

ASPECTS OF THE SENTENCING PROCESS IN CHILD SEXUAL ABUSE CASES

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by

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ABSTRACT

This thesis investigates current sentencing practices relating to the diverse, complex and emotionally laden phenomenon of child sexual abuse. It focuses on relevant legislative provisions, on case law and on an empirical study conducted amongst regional court magistrates. Trends, developments and problems are analysed and possible solutions to the main problems identified are investigated. The thesis concludes with proposed guidelines regarding the sentencing process in child sexual abuse cases. Such guidelines address general and specific principles, the use of victim impact statements, the increased recognition and use of behavioural science in the sentencing phase with regard to both the victim and the offender, and relevant aggravating and mitigating factors. The guidelines are an attempt to give some structure to the current haphazard approach adopted by the courts with regard to harm experienced by the victim. They are also aimed at assisting experts to provide more effective and reliable pre-sentence reports. Further, the thesis attempts to provide clarity concerning the factors that are considered to be aggravating or mitigating in the offence category, child sexual abuse, as well as with regard to the weight that should be attached to them. In addition, recommendations are made for the purpose of possible law reform and further research in relation to the regulation of judicial discretion through the introduction of formal sentencing guidelines, victim impact statements and the accommodation of behavioural science in the sentencing process pertaining to sexual offenders. This proposal is based on current South African sentencing practices as reflected in the consolidation of local judgments scattered over many years in different law reports and, to some extent, on English, Canadian, Australian and American sentencing practices as researched in this study.

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PART I: INTRODUCTION

CHAPTER 1 INTRODUCTION

*'What happened to me affected all of us – my mother, my father, my sisters and me: we all fell apart under the horror of it, and we all tried to pretend that there was no horror.'*¹

1.1 CONTEXT OF THE STUDY

1.1.1 Introduction

1.1.2 The sentencing phase

1.1.3 Judicial discretion

1.1.4 Sentencing aims

1.1.5 The changing 'landscape of sentencing' in South Africa

1.2 POINT OF DEPARTURE: SQUARING THE TRIAD

1.3 PURPOSE OF THE STUDY

1.4 DEFINITION OF CHILD SEXUAL ABUSE

1.5 METHODOLOGY AND STRUCTURE

1.1 CONTEXT OF THE STUDY

1.1.1 Introduction

Despite the fact that only a small percentage of child sexual abuse cases reach the sentencing stage of a criminal case,² this stage is nevertheless one that

¹ C Slaughter *Before the Knife: Memories of an African Childhood* (2002) 1.

² Recent statistics indicate that, in spite of reports of 43 children being raped every day, only 4,5 percent of prosecutions in child rape cases result in convictions (C Bawden 'What other papers say' (11/12/2004) *Pretoria News* 7). See KD Müller *The Child Witness in the Accusatorial System* Ph D (Rhodes) (1997) for a useful investigation that focused on methods to ensure reliable and accurate evidence by children to increase convictions in child sexual abuse cases.

creates great difficulties for judicial officers.³ This is exacerbated by the fact that judicial officers have often been severely criticised by courts of appeal⁴ and the media for the sentencing decisions they take.⁵ In sentencing the offender in child sexual abuse cases, judicial officers face a particularly complex task.⁶ First, the court finds itself in a conflict zone. On the one hand, it is faced with research indicating the high recidivism rate among paedophiles (impacting on its constitutional duty to protect vulnerable children),⁷ and, on the other, with the human rights model that requires the courts to treat offenders as

³ *R v C* 1955 (2) SA 51 (T) at 51g. J Kriegler and A Kruger *Hiemstra: Suid-Afrikaanse Strafbepalinge* 6 ed (2002) 682 also refer to the sentencing phase as the most difficult phase in a criminal case, and, at the same time, the least-known topic, yet it is the most important part of the trial for the accused.

⁴ In *Attorney General, Eastern-Cape v D* 1997 (1) SACR 473 (ECD) at 477j and 478c the court *a quo's* sentence was referred to as 'bizarre'. In *S v O* 2003 (2) SACR 147 (C) at 157c the court *a quo's* sentence was regarded as excessively harsh and its reasoning for the sentence was heavily criticised and compared to a sermon with the aim of pleasing the community. See also *S v Abrahams* 2002 (1) SACR 116 (SCA); *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v Jackson* 1998 (1) SACR 470 (SCA); *S v V* 1996 (2) SACR 133 (T); *S v W* 1994 (1) SACR 610 (A).

⁵ The imposition of a 7-year sentence by the court *a quo* on a father who had raped his 14-year-old daughter in *S v Abrahams supra* (n 4) caused a public outcry and the judge was accused in the media of being unconcerned about incest (Sapa 'Tougher sentence for man who raped daughter' *Pretoria News* (24/11/01)). See chapter 3 for a more detailed discussion of this case. Also, in *S v Makwetsja* 2004 (2) SACR 1 (T), the court *a quo* was heavily criticised in the media for the imposition of a suspended sentence for the rape of a 5-year-old girl (Sapa 'Teen rapist's suspended sentence to be probed' *The Herald* (6/02/02); Z Venter 'Judge furious over suspended sentence for rapist of 5-year-old' *The Star* (5/02/02)). For other examples of media criticism on sentences, see Herald Reporter 'Fury over rape sentence' *The Herald* (6/02/02); G Anstey 'All I want is justice' *Sunday Times (Insight)* (3/03/02); G Reilly 'Jail not enough any more' *Pretoria News* (23/09/02). These newspaper articles confirm that the sentencing exercise is 'a potential graveyard with the press just waiting for a slip or lenient sentence, the latter being far more reportable than wise sentences' (R Banks *Banks on Sentencing* (2003) v).

⁶ Incest rape in particular poses specific challenges in reconciling the conflicting aims of sentencing, namely that of preserving the family unity on the one hand and those of repugnance and prevention on the other (JMT Labuschagne 'Insesverkragting, straffoemeting, die Hoogste Hof van Appel en 'n glimlag van Freud' (2003) 66 *THRHR* 110).

⁷ Section 28 of the Constitution of the Republic of South Africa 1996. Sexual offences against children have been referred to as a cancer in society and the courts have been urged to play a role in protecting children (*S v Blaauw* 2001 (2) SACR 255 (CPD) at 260d).

'human beings ... not commodities to which a price can be attached; they are creatures with inherent and infinite worth and ought to be treated as ends in themselves, never merely as means to an end'.⁸

Secondly, sexual offenders are not a homogenous group. This implies that different groups require different approaches.⁹ Thirdly, the acts involved in sexual offences against children are highly varied and range from exhibitionism to sexual touch or repeated penetrations over a period of time.¹⁰ Fourthly, not only does the sentencing phase constitute a shift from the strict adversarial contest to a convergence of accusatorial and inquisitorial procedures, but, in child sexual abuse cases, a prominent convergence of different disciplines, namely behavioural science and law, is found.¹¹ In addition, as will be argued below,¹² a new focus has been placed on the victim and his or her story.¹³ Society also expects sentencing to achieve a diversity of goals, some of which may not be fully compatible, and this further contributes to the difficulty of sentencing.¹⁴ It would thus appear that child sexual abuse is a diverse and

⁸ *S v Dodo* 2001 (3) SA 382 (CC) at par 38. The Constitutional Court discussed the proportionality between the seriousness of an offence and the period of incarceration.

⁹ South African Law Commission (hereafter 'Law Commission') *Sexual Offences: Process and Procedure*. Discussion Paper 102 Project 107 (2001) 690; CR Bartol (1995) *Criminal Behaviour: A Psychological Approach* 4 ed 289.

¹⁰ G Vervaeke, S Bogaerts and A Heylen 'Onderkennen van seksueel misbruik bij kinderen' in PJ Van Koppen, DJ Hessing, HLGJ Merckelbach and HFM Crombag (eds) *Het Recht van Binnen: Psychologie van het Recht* (2002) 4.

¹¹ See chapter 5 par 5.2 for a discussion of the increased recognition of behavioural science with regard to sentencing law for sexual offenders.

¹² See par 1.2 below.

¹³ See chapter 6 for a discussion of the formal victim statement as a way of ensuring a standardised approach to placing evidence before the court with regard to the impact of the crime on the victim.

¹⁴ F Schmallegger *Criminal Justice Today: An Introductory Text for the 21st Century* (1997) 4 ed 359.

emotionally laden phenomenon that the court has to deal with during a complex sentencing process.¹⁵

1.1.2 The sentencing phase

The process involved in determining an appropriate sentence for the offender has, since the 1970s, been recognised internationally as an important field of study in its own right.¹⁶ The sentencing phase consists of four stages. Immediately after conviction the state may prove the accused's previous convictions.¹⁷ Thereafter the defence and the state have the opportunity to present evidence, either by calling witnesses or by making a statement from the bar, on issues and facts that will influence the sentence.¹⁸ Thirdly, both parties will be given the opportunity to address the court,¹⁹ followed, finally, by the court's consideration of the available information and of the imposition of a proper sentence. This process in child sexual abuse cases forms the focus of this thesis.

As indicated above, the sentencing phase differs from the clinical trial phase in that it adopts a more inquisitorial nature without rigid rules, fixed issues or onuses.²⁰ Impressions become significant and procedures more flexible,²¹ with

¹⁵ Vervaeke *et al op cit* (n 10) 3.

¹⁶ M Wasik (ed) *The Sentencing Process* The International Library of Criminology, Criminal Justice and Penology (1997) xi.

¹⁷ Section 271(1) of the Criminal Procedure Act 51 of 1977.

¹⁸ Section 274(1) of the Criminal Procedure Act 51 of 1977 provides as follows: 'A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed'.

¹⁹ Section 274(2) of the Criminal Procedure Act 51 of 1977 provides: 'The accused may address the court on any evidence received under subsection (1), as well as on the matter of the sentence, and thereafter the prosecution may likewise address the court'.

²⁰ Kriegler and Kruger *op cit* (n 3) 687.

the court at the centre; and the presiding officer is required to play an active role.²² This, in turn, impacts on the presentation and on the rules of evidence for obtaining the necessary information for sentencing purposes. In most cases the adversarial contest will, however, almost always be continued by the prosecutor and defence in the battle for the desired sentencing outcome, and the credibility of witnesses, both lay and expert, from both sides will be tested through cross-examination. Despite the adversarial element the parties bring from the trial, the prosecution, on occasion, has been criticised for adopting a passive attitude.²³

The sentencing phase differs from the trial in that it is more flexible and also focuses on new and separate issues that become relevant.²⁴ The necessary information in this phase extends beyond the elements of the crime and the question of guilt or innocence. This need for information is even more acute in the case of a plea of guilty, which would appear to be the trend in the majority of cases involving paedophiles and those charged with indecent assault. In these cases, the accused often does not testify under oath before sentence, but rather a report by a behavioural expert is submitted and the expert is required to testify, thereby acting as the voice of the accused.²⁵

With the accused as an individual becoming more important, and with his or her future being considered, the questions now posed are related to the reason why

²¹ SS Terblanche *The Guide to Sentencing in South Africa* (1999) 79.

²² See A van der Merwe 'Aspects of sentencing in child sexual abuse cases' in K Muller *The Judicial Officer and the Child Witness* (2002) 261-264, with specific reference to the more active role of the judicial officer in child sexual abuse cases.

²³ See chapter 5 par 5.9.2.

²⁴ H Daniels *Morris: Technique in Litigation* 5 ed (2003) 346.

²⁵ See, for example, *S v S* 1977 (3) SA 830 (A) at 834j.

the offence was committed, to the degree of culpability,²⁶ and to the dangerousness of the offender.²⁷ Questions of risk assessment and risk management also feature to a great extent in international jurisdictions²⁸ and are echoed in South Africa, where the emphasis has shifted to matters of supervision, treatment and rehabilitation with regard to sex offenders. For example, a guiding principle in the Criminal Law (Sexual Offences) Amendment Bill 2003²⁹ is that, in determining appropriate sanctions in all sexual offence cases, the possibility of rehabilitating the sexual offender should be taken into account.³⁰ This new focus on supervision, rehabilitation and treatment further necessitates the increased use of reliable expert evidence.

²⁶ J Engelbrecht 'Kindermolestering en verkragting: Die howe se rol' (1995) 2 *Consultus* 22 notes that, in cases of child sexual abuse, it is the despicable attitude displayed by the offender ('laakbare gesindheid wat die oortreder openbaar het') that constitutes the most important factor in sentencing, and the court can only determine whether it is mitigated in some way by considering expert evidence on the psychodynamic features of the child abuser. A Ashworth 'Criminal Justices and Deserved Sentences' (1989) 36 *Crim LR* 340-355 asserts that the sentencing process is a public, judicial assessment of the degree to which the offender may rightly be ordered to suffer legal punishment.

²⁷ NN Kittrie, EH Zenoff and VA Eng *Sentencing, Sanctions, and Corrections*. 2 ed (2002) 285; D Van Zyl Smit *Taking Life Imprisonment Seriously (In National and International Law)* (2002) 201 asserts that there must always be an element of dangerousness to justify life imprisonment in non-murder cases.

²⁸ C Hood, H Rothstein and R Baldwin *The Government of Risk: Understanding Risk Regulation Regimes* (2001) 217; G Pinard and L Pagani (eds) *Clinical Assessment of Dangerousness: Empirical Contributions* (2001) 286; Virginia Criminal Sentencing Commission *Assessing Risk Among Sex Offenders in Virginia* (2001); Home Office *Sex Offender Strategy for the National Probation Service* (2004) 12
<http://www.probation.homeoffice.gov.uk/files/pdf/Sex%20Offender%20Strategy%20Sep%2004.pdf> (accessed 1/11/04).

²⁹ B50 2003 GG No 25282 of 30 July 2003, Schedule 1(I)(v).

³⁰ Compare P Stella 'The purpose and effects of punishment' (2001) 9:1 *European Journal of Crime, Criminal Law and Criminal Justice* 57 for an argument that offenders have the right to rehabilitation in terms of society's co-responsibility for the origins of crime: 'A crime, in truth, is not just an individual fact that obliges only the person who commits it to answer for its atonement; is also a social factor, which indicates shortcomings and a state of unbalance in the society itself in which it has its origins'.

Not only does the accused as an individual become important with his or her future being considered, but, as argued below, in sexual offence cases, the victim's emotions and personal 'story' are now also being recognised as playing an important role.³¹

1.1.3 Judicial discretion

In general, South African courts have a discretion to determine the nature and extent of the punishment to be imposed for all offences. The application of this discretion involves making a choice with regard to the type and measure of the sentence imposed.³² This discretion may, however, not be exercised arbitrarily, and is controlled, first, by general statutory limits as well as, since 1998, minimum sentences prescribed by the Criminal Law Amendment Act 105 of 1997.³³ Despite the failure of minimum-sentence legislation to have the envisaged curbing effect on the prevalence of child rape, sentences for this offence are nevertheless longer than they used to be. However, the inconsistent application of this legislation as regards the widely formulated 'substantial and compelling circumstances' test³⁴ in order to deviate from the prescribed sentence of life imprisonment, causes difficulties and further disparity in sentencing.³⁵ It is also clear that the acceptance of life imprisonment as both the prescribed

³¹ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205f.

³² JJ Joubert (ed) *Criminal Procedure Handbook* 5 ed (2001) 261. See Terblanche *op cit* (n 21) 239-471 for a full discussion of the various types of sentencing options in general. Also Du Toit *et al Commentary on the Criminal Procedure Act* 29 (updated to 2003) 28-1-28-53.

³³ Section 51(1) of the Criminal Law Amendment Act 105 of 1997 prescribes life imprisonment for *inter alia* the rape of a child under 16.

³⁴ Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997.

³⁵ Law Commission *op cit* (n 9) 732.

minimum sentence and ultimate penalty for child rape has, as elsewhere,³⁶ been linked to the principle of proportionality and has been reserved by courts for only the 'worst' cases.³⁷ This, in turn, has led to the informal 'grading' of offences becoming more prominent.³⁸

Secondly, the courts' sentencing discretion is controlled by the guidelines laid down by the higher courts. These guidelines from courts of appeal have, however, been described as vague and unsatisfactory, and are further complicated by the differing approaches to the aims of punishment,³⁹ as discussed below.⁴⁰

Bearing in mind the principles of mercy and individualisation,⁴¹ South African courts exercise their discretion in accordance with the elements of the well-known *Zinn* triad,⁴² namely the crime, the accused and the interests of society. Though a degree of diversity in sentencing decisions has been accepted as inevitable, unjustified disparity has, however, been criticised as unacceptable.⁴³ Unjustified disparity would occur where sentences are not uniform owing to a

³⁶ Van Zyl Smit *op cit* (n 27) 217 indicates that, internationally, such as in England and Germany, a similar trend has developed to qualify the acceptance of life imprisonment as the ultimate penalty.

