prescribed minimum sentence as the sentence that should ordinarily and in the absence of weighty justification be imposed. Since the victim was raped more than once by the appellant and since she is under the age of 16 years, the discretionary minimum sentence is imprisonment for life. If the discretionary minimum sentence is disproportionate to the offence, a lesser sentence should be imposed *because disproportionate sentences are unconstitutional*. What the court was required to do, was to apply its mind as to whether the sentence of imprisonment for life was proportional to the offence' (para [24]; emphasis added).

May a court impose life imprisonment despite a finding that substantial and compelling circumstances are present in a certain case? This was the central question in *S v SM* 2010 (1) SACR 504 (WCC) (Le Grange J wrote for the majority (Traverso DJP concurring) and Moosa J wrote a minority judgment). The majority considered section 51(3), as it was at the time of sentencing in June 2007, to be clear and unambiguous (para [6]): when a court was satisfied that substantial and compelling circumstances exist justifying a lesser sentence, it 'may thereupon impose such lesser sentence'. Moosa J interpreted this

provision to mean the following (para [7]): 'If a court is of the view that the seriousness of the offence calls for the imposition of life imprisonment or a prescribed sentence . . . , then it flies in the face of logic to find that there are substantial and compelling circumstances to impose a lesser sentence.'

This argument is even stronger considering that section 51(3) specifically refers to substantial and compelling circumstances *which justify the imposition of a lesser sentence*. Le Grange J deals with this argument (para [6]) by explaining that it 'fails to distinguish between the two enquiries including the proportionality test envisaged by the subsection. It also militates against well established principles on sentencing in our law'. Therefore, as a first enquiry the court has to apply a subjective test (from the perspective of the offender) to determine whether substantial and compelling circumstances exist (para [10]). The examples provided then are basically the relevant mitigating and aggravating factors, although the court did warn against the drawing of distinctions that are too subtle to be justified (*ibid*). The second leg of the enquiry is to employ the triad of *Zinn* and the aims of punishment to determine whether a lesser sentence is justified, based on a proportionality analysis (paras [11]–[13]). I submit that there is no support from *Malgas* *supra*, the case on which much of the majority judgment is nevertheless based, for the second enquiry as a separate entity, to be established in terms of different ('objective') values. While it has repeatedly been emphasized that the minimum sentences legislation does not permit a court to impose a sentence out of all proportion to the seriousness of the crime, such assessment is by no means a separate enquiry.

SPECIFIC SENTENCES

Life imprisonment

Life imprisonment has generally only been dealt with as the prescribed sentence for crimes contained in Part I of Schedule 2 of the minimum sentences legislation. The following was briefly added in *S v Sangweni* 2010 (1) SACR 419 (KZP) (para [7]), namely that life imprisonment is recognized, internationally, as a grave sentence. The following quote from Dirk Van Zyl Smit ('Life imprisonment: Recent issues in national and international law' (2006) 9 *International Journal of Law and Psychiatry* 405 at 405–21) is added:

'It must be emphasized that life sentences are always very harsh penalties because of their potential to deny liberty indefinitely. . . . [C]areful consideration of when they are imposed can limit their use to the most serious cases'.

(See also generally the discussion under *Substantial and compelling circumstances* above; *Murder* and *Rape* below.)

Imprisonment

Within the context of minimum prison sentences it is not surprising that imprisonment remains accepted as the appropriate sentence in most instances of serious crime. As a result, 2010 saw little discussion of imprisonment. A few exceptions are mentioned here.

The appropriateness of imprisonment as a sentence for white-collar crime was briefly considered in *S v Janssen* 2010 (1) SACR 237 (ECG). The court referred to the arguments that the appellant (J) was not 'a criminal in the true sense of the word', and that she should not be incarcerated because of the overcrowded situation in prisons and the lack of rehabilitative programmes (para [17]). Chetty J noted that no evidence had been adduced that female facilities were as overcrowded as men's facilities. In addition, the court was not impressed with the argument that prison sentences should be reserved for violent offenders. Reference was made to *S v Sadler* 2000 (1) SACR 331 (SCA), where similar arguments were rejected and the seriousness of crimes of dishonesty stressed as crimes with an obvious erosive impact on society (para [17]).

Two judgments warned against sentencers assuming that imprisonment is the most commonly imposed sentence, and a cure for all of society's ills. In *S v Chipape* 2010 (1) SACR 245 (GNP), Legodi J warned as follows:

'It is a punishment which is imposed for the most serious crimes; for example, for criminals who offend regularly and are not deterred by other forms of punishment. Most people have a very high regard for imprisonment and believe that it will not only protect them from offenders, but also rehabilitate those offenders. However, in practice, imprisonment is less ideal than it is often made out to be' (para [36]).

Some of the misperceptions about imprisonment and its disadvantages were highlighted in *Chipape* (paras [37]–[42]) and *S v Sibiyi* 2010 (1) SACR 284 (GNP) (paras [7]–[12]). These include that when imprisonment is imposed when it is not essential (such as in the case of first offenders) the problem of overcrowding is

exacerbated; that the authorities find it increasingly impossible to teach anything to prisoners in such an environment; that the influencing of new offenders by other prisoners actually increases their danger to society once they are released; that prisoners get used to life in prison after a time; that short terms of imprisonment work against any rehabilitative programmes that might be available in prison; and that difficulties with reintegration of prisoners into society often make it impossible for them to earn a living outside prison. Imprisonment is often imposed because of a blind trust in the general deterrent effect of such punishment, despite strong indications that it is not that effective a deterrent. As a result first offenders should be kept out of jail as far as possible (*Chipape* para [42]).

It is appropriate to close this section with a quotation from Bertelsmann J in *S v Sibiya* 2010 (1) SACR 284 (GNP):

'Our courts have often emphasized that short terms of imprisonment do more harm than good, of which the present instance is a textbook example. Unfortunately, these admonishments appear to be largely ignored by the turning of a blind eye to the negative consequences that the accused's loss of employment — in these days of dire economic straits — has for the victim and society alike, as a result of the injudicious application of a sentencing option that should be reserved for offenders who are a real threat to society, and not for young hotheads who have not yet learnt to act with restraint' (para [12]).

Declaration as a dangerous criminal

Since this sentence is not common, every reported judgment dealing with it is to be welcomed. Plasket J convicted the accused of indecent assault in *S v Sekiti* 2010 (1) SACR 622 (ECG). The State then produced evidence that the accused (S) suffered from an antisocial personality disorder, which meant that S was a danger to society (para [5]). The court directed an enquiry in terms of section 286A of the Criminal Procedure Act. The psychiatrists returned a unanimous report which confirmed that S had an irremediable antisocial personality disorder, and a high risk of future violent behaviour (paras [12]–[13]). From this report, and the concession by the defence, the court concluded that S represented 'a danger to the physical or mental well-being of other persons, and that the community should be protected against him' (para [13]). He was then declared a dangerous criminal. In determining the duration of the initial period of incarceration, the court followed the approach established in

S v Bull; *S v Chavulla* (2002 (1) SA 535 (SCA) para [28]) that the court must consider what an appropriate sentence would be for the offence itself, and then impose half of that, being the time after which the prisoner would be considered for release on parole. The facts were that S sodomized the complainant forcefully, disregarding the complainant's objections. It was considered aggravating that the offence was preceded by planning, that the victim was physically small and therefore vulnerable, and that it happened within a psychiatric hospital (where S was also a patient) (para [15]). However, the victim suffered no serious injuries, and there was no evidence about possible psychological trauma (para [15]). Personal factors of S included that he was 39 years old at the time of sentencing, and he had numerous previous convictions which were 'indicative of his lack of respect for the rights of others and of his disregard for the norms of society' (para [16]). He had been held as a State patient for ten years, and had two children. Based on all these facts the court considered a sentence of ten years' imprisonment to be appropriate (para [17]) and based on the assumption that he would have served five years before he would normally be considered for parole, this was the term of initial incarceration ordered (para [18]).

Correctional supervision

The court in *S v Cedars* (2010 (1) SACR 75 (GNP) at 76*i*) stated that correctional supervision 'coupled with house arrest' was an incompetent sentence following a conviction based on a section 112(1)(a) procedure. Until now it has been uncertain whether this is the position, as section 112(1)(a) of the Criminal Procedure Act 51 of 1977 does not permit sentences of imprisonment 'or any other form of detention without the option of a fine' following a conviction without any questioning. The court did not explain this finding, stating only that the State correctly conceded that this was the correct position. The implication is that, if correctional supervision does not include house arrest, it might nevertheless be competent in this situation.

The few other judgments that dealt with correctional supervision in 2010 were generally in favour of the use of this sentence. The earlier judgments of *S v Williams* 1995 (2) SACR 251 (CC) and *S v R* 1993 (1) SACR 209 (A) played a considerable role in the recent judgments of *S v Chipape* 2010 (1) SACR 245 (GNP) and *S v De Klerk* 2010 (2) SACR 40 (KZP). Favourable character-

istics of correctional supervision include: that correctional supervision gives courts an additional means through which to impose highly punitive sentences without resorting to imprisonment; it is better geared to rehabilitate the offender than imprisonment is; it enables the court to impose proper punishment on an offender who does not need to be removed from society.

In *S v De Klerk* 2010 (2) SACR 40 (KZP) the court imposed correctional supervision (for the facts see *Indecent assault* below). Unfortunately, the wording of the sentence is not a good example. The court imposed five years' correctional supervision and although this mistake was corrected, after it was 'brought to our attention that the provisions of section 276A(1)(b) provide that no period imposed in terms of section 276(1)(h) may exceed three years' (para [31]), it is not to the judges' credit that they were not aware of this basic jurisdictional fact. The court also imposed the conditions of correctional supervision 'in terms of s 84 of the Correctional Services Act 8 of 1959' (para [30.2]), but this provision was repealed on 1 October 2004 (s 138 of the Correctional Services Act 111 of 1998, read with Proc R38 of 30 July 2004 (*GG* 26626)). The court also imposed a list of conditions, without taking account of the provisions of section 52 of the Correctional Services Act, which contains the list of conditions that may now be attached to a sentence of correctional supervision (see Terblanche *op cit* (*Guide*) at 295–303).

Suspension of sentence

The value of suspended sentences was alluded to in a few judgments. In *S v Chipape* (2010 (1) SACR 245 (GNP) para [35]), the court stressed that suspension is not a light sentence. If society considers it as equivalent to a discharge, then courts need to reconsider the way in which they communicate their judgments to the community. Instead, a

'suspended sentence is a reminder to an offender. It is like a red light flashing in the eyes and mind of the offender every time he or she is tempted to reoffend' (para [41]).

This value of suspension was also highlighted in *S v Sibiya* 2010 (1) SACR 284 (GNP) (para [13]), where the court added the possibility of effecting reconciliation between victim and offender as a useful sentencing option.

The wording of conditions of suspension frequently leads to difficulty, even at the highest level. The appellants in *S v Mostert* 2010 (1) SACR 223 (SCA) each received a sentence of a fine or

alternatively imprisonment, wholly suspended for a period of four years 'on condition that he is not convicted of fraud committed during the period of suspension and *for which he is sentenced to imprisonment without the option of a fine*' (emphasis added). The italicized words appear to be unnecessary in this context. Such wording is normally used when the suspended sentence consists of imprisonment only, when the words are intended to prevent a sentence of imprisonment coming into operation when the later offence is adjudged not to require incarceration (see, for example, *S v Sibiya* 2010 (1) SACR 284 (GNP) (para [15]), where the words used are 'for which the accused is sentenced to direct imprisonment'; also *S v Tsanshana* 1996 (2) SACR 157 (E) at 160a; *S v Maritz* 1996 (1) SACR 405 (A) at 418g). Since the sentence imposed in the current case includes a fine, this problem will not arise. If, for example, a sentence of R100 000 or two years' imprisonment is imposed on any of the appellants for a subsequent fraud committed during the period of suspension, then it should be possible to put into operation the current sentence, which also includes the option of a fine. This issue was not discussed and it is submitted that the addition of the relevant words should only be encouraged if the suspended sentence is limited to imprisonment.

Postponement of sentencing

In *S v RB*; *S v DK* 2010 (1) SACR 447 (NC), Majiedt and Olivier JJ were confronted with various problems relating to the sexual offences register instituted by section 42 of the Criminal Law (Sexual Offences and Related Matters) Act 32 of 2007. For present purposes only the following issue is noteworthy. In terms of section 50(2) of the Act a court that has convicted a person of a sexual offence against a child or mentally disabled person 'after sentence has been imposed by that court for such offence' has to make an order that the particulars of the offender be recorded in the sexual offences register. It is generally accepted that the postponement of sentencing is not be the same as the imposition of a sentence (para [41]; see also *S v Bani* 1985 (2) SA 420 (E); *S v Brits* 1974 (3) SA 758 (A)). Section 297(1)(a) of the Criminal Procedure Act expressly states that the court may under certain conditions 'postpone . . . the passing of sentence'. When such order is given unconditionally and the offender is not called upon to appear before the court again, it has the effect of a caution and discharge (s 297(3)). However, conditional postponement will

normally require that the offender appear before the court again in order to allow the court to determine whether the condition or conditions have been complied with (see also Terblanche *op cit* (*Guide*) at 385–7; Du Toit *et al op cit* (*Commentary*) 28–42B).

However, in *RB; DK* (paras [41]–[43]) the court, utilizing the wording used elsewhere in the Act, found justification for a wide interpretation of ‘after sentence has been imposed’ in the sexual offences legislation, to also include an order such as the postponement of sentencing. Whether such wider interpretation should be followed is doubtful, for a variety of reasons, such as the following: (1) sentencing is only likely to be postponed in the case of technical or minor offences; (2) the same reasons that dictate that criminal provisions should be interpreted restrictively should apply in the present instance; (3) if sentence is eventually imposed there is a great likelihood that the name of the offender will be ordered to appear in the register again, and such a situation might create the impression of repeated offending.

SENTENCING SELECTED OFFENCES

Murder

When discussing the sentences imposed for murder in cases reported during 2010, it is useful to consider the most severe sentences first. This approach permits certain conclusions to be drawn regarding conduct that is considered deserving of the most severe sentence available in our law, and to establish what factors are substantially mitigating.

Life imprisonment was imposed in *S v SM* 2010 (1) SACR 504 (WCC), a case that attracted substantial media attention. The appellants appealed to the full bench against the sentences imposed by the trial court. They had been convicted of the contract murder of ‘baby Jordan’. Aggravating features included that she was killed in her own home, and that the murder was premeditated and carefully planned (paras [23], [24] and [26]).

The facts are summarized by Moosa J (para [23]):

‘The contract murder of 6-month-old Jordan Leigh Norton (baby Jordan) was premeditated, thoughtfully planned, well orchestrated and carefully executed. The principal perpetrator was appellant 3, who sought the killing of her lover’s child, baby Jordan, for the reward of R10 000. Appellants 1, 2, 4 and 5 gained entry to the home of the Nortons by false pretences. Dylan Norton and Thobeka Buso, the child minder of baby Jordan, were threatened with knives, bound and ushered into the bedroom and later into the toilet, while the home was

ransacked. Appellant 2 brutally and callously plunged a knife three times into the defenceless body of baby Jordan. She died as a result of the wounds sustained.'

This murder is described in various terms, such as 'calculated, callous and cold-blooded' and 'barbaric and gruesome' (paras [24] and [24]–[26]).

The personal circumstances of the first three appellants are provided in some detail in the minority judgment (para [27]–[29]). All three were first offenders, and appellants 2 and 3 were respectively 22 and 23 years old when the offence was committed. Appellant 3 is described as the 'commander-in-chief', as it was she who initiated the contract and planned the murder. Appellant 1 is the 'second in command', who recruited the rest of the gang. Appellant 2 was the 'footsoldier', who committed the actual stabbing. Whereas appellant 3 was single, living with her parents and working in the family business, appellant 2 came from a very poor background and was effectively unemployed. They are therefore very different people, with different roles in the crime. Nevertheless, the trial court sentenced all the accused to life imprisonment, considering this 'harshesht punishment the only one this court can justify imposing' (para [22]). The majority considered such sentence not to be disproportionate to the offence (para [26]) and dismissed the appeal. Moosa J also found no reason to differentiate the sentences, but would have imposed 26 years' imprisonment for the murder (para [34]).

Life imprisonment was also imposed on the appellant in *S v De Koker* 2010 (2) SACR 196 (WCC). The appellant (D) had committed robbery with aggravating circumstances, when he threatened to stab his victim and stole her cellphone. He then raped her and, realizing that he was in trouble with the law, stabbed her multiple times with the knife, resulting in her death. The case deals mainly with the question of whether D was entitled to appeal against a sentence imposed in consequence of a sentence agreement in terms of section 105A of the Criminal Procedure Act, and as a result, the appellant's personal circumstances are not highlighted. However, the court mentioned that life imprisonment was prescribed for both the murder and the rape. This sentence 'was the only appropriate one in the circumstances, having regard to the appellant's brutal and callous actions and his criminal record' (para [26]); at the age of 24 he already had four previous convictions).

Life imprisonment was also imposed by the trial court in *S v Langa* 2010 (2) SACR 289 (KZP). The appellant and accused 2

contracted two persons to murder a business competitor. She (the appellant) had invited the deceased to her place of business under false pretences, where he was killed. A second person was murdered, simply because she had witnessed too much. The court of appeal described the crime (para [36]) as being '... of the most heinous kind and ... a major aggravating factor in approaching sentence'. The appellant denied any involvement and expressed no remorse. The only personal factor of note mentioned in the judgment is that the appellant was a married mother of six minor children (paras [2] and [10]). The court found that life imprisonment was the only appropriate sentence, despite her personal circumstances. In the concurring minority judgment Steyn J found that the trial judge was correct to find that there were 'simply no circumstances, let alone substantial and compelling circumstances, which would justify the imposition in respect of that count of murder, in respect of either of you, of anything less than a life sentence' (para [9]).

The appellant in *S v Maseola* 2010 (2) SACR 311 (SCA) was convicted, together with two other accused, of five charges involving the murder of two policemen, as well as various offences in connection with unlawful possession of an automatic firearm and its ammunition. M obtained the firearm (an R4) for accused 1, who was involved in a shoot-out with the policemen, resulting in their death. M was convicted of the murder based on *dolus eventualis* and, presumably, the common purpose doctrine (paras [5]–[6]). The court found it aggravating that the victims were policemen (para [10]). As far as personal circumstances were concerned, M was 43 years old, married, with four children. He used to be a member of the SAPS, until he was discharged on medical grounds. He then started his own business, but also registered as a police informer. He had no criminal record. The trial court imposed an effective sentence of 43 years' imprisonment, a sentence described by Saldulker AJA as so harsh and disproportionate that the Supreme Court of Appeal was entitled to interfere (para [11]). After referring to *S v Mhlakaza* 1997 (1) SACR 515 (SCA), specifically with respect to the unacceptability of prison sentences that are too long, the court concluded that a sentence of 30 years' imprisonment would be appropriate for the totality of the crimes committed (para [14]). For the two murders M was sentenced to 25 years' imprisonment each. He received the prescribed minimum sentence of fifteen years' imprisonment for possession of the automatic rifle, of which ten years were to be served concurrently with the sentences for murder (para [15]).

The appellant in *S v IO* 2010 (1) SACR 342 (C) was convicted in the trial court of two counts of murder; three counts of attempted murder; and various firearm-related offences (paras [2]–[3]). The only information in the judgment with respect to the crime is that ‘it was clearly a gang-related revenge killing’ (para [17]). The appellant was under the age of eighteen years at the time of sentencing (para [15]). However, despite being a child, the court of appeal found that the seriousness of the crimes, balanced with the appellant’s other personal circumstances, demanded a long period of imprisonment. The only question was what the ‘shortest appropriate period’ of time could be (para [17]). The court was guided by the sentence of 25 years imposed on the co-accused. It considered that the appellant should be treated more leniently, as he was younger than the co-accused, was more susceptible to peer pressure and more open to rehabilitation (para [18]), and concluded that an effective term of eighteen years’ imprisonment would be appropriate (para [19]). The appellant was sentenced to twelve years’ imprisonment for the first murder and eight years for the second. The effective term was achieved by ordering some of these sentences to be served concurrently.

The facts of *S v Ndzima* 2010 (2) SACR 501 (ECG) open with events that evoke some sympathy for the appellant (N), but then take a dramatic turn. N bought certain goods from the two deceased, but returned them when they did not function properly. An argument ensued and the deceased attacked N: one struck him with a half brick and the other used his fists. N responded by taking out a firearm and wounding his attackers. Up to this point he had reacted under provocation. However (para [25]),

‘... as his victims lay helpless and wounded on the ground, he cold-bloodedly proceeded to execute them one by one and in a deliberate and goal-directed way. The viciousness of these crimes makes the provocation, as a mitigating factor, pale to a significant degree.’

This reaction had the result that the court described the crime as ‘two horrific, callous acts of cold-blooded murder, executing two men whom he had already wounded and rendered helpless’ (para [28]). N’s personal circumstances were that he was 37 years old at the time of the events, a first offender, unemployed and in receipt of a disability grant. He was single and lived in an RDP house which he shared with family. He was considered an active member in his community (paras [18]–[20]). He used to work in the defence force and later as a security guard with a

cash-in-transit company. However, following a motor vehicle accident, he was medically boarded and lost his employment. There are indications that he might have suffered brain injuries as a result, which left him unable to manage his anger. However, these difficulties were no longer substantial at the time of the murders (para [22]). It was argued that, under the stress of the situation, N's training as a soldier might have taken over. However, the court considered this to be an aggravating factor, as it meant that N might act in a similar fashion in future (para [27]). Finally, N pleaded not guilty, although he changed his plea to guilty after giving evidence (para [17]). Having rejected N's argument that he acted under severe provocation, the court sentenced him to ten years' imprisonment on each charge but, as it considered twenty years too severe a total sentence, it ordered five years of the sentences to be served concurrently, for an effective sentence of fifteen years' imprisonment (para [32]).

In *Director of Public Prosecutions v Mngoma* 2010 (1) SACR 427 (SCA) the accused murdered his partner of six years with whom he had a child. On arriving home one day, the accused saw a man leaving their house. He concluded that his partner had been unfaithful, and chased her away. Four days later, the accused and the deceased were walking together when he lost control, assaulted her and strangled her with his shoe laces. At the trial he pleaded guilty, explaining that he was under severe provocation and emotional stress (para [5]). The Supreme Court of Appeal took into account that the accused did not act on the spur of the moment (para [8]). Further factors 'positive' to the accused included that he was 24 years old at the time, only schooled up to standard 5, which made him 'uneducated and unsophisticated' and restricted to doing odd jobs (para [9]). He did not have direct intent to kill the deceased, but was convicted based on *dolus eventualis* (ibid). In addition, he had been betrayed by the deceased (para [15]). The court agreed with the trial court that all these factors amounted to substantial and compelling circumstances which meant that a sentence less than the prescribed fifteen years' imprisonment had to be imposed (para [13]). However, the court also took into account the prevalence of violent crimes committed by men against women. The court considered twelve years' imprisonment to be appropriate (para [16]).