³⁷ The Supreme Court of Appeal used this term in *S v Abrahams supra* (n 4) and *S v Mahomotsa supra* (n 4). See also SS Terblanche (2003) 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' *Acta Juridica* 219-220 arguing that the courts are 'enjoined by the Constitution to ensure that sentences are proportionate'.

³⁸ See chapter 5 for a discussion of the grading process in practice.

³⁹ Law Commission *op cit* (n 9) 703.

⁴⁰ See par 1.1.4 below.

⁴¹ E Du Toit (1981) *Straf in Suid-Afrika* 122-124.

⁴² *S v Zinn* 1969 (2) SA 537 (A) at 540g.

⁴³ Law Commission *op cit* (n 9) 732; A Ashworth 'Disentangling disparity' in DC Pennington and S Lloyd-Bostock *The Psychology of Sentencing* (1987) 24-35.

lack of consensus on the part of the judiciary on a number of issues: the relative seriousness of offences, mitigating factors and aggravating factors, the relevant circumstances of the offender and the relative weight to be attached to each of these factors.⁴⁴

1.1.4 Sentencing aims

In the selection of a generally justifiable aim or purpose for the imposition of a sentence, the courts normally consider retribution, deterrence, prevention and/or rehabilitation.⁴⁵ Courts, in dealing with child sexual abuse matters, differ in their approach to, and selection of, the desired aim, or combination of aims, for sentences in these cases.⁴⁶ Yet, together with the individual aggravating and mitigating factors,⁴⁷ the sentencing aim comprises one of the two basic considerations in the process of determining the appropriate sentence,⁴⁸ thereby influencing the sentencing outcome significantly. For example, when a court finds that the effect of the accused's offence of indecent assault carries enough

⁴⁴ Law Commission *ibid.*

⁴⁵ See Terblanche *op cit* (n 21) 177-210 for a detailed discussion of the purposes and theories of sentences within the South African context. It should be noted that the aims and underlying theories of punishment have been the subject of discussion and critical evaluation by numerous local and international authors and need not be repeated here. See, further, Du Toit *op cit* (n 41) 99-116; MA Rabie, SA Strauss and MC Maré *Punishment: An Introduction to Principles* (1994) 19-65; CR Snyman *Criminal Law* 4 ed (2002) 12-31; J Burchell and J Milton *Principles of Criminal Law* 2 ed (1997) 38-56; T Metz 'Legal punishment' in C Roederer and D Moelendorf *Jurisprudence* (2004) 555-587; A Ashworth *Sentencing and Criminal Justice* 3 ed (2000) 59-89; M Wasik *Emmins on Sentencing* 3 ed (1998) 44-51; A Von Hirsch and A Ashworth *Principled Sentencing: Readings on Theory and Policy* (1998) 1-208; Kittrie *et al op cit* (n 27) 20-60.

⁴⁶ Compare Terblanche *op cit* (n 21) 154 who states that deterrence has been the most important aim in South African case law.

⁴⁷ Traditionally, aggravating and mitigating factors have been determined with reference to the triad of factors in *S v Zinn supra* (n 42). See par 1.2 for the argument that the victim's psychological harm should form a fourth, independent consideration.

⁴⁸ P Maisel and L Greenbaum *Introduction to Law and Legal Skills* (2001) 168.

weight to justify punishment first and then rehabilitation, this approach would lead to an initial period of imprisonment.⁴⁹ In contrast, in cases where the main focus is on rehabilitation, a suspended sentence or correctional supervision is imposed.⁵⁰ Further, public concern about child sexual abuse cases and the court's duty to take cognisance of such concern, in addition to the above aims, has been voiced in a number of judgments:

'Rape of a child is an appalling and perverse use of male power ... It is utterly terrifying that we live in a society where children ... are unable to grow up ... in freedom and without fear. The courts in punishing ... should ensure that sentences adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract.'⁵¹

The above quotation illustrates that, in cases of child rape, which are viewed by society with abhorrence, the aim of retribution has acquired great importance.⁵² The court's choice of censure and retribution also emphasises the proportionality of the sentence with regard to the seriousness of the crime and the affirmation of the value of the victim.⁵³ These aims appear to apply mostly to child rape cases where long periods of imprisonment are imposed, thereby also keeping in mind the general deterrent effect. In contrast, the aim of rehabilitation appears to be the most favoured aim in cases of indecent assault against children, obviously with the aim of ultimately preventing future child sexual abuse. It appears, however, that no research has been conducted into the effectiveness

⁴⁹ *S v D* 1989 (4) SA 225 (C) at 232c-e.

⁵⁰ See *S v S supra* (n 25) as one of many examples mentioned later in chapter 3.

⁵¹ *S v Jansen* 1999 (2) SACR 368 (CPD) at 378g-379b.

⁵² Terblanche *op cit* (n 21) 154; CR Snyman 'Die herlewing van vergelding as regverdiging vir straf' (2001) 64 *THRHR* 218-235. See also Law Commission *Sentencing (A New Sentencing Framework)* Discussion Paper 91 Project 82 (2000) 2 where it was emphasised that the values that society wishes to uphold should inform any reform of the sentencing system. See also see DP van der Merwe *Sentencing* 1-7 for a viewpoint that it is the moral reproach of the community that justifies punishment.

⁵³ Metz *op cit* (n 45) 572-573.

either of sentences imposed on sex offenders where such sentences have been motivated by the aim of rehabilitation, or of the punitive value of correctional supervision.⁵⁴

However, in the light of the proposed legislation referred to above,⁵⁵ it seems that, in future, the overriding aim of rehabilitation would have to be accorded substantial weight in all cases of child sexual abuse, either as part of a sentence of correctional supervision, or at the time of release on parole.⁵⁶ This proposal followed an earlier recommendation of the South African Law Commission (hereafter the 'Law Commission') that, in contrast, prioritised punishment as the main aim of sentencing in general.⁵⁷

In addition, restorative justice has been introduced in South Africa only relatively recently, emphasising a new aim of restoration between offender and victim.⁵⁸ Though the concepts of recognition of harm and victim impact statements are embraced in the sentencing of offenders for sexual offences against children, typical practices during sentencing aimed at restoration, such as victim-offender mediation, conferencing and circle sentencing,⁵⁹ do not appear to be relevant.⁶⁰

⁵⁴ In *S v O supra* (n 4) the court, however, took notice of the expert's evidence that the order for rehabilitation would be of no use without some form of punishment as motivation to ensure the accused's cooperation in the treatment programme.

⁵⁵ See *op cit* (n 29).

⁵⁶ Schedule 1(l)(v) of the Criminal Law (Sexual Offences) Amendment Act 2003.

⁵⁷ Section 2 of the draft Sentencing Framework Bill 2000.

⁵⁸ G Mousourakis 'Restorative justice: some reflections on contemporary theory and practice' 29:1 *Journal for Juridical Science* (2004) 1-27; B Naude, J Prinsloo and A Ladikos 'Restorative Justice: A global overview of its functioning and effectiveness' (2003) 16:5 *Acta Criminologica* 1; M Batley 'Restorative Justice' Unpublished Paper ARMSA and the Centre for Child Law Symposium *The Child in the Criminal Justice System* (16/06/04) Pretoria.

⁵⁹ W van Tongeren 'Circle Sentencing' Paper, 17th International Conference of the International Society for the Reform of Criminal Law, 24-28 August 2003, *Convergence of Criminal Justice Systems: Building Bridges – Bridging Gaps* explains that sentencing circles are mostly

From the above, it appears that the hybrid character of South African courts' sentencing practice in justifying legal punishment⁶¹ manifests itself particularly with regard to child sexual abuse cases.

1.1.5 The changing 'landscape of sentencing'⁶² in South Africa

Since 1991 there have been considerable developments in sentencing law. Correctional supervision was introduced as a sentencing option in 1991, with the first reported case implementing this being a case of indecent assault of an adolescent boy.⁶³ It has proved to be a valuable, alternative sentencing option with regard to indecent assault cases. In 1993, imprisonment for an indefinite period as a dangerous criminal was provided for.⁶⁴ The death penalty, which was ruled to be unconstitutional in 1995,⁶⁵ was replaced by life imprisonment as the ultimate penalty that can be imposed for a conviction of child rape.

applicable to close-knit, traditional communities such as those of the aboriginal people and consist of, in addition to criminal justice agents, all the role-players in the broader community who have been affected by the commission of the particular crime. The aim of this sentencing practice is restitution and healing of the victim, his or her family, the perpetrator and his or her family, as well as the community involved. Also Mousourakis *op cit* (n 58) 17.

⁶⁰ Metz *op cit* (n 45) 572-573.

⁶¹ Metz *op cit* (n 45) 577.

⁶² This phrase was used by M Wasik (2004) 'Going round in circles? Reflections on fifty years of change in sentencing' *Crim L R* 253.

⁶³ *S v R* 1993 (1) SACR 209 (A).

⁶⁴ Sections 286A and 286B were inserted in the Criminal Procedure Act 51 of 1977. Kriegler and Kruger *op cit* (n 3) 733 point out that, though the introduction of this sentencing option was motivated by the child sexual abuse debate, it has seldom been implemented – see, however, *S v T* 1997 (1) SACR 496 (SCA).

⁶⁵ *S v Makwanyane* 1995 (2) SACR 1 (CC). Another sentencing option that has been abolished by the Constitutional Court is that of the corporal punishment of juveniles: *S v Williams* 1995 (2) SACR 251 (CC) (see also chapter 2 (n 126) for a reference to the constitutional rights influencing these decisions).

The most recent, major shift in the legislative approach to sentencing was the introduction of life imprisonment as the prescribed minimum sentence for *inter alia* child rape, as indicated above.⁶⁶ In addition, new non-parole periods came into operation in October 2004,⁶⁷ changing the practical implication of imprisonment. The court that originally imposed life imprisonment may, after considering a report by the Correctional Supervision and Parole Board, and after a period of 25 years, release an offender on parole who is serving a life sentence.⁶⁸ However, on reaching the age of 65 years, a prisoner may be placed on parole if at least 15 years of the sentence have been served.⁶⁹ Further, different non-parole periods are prescribed for different types of sentences,⁷⁰ but, in some instances, the court may fix the non-parole period in its discretion.⁷¹

⁶⁶ Section 51(1) of the Criminal Law Amendment Act 105 of 1997. See chapter 2 par 2.1 for a discussion of its full implications with regard to child sexual abuse cases. It should be noted that, initially, the effect of this section was limited to two years from commencement of the Act, but it has since been extended on four further occasions and will, in all likelihood, probably be extended in future as well. At present, the section is in operation until April 2007: Proc R21 in GG 27549 of 29/4/05.

⁶⁷ Proc R38 GG 26626 of 30/7/2004.

⁶⁸ Section 78(1) read with s 73(5)(a)(ii) of the Correctional Services Act 111 of 1998. Prior to October 2004, offenders serving life imprisonment had, according to internal orders, been considered for parole after 20 years, and, prior to 1993, after 15 years (Personal communication with head of Correctional Services Legal Division on 24/01/05). It should be noted that, in contrast to the case of life imprisonment, the Correctional Supervision and Parole Board deals with parole in other instances of imprisonment that are longer than one year. In the case of imprisonment of less than one year, the Commissioner of Correctional Services decides on parole.

⁶⁹ Section 73(6)(b)(iv) of the Correctional Services Act 111 of 1998.

⁷⁰ In terms of s 73(6)(b)(v) of the Correctional Services Act 111 of 1998, an offender who has been sentenced in terms of sections 51 and 52 of the Criminal Law Amendment Act 105 of 1997 must serve at least four-fifths, or 25 years, whichever is the shortest. The court may however order that parole be considered after two-thirds of the sentence has been served.

⁷¹ If the sentence is two years' imprisonment, or more, in terms of s 276B(1)(a) of the Criminal Procedure Act 51 of 1977, the court may fix the non-parole period. However, the period may not exceed two-thirds of the term (s 276B(1)(b) of the Criminal Procedure Act 51 of 1977).

In addition to the above developments, judicial officers will in all likelihood be confronted with more changes in the near future that will impact on their sentencing discretion. The Law Commission has identified uniformity of approach as an essential objective and has proposed a new sentencing framework with more guidance for judicial officers in the form of legislated sentencing principles. This will be supplemented by sentencing guidelines developed by an independent Sentencing Council for a particular category or subcategory of offence.⁷²

The Law Commission further envisages a community protection model with regard to sexual offences. As part of the original sentence of the court, all sex offenders should, when released on parole or when under correctional supervision, be required to undergo treatment by way of an accredited treatment programme that is specifically related to sex offences.⁷³ Moreover, the introduction of a new sentencing option, namely an order of long-term supervision as part of the sentence after a person has been declared a dangerous sexual offender, is of further importance.⁷⁴ It will be in the court's discretion *inter alia* to declare any person who has been convicted of a sexual offence against a child, a dangerous sexual offender, unless such a person is a

⁷² Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000a) 28-30.

⁷³ Law Commission *Report on Sexual Offences* Project 107 (2002) 373. The Law Commission recommends that the Department of Justice and Constitutional Development give due regard to *inter alia* non-legislative recommendations regarding offender treatment and implement them as a matter of priority.

⁷⁴ Section 20(2) of the Criminal Law (Sexual Offences) Amendment Bill 2003 prescribes a rehabilitative supervision period of not less than five years. In determining the period of supervision, the Law Commission and/or courts will however have to take note of new research indicating that reconviction took place as long as ten and fifteen years after discharge from custody: See J Cann, L Falshaw, C Friendship 'Sexual offenders discharged from prison in England and Wales: A 21-year reconviction study' (2004) 9 *Legal and Criminological Psychology* 1-10. See chapter 2 par 2.3.1.6.

child himself or herself.⁷⁵ A further shift will be caused through the revised statutory definition and classification of rape by including more cases of indecent assault against children in the new sentencing paradigm.⁷⁶ Offences that would have been treated previously as indecent assault will now qualify as rape. The effect will be that such offences then fall within the ambit of the Criminal Law Amendment Act 105 of 1997 and therefore carry more severe minimum penalties.

1.2 POINT OF DEPARTURE: SQUARING THE TRIAD

Traditionally, as indicated above, the courts have had a wide discretion and have approached the question of sentencing from the viewpoint of the *Zinn*⁷⁷ triad, focusing their attention on aggravating and mitigating factors relating to the offender, the offence, and the interests of society. In recent years, however, a more victim-centred approach has emerged in the sentencing of sexual offenders, fueled by the growing victims' rights movement. The following overview of recent debates, led by the Law Commission, illustrates this approach to proposed law reform.

In its Issue Paper on restorative justice, the Law Commission⁷⁸ initiated the debate by introducing and defining the concept of restorative justice as a process which seeks to redefine crime by interpreting it not only as breaking the law or offending against the state, but also as an injury or a wrong done to another person. Proposals recommended the enactment of legislation that would

⁷⁵ Section 1(i) of the Criminal Law (Sexual Offences) Amendment Bill 2003 defines a child as a person below the age of 18 years.

⁷⁶ See chapter 2 par 2.3.1.1.

⁷⁷ *Supra* (n 42).

⁷⁸ Law Commission *Sentencing Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* Discussion Paper (1997) 7.

recognise victim impact statements as a method of impressing upon the court the seriousness of the offence.

In 2000, the Law Commission⁷⁹ proposed improved victim participation in the sentencing process, as well as the recognition of victim concerns in substantive sentences. Section 3 of the draft Sentencing Framework Bill 2000 further stipulates, as a guiding principle, that sentences must be proportionate to the seriousness of the offence, which is determined by the degree of harmfulness or risked harmfulness of the offence and the degree of culpability of the offender. In addition, in s 3(3) the victim is referred to as a separate entity from society and the offender with regard to the principle of proportionality. Prosecutors must, in terms of s 47, consider the interests of victims in every case when they intervene in sentencing. For this purpose, victim impact statements may be presented to the court about the harm that has been suffered in order for the court to learn what impact the crime has had on the victim.

Recently, the Criminal Law (Sexual Offences) Amendment Bill 2003⁸⁰ was published and added the latest contribution to the debate. In the determination of an appropriate sentence for a person who has been convicted of a sexual offence, schedule 1, s (I)(vi), provides as a guiding principle that the interests of the victim must be considered in any decision regarding sanctions. Section 17(1)(b) of the Criminal Law (Sexual Offences) Amendment Bill 2003 further provides that evidence of surrounding circumstances and of the impact of a sexual offence may be adduced at criminal proceedings for purposes of imposing an appropriate sentence, to inform the court of the extent of harm suffered by

⁷⁹ *Op cit* (n 72) xxii.

⁸⁰ Its predecessor was the draft Sexual Offences Bill 2000, where, in addition, s 19(1)(2) provided that a court may even order that the complainant be assessed by a suitably qualified person in order to establish the impact of the offence on the complainant. See chapter 2 (n 92) for more detail with regard to this section.

the person concerned. Though the introduction of evidence on the after-effects of the sexual offence is only optional, it will provide the first statutory platform for impact statements.

This approach has been further entrenched by the Law Commission's earlier non-legislative recommendations. These include the use of victim impact statements in the determination of an appropriate sentence and judicial training with regard to the potential impact of sexual crimes on victims generally.⁸¹ Of further importance is the fact that the legislature has recognised that infliction of grievous harm is not limited to bodily harm. The severe psychological impact of rape on a girl between the age of 16 and 18 years may in future bring an offence within the ambit of s 51(1), namely life imprisonment.⁸²

The traditional format, as laid out in *S v Zinn*,⁸³ has become trite since 1969. Terblanche⁸⁴ points out that it was not a new line of thinking on sentencing that was introduced, but rather a reflection of the practice of the time. Thirty-six years have elapsed since then and times have changed. Judicial officers should take cognisance of the context in which sentencing takes place.⁸⁵ Rape and indecent assault cases in which children are the victims have dramatically increased and have caused public outrage. Children, furthermore, have a constitutional right to be protected against abuse.⁸⁶ Sexual offences against

⁸¹ *Op cit* (n 73) 372.

⁸² Section 26 of the Criminal Law (Sexual Offences) Amendment Bill 2003.

⁸³ *Supra* (n 42).

⁸⁴ *Op cit* (n 21) 166.

⁸⁵ *S v Holder* 1979 (2) SA 70 (A) at 81b as referred to by Terblanche *ibid*.

⁸⁶ Section 28(1)(d) of the Constitution of the Republic of South Africa 1996.

children have been referred to as a cancer in society and courts are urged to play a role in protecting children.⁸⁷

Van Heerden J rightly remarked in *S v Blaauw*⁸⁸ that, in addition to the aims of sentencing and the factors in the traditional *Zinn* triad, the interests of the five-year-old rape victim constituted a critical factor to be taken into account in reaching an appropriate sentence. The Supreme Court of Appeal in *S v Abrahams*⁸⁹ set a further important precedent in its recognition, understanding and interpretation of the after-effects suffered by the child victim of rape. The court criticised the sentencing court and found that an appropriate assessment of the mother and of the social worker's evidence led to the unsurprising and indeed obvious conclusion that the complainant had been deeply and injuriously affected by the rape; hence such assessment should have been given more weight in sentencing. Further, the Supreme Court of Appeal⁹⁰ has ruled that evidence regarding the present and future impact of the crime on the child victim is now peremptory in the case of rape of a child younger than 16 years and gang rape of, or more than one act of rape on, a girl younger than 18 years.⁹¹

The rights of victims have fallen under the spotlight in recent years and have signalled the emergence of a new focus on the plight of victims. There has been an emphasis on the need to include and acknowledge victims in the legal process.⁹² It is argued that the criminal justice process is predominantly oriented

⁸⁷ *S v Blaauw supra* (n 7) at 260d.

⁸⁸ *Supra* (n 7) at 257e.

⁸⁹ *Supra* (n 4) at 124d.

⁹⁰ *Rammoko v Director of Public Prosecutions supra* (n 31) at 205f.

⁹¹ In terms of s 51 of the Criminal Law Amendment Act 105 of 1997 the prescribed minimum sentence for these crimes is life imprisonment.

⁹² Law Commission *op cit* (n 9) 646.

towards the offender, while the victim is relatively superfluous in the process.⁹³ In this regard, victims have argued that the Constitution provides arrested, detained and accused persons with a series of rights, but offers very little on victim rights.⁹⁴ As a result, a Service Charter for Victims of Crime (hereafter the Victims' Charter),⁹⁵ containing basic rights and principles with regard to victims, has recently been finalised and accepted by Cabinet.⁹⁶ It includes the right to participate and offer information during sentencing proceedings to bring the impact of the crime to the court's attention.⁹⁷ It is submitted that, notwithstanding the fact that the Constitution does not offer specific rights to victims of crime, the constitutional value of dignity applicable to all⁹⁸ requires the recognition of concern and respect for any victim. Ignoring or misrepresenting the victim's story shows utter disrespect and lack of concern for the victim.

From the above it is clear that the focus in sentencing has been expanded to include the impact of a crime on the victim. Apart from the physical injuries, the vital importance of the psychological effects of the incident on the complainant,

⁹³ Law Commission *op cit* (n 9) 647.

⁹⁴ *Ibid.*

⁹⁵ Available at <http://www.doj.gov.za/2004dojsite/policy/vc/2004vc.pdf> (accessed 3/01/05).

⁹⁶ Ministry for Justice and Constitutional Development (2/12/2004) *Press Statement: Cabinet approves the South African Service's Charter for Victims of Crime* (at the time of writing there was no clarity on its publication in the Government Gazette).

⁹⁷ Clause 2 Victims' Charter 2004. See chapter 6 par 6.4.1 for a discussion of the present position in South Africa with regard to impact evidence, which illustrates that the offering of information for sentencing purposes is not a new practice, despite being applied haphazardly, especially in indecent assault cases.

⁹⁸ Section 10 of the Constitution provides that everyone has inherent dignity and the right to have their dignity respected and protected. J De Waal, I Currie and G Erasmus *The Bill of Rights Handbook* 4 ed (2001) 230 emphasise the importance of the right to dignity and its central place in the Constitution.

as an independent factor influencing the appropriate sentence, is now recognised. There is therefore a change in focus from merely the physical to the psychological. It is submitted that this major shift in emphasis can be compared to the shift in the eighteenth century in the philosophy of punishment when the focus moved from punishing the body of the offender to acknowledging the offender's mind.⁹⁹ It is this wider focus on the psyche of the victim that points to the traditional triad, as expounded in *Zinn*,¹⁰⁰ having acquired a fourth dimension. Although it could perhaps be argued that this element is simply a fleshing out of the offence and not, as such, a new element to the triad, it is submitted that courts have always viewed the interests of society as a separate element and that the emphasis on the victim in the Victims' Charter, in proposed legislation and in recent case law has developed this into a consideration of its own.¹⁰¹

For the purpose of this thesis, then, the description and analysis of the current sentencing practice in Part II will focus on the approach adopted by the courts with regard to the impact of the crime on the victim. This involves an investigation into whether evidence of harm to a child victim of sexual offences has been introduced in court, into the ways in which the evidence has been introduced, and into the manner in which this evidence has been interpreted, as well as into the weight attached to it. In short, the assessment whether and how the victim's story in child sexual abuse cases has been told in sentencing, and the effect thereof, forms an integral part of this study.

⁹⁹ A St Q Skeen 'Sentencing' 24 *LAWSA* (2000) 281.

¹⁰⁰ *Supra* (n 42).

¹⁰¹ KD Müller and A van der Merwe 'Squaring the triad: The story of the victim in sentencing' (2004) 6 *Sexual Offences Bulletin* 17.

1.3 PURPOSE OF THE STUDY

The purpose of this thesis is to describe and analyse current sentencing practices in child sexual abuse cases in South Africa. Developments, trends and problems will be identified. Possible solutions will be examined and offered to improve the sentencing process – with regard to establishing a proper and balanced factual basis for judicial officers to consider as well as regulating judicial sentencing discretion.

This study does not include a theoretical discussion of the theories and aims of sentencing, the range of sentencing options or appellate procedures. Though related and a very important topic, the investigation of the sentencing process with regard to juvenile sex offenders is also perceived as a separate study falling outside the ambit of this thesis.

1.4 DEFINITION OF CHILD SEXUAL ABUSE

No statutory definition of child sexual abuse exists. Van Dokkum¹⁰² explains child sexual abuse as a category of child abuse and defines it as

'... the involvement of dependent, developmentally immature children in sexual activities that they do not fully comprehend, or to which they are unable to give informed consent, and that violate social taboos concerning family roles.'

He further asserts that it should be examined in its cultural context, since the definition provided is only a social definition.¹⁰³ In the international arena, age difference and the use of force between children are explicitly taken into account:

¹⁰² N van Dokkum 'The statutory obligation to report child abuse and neglect' in R Keightly (ed) *Children's Rights* (1996) 164.

¹⁰³ *Ibid.*

'Child sexual abuse can entail sexual interaction, with or without physical contact, between a child and someone substantially older or between children where force is involved.'¹⁰⁴

It is of import to notice that physical contact is not a prerequisite. Therefore the process of grooming, which is inherent in the preparation of sexual crimes where the adult involved uses no physical force, is being recognised. Accordingly, the legislature has proposed a new offence, namely the promotion of a sexual offence with a child,¹⁰⁵ aimed at protecting children against the provision or display of sex articles in the process of grooming.¹⁰⁶

For the purpose of this thesis, the offences of rape and indecent assault, committed by adults against children under 18, are included in the term 'child sexual abuse'. Exploitation offences such as child prostitution are excluded. The terms 'victim' and 'complainant' are used interchangeably.

1.5 METHODOLOGY AND STRUCTURE

This study adopts a qualitative approach. Literary sources, up to 30 April 2005, are reviewed, namely legislation, reported cases, books, journal articles, discussion papers and reports of the Law Commission. A comparative analysis is important for this study, as child sexual abuse is a common problem encountered internationally. Much may be gained from looking at how other countries address

¹⁰⁴ B Rind, P Tromovitch and R Bauserman 'A meta-analytic examination of assumed properties of child sexual abuse using college samples' (1998) 124 *Psychological Bulletin* 23 (Unofficial translation).

¹⁰⁵ Section 10 of the Criminal Law (Sexual Offences) Amendment Bill 2003.

¹⁰⁶ Compare the position in the United Kingdom where only the behaviour following grooming (online or offline), such as meeting a child, has been incorporated in s 15 of the recent England and Wales Sexual Offences Act 2003. See A Gillespie "'Grooming": Definitions and the law' (2004) 7124:154 *New Law Journal* 586. See also JD Duncan Brown 'Developing strategies for collecting and presenting grooming evidence in a high tech world' (2001) 14: 11 *American Prosecutors Research Institute: National Centre for Prosecution of Child Abuse Update* 1, for an explanation of the grooming process, specifically the aspect of deceptive trust that is created by the adult as well as manipulation of the child by the adult.

the process and unique challenges of sentencing offenders in child sexual abuse cases. A comparative study is undertaken of Anglo-American countries. Developments in England, which has been active with regard to sexual offence matters over the past years, have proven to be a valuable source in all chapters dealing with possible solutions. Material from other countries like Australia, the United States of America and Canada was selected, based on successful implementation of approaches that would be suitable to the legal tradition in South Africa. In addition, an empirical study was undertaken into the perceptions and attitudes of regional court magistrates as regards sentencing practices.

The method of citation followed in this study is based on the method used by the *South African Journal of Criminal Justice*.¹⁰⁷ It has been adapted in certain instances, for example: Latin words like *supra*, *op cit*, *ibid*, *et al* are in italics; the word 'at' is omitted between *op cit* and the page number(s) in references to journals; and there is no space between the page and paragraph numbers in case citations.

This study consists of three parts. Following the introduction in Part I, the second part of the study contains the description, critical evaluation and analysis of the current legal framework within which sentencing occurs in child sexual abuse cases. Part II consists of four chapters. Chapter 2 investigates relevant legislation, namely the Criminal Law Amendment Act 105 of 1997 and the Sexual Offences Act 23 of 1959, as well as draft legislation which will have a significant influence on sentencing practices in child sexual abuse cases once it comes into operation. The latter refers to the Criminal Law (Sexual Offences) Amendment Bill 2003, the draft Sentencing Framework Bill 2000 and the Child Justice Bill (which is referred to only briefly). Chapter 2 concludes with a reference to the Constitution.

¹⁰⁷ 'Notes for contributors' (2002) 15:3 *SACJ*.

In chapter 3, higher court judgments are examined in order to identify the interpretations given to relevant legislation as well as the internal guidelines developed over the years through precedent with regard to procedures, general principles and sentencing patterns. The cases have been divided into various categories for the purpose of the descriptive evaluation, namely sexual offence cases which apply the Criminal Law Amendment Act 105 of 1997, rape cases decided prior to the Criminal Law Amendment Act 105 of 1997 and sexual crimes other than rape.

An empirical study is undertaken in chapter 4 to identify underlying attitudes and perceptions of judicial officers that will influence their sentencing decisions. Since the attitudes and perceptions of the sentencing officer have an effect on his or her sentencing decisions, it was necessary to investigate these as well in order to obtain a more holistic picture of sentencing practice.

Chapter 5 in Part II concludes the investigation of current sentencing practices with an analysis of trends, developments, most prominent shortcomings and problems. This chapter reveals that there is increased statutory recognition of behavioural science in the sentencing phase, thereby necessitating reliable expert evidence and an improved understanding of psychology. Further, in practice the courts have reserved the imposition of the life sentence for only the worst cases of child rape. The unofficial grading process to determine the seriousness of an offence has, however, led to more unjustified disparity in sentencing. A compilation is made of all aggravating and mitigating factors recognised and weighed by courts in the grading process for the purpose of imposing a suitable sentence. It will then be shown that a plea of guilty causes particular problems and that the impact of the crime on the victim is dealt with in an inconsistent and arbitrary manner. Finally, it is illustrated that the courts do

not fully understand the harm caused to a child by the commission of a sexual offence, nor the grooming process used by the sexual offender.

Part III is devoted to possible solutions to the main problems identified in Part II, chapter 5. Chapter 6 deals with the introduction of a formal victim impact statement scheme in order to address the fact that the pre-sentencing stage in child sexual abuse cases has been dominated by focusing on the sexual offender. The chapter critically evaluates definitions of victim impact statements and victims, the rationale for these, as well as the practice and problems encountered internationally.

Chapter 7 addresses the need for reliable expertise with regard to both the impact of the crime on the victim and the question of risk, treatment and rehabilitation with regard to the accused. A code of ethics and guidelines for expert witnesses, with specific reference to child sexual abuse cases, are investigated. In addition, the appointment of expert assessors to assist the court in its dilemma of having to evaluate behavioural science (which has been introduced in the first place for the very reason that the court does not have the specialised knowledge to decide the issue under consideration) is examined.

Chapter 8 aims to address the problem of unacceptable inconsistency in the sentencing of offenders in child sexual abuse cases. Sentencing principles and guidelines suggested by the Law Commission over the past years, as well as internal guidelines from South African higher courts are investigated. Further, the regulation of judicial discretion in other jurisdictions, namely England and Wales and the American State of Virginia, is evaluated to assess international approaches to sentencing guidelines in child sexual abuse cases.

Chapter 9 concludes this thesis with a proposal that contains sentencing guidelines setting out general and specific principles for guiding the judicial

officer in exercising his or her discretion in the sentencing process related to cases of sexual abuse against children. The aim is to contribute to greater uniformity of judicial approach with respect to relevant aggravating and mitigating factors, sentencing aims, the imposition of life imprisonment, the use of victim impact statements and the presentation and accommodation of expert evidence. In addition, recommendations are made for the purpose of possible law reform and further research in relation to the regulation of judicial discretion through formal sentencing guidelines, victim impact statements and the effective use of behavioural science in the sentencing process of sexual offenders. The proposal is based on current South African sentencing practices, as well as on research conducted for this thesis.