These cases do not really permit meaningful conclusions to be drawn, except that contract murders are punished particularly

severely, and that sentences are substantially reduced for murders committed under severe stress or provocation.

Attempted murder

The appellants in *S v Libazi* 2010 (2) SACR 233 (SCA) were convicted of three and two counts, respectively, of attempted murder. Few facts surrounding the case are available with respect to sentencing. The appellants were identified by witnesses as amongst a group of passengers in one vehicle from which shots were fired at another vehicle. The event stemmed from rivalry between two taxi associations in rural parts of the Eastern Cape. One of the events resulted in one M being wounded in his hand and thigh (para [3]). The trial court sentenced the appellants to ten years' imprisonment on each of the charges. These sentences were considered 'clearly appropriate' and 'justified' by the Supreme Court of Appeal (paras [30]–[31]). The sentences were also ordered to be served concurrently.

Culpable homicide

Culpable homicide manifests itself in personal assaults on another human being and motor vehicle accidents. These manifestations are normally treated differently when it comes to sentencing. In *S v GL* 2010 (2) SACR 488 (WCC) the appellant (G) was convicted on his own version of how his wife had died. The pair had a fight and the deceased kicked and punched G. He attempted to restrain her and grabbed her around the neck, maintaining the pressure until she went limp (para [11]). She died as a consequence. The appeal court agreed with the trial court that this offence was very serious (para [25]). It not only caused the death of the deceased, but severely affected her family and the couple's children. It was also taken as a 'legitimate consideration' that the crime took place within the family (ibid). The court found support for its view of the importance of these considerations from *S v Nesane* [2008] ZASCA 122. The court also mentioned that the deceased was a young, yet productive member of society (para [26]). Insofar as the personal circumstances of G were concerned, they were mostly favourable (para [24]): he was a first offender with no record of violence, in stable employment, unlikely to reoffend and a responsible parent. The strongest mitigating factor was that he was the primary caregiver of his children (para [30]), although the children's grandparents

had been deeply involved in the care of the children (paras [19]–[23]). The court also took account of the interests of society, again agreeing with the magistrate that ‘anything less than a substantial custodial sentence would justifiably be regarded by society at large as an unduly lenient response to the tragic consequences of the deceased’s unlawful conduct’ (para [32]). In determining an appropriate sentence the court considered previous judgments (paras [33]–[34]), notably *S v Nxumalo* 1982 (3) SA 856 (A), in terms of which the sentence should reflect the consequences of the crime, as well as the blameworthiness of the offender. In the present case the death resulted from an unlawful assault, involving ‘prolonged and powerful pressure’ on the deceased’s neck, and not because of a moment of carelessness. Finally, the court confirmed the trial court’s sentence of ten years’ imprisonment, of which four years were conditionally suspended.

The appellant (M) in *S v Mapipa* 2010 (1) SACR 151 (ECG) appealed against the sentence imposed in the regional court for culpable homicide arising from a car crash and driving under the influence of alcohol. The regional court had sentenced M to four years’ imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. M and friends had been driving along a road in Port Elizabeth, when he turned right in front of a motorcycle travelling in the same direction. The two people on the motorcycle were killed in the process. Chetty J summarized the pertinent factors in the following terms (para [15]):

‘His conduct was deliberate and dangerous in the extreme. An aggravating feature is his drunkenness, his unconscionable conduct in seeking to apportion the blame for the collision onto his wife, his persistence in maintaining a false defence and his utter lack of remorse.’

The court dismissed the appeal and concluded that, if anything, the sentence was on the lenient side (para [12]). The judgment mentions that M was a local magistrate, whose regular drinking and driving was frequently talked about by regulars at the local pub (para [9]). Chetty J referred in detail to the judgment in *S v Nyathi* 2005 (2) SACR 273 (SCA), especially with regard to its comparison of a substantial number of cases of similar crimes and their sentences, and found similarities and differences which informed the court’s own assessment of an appropriate sentence.

Rape

The courts have again been at pains to stress the seriousness of rape as a crime, especially when a departure from the

prescribed sentence was dictated by justice and fairness. The most frequently cited dictum remains that from *S v Chapman* 1997 (3) SA 341 (SCA) that rape is a 'humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim' (see *S v Mqikela* 2010 (2) SACR 589 (ECG) para [5]; *S v R* 2010 (2) SACR 295 (GSJ) at 306). In addition, rape has been described as 'a loathsome crime' and 'one of the most serious crimes that can be committed' (*Mqikela* supra para [5]). A further quotation may be added here. In *S v RO* 2010 (2) SACR 248 (SCA), the majority wrote: 'The crime was loathsome and despicable: the serious abuse of two very young children in a domestic situation by adult members of the family who should each have protected the victims against the other's predations' (para [31]).

At the same time sentencers have generally been alert to the principle established by the Supreme Court of Appeal that all rapes are not equally serious and that life imprisonment should only be imposed for the most serious instances (see, especially, *S v Vilakazi* 2009 (1) SACR 552 (SCA), *S v Abrahams* 2002 (1) SACR 116 (SCA) and *S v Mahomotsa* 2002 (2) SACR 435 (SCA)). In *S v GN* (2010 (1) SACR 93 (T) para [11]), the court mentioned that the original 'test' was provided in *Abrahams* (para [4]), where the court declared that, although rape can never be condoned, some rapes are more serious than others. Because of this situation, life imprisonment should be '. . . reserved for cases devoid of substantial factors compelling a conclusion that such a sentence is inappropriate and unjust' (ibid). Justice often demands that different sentences be imposed for crimes of the same name (para [12]). When life imprisonment is prescribed, it is only possible to differentiate the more serious from the less serious with a downward adjustment from the prescribed sentence. 'Accordingly,' the court held, 'in its quest to do justice, a court will more readily impose a lesser sentence where the prescribed minimum sentence is imprisonment for life' (ibid).

Life imprisonment was imposed in a number of rape cases. In what follows, these cases are dealt with first, followed by the other judgments in descending order of sentence severity.

The details of the crime in *S v PN* 2010 (2) SACR 187 (ECG) were the following. The appellant (P) was convicted, despite his plea of not guilty, of raping a three-year-old girl in 2005. He was sentenced to the prescribed life imprisonment. The two families shared living quarters on a farm (at 189f–g). The rape occurred one evening, when the victim was playing with another girl in P's

room. Further details of the crime are unknown. The victim did not sustain any serious physical injury (at 189*j*). However, a social worker who interviewed the victim (B) three years after the event testified that B experienced the rape as very painful. It was a very traumatic experience and she was still suffering from various psychological symptoms, including loss of trust in, fear of and anger at men. Because of lack of resources she had no hope of psychotherapy (at 190*c–g*). P's personal circumstances were the following: he was 19 years old when he committed the rape; he worked as a farm labourer at the time, but after release on bail found other work as a casual labourer; he grew up in deprived conditions, as one of nine children; the abuse of alcohol was very prevalent; and he was a regular churchgoer (at 190–1). The appellant based his appeal on the facts that he was a young first offender and that the victim did not suffer any serious injuries. In addition, his ability to find new employment after being released on bail, indicated that he was a useful member of society (at 191*b–e*). However, the court of appeal adjudged the aggravating factors to completely outweigh these mitigating factors. The relevant aggravating factors were that (1) the appellant showed no remorse (he disputed the allegations throughout), (2) he abused the trust of the little children, (3) the rape of toddlers was rife and (4) the rape of such a small child was the worst kind of rape (at 191*f–h*). As a consequence the court dismissed the appeal.

This judgment is open to several points of criticism. There can be little argument with the statement that the rape of a three-year-old child is the worst kind of rape and if the sentence was to be determined exclusively by the crime, life imprisonment might well have been appropriate. Of course, sentencing in South Africa is supposed to consider the criminal as well as the crime, and if there are substantial mitigating factors, then those mitigating factors should be reflected in the eventual sentence.

Being a youthful first offender is a substantial mitigating factor and should be so. The court stated that the aggravating factors completely outweighed the mitigating factors. This assessment is undoubtedly true, but this does not mean that the mitigating factors should carry *no* weight. Yet, as soon as the severest sentence is imposed, the inevitable conclusion is that the mitigating factors carried no weight. This cannot be correct. Another point of criticism is that the court appears to have assessed every mitigating factor in isolation, instead of assessing their cumulative

or collective value (as required by *Malgas* para [25] ('all the circumstances relevant to sentencing must . . . be such as [to] *cumulatively* justify a departure from the standardized response that the legislature has ordained'); see also *S v Dlamini* 2010 (2) SACR 295 (GSJ) 303; *S v Vika* 2010 (2) SACR 444 (ECG)). For example, the absence of serious injuries is dealt with (at 192–3), and the conclusion reached that the lack of injuries in a small victim is no justification to depart from the prescribed sentence. The same happens when it comes to consideration of the age of the offender (at 194–5), at the end of which the court draws the following conclusion:

'Whereas his relative youth may be a mitigating factor, it does not, in my view, constitute a circumstance which would justify the imposition of a lesser sentence. The seriousness of the offence far outweighs the fact that he is a youthful first offender.'

It is submitted that the court erred in its approach in this regard. Despite the seriousness of the crime, the collective effect of the criminal's youth, that he was a first offender and from difficult social conditions should have been accepted as substantial and compelling circumstances.

In *S v Mqikela* 2010 (2) SACR 589 (ECG) the appellant and an accomplice broke into the home of the complainant, committed robbery at knife point, and raped her. The trial judge sentenced the appellant (M) to the prescribed life imprisonment for the rape, the prescribed minimum of fifteen years for the robbery and five years' imprisonment for the housebreaking. The appeal was essentially addressed against the life imprisonment only (para [2]). The full court found that this case was among the most serious instances of rape (para [7]). It was aggravated by the following factors: (1) rape by more than one person is referred to in Part I of Schedule 2 and thus set aside for the most severe punishment; (2) the victim was 73 years old, living by herself and threatened with a knife (which essentially had the result that the lack of physical injuries was of no consequence); (3) the criminals invaded the home of the victim, the place where she should have felt safe; (4) the housebreaking was executed arrogantly, by throwing a concrete bird bath through a window, terrifying the victim; and (5) the victim suffered serious psychological damage. These factors had to be balanced with the appellant's personal factors, the most important of which were the following (para [4]): he was 22 years old when sentenced, unmarried with no children, had a limited education and grew up with his grandparents, and

embarked on a 'career of crime' at an early stage, having five previous convictions for housebreaking. Jones J's conclusion was the following (para [8]):

'The combined effect of this aggravation leaves no room for the conclusion that the trial judge overemphasized the gravity of the offence. Any lesser sentence than life imprisonment would be inadequate and disproportionate. There is no basis for concluding that the learned trial judge did not exercise her discretion on sentence in a proper manner.'

This assessment is open to criticism as the court of appeal did not allocate the aggravating factors to the proper crimes. At least aggravating factors (3) and (4) mentioned above should have aggravated the housebreaking; not the rape. And yet the sentence for the housebreaking was five years' imprisonment; 'only' five years' imprisonment when compared to the life imprisonment imposed for the rape. (The robbery sentence cannot be assessed, as the judgment contains no information regarding what was stolen.)