PART II: CURRENT SENTENCING PRACTICES IN CHILD SEXUAL ABUSE CASES

CHAPTER 2 LEGISLATIVE PROVISIONS

*'If penal law is weak or ineffective, basic human interests are in jeopardy. If it is harsh or arbitrary in its impact, it works a gross injustice on those caught within its toils. The law that carries such responsibilities should surely be as rational and just as law can be. Nowhere in the entire legal field is more at stake for the community or for the individual.'*¹

2.1 CRIMINAL LAW AMENDMENT ACT 105 OF 1997

2.1.1 General

2.1.2 Substantial and compelling circumstances

2.1.3 Procedural issues

2.2 THE SEXUAL OFFENCES ACT 23 of 1957

2.3 DRAFT LEGISLATION

2.3.1 The Criminal Law (Sexual Offences) Amendment Bill 2003

2.3.1.1 Increasing the ambit of the General Law Amendment Act 105 of 1997

2.3.1.2 New offences

2.3.1.3 Correctional supervision

2.3.1.4 Evidence of the impact of a sexual offence

2.3.1.5 Guiding principles in determining appropriate sanctions

2.3.1.6 Orders

2.3.1.7 Non-legislative recommendations

2.3.2 Draft Sentencing Framework Bill

2.3.3 Child Justice Bill

2.4 CONSTITUTION

¹ H Wechsler 'The challenge of a model penal code' (1952) *Harvard Law Review* 1098 as referred to in JJ Joubert (ed) *Criminal Procedure Handbook* 5 ed (2001) 4.

2.5 CONCLUSION

2.1 CRIMINAL LAW AMENDMENT ACT 105 OF 1997

2.1.1 General

Prior to 1997, the courts had a relatively unfettered discretion to determine the term of imprisonment imposed in cases of rape involving children. On 1 May 1998, the Criminal Law Amendment Act 105 of 1997² came into operation, and s 51 introduced the concept of minimum sentencing in cases involving more serious crimes, while s 52 and s 53 provided for relevant procedural matters. Initially, the application of this section was limited to two years from commencement of the Act, but it has since been extended on four further occasions and will, in all likelihood, probably be extended in future as well. At present, the section is in operation until April 2007.³

The Criminal Law Amendment Act 105 of 1997 constituted a major shift in the approach to sentencing in an effort to stem the tide of criminality that threatened at the time, and which still continues to engulf South African society.⁴ The

² This Act has been amended on two occasions by the Judicial Matters Amendment Act 62 of 2000 and the Judicial Matters Amendment Act 42 of 2001. This is not the first attempt by the South African legislature to prescribe a sentence in the case of rape. Law 27 of 1887 was entitled, 'To regulate and define the punishment for the crimes of rape and assault with intent to commit rape and of indecent assault'. Section 1 of that law prescribed death as the punishment for the crime of rape. It thus prescribed the punishment, leaving no discretion whatsoever to the court (as referred to in *Rex v Conway* 1948 NPD 880). It was, however, repealed by Act 22 of 1898, which amended the law relevant to the trial and punishment of the crimes of rape and indecent assault, and did not bind the court any more to a prescribed punishment, but simply determined the upper limit of the forms of punishment. See Y le Roux 'The Impact of the Death Penalty on Criminality' Published Paper 17th International Conference of the International Society for the Reform of Criminal Law, 24-28 August 2003, *Convergence of Criminal Justice Systems: Building Bridges – Bridging Gaps* (2003) 1-4 for an overview and brief discussion of the history and politicisation of the death penalty in South Africa.

³ Proc R21 in GG 27549 of 29/4/05.

⁴ CR Snyman *Criminal Law* 4 ed (2002) 26 referring specifically to rape statistics; *S v Swartz* 1999 (2) SACR 380 CPD at 385c-d referring to rape statistics from 1994 to 1998; South African Human Rights Commission *Report on Sexual Offences against Children* (2002) 11.

introduction of minimum sentencing arose from the need to deal a decisive blow to serious crime by employing dramatically increased sentences implemented by the courts in a standardised and consistent manner. Notwithstanding these high expectations, the legislation has been criticised for being just an 'expensive tool', and for creating a false sense of security as 'something that will be effective against the high crime rates'.⁵ At this point, however, it is necessary to adopt a descriptive approach and focus on the contents of the legislation before the shortcomings and problems with regard to interpretation are dealt with.

For ease of reference, s 51 has been set out below and provides as follows:

- 51 Minimum sentences for certain serious offences
- (1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall:
- (a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or
 - (b) if the matter has been referred to it under section 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2,
- sentence the person for imprisonment for life.
- [Sub-s(1) substituted by s. 33(a) of Act 62 of 2000.]
- (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in:
- (a) Part II of Schedule 2, sentence the person, in the case of:
 - (i) a first offender, to imprisonment of a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- [Para. (a) amended by s. 33(c) of Act 62 of 2000.]
- (b) Part III of Schedule 2, sentence the person, in the case of:
 - (i) a first offender, to imprisonment of a period not less than 10 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

⁵ SS Terblanche (2003) 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' *Acta Juridica* 220.

- (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years;

[Para. (b) amended by s. 33(d) of Act 62 of 2000.]

- (c) Part IV of Schedule 2, sentence the person, in the case of:
 - (i) a first offender, to imprisonment of a period not less than 5 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

[Para. (c) amended by s. 33(e) of Act 62 of 2000.]

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than 5 years longer than the minimum sentence that it may impose in terms of this subsection.

[Sub-s (2) amended by s. 33(b) of Act 62 of 2000.]

- (3)
 - (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.
 - (b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.
- (4) Any sentence contemplated in this section shall be calculated from the date of sentence.
- (5) The operation of a sentence imposed in terms of this section shall not be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977 (Act 51 of 1977).
- (6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.
- (7) If in the application of this section the age of a child is placed in issue, the onus shall be on the state to prove the age of the child beyond reasonable doubt.
- (8) For the purposes of this section and Schedule 2, 'law enforcement officer' includes:
 - (a) a member of the National Intelligence Agency or the South African Secret Service established under the Intelligence Services Act, 1994 (Act 38 of 1994); and
 - (b) a correctional official in the Department of Correctional Services or a person authorised under the Correctional Services Act, 1998 (Act 111 of 1998).

[Para. (b) amended by s. 33(f) of Act 62 of 2000.]

Schedule 2

[Schedule 2 amended by s 37 of Act 62 of 2000]

(Section 51)

Only the relevant portions of schedule 2 are set out below:

PART I

Murder, when:

- (a) ...
- (b) ...
- (c) the death of the victim was caused by the accused in committing or attempting to commit or after having committed or attempted to commit one of the following offences:
 - (i) Rape
- (d) ...

Rape:

- (a) when committed:
 - (i) in circumstances where the victim was raped more than once whether by the accused or by any co-perpetrator or accomplice;
 - (ii) by more than one person, where such persons acted in the execution or furtherance of a common purpose or conspiracy;
 - (iii) by a person who has been convicted of two or more offences of rape, but has not yet been sentenced in respect of such convictions; or
 - (iv) by a person, knowing that he has the acquired immune deficiency syndrome or the human immunodeficiency virus;
- (b) where the victim:
 - (i) is a girl under the age of 16 years;
 - (ii) is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable; or
 - (iii) is a mentally ill woman as contemplated in section 1 of the Mental Health Act, 1973 (Act 18 of 1973); or
- (c) involving the infliction of grievous bodily harm.

PART II (Not relevant to the topic)

PART III

Rape in circumstances other than those referred to in Part I.

Indecent assault on a child under the age of 16 years, involving the infliction of bodily harm.

Assault with intent to do grievous bodily harm on a child under the age of 16 years.

Any offence ... (Not relevant)

PART IV

Any offence referred to in Schedule I to the Criminal Procedure Act, 1977 (Act 51 of 1977), other than an offence referred to in PART I, II or III of this Schedule, if the accused had with him or her at the time a firearm, which was intended for use as such, in the commission of such offence.

It is important at this point to highlight the effects which s 51 has on sentencing in cases of sexual offences committed against children. These provisions can be summarised briefly as follows:

Life imprisonment shall be imposed in a case of rape against children where:

- the victim is under the age of 18 and the rape has resulted in the death of the victim;⁶
- the victim is between the ages of 16 and 18 years and was raped more than once, or by more than one person acting under common purpose;⁷
- the accused has been convicted of two or more offences of rape and has not yet been sentenced;⁸
- the accused knew that he was HIV-infected;⁹
- the victim is a girl under the age of 16 years;¹⁰
- grievous bodily harm is inflicted on a victim aged between 16 and 18 years;¹¹
- the victim is a physical disabled girl between the ages of 16 and 18 years;¹² and

⁶ Refer to murder in part I, (c)(i).

⁷ Refer to rape in part I, (a)(i) and (ii).

⁸ Refer to rape in part I, (a)(iii).

⁹ Refer to rape in part I, (a)(iv). If the complainant is fortunate enough not to contract HIV/Aids, the mere taking of the medication for the tests may still have substantial negative side-effects: in *S v Segole* 1999 (2) SACR 115 WLD at 124c the complainant could not go to work, was nauseous, stayed in bed for about six weeks and her hair started falling out.

¹⁰ Refer to rape in part I, (b)(i).

¹¹ Refer to rape in part I, (c). It is important to note that the Criminal Law (Sexual Offences) Bill 2003 proposes an amendment to this provision to include grievous harm of any kind, thus including the psychological impact of rape. See par 2.2.3.1 below. The same approach is however not followed in making minimum sentences applicable to indecent assault. It is submitted that this reflects an inconsistency on the part of the legislature.

¹² Refer to rape in part I, (b)(ii).

- the victim is a mentally ill girl between the ages of 16 and 18 years.¹³

Imprisonment for a period of 10, 15 and 20 years respectively for first, second and third offenders shall be imposed in the following instances:

- rape other than in the above-mentioned situations;¹⁴
- indecent assault on a child younger than 16 years involving the infliction of bodily harm;¹⁵ and
- assault with intent to do grievous bodily harm to a child younger than 16 years.

Imprisonment for a period of 5, 7 and 10 years respectively for first, second and third offenders shall be imposed in the following instances:

- indecent assault where the use of a firearm is involved;
- sodomy where the use of a firearm is involved;
- bestiality where the use of a firearm is involved.

If, at the time of the commission of the crime, the accused was younger than 16 years, the Act will not be applicable. Where the age of the child victim becomes an issue, the onus will be on the state to prove the age of the child beyond reasonable doubt. If a sentence of life imprisonment is imposed on an offender who was between the ages of 16 and 18 years at the time of the commission of

¹³ Refer to rape in part I, (b)(iii).

¹⁴ Offences where the accused has a firearm intended for use when committing rape will be dealt with hereunder, as will those offences where the victim is over the age of 16 years.

¹⁵ In *S v Fatyi* 2001 (1) SACR 485 (SCA) at 488a 'bodily harm' was interpreted as including every kind of physical injury, no matter however trivial it might appear. Injuries to the victim's genitalia included bruising of the *labia minora*, the vestibule and the vagina, as well as tearing of the hymen and *fouchette*, with mild haemorrhaging. The court assumed that the accused's fingers, not his penis, had penetrated the victim's vagina.

the crime, the court must indicate its reasons for its decision on the record of the proceedings.¹⁶

With regard to the applicability of minimum sentences to offenders aged 16 and 17, the courts have adopted different interpretations. In *S v Blaauw*,¹⁷ Van Heerden J remarked in passing that the court is not obliged in terms of s 51(3)(b) to impose a minimum sentence on an accused who, at the time of committing the offence, was 16 or 17 years, unless the state satisfies the court that the circumstances justify the imposition of such a sentence. The state must thus provide evidence to show why the prescribed sentence should be imposed. It is submitted that this evidence should include expert testimony on the medical, emotional and psychological long-term effects of the offence on the child victim. In *S v Nkosi*,¹⁸ Cachalia J, delivering the judgment of the full bench, confirmed the responsibility of the state to persuade the court that the minimum sentence should be imposed. He concluded:

‘[D]espite the peculiar wording of s 51(3)(b), the legislature intended children aged between 16 and 18 years of age to be treated more leniently than those offenders who have turned 18 and are consequently deemed to be more mature.’¹⁹

In contrast to the previous two decisions, the court in *Director of Public Prosecutions, Transvaal v Makwetsja*²⁰ held that, although the statutorily prescribed minimum sentence should be imposed on offenders between the ages of 16 and 18 only in extreme cases, this did not mean that the legislature did not

¹⁶ Section 51(3)(b).

¹⁷ 2001(2) SACR 255 (CPD).

¹⁸ 2002 (1) SACR 135 (W).

¹⁹ *S v Nkosi supra* (n 18) at 142c-d.

²⁰ 2004 (2) SACR 1 (T) at 13f.

intend those sentences to apply to all offenders above the age of 16 years. If the legislature did not intend the minimum sentences to apply to offenders aged 16 and 17 as a starting point, it would have explicitly excluded that category of offender, as it has children below the age of 16.²¹

Requiring the court to set out clearly its reasons for imposing the prescribed minimum sentence on a youthful offender in this category serves as a reminder to the court to be cautious and to make 'doubly sure' that the young offender is deserving of the prescribed minimum sentence. However, the result of this approach would require the child offender to establish the existence of substantial and compelling circumstances, thereby burdening such offender in the same way as an offender over 18. This outcome was recently criticised by the Supreme Court of Appeal in *S v Brandt*²² and the position was then clarified by giving preference to the approach adopted in *Nkosi*²³ and *Blaauw*.²⁴ Based on international trends and constitutional values, it was held that s 51(3)(a) finds no application in the case of the offender aged 16 to 18.²⁵ This decision was however qualified. The court held that the fact that the legislature has 'ordinarily ordained the prescribed sentences for the offences in question'²⁶ should operate as a 'weighting factor in the sentencing process'.²⁷ Bearing this in mind, the sentencing court is thus free to apply the usual sentencing criteria in deciding on the appropriate sentence for offenders aged between 16 and 17 who have been

²¹ Section 51(6) of the Criminal Law Amendment Act 105 of 1997.

²² Case no 513/03, dated 30 November 2004 (unreported) (SCA).

²³ *Supra* (n 17).

²⁴ *Supra* (n 16).

²⁵ *S v Brandt supra* (n 21) at par 24 at 17.

²⁶ *S v Brandt ibid.*

²⁷ *S v Brandt ibid.*

convicted of child rape, of the gang-rape of victims aged between 16 and 17, of indecent assault inflicting bodily harm or of using a firearm during the commission of a sexual offence against a child.

2.1.2 Substantial and compelling circumstances

In terms of s 51(3)(a), the court does have a discretion to impose a lesser sentence than that prescribed by the Act where 'substantial and compelling circumstances' are present. The phrase 'substantial and compelling circumstances' has given rise to much debate and the interpretation of this clause has led to differing approaches. Broadly speaking, two approaches have developed, namely a narrow interpretation and a wide interpretation.

*S v Mofokeng and Another*²⁸ represented the narrow interpretation and left almost no discretion to the court. It was found that, for substantial and compelling reasons to exist, the facts of the particular case must present some circumstance that is so exceptional in its nature and that so obviously exposes the injustice of the statutory, prescribed sentence in the particular case that it can rightly be described as 'compelling' that a lesser sentence is justified.²⁹

²⁸ 1999 (1) SACR 502 (W).

²⁹ *S v Mofokeng and Another supra* (n 288) at 522. See part II, chapter 2, for a discussion of *S v Boer* 2000 (2) SASV 114 (NKA) where this approach was followed in the case of the rape of a 14-year-old girl. No exceptional circumstances were found and two of the three accused received life imprisonment. The term 'substantial and compelling circumstances' has been borrowed from the State of Minnesota in the United States of America. This has been criticised as unfortunate, as borrowing from other countries is often done without account being taken of the particular circumstances of that country or of the context in terms of which the system has operated for a number of years (*S v Jansen* 1999 (2) SACR 368 CPD at 374j). The Minnesota guidelines provide a particular approach, namely a desert-based approach, to the problem of sentencing. In South Africa, no grid system applies as it does in Minnesota, and the rigid application of s 51 of the Criminal Law Amendment Act 105 of 1997 in *S v Mofokeng and Another supra* (n 288) was held not to be applicable in the context of South Africa (*S v Jansen supra* (n 29) at 376i).

The wider approach was mooted in *S v Homareda*,³⁰ where the court held that each case must be decided on its own facts, with all aggravating and mitigating factors considered cumulatively. This approach allows the court to deviate from the prescribed sentence when the aggravating factors are outweighed by the cumulative effect of the mitigating factors. Then the Supreme Court of Appeal in *S v Malgas*³¹ clarified the meaning to a certain extent when Marais JA held that the court had not been completely deprived of its sentencing discretion by the Act, but that this discretion had only been partially limited.

The Supreme Court of Appeal in *S v Malgas*³² found it significant that the legislature had refrained from giving guidance, by way of definition or otherwise, as to what circumstances should rank as substantial and compelling.³³ It was found that, when sentence was considered, the emphasis had shifted to the 'objective gravity of the type of crime and the public's need for effective sanction against it' and that the 'residual discretion' not to impose the prescribed sentence was not eliminated 'in recognition of the easily foreseeable injustices which could result (therefrom)'.³⁴ The central thrust of the phrase was that the specified sentences were not to be departed from lightly and for 'flimsy reasons which could not withstand scrutiny'.³⁵ Speculative hypothesis favourable to the offender, undue sympathy, aversion to the imprisonment of first offenders, and personal doubts as to the efficacy of the policy underlying the legislation are to

³⁰ 1999 (2) SACR 319 (W). See part 11, chapter 2, for a discussion of *S v Gqamana* 2001 (2) SACR 28 (CPC) where this wider approach was followed in the case of a 14-year-old girl who had been raped.

³¹ *S v Malgas* 2001 (1) SACR 469 (SCA).

³² *S v Malgas supra* (n 31).

³³ *S v Malgas supra* (n 31) at par 18.

³⁴ *S v Malgas supra* (n 31) at par 8.

³⁵ *S v Malgas supra* (n 31) at par 9.

be excluded. In analysing the phrase 'substantial and compelling circumstances', it was found that what the words conveyed was that the 'ultimate cumulative impact of those circumstances' had to be such as to justify a departure from the prescribed sentence.³⁶ Factors which were traditionally and rightly taken into consideration when assessing sentence, should further still apply.³⁷ By using the word 'and', a composite description test is provided in respect of the circumstances that could justify a departure from the prescribed sentences.

A trial court, in applying the provisions of s 51, 'was faced with a generalised statutory injunction to impose a particular sentence' and was vested with the power and obligation to consider whether the particular circumstances of the case required a different sentence to be imposed.³⁸ This signals an approach that prescribed sentences have to be regarded as 'generally appropriate' for certain specified crimes, coupled with the injunction that they are not to be departed from unless the courts are satisfied that there is weighty justification for so doing.³⁹ The Constitutional Court in *S v Dodo*⁴⁰ unanimously endorsed the construction of the phrase 'substantial and compelling circumstances' by the Supreme Court of Appeal and further declared s 51(1) to be constitutional in nature.

The *Malgas* case⁴¹ has, however, been criticised for lack of more concrete guidance regarding the interpretation of the term 'substantial and compelling

³⁶ *S v Malgas* *ibid.*

³⁷ *S v Malgas* *ibid.*

³⁸ *S v Malgas* *supra* (n 31) at par 14.

³⁹ *S v Malgas* *supra* (n 31) at par 1.

⁴⁰ 2001 (1) SACR 594 (CC).

⁴¹ *S v Malgas* *supra* (n 31).

circumstances' and the dangers inherent therein. Terblanche⁴² points out that, even where reasonable people are concerned, the concept of justice differs from one person to another, and from one case to another. Consequently, to link the discretion to deviate from the prescribed sentence to an individual sentencer's recognition of 'an easily foreseeable injustice', would be a recipe for disparate sentencing.⁴³ This criticism seems justified and is clearly highlighted in the discussion of judgments later on. It would also appear from an analysis of court judgments that a vague categorisation of the seriousness of the most serious crimes seems to be taking place as a method of deviating from imposing the prescribed sentence.⁴⁴ The discretion to deviate is further complicated by the

⁴² 'Die praktyk van vonnisoplegging onder minimumvonniswetgewing: *S v Malgas* 2001 (1) SASV 469 (HHA)' (2002) 15 *SACJ* 365. Not only was it criticised by academics, but also by the judiciary itself. See *S v Kgafela* 2003 (5) SA 339 (SCA) where Friedman J granted leave to appeal, suggesting that the Supreme Court of Appeal should revisit *Malgas supra* (n 30) in order to give more definition or formulation to the phrase 'substantial and compelling circumstances' and to reverse the order of the enquiry. His suggestion was however rejected.

⁴³ Terblanche *ibid*; also D van Zyl Smit 'Mandatory sentences: A conundrum for the New South Africa?' (1999) 2:2 *Punishment and Society* 208 who recognises disparity as a result of blunt mandatory sentences.

⁴⁴ See *S v Jansen supra* (n 29) at 378g; *S v Abrahams* 2002 (1) SACR 116 (SCA) at 127; *S v Mahomotsa* 2002 (2) SACR 435 (SCA); *S v G* 2004 (2) SACR 296 (C) at 300g. See also S Terblanche 'Recent cases: Sentencing – minimum and mandatory sentences in terms of Act 105 of 1997' (2003) 16 *SACJ* 100 who argues that the courts went back to the original test for imposing life imprisonment as employed before Act 105 of 1997; NJ Kubista 'Substantial and compelling circumstances': Sentencing of rapists under the mandatory minimum sentencing scheme' (2005) 18:1 *SACJ* 77.

Also see *S v J* 1989 (1) SA 669 (A) at 673-374 and 681-682 for a discussion of the approach in order to determine the category of worst cases of rape, which also appears to have been relevant when the death penalty was still a competent sentence for the crime of rape. The term 'worst category' of rape should not be interpreted literally, as this would lead to the judicial officer always being able to think of an even worse scenario which would, in turn, limit his discretion (referring to *S v Tshomi en 'n Ander* 1983 (3) SA 662 at 666, where it was found that the proposition meant no more than that a trial judge should not impose the death penalty unless he or she is of the opinion that the crime itself is of such a nature that it would be an appropriate punishment). Ultimately, the question seemed to remain what the appropriate sentence would be or whether some other alternative would sufficiently satisfy the deterrent, punitive and reformatory aspects of sentencing (referring to *S v V* 1972 (3) SA 611 (A) at 614). Considerations favouring the imposition of the death penalty would be an ungovernable sex drive, or a propensity, irrespective of the cause, to commit violent sexual

mixed reactions to, and interpretations of, the impact of the crime, which, in turn, depends on the personal value judgement of the presiding officer.⁴⁵

Though less critical of the decision in *Malgas*,⁴⁶ Kotze⁴⁷ is concerned about the dilemma of less-experienced judicial officers in applying past sentencing patterns not being able to recognise 'actionable disparity' in imposing life imprisonment. This concern would appear to be in conflict with the court's approach of creating a new, more severe norm as regards the prescribed minimum sentences.⁴⁸ Further, it should be noted that this guideline to consult precedents prior to the enactment of the General Law Amendment Act 105 of 1997 with regard to the length of imprisonment is explicitly amended as far as child rape cases are concerned.⁴⁹

The Supreme Court of Appeal in *Rammoko v Director of Public Prosecutions*⁵⁰ refined the *Malgas* decision by providing further guidance as to what factors should rank as substantial in the sentencing decision regarding rape cases involving children. It was held that the fact that a victim may be under the age of 16 years is not the only criterion necessary for the imposition of a life sentence. Not only does the objective gravity of the crime play an important role, but also the present and future impact of the crime on the victim. It would appear that, in

crimes against women, or the fact that the accused had, despite previous sentences, not been deterred from again committing rape (at 683f).

⁴⁵ See the discussion in chapter 5 par 5.3 and chapter 6 par 6.5.

⁴⁶ *Supra* (n 31).

⁴⁷ '*S v Malgas* 2001 (1) SACR 469 (SCA)' (2004) *De Jure* 157 (see 3.1.1.2 below).

⁴⁸ *S v Malgas supra* (n 31) at 482f.

⁴⁹ *S v Abrahams supra* (n 44) at 126b.

⁵⁰ 2003 (1) SACR 200 (SCA).

the absence of evidence of harm, no fair decision can be taken as to the imposition of a life sentence. The accused, a 34-year-old neighbour, raped the 13-and-a-half-year-old complainant. Life imprisonment was then, and is still, the heaviest sentence he could legally be obliged to serve.⁵¹ However, neither the mother nor the medical doctor was questioned about the after-effects of the rape on the complainant, nor were any other witnesses called to testify to that effect.⁵² The court held that the omission of evidence regarding the after-effects of the rape led to a risk for the accused where s 51(1) of the Criminal Law Amendment Act 105 of 1997 applies:

‘ ... that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present.’⁵³

2.1.3 Procedural issues

Section 52 of the Criminal Law Amendment Act 105 of 1997 deals with committal of the accused for sentence to the high court after conviction in a regional court of an offence referred to in schedule 2. This section was amended by s 34(b) of the Judicial Matters Amendment Act 62 of 2000 as a result of conflicting interpretations by the regional court with regard to its discretion in determining whether an accused merits punishment which falls outside its jurisdiction, namely life imprisonment. In the case where life imprisonment was not justified

⁵¹ This has replaced the death sentence as the maximum sentence that can be imposed on a conviction of rape since the abolition of the death penalty in *S v Makwanyane* 1995 2 SACR 1 (CC). Snyman *op cit* (n 4) 451 is however sceptical of the mere existence of such a punishment as life imprisonment, and suggests that the existence must be taken with a pinch of salt, since an offender may be released on parole after a period of 25 years. See chapter 1 par 1.1.5 for the new release procedures.

⁵² *Rammoko v Director of Public Prosecutions supra* (n 50) at 204a. See chapter 3 par 3.1.1.2 (d) for the final judgment.

⁵³ *Rammoko v Director of Public Prosecutions supra* (n 50) at 205e.

according to the regional court, the case could be finalised in the regional court, which had sentencing jurisdiction up to 15 years' imprisonment. As the section reads now, a regional court has no choice but to refer a case to the high court if an accused is convicted of a schedule 2, part I, offence. In practice, some regional courts continued to ignore this legislation, but the position that all offenders older than 16 years had to be referred to the high court was then confirmed in *Director of Public Prosecutions, Transvaal v Makwetsja*.⁵⁴ In order to combat the excessive delay of cases, the National Prosecuting Authority then submitted a proposal to the Justice Parliamentary Portfolio Committee that s 52 be amended to allow regional court magistrates to impose life imprisonment in cases of child rape.⁵⁵ It was argued that this was the only way in which to uphold the constitutional principle in s 28(2) of the Constitution that, in every matter concerning the child, a child's best interests are of paramount importance. Very recently, however, regional courts have again been authorised to finalise child sexual abuse cases falling under schedule 2, part I, of the Criminal Law Amendment Act 105 of 1997 where the offender is between 16 and 18 years old, since s 51(3)(a) is not applicable to the offender aged 16 to 18 any more.⁵⁶

Although the ideal is that cases be tried in the high court from the outset,⁵⁷ this is not practical. Even though the regional court has jurisdiction to hear all offences except treason,⁵⁸ some regional court magistrates have recently refused

⁵⁴ *Supra* (n 20). In the latter case, the state appealed against a suspended sentence imposed by the regional court in the case of the rape of a four-year-old girl by an accused aged between 16 and 18, and the case was then referred to the high court for sentencing (the sentence was then increased to seven years).

⁵⁵ S Carstens 'Vonnis-wette lei dalk tot ophoop van hoë-hof sake' *Beeld* (11/06/2003) 11.

⁵⁶ *S v Brandt supra* (n 20) at par 24. See par 2.1.1 above.

⁵⁷ *S v Ndlovu* 2001 (1) SACR 204 (W).

⁵⁸ Section 89(2) of the Magistrates Court Act 32 of 1944.

to hear cases falling under part I of schedule 2, but have been ordered by the high court to preside over the relevant trials.⁵⁹ This procedural regulation has not only led to a large backlog of cases, but also to the reliving of trauma by victims who are called by the high court to testify for purposes of sentencing.⁶⁰ In addition to hampering the victim's healing process, the procedure also appears to contribute to the stress and frustration of regional court magistrates⁶¹ and constitutes a denial of the fact that the trial court is in the best position to impose an appropriate sentence.⁶² Davis J describes the dilemma of the high court as follows:

'This Court now finds itself in the position of a chain novelist. The first chapter has been written by another court and this Court is now expected to complete the work on the basis of a framework determined by another author. It is a most unsatisfactory system.'⁶³

This remark simply highlights the difficulty of deciding on an appropriate sentence when a case is divided into two parts:

⁵⁹ *Director of Public Prosecutions (Kwa-Zulu Natal v Regional Magistrate, Mtubatuba* 2002 (1) SACR 31 (N).

⁶⁰ Subsection (3)(d). The case of *Rammokko supra* (n 49), for instance, was finalised only on 26 September 2003, five years after the victim, as a 13-year-old, was raped on 23 September 1998. Also *S v Gqamana supra* (n 30). In a personal communication with regional court magistrates from the Northern Cape (19/2/05, Bloemfontein), the author was also informed that it is the practice in that division for the high court to subpoena victims in child sexual abuse cases as a matter of routine to testify for sentencing purposes.

⁶¹ Personal communication with regional court magistrates from Gauteng in March 2004, Pretoria.

⁶² As Broom J stated five-and-a-half decades ago in *Rex v Conway supra* (n 2) at 883, the severity of the punishment as well as the choice of punishment 'are all matters within the discretion of the magistrate who, having dealt with the whole case, is in a much better position in regard to punishment than we are'. See also *S v Mkhondo* 2001 (1) SACR 49 (WLD) at 57-58 for an argument that the more serious the crime, the more important it is that the judicial officer imposing the sentence should be the one who has tried the accused.

⁶³ *S v Swartz supra* (n 4) at 383c-d.

'It is difficult to obtain a sufficient understanding for the matter in its entirety when only matters of sentence are referred to this court.'⁶⁴

Despite the above, the procedure of dividing a case into two parts was declared to be constitutional.⁶⁵

2.2 THE SEXUAL OFFENCES ACT 23 OF 1957

Once in operation, the proposed new Criminal Law (Sexual Offences) Bill of 2003, which is discussed below, will regulate matters relating to all sexual offences and s 26 will repeal sections 9, 11, 13, 14, 15, 18, 18A and 20A of the Sexual Offences Act 23 of 1957.⁶⁶ For purposes of this thesis, the most important provisions are those aimed at protecting the sexual integrity of young people, and these provisions are highlighted below. Section 14 of the Sexual Offences Act 23 of 1957 prohibits carnal intercourse, or the commission of immoral or indecent acts, with youths below a certain age, even with their consent. It deals with sexual intercourse or indecent acts by males with girls under 16, or with males under 19.⁶⁷ Subsection (3) reverses the gender and punishes sexual intercourse or indecent acts committed by females with boys under 16, or with females under 19. There seems to be no gender discrimination in s 14, since what the one gender is prohibited from doing, holds equally for the other.⁶⁸ The prescribed penalty for contravening s 14 is imprisonment for a period not

⁶⁴ *S v Jansen supra* (n 29) at 372g. See chapter 4 par 4.5.5 where regional court magistrates indicate that the process also causes them frustration.

⁶⁵ *S v Dzukuda* 2000 (2) SACR 443 (CC).

⁶⁶ Before 1988 the Act was known as the Immorality Act, and was later renamed by the Immorality Amendment Act 2 of 1988. Section 33 of the Sexual Offences Bill further provides for any inconsistency between any of its provisions and the provisions of sections 3, 10, 12, 12A, 20 and 21 of the Sexual Offences Act of 1957 insofar as those provisions relate to children. The new Act will then take precedence.

⁶⁷ Subsection (1) and (2).

⁶⁸ *Snyman op cit* (n 4) 365.

exceeding six years, with or without a fine not exceeding R120 000 in addition to such imprisonment.⁶⁹

The offence of procuration is defined as any act by which a young woman or girl is procured to become a prostitute. The underlying reason for this offence is the protection of impoverished young girls against the unscrupulous exploiting of their bodies.⁷⁰ The prescribed penalty for the various forms of procuration ranges from a maximum of five to seven years.⁷¹

Statutory abduction is made an offence in terms of s 13. The section prohibits the taking and detention of any unmarried male or female under the age of 21 years of age out of the custody and against the will of the father, mother or guardian with the intent that that person, or any other person, may have unlawful carnal intercourse with the unmarried person. The listed penalty is a maximum period of seven years.⁷²

Lastly, s 15 prohibits intercourse with male or female idiots or imbeciles. Section 15 provides that any person who (a) has or attempts to have unlawful carnal intercourse with a male or female idiot or imbecile in circumstances which do not amount to rape; or (b) commits or attempts to commit any immoral or indecent act with such a male or female; or (c) solicits or entices such a male or

⁶⁹ Section 22(f) of the Sexual Offences Act 23 of 1957 read with s 1(a) of the Adjustment of Fines Act 101 of 1991. The Adjustment of Fines Act 105 of 1997 applies to penal provisions which merely provide for the imposition of a fine without reference to a maximum amount. The ratio between fine and imprisonment is determined by the standard jurisdiction of the magistrate's court, which, at present, is R10 000 for each six months of imprisonment: see SS Terblanche *The Guide to Sentencing in South Africa* (1999) 49-54.