In *S v R* 2010 (2) SACR 295 (GSJ) the facts were as follows. In 2002 the victim was on her way to work very early one morning. When she came across the appellant (R) he forced her, with the assistance of a firearm, to a house where he robbed her of her cellphone and jewellery and then raped her. He then took her outside and raped her again. He was convicted of kidnapping, robbery with aggravating circumstances, two counts of rape and unlawful possession of a firearm. The court (Makgoka J wrote the judgment for the full bench) described the rape as serious, quoting the well-known dictum from *S v Chapman* supra. The court acknowledged that the experience had to have been '... particularly terrifying and traumatic' for the complainant (para [14]). The court also deduced from the fact that R was roaming the streets at 04:25 in the morning that an element of premeditation was present (para [15]). R's personal circumstances were as follows (para [9]): he was twenty years old at the time of the offences; lived in a township with his parents and two siblings; had a limited education (up to standard 6); he had a previous conviction for housebreaking with intent to steal and theft, committed in 1999; he had been in custody for two and a half years before he was sentenced. As far as the role of society is concerned, the court acknowledged society's indignation at the 'increasing wave of violent crime engulfing the country' (para [17]) and determined that its sentence should give expression to this indignation. The court found that an effective sentence of 23

years' imprisonment would be appropriate (para [19]). Each of the rapes was punished with twenty years' imprisonment, with the effective sentence achieved through orders that parts of the various sentences be served concurrently. The full bench's sentence was also antedated to the date of the original sentence in 2005.

In *S v Dlamini* 2010 (2) SACR 295 (GSJ) the appellant was convicted, with two co-accused, of rape and robbery with aggravating circumstances. They robbed the victim of a cell-phone and some jewellery at knifepoint, and then left. However, they returned shortly afterwards, when they took the complainant into the veld and raped her. They were still armed with the knife. Makhanya J regarded the crimes as serious (para [10]). Nevertheless, there were mitigating factors present. The appellant was nineteen years old at the time of the offence, had no previous convictions, the rape was not premeditated and the appellant pleaded guilty. This show of contrition indicated that he had better prospects for rehabilitation. In addition, the victim did not suffer serious physical injuries (para [10]). The appellant also grew up in a poor and broken family and was himself sexually abused as a teenager (para [11]). The court considered life imprisonment disproportionate to the crime, given the cumulative effect of all the mitigating factors. D was sentenced to twenty years' imprisonment for the rape and thirteen years for the robbery. An order that parts of the sentences should run concurrently resulted in an effective sentence of 23 years' imprisonment. The sentence was also antedated to the date of the original sentence in 2002.

In *S v GN* 2010 (1) SACR 93 (T), a judgment decided in February 2008, the appellant (G) was the father of the victim, who was only 5 years old at the time of the offence. The appellant lived with his three daughters in a single-roomed shack in an informal settlement. The shack had room for only two beds and he shared a bed with the complainant. One night he raped her. This act was not accompanied by any violence, but the complainant suffered bruising all around her labia minora (para [2]). The appeal court considered the emotional harm to be of more importance in this instance, but there was no evidence in this regard (para [16]). The court assumed that 'she was not left unscathed' (ibid). The appellant was a first offender, 46 years old at the time of sentencing, and estranged from the children's mother. He was employed. However, the family's socio-economic situation

was clearly dire (minority judgment, para [23]). The court below imposed the prescribed life imprisonment. On appeal, Du Plessis J considered the various judgments by the Supreme Court of Appeal on the imposition of life imprisonment for rape. As some rapes are more serious than others, such differences in severity should be reflected in the sentence, in the interests of justice. The court stressed that the absence of physical injuries was not a mitigating factor of much weight. Rape itself is a very serious crime. Physical injuries render it even more serious, but emotional harm deserves more emphasis (para [16]). The court confirmed that it was not a mitigating factor that the victim was the appellant's daughter, as he acted in breach of her trust (para [17]). What was considered as mitigation was that the appellant was a first offender who, through gainful employment, maintained his children under difficult conditions (paras [18]–[19]). In conclusion, the court of appeal found, twenty years' imprisonment 'would do justice to all the considerations that dictate an appropriate sentence' (para [20]). The court also antedated the sentence to the date of the original sentence in August 2004.

In *S v Senyolo* 2010 (2) SACR 571 (GSJ), the appellant (S) was convicted of two counts of raping a girl aged ten years old. The crimes were committed about two weeks apart. Both S and the victim lived in shacks and were known to each other. On both occasions S invited her to his shack, then raped her and afterwards gave her some incentive not to tell anyone (paras [16]–[18]). In both instances the victim appears to have been completely passive. The rapes were only discovered after the second rape, when a physical examination showed no external injuries, but some internal injuries were noted (para [19]). No major changes in her behaviour occurred: she still did well at school, although she became very quiet at times, which had not happened before (para [23]). However, substantial negative effects in future could not be excluded (*ibid*). S completely denied having sexual intercourse with the victim (para [20]), which meant he had no remorse. He was 56 years of age at the time of sentencing and effectively a first offender. He lived by himself in a backyard shack in Thokoza, but was married; his wife and two minor children lived in Limpopo. He had a good relationship with the family. He suffered from certain ailments and was an active church member. Imprisonment was considered the only appropriate sentence (para [22]). The court compared the sentences imposed in a number of similar cases,

including *Vilakazi, S v Sikhapha* 2006 (2) SACR 439 (SCA), *Abrahams*, and *Mahomotsa*. The crime is inherently serious, but was aggravated by the youthfulness of the victim and the repetition of the crimes (para [27]). However, life imprisonment (the prescribed sentence) would be disproportionate and therefore unconstitutional (*ibid*). Upholding the appeal against the sentence imposed in the regional court, the court imposed ten years' imprisonment on each count, for an effective sentence of twenty years.

In *S v Ntsheno* 2010 (1) SACR 295 (GSJ) the victim was gang-raped by five or six youths. The appellant (N) was convicted of two counts of rape and one of kidnapping. Willis J found, on behalf of the full court, that substantial and compelling circumstances were present, being the aggregate of the following facts: N was twenty years old at the time of the offence; a first offender; under the influence of alcohol; suffered from an unfortunate background; was probably influenced by some of the other rapists; and spent seven months in custody before being sentenced. In addition no dangerous weapon was used, and the victim suffered neither serious physical injury nor serious psychological trauma (paras [7] and [13]). Based on all these factors the prescribed life imprisonment was clearly disproportionate to the crime (para [13]). The court imposed nineteen years' imprisonment for each count of rape, and ordered that they be served concurrently and antedated to the date of the original sentence in 1998. This sentence, Willis J felt, was 'just: severe, but not disproportionate' (para [15]).

In *S v Sangweni* 2010 (1) SACR 419 (KZP) the victim was seven years old, but the appeal court's judgment does not contain further information regarding the offence itself, whether the victim sustained injuries or what the effect of the crime was on her psyche. What is revealed, apart from the 'tender age of the complainant', is that 'the appellant was known to the girl and was also in a position of trust' (para [3]). Some of the mitigating factors included that the appellant 'was relatively young, 30 years old'; that he had been employed before his arrest and that he was a first offender. He was considered a suitable candidate for rehabilitation (paras [7], [11], [13]). In addition, he was the family breadwinner. Steyn J found that a long term of imprisonment would express the seriousness of the offence adequately, while also serving the 'community interest' and give the appellant the opportunity to improve himself (para [13]). The appellant's sentence was reduced to eighteen years' imprisonment.

The same sentence was imposed by the trial court, and confirmed by the court of appeal in *S v MG* 2010 (2) SACR 66 (ECG). The appellant appealed against the conviction and sentence and most of the judgment deals with the veracity of the evidence. What we know of the crime is the following: The appellant was convicted of the rape of a twelve-year-old girl, committed in 2002 (para [1]). As in several of the previous cases, the appellant knew the victim. He lured her from her home with a false message, followed her and then raped her under threat of a knife in a secluded spot. After the rape he gave her R2 and warned her not to tell (para [2]). The court supported the trial magistrate's decision that substantial and compelling circumstances existed. These circumstances were established by 'the combined effect of his personal circumstances (he was 46 years old with a family, he had no record of previous crimes of violence or of sexual abuse, and he suffered from HIV and poor health)' (para [18]). The sentence of eighteen years' imprisonment was considered to be 'in line with the sentences which are frequently imposed in these courts for the rape of juvenile victims' (ibid).

The facts in *S v RO* 2010 (2) SACR 248 (SCA) were the following. The appellants (two brothers) were convicted of rape of a 4-year-old girl (their niece), as well as several charges of indecent assault of this girl and her 6-year-old brother. These offences were committed over a period of one to two years. (Details of the rape and indecent assaults are sketchy because of major deficiencies in the charge sheet and evidence produced at the trial (paras [4] and [26]).) The trial court sentenced the first appellant to 25 years' imprisonment for the rape, and the second appellant to twenty years. Both were sentenced to six years' imprisonment for each indecent assault charge, but all these sentences were ordered to be served concurrently with the sentences for the rape. The appellants were in their mid twenties when they committed these offences, were first offenders and were still living with their parents. Both had unstable employment records, apparently as a result of their parents frequently relocating. Both were abused by close family members themselves. Both had a low intellect. These facts resulted in substantial disagreement between the judges in the Supreme Court of Appeal. The majority judgment (by Heher JA, with Lewis JA and Leach JA concurring) considered the appellants' limited intellectual capacity to be a crucial factor in determining their moral blameworthiness (para [34]):

'Seriously stunted moral sensibility is not quickened by the repetition of conduct which other right-thinking members of society know to be reprehensible or, even, evil. The appellants started with a material deficit. When they gave evidence the gap had not narrowed. Knowledge of the wrongfulness of the appellants' conduct was proved. That was necessary for mens rea. But I am far from satisfied that it was matched by insight into the seriousness of their offence or by an ability to resist the pull of their own lusts, both qualities which one would expect to find in a mature adult possessing even a limited perception of correct social norms.'

It was no surprise, considering their intellectual capacity and the fact that they were regularly exposed to sexually deviant behaviour within their family, that they did not show remorse or insight into their crimes (para [35]). In addition, the victims and offenders were forced to live in 'close proximity', which was a 'recipe for disaster'. They were therefore less likely to consider 'socially deviant conduct as abnormal' (para [36]). The majority found that a sentence of 15 years' imprisonment would meet 'legitimate societal demands and [was] not unfair to the appellants' (para [42]). The minority (Majiedt AJA, Griesel AJA concurring) found the extent of the appellants' low intellect to be greatly exaggerated (para [17]): '[T]hey hardly strike me as severely retarded men'. Although the minority accepted that the trial court's sentence was severe, it did not find that the sentence induced a sense of shock (para [19]). Any shorter sentence 'would to my mind overemphasize the appellants' personal circumstances and underemphasize the seriousness of the rape' (para [20]). Of particular importance to the two judges was the age of the victims. Based on the approach proposed in *Vilakazi*, where fifteen years' imprisonment was imposed when the victim was about fifteen years old, they argued that a substantially longer period of imprisonment was justified by the much younger victims in this case (para [22]).

One aspect here that differs from those dealt with previously, is the harm caused to the victims (see para [9]). The girl showed signs of a need for affection and acceptance, leaving her a potential victim for further, future molestation. She also exhibited sexual behaviour atypical of someone of her age. The boy had very low self-esteem, distrusted adults, felt guilty that he could not protect his sister and performed poorly at school. In essence, without successful psychological intervention, these children's lives had been ruined.