⁷⁰ Snyman *op cit* (n 4) 362.

⁷¹ Sections 22(d) and 22(e) of the Sexual Offences Act 23 of 1957.

⁷² Section 22(e) of the Sexual Offences Act 23 of 1957.

female into the commission of any immoral or indecent act, commits an offence. The punishment for this crime is also imprisonment for a period not exceeding six years, with or without a fine not exceeding R120 000 in addition to such imprisonment.⁷³

2.3 DRAFT LEGISLATION

2.3.1 The Criminal Law (Sexual Offences) Amendment Bill 2003⁷⁴

The draft Sexual Offences Bill was first introduced at the end of 2002.⁷⁵ This legislation has been renamed the Criminal Law (Sexual Offences) Amendment Bill 2003 and has yet again been referred back for further deliberations. The provisions in the first draft have been retained to a large extent, with the exception of the provisions with regard to support persons and the treatment of victims. The excision of the latter provisions was attributed to the cost involved and the present lack of infrastructure. This omission is open to criticism in the light of the new emphasis on the victim as well as of research indicating the long-term impact of sexual offences.⁷⁶ Further, as is also indicated later, since a significant percentage of victims turn into abusers themselves,⁷⁷ effective

⁷³ Section 22(f) of the Sexual Offences Act 23 of 1957 read with s 1(a) of the Adjustment of Fines Act 101 of 1991.

⁷⁴ 2003 B50 2003 GG No 25282 of 30 July 2003.

⁷⁵ Law Commission *Report on Sexual Offences* Project 107 (2002) 293-294.

⁷⁶ See discussion in chapter 5 par 5.3.4 and chapter 6 par 6.6.4 with regard to the future impact of sexual offences.

⁷⁷ D Caelers "'Unwanted touching" is not rape, say teens' (22/10/2004) *Legalbrief*. In a study of 300 000 children in South Africa, about 11 percent of boys and 4 percent of girls claimed to have forced someone else to have sex. Of these children, 66 percent of the boys and nearly 75 percent of the girls had themselves been the victims of forced sex before. See also L Magnus 'Kind sny haarsel oor "lollery" (Pa wat molesteer is gesodomiseer)' *Beeld* (2/11/2004) for an example of a man who had been sodomised himself as a boy and recently pleaded guilty to incest with his stepdaughter; C Itzen 'Child protection and child sexual abuse prevention' in C Itzen (ed) *Home Truths about Child Sexual Abuse (Influencing policy and practice: A reader)* (2000) 411-412 for research cited that confirms the fact that in the region of 50 percent of sexually abused boys become abusers themselves.

treatment can at least break the vicious cycle.⁷⁸ Though the main aim of the Criminal Law (Sexual Offences) Amendment Bill 2003 is to regulate matters relating to sexual abuse cases in a holistic manner, the focus for the purpose of this thesis is only on its effect on sentencing practice in child sexual abuse cases. This legislation will cause a further major shift by introducing a completely new sentencing paradigm as a result of the new classification of rape. Offences that would previously have been treated as indecent assault will now qualify as rape, which will fall under the Criminal Law Amendment Act 105 of 1997 and therefore carry a heavier penalty.

2.3.1.1 Increasing the ambit of the General Law Amendment Act 105 of 1997

The Criminal Law Amendment Act 105 of 1997 will in all likelihood in future be amended by the newly proposed Criminal Law (Sexual Offences) Amendment Bill once the latter comes into force. Under schedule 1 of the latter, the word 'victim' as contained in the definition of rape will be gender-neutral. The words 'girl' and 'woman' will be replaced with 'person'. In cases where boys under the age of 16 are sodomised, the Criminal Law Amendment Act 105 of 1997 will then be applicable.

Of further importance is the fact that the infliction of grievous harm will not be limited to bodily harm only. The severe psychological impact of rape on a girl between the ages of 16 and 18 years may then bring the offence within the ambit of s 51(1) and accordingly entail life imprisonment.⁷⁹

Two new crimes of a sexual nature are to be added to part 1, thus making a sentence of life imprisonment applicable, namely:

- sexual violation involving the infliction of grievous harm; and

⁷⁸ S Wieland 'Therapy – The Brain's Second Chance' (2004) 6:3 *SAPSAC Newsletter* 1.

- oral, genital sexual violation of a person under the age of 16 years.

Under part III, where imprisonment for a period of 10, 15 and 20 years respectively for first, second and third offenders must be imposed, the following offences are to be inserted:

- sexual violation; and
- oral, genital sexual violation where the victim is 16 years of age or older.

Thus, by extending the definition of rape and creating two new offences, the ambit of application of the Criminal Law Amendment Act 105 of 1997 will be broadened. The definitions included in the Criminal Law (Sexual Offences) Amendment Bill 2003 will, for the sake of completeness, be set out here:

Rape

- S2. (1) Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person into or beyond the anus or genital organs of another person, or any act which causes penetration to any extent whatsoever by the genital organs of another person into or beyond the anus or genital organs of the person committing the act, is guilty of the offence of rape.

Subsections 2(2) to 2(5) set out the various situations which are regarded as prima facie unlawful acts causing penetration, namely if the act is committed in:

- any coercive circumstance;
- under false pretences or by fraudulent means; or
- in respect of a person who is incapable in law of appreciating the nature of an act which causes penetration.

⁷⁹ Section 26 of the Criminal Law (Sexual Offences) Amendment Bill 2003.

These requirements in respect of unlawful acts causing penetration are also applicable to the newly-created offences listed below.⁸⁰

Sexual violation

- s3. Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by any object, including any part of the body of an animal, or part of the body of that person, other than the genital organs, into or beyond the anus or genital organs of another person, is guilty of the offence of sexual violation.

Oral genital sexual violation

- s4. Any person who unlawfully and intentionally commits any act which causes penetration to any extent whatsoever by the genital organs of that person, or the genital organs of an animal, into or beyond the mouth of another person, is guilty of the offence of oral genital sexual violation.

It is clear from the above definitions that there is a distinction between certain degrees of penetration for purposes of sentencing under the current, applicable provisions regarding minimum sentences.⁸¹ In summary, the following types of unlawful and intentional penetration, to any extent whatsoever, are recognised:

- the genital organs of one person into or beyond the anus or genital organs of another person would amount to rape;
- an object, including any part of the body of an animal or any part of the body of a person, into or beyond the anus or genital organs of another person, would amount to an offence, named sexual violation; and
- the genital organs of one person or of an animal into or beyond the mouth of another person would amount to an offence named oral, genital sexual violation.

⁸⁰ Subsections 2(6) to 2(9) of the Criminal Law (Sexual Offences) Amendment Bill 2003 provide for defences and the repeal of common law provisions, matters that are not directly relevant for the purposes of this discussion.

⁸¹ Law Commission *op cit* (n 75) 25.

2.3.1.2 New offences

A further new offence has been created which aims to protect children against the provision or display of sex articles in the process of grooming,⁸² namely the promotion of a sexual offence with a child. A penalty is included, since this offence would not fall under the Criminal Law Amendment Act 105 of 1997. A convicted person is liable to a fine, or to imprisonment for a period not exceeding six years, or to both such a fine and imprisonment.⁸³

Other offences under the Criminal Law (Sexual Offences) Amendment Bill 2003 are the following:

- the offence of having compelled, induced or caused a person to engage in an indecent act, which carries the penalty of a fine and imprisonment for a period not exceeding five years;⁸⁴
- the offence of having committed an act which caused penetration, or an indecent act with another within the view of a child below the age of 16 years or a mentally impaired person, with the penalty upon conviction of a fine of R40 000 or imprisonment for a period not exceeding two years;⁸⁵

⁸² Internationally, the process of grooming, which is inherent in the preparation of sexual crimes where the adult involved uses no physical force, is being recognised. In South Africa, the actual grooming process, where it involves exposing the child to a sex apparatus or sex toy, could be an offence in terms of the proposed legislation, while only the behaviour following grooming (on-line or off-line), such as meeting a child, has been incorporated in British sexual offence legislation as s 15 of the new England and Wales Sexual Offences Act 2003. See A Gillespie "'Grooming": Definitions and the law' (2004) 7124:154 *New Law Journal* 586. See also JD Duncan Brown 'Developing strategies for collecting and presenting grooming evidence in a high tech world' (2001) 14:11 *American Prosecutors' Research Institute: National Center for Prosecution of Child Abuse Update* 1, for an explanation of the grooming process, specifically the aspect of deceptive trust created and manipulation by the adult. See chapter 5 par 5.4.

⁸³ Section 10 of the Criminal Law (Sexual Offences) Amendment Bill 2003. Applying the Adjustment of Fines Act 101 of 1991, the maximum fine will then be R120 000.

⁸⁴ Section 6 of the Criminal Law (Sexual Offences) Amendment Bill 2003.

⁸⁵ Section 8 of the Criminal Law (Sexual Offences) Amendment Bill 2003.

- the offence of having committed an act, which caused penetration, with a child who is older than 12 years of age, but below the age of 16 years, notwithstanding the consent of that child to the commission of such an act, with the penalty upon conviction of a fine or imprisonment for a period not exceeding six years, or both such fine and imprisonment;⁸⁶
- the offence of having committed an indecent act with a child below the age of 16 years, notwithstanding the consent of that child to the commission of such an act, with the penalty upon conviction of a fine or imprisonment for a period not exceeding four years, or both such fine and imprisonment.⁸⁷
The corresponding fine in terms of the Adjustment of Fines Act 101 of 1991 is then R80 000. This offence excludes penetration, but includes any act causing contact between the anus, genital organs or female breasts and any body part of another person or any object; exposure or display of the genital organs; exposure or display of any pornographic material to any person against his or her will, or to a child; and
- the offences of being involved in⁸⁸ and living from the earnings⁸⁹ of child prostitution, with the penalty upon conviction of imprisonment for a period not exceeding 20 years, with or without a fine.

2.3.1.3 Correctional supervision

Section 26 of the Criminal Law (Sexual Offences) Amendment Bill 2003 further proposes an amendment to s 276A of the Criminal Procedure Act 51 of 1977⁹⁰ dealing with correctional supervision. It provides for the following subsection:

⁸⁶ Section 9(1) of the Criminal Law (Sexual Offences) Amendment Bill 2003 replaces s 14 of the Sexual Offences Act 23 of 1957. It is interesting to note that the punishment in effect remains the same.

⁸⁷ Section 9(4) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

⁸⁸ Section 11(1) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

⁸⁹ Section 11(3) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

- (2A) Punishment imposed under paragraphs (h) or (i) of subsection 276(1) on a person convicted of any sexual offence shall if practicable and if the convicted person demonstrates the potential to benefit from treatment, include the benefit of any participation in a sex offence specific accredited treatment programme, the cost of which shall be born by the convicted person himself or herself or the State if the court is satisfied that the convicted person has no adequate means to bear such cost.

The period of correctional supervision as a sentencing option in s 276(h), as explained in s 276A(1)(b), has been extended from three years to five years in an endeavour to take into account that treatment programmes should be of an effective length.⁹¹

In the case of sexual offences, provision has also been made for the appointment of at least one assessor to assist the judicial officer when a community-based punishment is considered. The assessor should be one who has, *inter alia*, experience or knowledge of the impact of sexual offences on the victims of such offences, or of the characteristics of sexual offenders.⁹²

2.3.1.4 Evidence of the impact of a sexual offence

Section 17(1)(b) further provides that evidence of surrounding circumstances and the impact of a sexual offence may be adduced at criminal proceedings to prove, for purposes of imposing an appropriate sentence, the extent of harm suffered by the victim.⁹³ Though the introduction of evidence on the after-effects

⁹⁰ Hereafter referred to as the CPA.

⁹¹ The availability as well as the quality and effectiveness of existing programmes however pose problems.

⁹² Section 14 of the schedule attached to the Bill. The importance of behavioural science expertise during sentencing will be discussed in chapter 5 par 1.

⁹³ This provision seems to be a slight adaptation of the suggestion in s 19(1)(b) of the draft Sexual Offences Bill 2002 which provided that evidence of the psychosocial effects of any sexual offence upon a complainant may be adduced in order to prove, for purposes of imposing an appropriate sentence, the extent of harm suffered by that complainant (see also Law Commission *Sexual Offences: Process and Procedure* Discussion Paper 102 Project 107 (2001) 835). The reason for this seems to lie in the distinction between evidence portraying

of the sexual offence is only optional, it may contribute to a paradigm shift among role-players. However, it will be argued later in chapter 6 that the responsibility for receiving impact evidence should be on the judicial officer and that the consideration thereof should be mandatory, unless the victim refuses to provide evidence regarding harm.⁹⁴ As a non-legislative recommendation,⁹⁵ judicial training is further envisaged which will address the potential impact of sexual crimes on victims generally. This responsibility for facilitating and establishing a programme of judicial education is placed on the proposed Sentencing Council, as recommended in the Report on Sentencing, discussed below.

2.3.1.5 Guiding principles in determining appropriate sanctions

The Bill provides a comprehensive list of guiding principles that must be considered in the application of the provisions of the new Act. In determining the appropriate sanction for a person who has been found guilty of committing a sexual offence, the guiding principles in schedule 1 (I)(i) to (vi) are as follows:

- (i) the sanctions applied should ensure the safety and security of the victim, the family of the victim and the community;
- (ii) the sanctions should promote the recovery of the victim and the restoration of the family of the victim and the community;

the result of the sexual offence as opposed to evidence relating to the surrounding circumstances of a sexual offence that may address issues such as the cause of a late disclosure and the context in which a child sexual abuse victim finds himself or herself (Law Commission *supra* (n 75) 199).

In terms of s 19(1)(2), a court could even have ordered that a suitably qualified person assess the complainant in order to establish the impact of the offence. Where, however, a child aged 12 or younger had previously been assessed, the court had to consider the harmful impact of a further assessment upon that child. An assessment of the complainant would not have been a prerequisite for leading expert evidence on the expected impact of a particular offence, and limiting the court from repeatedly ordering the assessment of the complainant will not impact on the ability of the defence to request such assessments (Law Commission *op cit* (n 74) 197).

⁹⁴ See chapter 6 par 6.4.3.

⁹⁵ Law Commission *op cit* (n 75) 372.

- (iii) where appropriate, offenders should make restitution which may include material, medical or therapeutic assistance, to victims and their families or dependants;
- (iv) the child sexual offender should receive special consideration in respect of sanctions and rehabilitation;
- (v) the possibility of rehabilitating the sexual offender should be taken into account in considering the long-term goal of safety and security of victims, their families and communities; and
- (vi) the interests of the victim should be considered in any decision regarding sanctions.

Though the above guiding principles are based on a broad approach, they are indicative of the legislator taking further control in an attempt to regulate judicial discretion in the sentencing of offenders in sexual abuse cases.⁹⁶ These principles will become relevant again in chapter 8 when the regulation of the sentencing process in South Africa is investigated.

2.3.1.6 Orders

In addition to any sentence, including imprisonment which is not suspended, the Criminal Law (Sexual Offences) Amendment Bill 2003 specifically refers in s 19 to drug and alcohol treatment orders in the case of an accused being convicted of having committed a sexual offence.

Of further importance is the introduction of a new sentencing option, namely an order of long-term supervision as part of the sentence after a person has been declared a dangerous sexual offender.⁹⁷ It is in the court's discretion to *inter alia*

⁹⁶ M Wasik 'Going round in circles? Reflections on fifty years of change in sentencing' (2004) *Crim L R* 253 argues that the legislator can at any time rightfully take its original sentencing authority back from the courts.

⁹⁷ Section 20(2) of the Criminal Law (Sexual Offences) Amendment Bill 2003. The Project Committee on Sexual Offences pointed out that sexual offenders are not a homogenous group and that the different types of offenders require a differential approach. Therefore, a community protection model was recommended where long-term supervision and treatment programmes for sex offenders should be considered, as well as skilled input regarding the management of sexual offenders (Law Commission *op cit* (n 83) 734-735). In determining the period of supervision, the Commission will however have to take note of new research indicating that reconviction occurs as long as 10 and 15 years after discharge from custody

declare any person who has been convicted of a sexual offence against a child, a dangerous sexual offender, unless such a person is a child himself or herself.⁹⁸ When such an offender is released after having served part of a term of imprisonment imposed, or has been released on parole, the Department of Correctional Services must ensure that the offender is placed under such long-term supervision by an appropriate person for the remainder of the sentence. Long-term supervision is defined as supervision of a rehabilitative nature for a period of not less than five years. There are certain requirements that must be complied with before such an order can be made, namely that the court must have regard to a report compiled by a probation officer, social worker or other person designated by the court. The report must contain an exposition of:

- (a) the suitability of the offender to undergo long-term supervision;
- (b) the possible benefits of the imposition of a long-term supervision order on the offender;
- (c) a proposed rehabilitative programme for the offender;
- (d) information on the family and social background of the offender;
- (e) recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and
- (f) any other matter as directed by the court.⁹⁹

The above appear to have the far-reaching implication that the sex offender now has the right of access to appropriate evaluation, treatment and rehabilitation.

(see J Cann, L Falshaw and C Friendship 'Sexual offenders discharged from prison in England and Wales: A 21-year reconviction study' (2004) 9 *Legal and Criminological Psychology* 1-10.

⁹⁸ Section 1(i) of the Criminal Law (Sexual Offences) Amendment Bill 2003 defines a child as a person below the age of 18 years.

⁹⁹ Section 20(4) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

The order must further specify:

- (a) that the offender is required to take part in a rehabilitative programme (the offender may even be ordered to contribute to the cost of such a programme);¹⁰⁰
- (b) the nature of the rehabilitative programme to be attended;
- (c) the number of hours per month that the offender is required to undergo rehabilitative supervision; and
- (d) that the offender is required, where applicable, to refrain from using or abusing alcohol or drugs.

In addition, the court may specifically order the offender to refrain from visiting a specified location or seeking employment of a specified nature, and the offender may further be subjected to a specified form of monitoring.¹⁰¹

The sentencing court must review a long-term supervision order within three years,¹⁰² and the victim has the right to be present at the review proceedings.¹⁰³ When a dangerous sexual offender fails to comply with the long-term supervision order, or with any condition imposed in connection with such order, an inquiry must be conducted. The court then has the option of reviewing the original sentence and of imposing an alternative sentence.¹⁰⁴

¹⁰⁰ Section 20(11) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

¹⁰¹ Section 20(6) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

¹⁰² Section 20(7) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

¹⁰³ Section 20(8) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

¹⁰⁴ Section 20(10) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

2.3.1.7 Non-legislative recommendations

In addition to the above provision, the Commission also proposes, as a non-legislative recommendation, that all sexual offenders be required to undergo treatment in an accredited programme as part of the original sentence, preferably in a community setting, when released on parole or under correctional supervision.¹⁰⁵

Other recommendations relating to offender treatment include the following:

- that more extensive use be made of s 274(1) of the Criminal Procedure Act 51 of 1977¹⁰⁶ and that expert opinion should be canvassed by the court when determining the appropriate treatment programme;
- that the offender should, as far as possible, be liable for the costs of the treatment. (If the offender does not have the means, the state should bear the responsibility for the cost of treatment as a way of ensuring long-term community protection.);
- that provision be made for the monitoring of the sentencing magistrate's treatment order (At present, the sentencing magistrate may order rehabilitation as part of a prison sentence, but this order may not be complied with by the prison staff, sometimes owing to the lack of resources in the prison in which the offender is held, or to a lack of insight on the part

¹⁰⁵ Law Commission *op cit* (n 75) 373. In evaluating the sex offender's behaviour during treatment programmes, it is submitted that it is important that the Department of Correctional Services take note of new research showing that multi-agency information indicates higher levels of offence-related sexual behaviour displayed by sexual offenders than that reflected by reconviction data only (see L Falshaw, A Bates, V Patel, C Corbett and C Friendship 'Assessing reconviction, re-offending and recidivism in a sample of UK sexual offenders' (2003) 8 *Legal and Criminological Psychology* 207). In other words, a sex offender on parole who frequents school areas or visits child pornography web sites would indicate a leaning towards recidivism without any formal offence against him. This might, in turn, impact on the risk posed by the person as well as on the success of the specific treatment programme.

¹⁰⁶ See chapter 1 (n 18).

of the prison staff as to the need for the rehabilitation of the sexual offender.);

- that treatment and rehabilitation programmes be made available to all sexual offenders;
- that, as rehabilitation of sexual offenders is a long-term strategy, the period of correctional service be extended from three to five years.

The general purpose of including non-legislative recommendations is to encourage action by the appropriate government structures and to galvanise communities to participate in the fight against this form of violence.¹⁰⁷ For the purposes of sentencing, other relevant recommendations, in addition to the above, are those relating to rules of evidence, to victim impact statements and to a dedicated judiciary.

As far as rules of evidence are concerned, recommendations are included for the training of judicial officers regarding the potential impact of sexual crimes on victims generally, and for providing such officers with information of this nature. This should form part of a programme of judicial education on sentencing. This type of training may raise questions concerning the role of judicial notice in sentencing.¹⁰⁸ It is submitted, however, that by raising the awareness of judicial officers about issues of harm in general, a situation similar to that which occurred in *S v O*¹⁰⁹ may be avoided, namely the omission by the court to call an available therapist of a child victim as an expert witness on the after-effects of the crime.

¹⁰⁷ Law Commission *op cit* (n 74) 300.

¹⁰⁸ See chapter 7 par 7.5 for a discussion with regard to judicial notice of harm.

¹⁰⁹ 2003 (2) SACR 147 (C).

A further recommendation refers to the assessment by judicial officers of the offender's knowledge, use and manipulation of the particular victim's vulnerability as factors that should be taken into account for the purpose of sentencing.¹¹⁰ This is relevant to the offender's degree of culpability, which becomes important during sentencing and appears to be a particularly difficult aspect for the judicial officer in child sexual abuse cases.¹¹¹

The concept of a dedicated judiciary is introduced and refers to a far-reaching option of allowing only judges and magistrates who are certified to preside in sexual matters, to do so.¹¹²

Reference to formal victim impact statements is not included in the Criminal Law (Sexual Offences) Amendment Bill 2003, as was done in the draft Sentencing Framework Bill 2000,¹¹³ but forms part of the non-legislative recommendations. A critical discussion of the recommendations regarding victim impact statements appears in chapter 6.

2.3.2 Draft Sentencing Framework Bill¹¹⁴

In 2000, the Law Commission's Project Committee on Sentencing proposed a new partnership between the state and public in which the focus would fall on improved provision for victim involvement in the sentencing process and on the

¹¹⁰ Law Commission *op cit* (n 74) 372.

¹¹¹ *S v O supra* (n 109).

¹¹² Law Commission *op cit* (n 75) 373.

¹¹³ Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000) 132.

¹¹⁴ Law Commission *op cit* (n 113). Earlier during 2000 the *Sentencing (A New Sentencing Framework)* Discussion Paper 91 Project 82 was published.

recognition of victim concerns in the type of substantive sentences imposed.¹¹⁵ Clause 47 of the accompanying draft Sentencing Framework Bill 2000 proposes a procedural innovation requiring that prosecutors, when they intervene regarding sentence, must consider the interests of victims in every case. Victim impact statements may be presented to the courts about harm suffered as a way of informing the courts of the impact that a crime has had on the victim. In addition, a court has to consider, in every case, the new sentencing option of reparation. In terms of clause 37, the offender may be ordered to make appropriate reparation, in the form of restitution, to any victim of an offence for *inter alia* physical, psychological or other injury.

Unjustified disparity occurs where sentences are not uniform owing to a lack of consensus across the judiciary. The affected areas include the relative seriousness of offences, mitigating factors, aggravating factors, relevant circumstances of the offender, and the relative weight to be given to each of these factors. Uniformity of approach was further identified as a need by the Law Commission¹¹⁶ and the new sentencing framework thus proposed more guidance in the form of legislated sentencing principles. These will be supplemented by sentencing guidelines developed by an independent Sentencing Council for a particular category or subcategory of offence.¹¹⁷ Unjustified disparity in sentences which justifies the need for guidelines is illustrated *inter alia* in *S v Abrahams*.¹¹⁸ The trial judge failed to take into account, as an aggravating feature of the accused's rape of his 14-year-old daughter, the fact that he viewed

¹¹⁵ *Op cit* (n 112) xxii.

¹¹⁶ Law Commission *op cit* (n 113) xix.

¹¹⁷ Law Commission *op cit* (n 113) 28-30. See chapter 8 par 8.4.2.1 for a discussion on guidelines with reference to the Sentencing Advisory Panel which fulfils such a role in England.

¹¹⁸ *Supra* (n 44).

his daughter as an object to be used at will and then to be discarded for further similar use by others, while the court of appeal viewed this as a most material aspect of the crime. A further example is found in *S v Mahomotsa*,¹¹⁹ where the sentencer took a young man's virility into consideration as a mitigating factor in the repeated rape of two girls. The court *a quo* stood to be corrected by the Supreme Court of Appeal.

However, no report has been published on the new sentencing framework following the discussion paper stage, and the Justice Portfolio Committee has decided to prioritise the draft Sexual Offences legislation and not the Sentencing Framework Bill 2000.¹²⁰ The Sexual Offences Project Committee therefore based its recommendations on the status quo featuring minimum, mandatory sentencing legislation.¹²¹ This seems justified, especially in the light of the Criminal Law Amendment Act 105 of 1997 being extended for another two years from 1 May 2003. This approach is, however, in contrast to that of the draft Sentencing Framework Bill 2000, which has proposed the repeal of the minimum sentencing provisions. The Sentencing Framework Bill 2000 is discussed in greater detail in chapter 8 when this study focuses on regulating judicial discretion through sentencing guidelines.

2.3.3 Child Justice Bill¹²²

The Child Justice Bill provides for a process of diversion from the criminal justice system for the juvenile offender. The aim is to offer child offenders the opportunity to take responsibility for criminal behaviour, make restitution to the

¹¹⁹ *Supra* (n 44).

¹²⁰ Law Commission *op cit* (n 75) 292-293.

¹²¹ Law Commission *op cit* (n 75) 23.

¹²² Bill 49 of 2002 was introduced into Parliament in August 2002, but, at the time of writing, had not been finalised.

victim of the offence and to the community, and to participate in rehabilitation programmes focusing on developing socially acceptable patterns of behaviour. The success of this legislation will, however, depend on the development and implementation of programmes that will support the development of behavioural change.¹²³ Research indicates that children under the age of 18 years commit a significant proportion of sexual crimes¹²⁴ and this legislation will therefore play a key role in future when dealing with sexual offence complaints. A full discussion and evaluation of the Child Justice Bill however falls outside the scope of this thesis and the Bill is referred to only for the purpose of providing an overview of the complete, draft legislative framework that will in future impact on the sentencing process in child sexual abuse cases.

2.4 CONSTITUTION

The Constitution¹²⁵ introduced a new legal order in South Africa by becoming the supreme law of the country. Courts have to reappraise and develop, where necessary, existing laws to accord with the spirit and purport of the

¹²³ J van Niekerk 'Foreword' *Say Stop: South African Young Sex Offenders Programme – A Diversion Programme for Young Sex Offenders* (2001). At present there are three different programmes in South Africa addressing this legislative development of diversion and focusing on juvenile sex offenders. Apart from the aforementioned programme in the Western Cape, the other two are offered by Childline (Kwa-Zulu Natal) and the Teddybear Clinic (Johannesburg): Criminal Justice Initiative Report *Managing and Treating Young Sex Offenders: What Action for Government and Civil Society*. Workshop 17-18 November 2003 Cape Town. It is of interest to note that a workshop has also been held in order to address preventative steps to be taken in this matter: 'Prevention of Sex Offences by Targeting Youth at Risk' 27-28 November 2003 4:4 *Saystop Newsletter* at 1.

¹²⁴ Childline, Unpublished report *Childline Crisis Line Calls* (2001), as referred to by Van Niekerk *ibid*; P du Rand 'Specialised court services and the promotion of the rights of vulnerable groups' *The Judicial Officer and the Child Witness* Training Workshop 18-21 March 2004 Durban. It was indicated that 11 percent of accused in sexual offence cases in Kwa-Zulu Natal during the period January 2002 to November 2003 were younger than 18 years. See also G Hosken 'Violent crimes by young on the rise' 4/5/2004 *Pretoria News* 7 for a reference to NICRO findings that the majority of children being arrested for sexual offences are between the ages of 10 and 13.

¹²⁵ The Interim Constitution Act 200 of 1993 was followed by the final Constitution of the Republic of South Africa Act 108 of 1996.

Constitution.¹²⁶ The different fundamental rights contained in the Bill of Rights have influenced,¹²⁷ and will in future certainly continue to influence,¹²⁸ decisions with regard to sentencing law. Further, it would appear that proportionality has, by implication, been affirmed as a constitutional principle.¹²⁹ Therefore, grossly disproportionate sentences would be unconstitutional and void in general,¹³⁰ as well as with regard to individual sentences.¹³¹ Currently, the constitutional guarantee against arbitrary punishment¹³² does not appear to be an issue within

¹²⁶ See *S v Brandt supra* (n 22) 11-12 for the most recent practical application of this principle with regard to the interpretation of s 51(3)(b) of the Criminal Law Amendment Act 105 of 1997 regarding life imprisonment for child offenders between the ages of 16 and 18.

¹²⁷ The rights to life (s 11), dignity (s 10) and not to be punished in a cruel, inhuman or degrading way (s 12(10)(e)) have formed the basis of several Constitutional Court judgments. The death penalty (*S v Makwanyane supra* (n 50)) and corporal punishment for juveniles (*S v Williams* 1995 (2) SACR 251 (CC)) are examples of sentencing options that have been abolished on the ground of being unconstitutional. According to FW Krugel and SS Terblanche *Praktiese Vonnisoplegging* (2003) 108, the right to equality (s 9) might in future play a more important role. Other relevant rights are the general right to freedom and security of the person (s 12(1)) and the right to conditions of detention that are consistent with human dignity, including, at least, exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment (s 35(2)(e)). Finally, the limitation clause in s 36 regulates the scope of rights and how they may be limited if reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including the nature of the right, the importance and purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and the purpose, and less restricted means of achieving the purpose.

¹²⁸ Krugel and Terblanche *ibid* point out that legal development in this area has not been completed.

¹²⁹ Krugel and Terblanche *op cit* (n 127) par 6.4. The Constitutional Court has recently confirmed proportionality, together with individualisation, as well-established sentencing principles: *S v Brandt supra* (n 22) at par 22 referring to *S v Kwalase* 2000 (2) 135 (C).

¹³⁰ In *S v Dodo supra* (n 40) par 26 it was found that the Criminal Law Amendment Act 105 of 1997 was not per se unconstitutional in the light of the court's discretion to deviate from the prescribed life imprisonment if it would be grossly disproportionate in an individual instance: s 51(3)(a). See par 2.1.2 above.

¹³¹ N Steytler *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* (1998) 411.

¹³² In terms of s 35(3)(l), every accused has the right not to be convicted for an act or omission that was not an offence under either national or international law at the time it was

the context of the broad sentencing discretion that judicial officers enjoy. However, it is asserted by Van Zyl Smit¹³³ that it might in future become an issue if sentencing discretion becomes more structured.

The Constitution's influence extends beyond the accused and sentencing options to the way in which sexual offences against children are perceived. According to Kriegler and Kruger,¹³⁴ the rape of children is now viewed in an even more serious light than before. This view is based on the infringement of the victim's fundamental rights to dignity,¹³⁵ privacy,¹³⁶ security of the person¹³⁷ and freedom from abuse.¹³⁸ Consequently, the court is under a duty to protect these victim interests and, as will be indicated in the following chapter, to convey this message to rapists, potential rapists and society. Sensitivity to the underlying values of the Constitution has also contributed to the Supreme Court of Appeal's recognition in two instances of the attitude of the accused towards the victims as an important aggravating factor, a factor that was overlooked by the trial courts.¹³⁹ The Constitution has thus served as an impetus with regard to both

committed or omitted. This is also known as the principle of legality, which ensures due notification of a criminal violation and its prescribed sanction.

¹³³ 'Sentencing and punishment' in M Chaskelson *et al Constitutional Law of South Africa* 28-4.

¹³⁴ *Hiemstra: Suid-Afrikaanse Strafproses* 6 ed (2002) 686.

¹³⁵ Section 10.

¹³⁶ Section 14.

¹³⁷ Sections 12(1)(c) and 12(2)(b).