S v MM 2010 (2) SACR 543 (GNP) dealt with the appellant, who had been convicted of one count of rape, involving two acts of penetration that happened within a short period of time. The rape

was 'rough', as the victim experienced 'extensive injury to [her] internal genital organs' including '[e]xtensive black bruising' (at 547*a*). The appellant was 26 years old at the time of the offence and, although unmarried, the father of two children. He was employed at Lovelife, ironically, an 'organization devoted to the propagation of appropriate sexual conduct in the community' (at 546*h*). The court took into account, in the appellant's favour, that his initial reaction was to apologize to the victim (at 549–50). The court imposed a sentence of fifteen years' imprisonment. (See also *Minimum and mandatory sentences* above.) Referring to *Mahomotsa* and *S v GN* 2010 (1) SACR 93 (T), the court held that this was not one of the worst forms of rape. In particular, the fact that the second penetration followed closely on the first, meant that the 'shock, injury and humiliation' of the first rape was still active in the victim's mind, and not renewed when the second rape took place. In the interests of justice, therefore, this had to be sentenced as 'a single rape with aggravating circumstances' (at 549*f–h*).

In *S v Barendse* 2010 (2) SACR 616 (ECG), the appellant was convicted of indecent assault and rape. The complainant was placed in foster-care with the appellant and his wife in 1999. During the period 2002 to 2005, when the complainant was about thirteen to sixteen years old, the appellant essentially used her as his sex slave and frequently raped her. There was no evidence of violence or threats, but the appellant used the fact that he was providing the roof over her head to overcome any resistance (at 617–18). The main mitigating factor taken into account was the advanced age of the appellant — he was 72 years old when sentence was imposed. Jansen J, on behalf of the full court, found that the sentence of twenty years' imprisonment, imposed in the trial court, would effectively amount to life imprisonment (at 619*e–f*). This factor, combined with the fact that the victim was not physically injured, led the court to conclude that a sentence of ten years' imprisonment should have been imposed. The lack of consistency in the sentences that are imposed for rape, especially when the rape falls within the descriptions contained in Part I of Schedule 2, is patently obvious from the overview provided above. This is proof that the minimum sentences legislation results in frequent injustices regarding rape sentences. It is time for the Constitutional Court to reconsider the constitutionality of this legislation. Clearly, our courts do not have the capacity or the information necessary to ensure sufficient consistency for these sentences to be just and fair.

Indecent assault

H, the appellant in *S v HD* 2010 (2) SACR 355 (ECG), was convicted of two counts of indecent assault. The first assault happened from 1985 to 1986 and the second from 2004 to 2006. In both instances the complainant was a niece of the appellant, and in each instance the complainant was about seven years old. The assaults involved touching the vaginas of the complainants and, in the second instance, placing his penis against her buttocks. Pickering J described the offences as (at 361*d-e*)

'... extremely serious in nature. The sexual abuse of a young child is a particularly abhorrent offence which can, and often does, have devastating consequences on the life of the innocent child.'

Both complainants suffered severe emotional trauma and a clinical psychologist reported that he 'took away their childhood innocence and left them both emotionally scarred for life', an issue made worse by the fact that he was in a position of trust (at 362*h-i*). These adverse effects distinguished this matter from cases such as *S v Ndaba* 1993 (1) SACR 637 (A) and *S v Mohlakane* 2003 (2) SACR 569 (O), where there was no evidence that the complainants suffered emotionally after the crimes.

The court acknowledged that it had to balance the seriousness of the crime with the personal circumstances of the appellant, in particular his age and the prospects for reform (at 363*a*). At the time of the judgment he was 62 years of age. He had been married for 36 years and enjoyed the support of his wife and adult children. He was also highly thought of in his community (at 358*d-e*). He pleaded guilty to the charges, which the court found 'exhibited a degree of remorse' (at 358*e*). A different clinical psychologist expressed the opinion that he was genuinely remorseful, with a favourable prognosis, in particular because his paedophilic disorder was no longer concealed. In addition, he sought treatment for the disorder before charges were laid for the second series of assaults, although the victims had already reported the matter (at 358*f-i*). Nevertheless, these personal circumstances were outweighed by the seriousness of the offences and the interests of society to such an extent that a sentence of correctional supervision was inadequate (at 363*b*). A custodial sentence had to be imposed, although a long period of incarceration was unnecessary. The court confirmed the trial court's sentence of five years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act.

The appellant in *S v Coetzee* 2010 (1) SACR 176 (SCA) was convicted on four counts of indecent assault and two of *crimen injuria*. He worked as a pastor at a local church and counselled certain members of the church. The convictions arose from various incidents where the parents of women aged between sixteen and 21 years of age requested him to counsel these women, for a variety of reasons. During these sessions C indecently assaulted the complainants, with actions ranging from lifting the clothing of the complainants to reveal their undergarments, to the actual touching of their private parts (paras [4]–[8]). The trial court sentenced C to six years' imprisonment, of which two years were conditionally suspended, for each of the indecent assaults. Lesser terms of imprisonment were imposed for the *crimen injuria*. The effective sentence was four years' imprisonment because the various sentences were to be served concurrently. The sentences were the same for every indecent assault, although C's criminal actions were not identical. All the victims had already been sexually active, but one would expect the offence against the sixteen-year-old to be treated somewhat differently from that against the 21-year-old (para [26]). C was a first offender, married, with children. He lost his employment as a result of the conviction (paras [15] and [26]). In considering the appropriate sentence, the Supreme Court of Appeal considered various cases involving similar offences. As noted above (see *Comparison of similar cases*) this comparison was too superficial to be useful. Nevertheless, the court came to the conclusion that the trial court's effective sentence of four years' imprisonment was excessively severe (para [26]). Mhlantla JA stressed that the offences were serious. They were aggravated in that C did not show remorse and that he abused the position of trust that had been placed in him by the complainants and their parents (para [27]). The victims were vulnerable because of their particular needs. The court concluded that imprisonment should be imposed, but, in terms of section 276(1)(i) of the Criminal Procedure Act, permitted the Commissioner to determine the actual duration of the sentence. The period of imprisonment, however, was left at four years.

This judgment is open to criticism. The fundamental problem is the court's finding that four years' imprisonment was 'excessively severe', but then making its own sentence no shorter than the 'excessively severe' sentence. Although section 276(1)(i) imprisonment is somewhat less severe than ordinary imprison-

ment (see *S v Sheepers* 2006 (1) SACR 72 (SCA) para [10]), the maximum duration that a prisoner might spend in prison remains the same. This matter was not addressed by the court. A second problem is that the court's order read that the sentences imposed by the trial court were set aside and replaced by a single sentence, when the order should at least have indicated that all six counts were taken as one for the purpose of sentencing.

The facts in *S v De Klerk* 2010 (2) SACR 40 (KZP) were similar to those of *HD*. D was convicted of three counts of indecent assault on girls aged 6, 7 and 11 years respectively. He pleaded guilty. The judgment does not explain the nature of the assaults, except that they were non-violent (para [7]). However, the judgment states that there 'is no doubt that the appellant . . . committed heinous crimes on vulnerable young girls who had been left in his care' (para [27]). The crimes were 'abhorrent' and the trial court was correct to emphasize their seriousness (ibid). It is not unreasonable to assume that the assaults were very serious, as the trial court imposed ten years' imprisonment for each count, for a total sentence of 30 years' imprisonment. The personal factors of the appellant included that he was 39 years old at the time of sentencing and a first offender (para [1]). An expert clinical psychologist testifying on sentence, came to the conclusion that D was a regressed sexual offender. Such offenders are not fixated on children, can feel remorse for their actions and have a lower risk of reoffending than fixated offenders. In addition, D was an opportunistic paedophile who, in contrast to predatory paedophiles, did not actively seek the out potential victims (paras [3]–[7]). These factors made him a better candidate than most for rehabilitation, especially since he had already taken several steps to give effect to his remorse, such as informing the mother of the victims of his actions, submitting himself to treatment and moving to another part of the country (para [9]). He also expressed real remorse and acted on that (see *Remorse* above).

The court compared the facts and sentences of various other cases: *S v E* 1992 (2) SACR 625 (A); *S v R* 1993 (2) SACR 590 (A); *S v Gerber* 2001 (1) SACR 621 (W); *S v Mohlakane* 2003 (2) SACR 569 (O); *S v McMillan* 2003 (1) SACR 27 (SCA); *S v D* 1995 (1) SACR 259 (A); and *S v Coetzee* supra. Taking into account all the factors in this case, and taking the counts together for the purpose of sentencing, the court concluded that D did not have to be removed from society and that a sentence of correctional supervision would be appropriate (para [29]; see also *Correc-*

tional supervision above). D was sentenced to three years' correctional supervision, with conditions such as house arrest, community service and various requirements regarding treatment programmes added (para [30]).

Incest

The trial court convicted the appellant (MN) of raping his thirteen-year-old daughter in 2000, but, on appeal, the court in *S v MN* 2010 (2) SACR 225 (KZP) replaced the conviction with the common-law offence of incest. While describing the offence as 'a serious one' (para [15]), Gorven J found very few cases providing a guideline for an appropriate sentence for incest (*ibid*). In *S v M* 1968 (2) SA 617 (T), the offender was sentenced to a suspended sentence of three months' imprisonment. The parties had both consented to the intercourse and felt real affection for each other. In *S v S* 1995 (1) SACR 267 (A), the appellant was convicted of two counts of incest, relating to his 17-year-old daughter. His sentence was three years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act, plus suspended imprisonment of two years (para [18]). Gorven J considered these sentences somewhat lenient, as, in the constitutional era children's rights deserved added protection:

'The crime in question fundamentally undermines these rights, since it is the person charged with protecting the child who commits the offence. It is likely to have long-term deleterious consequences on the ability of the complainant to trust others, along with the likelihood of psychological trauma.' (para [19]).

Since the Constitution 'marks a departure from the somewhat lenient approach taken in the past', and despite the plea of the appellant's wife that he not be incarcerated, the court concluded that justice demanded direct imprisonment, with a suspended sentence added to serve as a deterrent against a repetition of the crime. The court also considered the appellant's personal circumstances. At 41 years of age he was a first offender. At the time of arrest he did casual work. He was married and had other children. He had already spent six years in prison, of which about 18 months were awaiting trial (para [19]). Based on all these considerations a sentence of eight years' imprisonment, of which two years were conditionally suspended, was imposed.

Two aspects justify discussion. The first is that the sentence imposed here is much more severe than that imposed in *S* and hardly something that can be described as a mere correction of a

'somewhat lenient approach'. The second comment, however, is to support the wording of the conditions of the sentence imposed by the court of appeal, as the correct approach with respect to the new statutory offence of incest. It read that the two years' imprisonment were '... suspended on condition that the appellant is not convicted of rape or of the crime of incest, as envisaged in section 12 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, committed during the period of suspension' (para [21]).

Robbery

Two judgments by the Supreme Court of Appeal dealt with the merits of the cases, and only briefly touched on the sentences. In *S v Khoza* 2010 (2) SACR 207 (SCA) the appellants were involved in two cash-in-transit heists during 2002. In the first incident the couriers of the cash were attacked by armed robbers and a substantial amount of money taken. In the process one of the security officers was killed (however, none of the appellants appears to have been held responsible for this death). In the second incident the armed vehicle transporting the cash was rammed from behind and, when it overturned, about R200 000 was taken. The aggravating factors taken into account against the appellants were that 'the armed robbery was extremely dangerous', involving a gang armed with two automatic rifles and machine guns, who had no concern for the safety of the security officers (para [89]). Both the robbery and the unlawful possession of machine guns carried minimum sentences of fifteen years' imprisonment, but the trial court imposed a sentence of 21 years' imprisonment for the robbery on the first appellant and 23 years' imprisonment for the robbery (with the charge of malicious injury to property taken together for purposes of sentencing) on the other appellants. The prescribed minimum sentence was imposed for unlawful possession of a machine gun, but with orders that part of the various sentences should be served concurrently. So the effective sentences were 26 years' imprisonment for appellant 1 and 35 years' imprisonment for the others.

S v Mdlongwa 2010 (2) SACR 419 (SCA) was an appeal by the appellant (M) against his conviction, with another accused, of robbery with aggravating circumstances. They were members of a small gang who robbed a bank in Dundee in 2004. The appellant used a firearm to gain entry to the bank and pointed it at the person working at the enquiries counter. The gang also

assaulted some of the bank's employees. They left with money taken from the tellers' section. The amount involved is not disclosed in the judgment. The trial court sentenced M to twenty years' imprisonment, five years above the minimum required in the minimum sentences legislation (para [28]). The Supreme Court of Appeal considered M's brazen conduct 'in entering a bank, and robbing it with impunity in the presence of innocent members of the public, and assaulting a staff member, [as] deserving of the sentence imposed' (para [29]). In the process the court took into account that M was a first offender, had been held in custody awaiting the sentence for more than a year, and that no one was injured during the robbery (para [28]).

In October 2006, M was robbed of his cellphone by two robbers who pointed firearms at M and a friend, who were walking home one night. Only one of the robbers was caught: the appellant in *S v Chowe* 2010 (1) SACR 141 (GNP). The trial court sentenced the appellant (C) to fifteen years' imprisonment for robbery with aggravating circumstances (the minimum sentence prescribed), and three years' imprisonment for illegal possession of a firearm. The sentences were ordered to run concurrently. On appeal the court took into account that the value of the property taken during the robbery was R600 and that the victim was not physically harmed, as well as the manner in which this robbery was committed (paras [25]–[26]). In addition, C was 26 years old when he committed the crime, had a young child and held fixed employment with an income of R3 000 per month (para [16]). He had a previous conviction for housebreaking and theft and was therefore, 'strictly speaking, not a first offender' (para [27]). He had also spent about eight months in custody awaiting trial (*ibid*). The court considered C to be a good candidate for rehabilitation (para [25]). It concluded that, taken together, all these factors amounted to substantial and compelling circumstances (para [26]), and imposed a sentence of ten years' imprisonment for the robbery.

Housebreaking

The accused in *S v Dube* 2010 (1) SACR 65 (KZP) had been convicted of housebreaking with intent to commit theft and attempted theft. A group of ten 'bank robbers' broke into a bank at Harding, KwaZulu-Natal on a Sunday morning in 2005. While some of the members of the gang kept look-out, others attempted to access the money vault. The police arrived on the scene and

arrested the whole gang, except for one of the robbers, who was shot dead by the police. (Most of the judgment deals with the question whether the surviving gang members could be held liable for the death of their partner, the court finding that they could not.)

The court of appeal considered sentences of fifteen years' imprisonment for appellant 4 and twelve years' imprisonment for all the others appropriate for the housebreaking. It should be noted that neither the offence, nor the attempted offence, of housebreaking with intent to commit any further kind of offence is contained in the minimum sentences legislation. The judgment does not state what aggravating and mitigating factors informed these sentences; it merely agrees with the trial court's assessment (para [33]). One assumes that appellant 4 received a longer sentence as he was a ringleader, and also that the fact that it was a bank that had been broken into, was an aggravating factor.

Fraud

A sufficient number of judgments dealing with sentences for fraud were reported in 2010 to justify arranging them in terms of the severity of the sentences.

The appellant in *S v Janssen* 2010 (1) SACR 237 (ECG) was convicted of 144 counts of fraud, committed over a period of 10 months. She defrauded the company where she worked as bookkeeper of an amount in excess of R1,5 million. Although there is no indication that any of the counts involved an amount in excess of R500 000 (the threshold amount for economic crimes in Part II of Schedule 1 to the minimum sentences legislation), the trial court used this legislation as point of departure. It considered substantial and compelling circumstances to be present (para [10]) and imposed eight years' imprisonment. As far as the crime was concerned the court of appeal referred to the extent of the losses suffered by the appellant's employer. These were such that the company went bankrupt, resulting in several people becoming unemployed (para [7]). The appellant's *modus operandi* was quite simple. She obtained permission from the manager to make certain payments, which she then paid into her own bank account (para [5]). She was 50 years old at the time of the crime, divorced, with adult children. At the time of sentencing she was working for one of her children, and earned a reasonable income (para [9]). The appellant attempted to escape incarceration by submitting that she had been diagnosed as a pathological

gambler (paras [9]–[10]; see *Other factors affecting sentencing* above), but the court stressed that this could not by itself be a mitigating, substantial or compelling circumstance (para [15]). Chetty J found no fault with the trial court's reasoning and dismissed the appeal (para [18]).

The Supreme Court of Appeal, in *S v Olivier* 2010 (2) SACR 178 (SCA) (para [24]), reiterated that direct imprisonment for white-collar crime, such as fraud, is not uncommon, even in the case of first offenders. The court rejected an appeal against a sentence of seven years' imprisonment, of which three years were conditionally suspended, imposed in the regional court. The appellant (O) was convicted, on a plea of guilty, of six charges of fraud. The counts were taken as one for the purposes of sentencing. O was a financial advisor, but he invested the money of his victims in disregard of their express instructions. As a result of his fraudulent conduct, committed over a period of about one year, the victims lost a total amount of R807 000. The prosecutor called two victims as witnesses on sentence. This evidence showed that O had abused the trust of the complainants, who were mostly poor, simple people (para [23]). They were left destitute as a result, although most were compensated by the bank where the monies had been deposited (para [20]). The Supreme Court of Appeal concluded that the 'gravity of the offences is beyond question' (para [19]). It accepted that O was a first offender; in fixed employment; married with one dependent adopted daughter; that the plea of guilty was an indication of remorse (para [21]). Nevertheless, far from inducing a sense of shock, the Supreme Court of Appeal considered the imposed sentence to be on the lenient side (para [24]).

A similar crime was committed in *S v EB* 2010 (2) SACR 524 (SCA). The facts are succinctly set out by Cloete JA (para [1]):

'On 6 May 2008, in the Eastern Cape Commercial Crimes Division of the regional court in Port Elizabeth, the appellant, an adult female aged 33 years, pleaded guilty to, and was convicted of, 67 counts of fraud. The first fraud was committed in June 2003 and the last, some three and a half years later, in January 2007. The appellant was employed by a close corporation as a bookkeeper. She made electronic transfers of money from the close corporation's bank account into the account of her husband, and she also purchased goods, which she appropriated, from suppliers to the close corporation, using the close corporation's money, whilst representing to the close corporation and its sole member that the transfers were to settle debts owed to the close corporation's creditors, and representing to

the suppliers that the goods had been purchased for the close corporation. The total amount involved was over R330 000 and nothing has been voluntarily repaid.'

EB was a first offender and, although she pleaded guilty, this was not taken as an indication of remorse, as she did not have much choice (para [11]). It was held against her that she was in a position of trust, committed the crimes over an extended period, that it involved a considerable amount and that nothing had been repaid (ibid). The court considered her motivation for the crime to be 'pure greed — she wished to maintain a standard of living above the family's means' (ibid). It was argued on behalf of the appellant that she was the primary caregiver of her children and that her husband could not cope without her, as he had to work longer hours to make up for the loss of her income (para [2]). On the facts available to the court, and despite the court having 'the greatest sympathy for the children' (para [14]), imprisonment was considered to be the only appropriate sentence in this case (paras [11] and [14]). The children's emotional needs could not override the court's duty to impose an appropriate sentence. The regional court suspended part of its sentence to ensure that the appellant would not be absent from her children for an unnecessarily long period (para [11]). This, the Supreme Court of Appeal found, was as much as could be done in this case (ibid). In dismissing the appeal, it confirmed the trial court's sentence of five years' imprisonment of which two years were conditionally suspended.

The facts in *S v Michele* 2010 (1) SACR 131 (SCA) were briefly that the appellants took out a life insurance policy on the life of one M, to the value of almost R380 000. In 1999 they submitted a claim, falsely alleging that M had died. The insurance company immediately paid out R20 000 for funeral expenses. It then established that the claim was fraudulent and stopped payment of the balance. Nevertheless, the potential loss for the company was the full amount of almost R380 000. The Supreme Court of Appeal had no doubt that this crime was serious (para [9]). The appellants acted out of greed, and they carefully planned and executed the fraud. 'The severity of white-collar crime such as this should not be underestimated', Leach AJA stated (para [9]), adding that the particular insurance company loses R2 million per year as a result of such frauds. Of course, the eventual loss has to be paid by innocent clients of the company in the form of higher premiums for their policies. The court repeated its state-

ments in *S v Sadler* 2000 (1) SACR 331 (SCA) and *S v Barnard* 2004 (1) SACR 191 (SCA), that these kind of offences are not petty, that they have a 'corrosive effect on society' and that the perpetrators are criminals who cannot expect that they will not be imprisoned. As far as the appellants' personal circumstances were concerned (paras [6]–[7]) they were businessmen with private businesses that provided them with adequate income. Both were first offenders and regular churchgoers. At the time of sentencing in the trial court the first appellant was 32 years old and unmarried, but supported a child. The second appellant was 42 years old, married with six children. As discussed above (see *Remorse*), their pleas of guilty and willingness to repay the R20 000 were only accepted as a limited indication of remorse (para [8]). The appellants were each sentenced to four years' imprisonment, half of which was conditionally suspended for three years.

In *S v Mostert* 2010 (1) SACR 223 (SCA) the appellants were convicted of fraud and two statutory offences in terms of the National Water Act 36 of 1998. The Supreme Court of Appeal sentenced them to a fine of R20 000 or twelve months' imprisonment, wholly suspended for four years, for the fraud. The appellants, a father and son, farmed sugarcane near Barberton. They made misrepresentations to the Lomati Irrigation Board ('the Board') with respect to the amount of water they were drawing from the local irrigation scheme. They acted to the prejudice of the Board, as they prevented the Board from fulfilling its statutory duties, such as the protection of the water sources (para [30]). The amount of water that they obtained illegally was unknown. The judgment provides no further detail of the appellants' personal circumstances. As far as the seriousness of the crime is concerned, the court merely stated that water is a scarce and valuable resource in South Africa (paras [8] and [34]).

Kidnapping

The judgment in *S v Johaar* 2010 (1) SACR 23 (SCA) gives a rough indication of the kind of sentences that might be appropriate for this crime. Unfortunately, the totality of offences in this case (see *Cumulative effect of sentences* above) clouds the issue and had the effect that the court was not required to give a definitive judgment on sentencing for kidnapping as such.

The victim in this case was hijacked by two offenders and forced to accompany them, in his car, on a trip from Cape Town to

Mossel Bay and back. This ordeal lasted (apparently) for two days. As the accused pleaded guilty it is not known how they treated the victim, how they kept him from escaping or whether he was physically harmed in any way. The offenders also robbed R60 cash from the victim, at gunpoint, but this was returned when he was allowed to leave with his car. Accused 2 (J) was sentenced to ten years' imprisonment and accused 3 (X) to eight years' imprisonment for the kidnapping itself. One deduces that the difference in sentences was justified as J played the leading role in the planning and execution of these crimes, and had several previous convictions for offences involving dishonesty, although he was substantially younger than X (23 against 27 years old), who was a first offender. On appeal to the Supreme Court of Appeal, the appellants criticized these sentences as being too severe. The court expressed no opinion on the matter, as it held that it was only concerned with the totality of criminal behaviour and the question whether the total sentence was appropriate punishment (para [14]).

Public violence

The actions of a group of hooligans at a well-known restaurant and shop near the Hartebeespoort Dam in 1996 gave rise to *S v Le Roux* 2010 (2) SACR 11 (SCA). Although much of the judgment deals with the question whether these actions actually amounted to the crime of public violence, the facts are relevant to the question of an appropriate sentence for this kind of crime. The perpetrators' actions were summarized by the court as 'a rowdy, violent and bloody confrontation, in addition to which windows, shop wares and furniture were either upended and/or broken', resulting in a serious disturbance to the public peace (para [12]). An innocuous remark by one of the clients at the restaurant caused a group of big men, mostly with shaven heads, to attack this client and other members of his party. Once finished with this party, they moved on to other patrons, split into smaller groups and attacked people as they encountered them. The result was 'full-scale chaos' (para [9]) and 'mayhem' (para [13]). The assistant to the owner of the establishment explained that what happened was more like an attack than an assault, and that they felt like hostages, who could go nowhere for fear of further attacks. The first two policemen to arrive on the scene could not get the situation under control until reinforcements arrived, and the chaos only ended when the attackers left the scene. Several

victims required medical attention after the event. At least one victim was hit with a sjambok and another lost consciousness for a considerable period.

The leader of the group was sentenced to six years' imprisonment, of which two years were conditionally suspended. The other two appellants whose convictions were confirmed were also sentenced to six years' imprisonment, but in their case half of the sentences were conditionally suspended. For current purposes the only question in the *Le Roux* case was whether these sentences were appropriate. In addressing this question the court mentioned that the appellants' personal circumstances were considered by the trial court, and that the trial court was aware of the delay before finalization of the case (see *Factors affecting sentence*). No misdirection could be found (para [35]). In addition, the court found the facts in *S v Whitehead* 2008 (1) SACR 431 (SCA) to be not dissimilar. In *Whitehead* a sentence of five years' imprisonment, two of which were conditionally suspended, was upheld. With this 'guideline' clearly in mind, Mlambo JA had no hesitation in finding that the imposed sentences were fully justified. The actions of the appellants warranted severe punishment, especially as 'families were out on an afternoon to have fun and minding their own business when they were wantonly and violently subjected to senseless assaults' (para [36]).

I submit that, as far as sentence is concerned, the judgment in *Le Roux* is problematic in some respects, the most important of these being the 'translation' (see *S v Nyathi* 2005 (2) SACR 273 (SCA) para [15]) of the seriousness of the crime into a sentence of (in this case) six years' imprisonment. Many factors that are relevant to the establishment of the seriousness of the crime of public violence, or the wanton and violent assaults mentioned in the judgment, are not referred to at all. Examples include the size of the group, the duration of the attack, and the extent of the damage caused. The comparison of the facts in *Whitehead* is also rather unfortunate. Apart from the fact that the latter case probably involved a planned action by the perpetrators (in explicit contrast to the situation in *Le Roux* para [15]) and that it was a racist attack by white on black, the most important difference is that the attack in *Whitehead* resulted in the death of one of the victims. In fact, nine victims were left 'lying on the grass' following the attack in *Whitehead*, although in total 22 people sustained injuries. The death of the one victim in *White-*

head did result in a conviction of culpable homicide in addition to the conviction of public violence, and the same sentence was also imposed for the culpable homicide, resulting in an effective eight years in prison. However, there is no doubt that the death of the deceased resulted from the same actions that justified the conviction of public violence, despite the finding by the majority that the convictions did not amount to a duplication of convictions (*Whitehead* para [47]).

There is no indication in *Le Roux* that *any* of the victims were as severely injured as *any* of these nine. It is submitted that a considerably lighter sentence than that imposed in *Whitehead* is indicated in the case of *Le Roux* and not, as happened, more severe sentences. It is also unfortunate that the judgment in *Le Roux* does not refer to any of the personal circumstances of the appellants. One does not know whether their actions on the day were part of a pattern or whether this happened only once, to mention one example. In fact, it is submitted, this crime would have been an excellent opportunity for a restorative justice approach. Even retribution would have been served if the offenders were given the opportunity to explain their actions, to apologize (evidently only if this was done truthfully) to the victims and to compensate the victims for their losses.

Theft

The appellant in *S v Naidoo* 2010 (1) SACR 499 (GSJ) stole a truck worth more than R500 000 from his employer. The relevant vehicle was designated to the appellant (N). The court found that the minimum sentences legislation was not applicable in this case (see *Details of the provisions* above). The following factors aggravated the offence in this case (para [24]): the value of the truck; the fact that the vehicle had not been recovered; N was in a position of trust; N refused to admit his involvement in the offence or to show any remorse. On the other hand, N was 34 years of age, and under duty to take care of two minor children from an earlier marriage (para [21]). The court considered partly suspended imprisonment to be the appropriate sentence (para [25]) and imposed eight years' imprisonment of which three years were conditionally suspended for five years.

Following a partially successful appeal, the appellants in *S v Matlou* 2010 (2) SACR 342 (SCA) were convicted of theft of a bakkie, a grinder and a welding machine. The value of these items is not revealed in the judgment, but they belonged to the

deceased (although the first appellant pointed out the body of the deceased to the police, as well as the firearm with which he was killed, this was done following an assault on the appellant, resulting in this evidence being excluded at the trial (paras [7]–[16])). In sentencing the appellants for this theft the court held it against them that they showed no respect for the property of the deceased. Indications of this lack of respect included that the vehicle was damaged when it was overturned by one of them, that the grinder was given in return for towing this damaged vehicle and that the welding machine was sold ‘for a paltry R100’ (para [34]). These indications of ‘sheer arrogance’ had to be balanced with the mitigating factors, namely that the appellants were first offenders; that they had been in detention since their arrest; and they had already served their sentences from 25 April 2003 (the judgment was delivered almost seven years later, on 31 March 2010). The court imposed six years’ imprisonment, a sentence it thought fair and balanced while serving the interests of society.

Stock theft

The trial magistrate in *S v Chipape* 2010 (1) SACR 245 (GNP) thought imprisonment was the only appropriate sentence for stock theft involving a bull that was later sold for R2 800. The accused (C) used the money to buy clothes and groceries. From this fact the review court (per Legodi J) accepted in C’s favour that he was not motivated by ‘blatant greediness’ (para [18]). The personal circumstances of C were the following (paras [16]–[17]): He was a first offender; attended school to grade 11; was 23 years old at the time of the offence; pleaded guilty, which was accepted as ‘a sign of remorse’. The court felt that the trial court should have investigated the background of C, in particular why, at 23, he was still in grade 11 (para [22]). The trial court had imposed 18 months’ imprisonment. The magistrate referred to the seriousness of the cases, the escalation of stock theft in the area, black people’s attitude regarding the importance of their cattle and the fear that the community might take the law into their own hands if any sentence other than imprisonment was imposed (para [2]). As indicated above, these considerations were either rejected by the review court, or a more nuanced approach required. The review court indicated that correctional supervision would probably have been the appropriate sentence (para [30]). However, since C had already served 6 months of his sentence,

the review court imposed six months' imprisonment, antedated to the date of original sentencing. As a result, C was released immediately.

Certain statutory offences

Drugs

In *S v Naidoo* 2010 (1) SACR 369 (KZP) the appellant (N) was convicted of three counts of dealing in heroin, a dangerous dependence-producing drug, in contravention of section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992. He was caught in a police trap, following three transactions during which just over R7 000 was paid for 139 'loops' of heroin (para [8]). The trial court consolidated the charges and sentenced N to twelve years' imprisonment.

Steyn J referred to *S v Xaba* 2005 (1) SACR 435 (SCA) as support for the statement that a distinction should be made when sentencing offences related to dagga and more dangerous drugs (para [17]). The statement in *Anthony v S* [2006] JOL 17440 (W), that five to ten years' imprisonment was the 'average' sentence for dealing in cocaine and heroin, was also acknowledged (para [18]). The court also explained that the seriousness of the offence should be 'gleaned from the penalty clause' (para [20]) and section 5(b) of the Drugs and Drug Trafficking Act 140 of 1992 provides for imprisonment of not more than 25 years, any fine, or both such imprisonment and any fine. In addition, possession of a drug and dealing in that drug should be distinguished, as dealing 'is a far greater evil and deserving of a harsher sentence than the mere possession of the drug' (ibid). While it is true that the penalty clause of a statutory offence should be an indication of the seriousness of the crime, it often happens, particularly in the case of drug offences, that a specific offence has a tremendous range of seriousness. Apart from the dangerousness of the drug (see above) it also makes a big difference whether the offender dealt only in a small quantity or in huge quantities worth hundreds of thousands of rand.

N was 39 years old during the appeal; a first offender; married for 19 years with two teenage children; unemployed but previously an administrative clerk; also taking care of an elderly family member; and was experiencing financial problems (para [23]). However, he showed no remorse and the 'public's need for protection' outweighed these personal circumstances (para

[24]). Reference was made to the following quotation from *S v Randall* 1995 (1) SACR 559 (C) 566*g-i* in *S v Jimenez* 2003 (1) SACR 507 (SCA) (para [21]):

'Drug dealers are unscrupulous criminals. They will use the weak, the gullible, and, may I add, the greedy. They are without conscience. They do not care for those who facilitate their evil objectives, nor do they have a concern about the lives they ruin by trafficking in drugs. Society is at risk should it hesitate to use every legitimate mechanism at its disposal to protect itself against their destructive designs. One of these weapons — and I emphasize that it is only one of them — is to make it clear to courier and principal alike, that the game is not worth the candle and that the price society exacts for transgressions will not be tempered by concern for the plight of the weak and the greedy.'

In Steyn J's view the repetition of the offence was a substantial aggravating feature of this case, which required a clear message to be sent that the selling of hard drugs is not worth any money (para [26]). In her view that trial court's sentence was not inappropriate or disproportional (*ibid*).

It is notable that in *Jimenez* the same sentence (of twelve years' imprisonment) was imposed for dealing in 653g of cocaine, then worth R210 000. This sentence is in stark contrast to the sentence of 25 years' imprisonment for selling, to a police trap, 4,83g cocaine worth R3 000 imposed by the trial magistrate, that resulted in the appeal in *S v Nnasolu* 2010 (1) SACR 561 (KZP). Unsurprisingly, the State conceded that this sentence was out of all proportion to the seriousness of the crime (para [49]). N had one previous conviction for 'abuse' of dependence-producing substances, committed in 2000, leading to a sentence of five years' imprisonment, partly suspended. At the time of the appeal he was 31 years old; several members of the extended family were dependent on him; he was employed as a packer prior to his arrest; and had been in custody for one year prior to sentencing (para [51]). Stewart AJ considered these personal circumstances 'heart-wrenching in as much as there are other people dependent on the appellant who will suffer as a consequence of his crime and his incarceration' (para [52]). However, drug dealing is a prevalent crime, which not only feeds the addiction of drug-dependent people, but creates further addiction. Drug dealers should therefore be removed from society in order to protect society against them. The court considered an appropriate sentence to be ten years' imprisonment, half of which was conditionally suspended. This sentence still appears to be

out of proportion to the severity of the crime, considering the amount of drugs dealt in.

Drunken driving

In *S v Jaftha* 2010 (1) SACR 136 (SCA) the appellant had been convicted of a contravention of section 122(1)(a) of the Road Traffic Act 29 of 1989, for driving under the influence of alcohol in November 1997. He had several previous convictions: In 1991 he was given a totally suspended sentence; for the second offence, committed in August 1997, he had not even been sentenced when he offended for the third time. The magistrate considered imprisonment to be the only appropriate sentence, and sentenced J to three years' imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act. The trial court took into account his favourable personal circumstances, but also that his blood alcohol level was four times the legal limit and that he had two passengers with him (para [4]). What changed everything in this case was a delay of ten years in the implementation of the sentence, during which time J became rehabilitated. He now had a successful business and a stable family with a wife and two children. Although the Supreme Court of Appeal considered the initial prison sentence 'understandable' (para [3]), it found that no purpose could now be served by imposing such a sentence on a rehabilitated offender. Nevertheless, the sentence still needed to be punitive with a genuine deterrent effect (para [21]). J was sentenced to a fine of R10 000, or alternatively imprisonment of two years.

Others

A protection order had been served on the accused in *S v Sibiyá* 2010 (1) SACR 284 (GNP), in terms of the Domestic Violence Act 116 of 1998. A week later he disregarded this order when he harassed the complainant, hitting her twice in the face. The appellant worked as a security guard and earned R1 500 per month; he supported several family members from his income and would lose this employment if incarcerated (para [8]). The review court felt that a suspended sentence with a restorative justice element would have been appropriate in this case (para [13]).

S v Dembe 2010 (1) SACR 360 (NCK) is probably the first reported case on appropriate sentences for performing illegal abortions in terms of the Choice on Termination of Pregnancy Act

92 of 1996. After finding the sentences imposed by the magistrate (effectively 10 years' imprisonment) to be shockingly excessive, the court of appeal was at large to impose sentence on the appellant (D) (para [17]). D performed a successful abortion on a 23-year-old woman after the twentieth week of her pregnancy. This gave rise to his conviction on counts 1 and 2. In addition, he unsuccessfully attempted an abortion on an 18-year-old woman between the thirteenth and twentieth weeks of her pregnancy (counts 4 and 5). The offences amounted to the contravention (or attempted contravention) of section 10(1)(b) of the Act (performance of an abortion by someone who is not a medical practitioner) and section 10(1)(d) of the Act (performance of an abortion at a facility not approved for this purpose). In each of the two instances the court of appeal took the two counts together and imposed three years' imprisonment, half of which was suspended conditionally, for a period of five years. The result was an effective sentence of three years' imprisonment, backdated to the date of imposition of the original sentence in February 2009 (see also para [21]).

The seriousness of these crimes was established with reference to the following factors. First, the appellant openly advertised his services on lamp posts (para [13]). He performed the abortions by administering a Schedule 4 drug to the complainants to induce labour (para [4]). This drug could only be obtained on prescription from a medical practitioner. If used without supervision it had various potential complications, some of which could result in the death of the patient (para [12]). In this case both the complainants experienced severe pain and had to receive medical treatment (para [15.2]). The court also regarded it as aggravating that D received payment for his actions and took this as an indication of his greed (para [15.5]). The penalty clauses were taken as further indication of the seriousness of the crime. In terms of previous legislation (the Abortion and Sterilization Act 2 of 1975) performers of abortions could be sentenced with a maximum of R5 000 or 5 years' imprisonment, or both. The current Act's penalty clause increased the maximum imprisonment to ten years. Majiedt J considered this increase as 'instructive' (para [20]). The personal circumstances of D were as follows (para [14]): He was a first offender, and 32 years of age at the time of sentencing; he worked as a herbalist and earned approximately R3 500 per month; he had several dependants, including two minor children; he had pleaded guilty and expressed remorse about the crimes. The court deduced

the role of the interests of society from the preamble to the Act and from the judgments in *Christian Lawyers Association v Minister of Health and Others (Reproductive Health Alliance as Amicus Curiae)* 2005 (1) SA 509 (T) and *Nourse v Van Heerden NO and Others* 1999 (2) SACR 198 (W) at 205a–g. The essence of the legislation was that any consent to termination of pregnancy had to be ‘informed’ and ‘the requirements of a safe termination of pregnancy being carried out by a qualified person under certain conditions at an approved medical facility as stipulated in the Act’ (para [19]). The court could find no decided cases to serve as a guide on sentence in respect of the current Act, but in *S v Collop* 1981 (1) SA 150 (A) 168G–H, decided under the previous Act, a sentence of six months’ imprisonment had been considered appropriate. In the current case the court concluded that only imprisonment was appropriate as no other sentence would be proportionate to the gravity of the offence (para [19]). It then imposed the partly suspended sentence mentioned above.

S v Dos Santos 2010 (2) SACR 382 (SCA) dealt, inter alia, with the sentencing of certain offences under the Diamonds Act. In the trial court the first appellant (D) was convicted of five counts of dealing in unpolished diamonds and sentenced to twelve months’ imprisonment for each count. The second appellant (M) was convicted of one such count and sentenced to a fine of R20 000 or four years’ imprisonment, half of which was suspended (paras [5]–[7]). Ponnann JA (para [47]) had no problem with the sentences imposed on D, but found the sentence imposed on M, for the same offence, to be grossly inconsistent. The diamond in question weighed 91 carats and was sold by M to D for R14 000. Both appellants’ involvement was more or less equal, although D was the main planner of the crime. As a result the sentence for M was replaced with a fine of R20 000 or one year’s imprisonment, half of which was conditionally suspended.

S v Vika 2010 (2) SACR 444 (ECG) deals with sentencing for contraventions of section 1(1) of the Criminal Law Amendment Act 1 of 1988. This offence was created in order to prevent a person who commits a serious ‘crime’ when heavily under the influence of alcohol or another substance from escaping criminal liability (para [7]). The offence’s penalty clause reads that someone convicted of this offence ‘is liable on conviction to the penalty that may be imposed in respect of the commission of that act’. The appellant (V) was convicted of this offence in the regional court. The facts of the case were that V consumed alcohol

throughout the course of a party, that he became involved in a fight during the course of which he stabbed two friends, one of them to death (paras [9]–[10]). He would have been liable for murder and attempted murder, had it not been for the consumption of alcohol. The court stressed that the serious consequences of his actions had to be taken into account for sentencing purposes (para [18]). However, it also referred to the warning previously noted in our courts, that such offenders should not be punished for the ‘prohibited acts (in this case murder and attempted murder)’ (paras [8] and [16]). The implication is that sentences for this statutory offence would invariably be less severe than a sentence for the ‘prohibited acts’ themselves. V’s personal circumstances were that he was 30 years old at the time of the offence; a first offender; he had stable employment as a security guard; and he had several dependants. In addition he pleaded guilty and it was argued on his behalf that he regretted his actions (paras [12]–[13]). Both the trial court and the court of appeal assumed that the minimum sentences legislation was applicable (see *Offences involved* above). However, the cumulative effect of the mitigating and aggravating factors were held to amount to substantial and compelling circumstances, justifying a sentence less than the prescribed minimum sentence (para [17]). When the interests of society were also taken into account, the conclusion was inevitable that a custodial sentence had to be imposed (paras [19]–[20]). In determining an appropriate sentence, the court then considered sentences imposed (paras [22]–[25]) for the same kind of offence in other cases, including *S v Maki* 1994 (2) SACR 414 (E) and *S v Ingram* 1999 (2) SACR 127 (W). This assessment showed that the sentences imposed for contraventions of section 1(1) were considerably less than those for the ‘full offence’ or prohibited act itself (para [26]).

Such a conclusion certainly makes sense. A person who acts with impaired appreciation of wrongfulness will invariably have to be considered less blameworthy for his actions, which by itself would normally indicate that a less severe sentence is appropriate. In this respect the following conclusion remains increasingly important (Terblanche *op cit* (*Guide*) at 150):

‘The courts frequently refer to the *blameworthiness* or *culpability* of the offender as a measure of how severe the punishment needs to be. It is therefore a useful question, in determining an appropriate sentence, to ask how blameworthy the offender is. If one offender is more blameworthy than the other, her sentence should reflect this and, thus,

be more severe. Likewise, the less blameworthy an offender, the less severe should be her sentence.'

The court in *Vika* upheld the appeal and sentenced V to seven years' imprisonment for the first count and four years' imprisonment for the second (involving the stabbing only). These sentences were ordered to run concurrently (para [27]) and ante-dated to the date of the original sentence.

EXECUTION OF SENTENCES

Parole

The parole board was taken to court in *Lebotsa v Minister of Correctional Services* 2010 (1) SACR 379 (GNP). It was not in dispute that the prisoners qualified for consideration of parole. The facts are not important for current purposes, but Southwood J made a number of pertinent observations regarding parole in general. He reiterated that no prisoner is ever entitled to be released on parole (para [13]). In general, prisoners sentenced before 1 October 2004 will qualify for consideration for parole after having served a third of their sentences (para [13]). However, Correctional Supervision and Parole Boards (parole boards) can only take decisions based on *all* the relevant information pertaining to each prisoner, as required by the Correctional Services Act 111 of 1998. Without such information, a decision taken by the parole board will be arbitrary and capricious (s 6(2)(e)(vi) of the Promotion of Administrative Justice Act 3 of 2000). For example, s 38(2) of the Correctional Services Act requires, in respect of every prisoner with a sentence of more than twelve months, a plan of how the sentence will be served (para [18]). What is required is

'... that a CMC [Case Management Committee] has interviewed the applicants at regular intervals and reviewed the plans and the progress made and, where necessary, amended the plans; and that a CMC has submitted to the parole board a judgment on the merits and the remarks made by the court when imposing the sentence, and dealt with the likelihood of the applicants' relapsing into crime, the risk posed to the community and the manner in which the risk can be reduced. The existence of the s 38(2) plan and the progress made by the prisoners in serving the sentence in accordance with the plan, and any special therapy received and still required, are obviously essential to the question of the likelihood of a relapse into crime, the risk posed to the community and the manner in which this risk can be reduced. In the absence of this information the parole board's consideration of the

applicants for parole of necessity is not only superficial, but arbitrary and capricious.'

(See also para [22].) The parole board is not entitled to simply postpone its decision to the next consideration of parole when it does not have the requisite information. This requisite information includes the written representations of the prisoners, the comments of the court during sentencing, and so on.

Orders on execution of prison sentence

It is a well-established principle of our law that a sentencing court has no authority to make any orders with respect to the way in which a sentence of imprisonment is to be executed (cf, in particular, *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 520–3; *S v Dodo* 2001 (1) SACR 594 (CC) para [23]). Nevertheless, sentencers regularly exceed their powers in this regard. In *S v Langa* 2010 (1) SACR 47 (GNP) the magistrate of Hoedspruit sentenced the offender to two years' imprisonment and then ordered that he should attend programmes, during his sentence, 'in not committing' various crimes involving dishonesty. The review court confirmed (at 48f) that a court may not dictate to the prison authorities how they should execute such a sentence.