¹³⁸ Section 28(1)(d). Contrast M King 'Against Children's Rights' in Keightley R (ed) *Children's Rights* (1996) 28 who criticises the trend of constitutionalising children's rights and points out the limited role of the law in improving the lot of children.

¹³⁹ *S v Abrahams supra* (n 44) at 123c; *S v Mahomotsa supra* (n 44) at 443c (see chapter 5 par 5.7.1.1 (b)).

legislation and case law in recognising the victim as an independent consideration in sentencing.¹⁴⁰

2.5 CONCLUSION

This chapter investigated the statutory legal framework for the sentencing process in child sexual abuse cases. It has been shown that the legislature presently views these cases in an extremely serious light. The Criminal Law Amendment Act 105 of 1997 was introduced seven years ago in an endeavour to enforce more serious sentences in a standardised and consistent manner. However, when substantial and compelling circumstances exist, the court can deviate from the prescribed life sentence in order to prevent grossly disproportionate sentences. Though the prevalence of child rape has not been curbed, a benchmark for more severe sentences of imprisonment has been set. Something that remains a matter of concern, and which certainly contributes to making the sentencing process more difficult, is the divided-case procedure, where the regional court convicts a rapist and the high court must decide on his sentence.

Secondly, the Criminal Law (Sexual Offences) Bill 2003 has been introduced. When in operation, it will replace the Sexual Offences Act 23 of 1957 and cause a major shift by introducing a completely different sentencing paradigm through the new classification of rape. Offences that would previously have been treated as indecent assault, will now qualify as rape, which will fall under the Criminal Law Amendment Act 105 of 1997 and therefore carry a heavier penalty. In addition, the concept of grievous harm will be expanded to include harm of a psychological nature. However, the legislation's proper implementation might be hampered by practical issues. For example, the new sentencing option of long-

¹⁴⁰ See chapter 1 par 1.2 for a discussion with regard to squaring the triad in sentencing.

term supervision has cost implications and proper treatment programmes are not yet available.

Further, the earlier criticism of the omission of the victims' treatment clause from the Criminal Law (Sexual Offences) Amendment Bill 2003 should, in the light of the new emphasis on the victim and of research indicating the long-term impact of sexual offences,¹⁴¹ be reiterated. As indicated above, a significant percentage of victims become abusers themselves¹⁴² and this vicious cycle can be broken through effective treatment.¹⁴³ What is of importance, though, is that the value of training of the judiciary with regard to the impact of sexual offences has been acknowledged by the legislature. If implemented, it will certainly contribute to the court's understanding (and potential action) with regard to the victim's need for treatment.

Other draft legislation that will impact significantly on the sentencing process in child sexual abuse cases was also discussed briefly, namely the draft Sentencing Framework Bill 2000 and the Child Justice Bill. In conclusion, the overarching effect of the Constitution on all aspects of the sentencing process in child sexual abuse cases was highlighted.

¹⁴¹ See the discussion in chapter 5 par 3 on the future impact of sexual offences.

¹⁴² *Op cit* (n 77).

¹⁴³ Wieland *op cit* (n 78).

CHAPTER 3

CASE LAW

*'... for sentencing is an art, not an exact science.'*¹

3.1 CASES APPLYING S 51 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

3.1.1 Schedule 2, part 1, offences

3.1.1.1 *Cases prior to S v Malgas*

- a) *S v Gqamana*
- b) *S v Boer*
- c) *S v Jansen*
- d) *S v Dithotze*

3.1.1.2 *Cases decided after S v Malgas*

- a) *S v Blaauw*
- b) *S v Abrahams*
- c) *S v Mahomotsa*
- d) *Rammoko v Director of Public Prosecutions*
- e) *S v Njikelana*
- f) *S v G*

3.1.2 Schedule 2, part III, offences

3.1.2.1 *S v Fatyi*

3.2 RAPE CASES NOT APPLYING THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

3.2.1 *S v M*

3.2.2 *S v Jackson*

3.2.3 *Attorney-General, Eastern Cape v D*

3.2.4 *S v T*

3.2.5 *S v Plaatjies*

3.2.6 *S v V*

¹ J Burnside 'Book Review: JW De Keijser (2000) "Punishment and Purpose: From Moral Theory to Punishment in Action"' (2000) *Ebscohost*.

- 3.2.7 *S v R*
- 3.2.8 *S v B*
- 3.2.9 *S v C*
- 3.2.10 *S v A*
- 3.2.11 *S v M*
- 3.2.12 *S v M*
- 3.2.13 *S v Tyatyame*
- 3.2.14 *S v Ven 'n Ander*
- 3.2.15 *S v J*
- 3.2.16 *S v S*
- 3.2.17 *S v Pieters*
- 3.2.18 *S v M*
- 3.2.19 *S v M*
- 3.2.20 *S v N*
- 3.2.21 *S v M en Andere*
- 3.2.22 *S v M*
- 3.2.23 *S v P*
- 3.2.24 *S v V*
- 3.2.25 *S v D*
- 3.2.26 *S v V*
- 3.3 SEXUAL CRIMES OTHER THAN RAPE
 - 3.3.1 *S v O*
 - 3.3.2 *S v McMillan*
 - 3.3.3 *S v Gerber*
 - 3.3.4 *S v Manamela*
 - 3.3.5 *S v L*
 - 3.3.6 *S v B*
 - 3.3.7 *S v K*
 - 3.3.8 *S v R*
 - 3.3.9 *S v D*
 - 3.3.10 *S v S*
 - 3.3.11 *S v V*

- 3.3.12 *S v W*
- 3.3.13 *S v R*
- 3.3.14 *S v Ndaba*
- 3.3.15 *S v V*
- 3.3.16 *S v E*
- 3.3.17 *S v V*
- 3.3.18 *S v V*
- 3.3.19 *S v N*
- 3.3.20 *S v B*
- 3.3.21 *S v D*
- 3.3.22 *S v D*
- 3.3.23 *S v Muvhaki*
- 3.3.24 *S v B*
- 3.3.25 *S v S*
- 3.3.26 *S v T*
- 3.3.27 *R v Z*
- 3.3.28 *R v C*
- 3.3.29 *Rex v Khumalo*

3.4 CONCLUSION

3.1 CASES APPLYING S 51 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Several recent reported decisions on rape and indecent assault involving girls under the age of 16 years, or the repeated rape of girls between 16 and 18 years, have dealt with the question of whether substantial and compelling circumstances existed in order to deviate from the prescribed life sentence. Each case will be dealt with briefly to investigate the manner in which the courts have applied the 'substantial and compelling circumstances' test.²

² Section 51(3)(a) of the Criminal Law Amendment Act 105 of 1997. See chapter 2 par 2.1.2 for an evaluation of the two different approaches to the interpretation of 'substantial and compelling circumstances' prior to *S v Malgas* 2001 (1) SACR 469 (SCA).

3.1.1 Schedule 2, part 1, offences

3.1.1.1 Cases prior to *S v Malgas*³

a) *S v Gqamana*⁴

Though decided before the Supreme Court of Appeal judgment in *Malgas*,⁵ the court in *S v Gqamana*⁶ opted for a similar approach. Following the decision in *S v Homareda*,⁷ the court in *Gqamana*⁸ held that each case must be decided on its own facts, with all aggravating and mitigating factors considered cumulatively.

The accused was convicted in the regional court of raping a girl of 14 years and 10 months and was referred to the high court for sentencing in terms of s 52(1)(b) of the Act. The court wished to hear evidence, in terms of s 52(3)(d) of the Act, from the complainant and her mother, and from the probation officer, who had prepared reports on both the complainant and the accused. The prosecution was requested to secure their attendance in an attempt by the court to get a feel for the atmosphere of the trial in order to decide on the imposition of a life sentence.

It appeared that the accused and the complainant were not known to each other and that, on the night of the commission of the offence, the accused had persuaded the complainant, by swearing and shouting at her, to accompany him on foot to a certain shack. On arrival at the shack, the accused ordered the complainant to remove her clothes, whereupon he raped her twice within a 30-minute period. He left her locked in the shack for several hours until she escaped

³ *Supra* (n 2). See chapter 2 par 2.1.2 for a discussion of *Malgas*.

⁴ 2001 (2) SACR 28 (C).

⁵ *Supra* (n 2).

⁶ *Supra* (n 4).

⁷ 1999 (2) SACR 319 (W).

on the arrival of the accused's friend. The court found the major mitigating factors to be the following:

- the youth of the accused (he was 20 years and eight months at the time of the offence);
- the fact that he had no previous convictions;
- the fact that the complainant had suffered no real physical injury, apart from a torn hymen and that the mental sequelae (fearfulness, distrust of men, bad sleep patterns and dreams, nervousness) were not of any great seriousness and were apparently not of a lasting nature;
- the fact that the accused did not use a weapon in the commission of the crime; and the fact that, after seeing the complainant to assess her appearance and maturity, the court found that it was quite possible that, at the time of the commission of the offence, the accused believed, on the basis of her appearance, that the complainant was over the age of 16 years;
- the fact that the complainant appeared intelligent, well-spoken and self-assured and to be two to three years older than her true age.

The court posed the question whether these factors and their cumulative effect were so outweighed by the aggravating circumstances that a sentence of life imprisonment could be justified. Thring J concluded that the prescribed life sentence was grossly disproportionate, startlingly inappropriate and offensive to the court's sense of justice. Further, no reasonable court would impose imprisonment for life. A sentence of 10 years was therefore found to be appropriate, but was reduced to eight years in view of the time already spent in jail.

⁸ *Supra* (n 4).

b) *S v Boer*⁹

A slightly-built, 14-year-old virgin was raped by three accused in an isolated spot. The first offender was 21 years of age, had passed Standard 7 at school, worked at a chain store and had no previous convictions. The second offender was 20, had passed Standard 6 at school and worked at the same chain store. The third accused was 17 years old, a Standard 9 pupil and also had no previous convictions. However, despite his youth, the court found as aggravating the fact that, on the night of the crime, the third accused had consumed alcohol with adults, had raped the victim, and had strangled her while the first and second accused also raped her.

The prescribed sentence of life imprisonment was imposed on both the first and second accused, while the third accused was sentenced to 15 years' imprisonment. The court followed the narrow approach mooted in *S v Mofokeng and Another*.¹⁰ It was found that the seriousness of the offence overshadowed the mitigating factors and could not be regarded as substantial and compelling. Aggravating factors included the fact that three persons had attacked, assaulted and raped the victim while the others held her down by force. They shut her mouth and strangled her. She was still a virgin at the time of the rape and they refused to let her go when the state witnesses arrived, instead exposing her private parts and thereby further humiliating her in front of others. The offence itself was considered to be scandalous and repulsive. It was also pointed out that the aims of retribution and deterrence had recently gained greater importance and reference was made to the dictum of Mahommed CJ in *S v Chapman*:

'Courts are under a duty to send a clear message to the accused, to other potential rapists and the community: We are determined to protect the equality, dignity and

⁹ 2000 (2) SACR 114 (NC).

¹⁰ 1999 (1) SACR 502 (W).

freedom of all women, and we shall show no mercy to those who seek to invade those rights.¹¹

The court did not refer to the after-effects of the offence suffered by the victim as a factor to be taken into account in determining sentence.

c) *S v Jansen*¹²

The accused, aged 26, was convicted of raping a nine-year-old girl on the state's acceptance of his plea of guilty. In his explanation of plea, the accused averred that the act had been committed with the complainant's consent. The court refused to accept evidence by the state as to the force used by the accused and held that, though the framework set by the plea could be filled in, the factual matrix as set by the plea could not be extended or altered by evidence subsequent thereto.¹³

The court criticised the introduction of the minimum-sentence legislation as being panic-induced. Such legislation, it stated, could not be justified even in the light of South African sentencing practices not being sufficiently rigorous, the absence of an adequate textbook on sentencing¹⁴ or lack of research on the topic.¹⁵ The legislation was further criticised in that the term 'substantial and compelling circumstances' had been borrowed from the State of Minnesota in the United States of America. This was said to be unfortunate, as borrowing from other

¹¹ 1997 (2) SACR 3 (SCA) at 5b.

¹² 1999 (2) SACR 368 (C).

¹³ *S v Jansen supra* (n 12) at 371e. Mere filling in of the plea would however be allowed.

¹⁴ This judgment was handed down shortly before the publication of the most comprehensive and authoritative work on sentencing in South Africa, namely SS Terblanche *Guide to Sentencing in South Africa* (1999).

¹⁵ *S v Jansen supra* (n 12) at 373f.

countries was often done without account being taken of the particular circumstances of that country or of the context in terms of which the system had operated for a number of years.¹⁶ The Minnesota guidelines provided a particular approach, namely a desert-based approach to the problem of sentencing. In South Africa, no grid system applied as it did in Minnesota, and the rigid application of s 51 of the Criminal Law Amendment Act 105 of 1997 (as in *S v Mofokeng and Another*¹⁷) was held not to be applicable in the context of South Africa.¹⁸ The term 'substantial and compelling circumstances' therefore went to weight rather than to exception.

Though the court conceded that an argument on its own that the consent of a nine-year-old girl had been obtained bordered on the obscene, it nevertheless held that, based on medical evidence revealing little violence, this case could be classified as a borderline rape.¹⁹ This would then amount to a substantial and compelling circumstance justifying a deviation from the prescribed sentence. Further, the accused was a first offender and the opportunity of rejoining society was considered.

Yet, the seriousness of child rape was acknowledged as an appalling and perverse abuse of male power. Further, it was stated that the prevalence of the crime negatively impacted on the climate in which children should be able to grow up, that is, in freedom and without fear.²⁰ The court also took cognisance

¹⁶ *S v Jansen supra* (n 12) at 374j.

¹⁷ *Supra* (n 10).

¹⁸ *S v Jansen supra* (n 12) at 376i.

¹⁹ *S v Jansen supra* (n 12) at 378g. The doctor reported that only one finger had been admitted into the vagina and that no sign of rape had been found during the medical examination which took place two days after the incident.

²⁰ *S v Jansen supra* (n 12) at 378j.

of the psychological harm caused by the incident, as well as of the community's expectations in regard to sentencing:

'It is sadly to be expected that the young complainant ... will now suffer the added psychological trauma which resulted in a marked change in attitude and of school performance. The community is entitled to demand that those who perform such perverse acts of terror be adequately punished and that the punishment reflects the societal censure.'²¹

The appropriate sentence, after the year already spent in prison had been deducted, was considered to be 18 years. Of interest is the approach that the accused should remain in prison until the complainant reached adulthood.²²

Very little was known about the surrounding circumstances of the crime, for example about what the relationship between the accused and complainant was and about where the incident took place. Though the psychological trauma of the victim was recognised, it would appear that the absence of physical injuries was accorded substantial weight. This creates the impression that judicial officers always perceive rape as being accompanied by physical violence. It further highlights the court's lack of knowledge of the grooming process, as well as of the inability of a child to comprehend the nature and impact of sexual activities with adults, even in the case of 'ostensible consent'.²³

d) *S v Dithotze*²⁴

The accused was convicted of raping a 12-year-old girl, the daughter of his girlfriend's sister. They had been visiting the sister one afternoon and had been

²¹ *S v Jansen supra* (n 12) at 378h-i.

²² *S v Jansen supra* (n 12) at 379d.

²³ See chapter 5 par 5.4 for a discussion on the grooming process and on ostensible consent with regard to children who are the victims of sexual offences.

²⁴ 1999 (2) SACR 314 (W).

drinking. When supplies ran out, the accused suggested that the victim accompany him to buy more beer for the drinking spree, to which her mother agreed. On the way there, the accused raped the victim once. She did not sustain particularly severe injuries and it transpired from the medical examination that she had been raped once before.

The crime was described as one that filled society with revulsion. However, although very serious indeed, it was found 'not to lie in the ionosphere of criminal depravity'²⁵ when compared with other cases at the very extremity of seriousness. The court then compared the case with *inter alia* that of a nine-year-old girl who had been injured so severely by the act of rape that the flesh between her vagina and her rectum had been perforated. She would, in all probability, never be able to have a satisfactory sex life in adulthood and would experience difficulties with child birth. Of import is the fact that, once again, the focus was solely on physical harm and that no reference or inquiry was made in either of these cases as to the psychological harm to the victim.

The cumulative effect of the following factors however weighed heavily with the court: the accused was relatively young at the age of 22 and was a first offender; he did not use a firearm or other dangerous weapon to force the victim's compliance; other than the actual act of rape, he did not use gratuitous violence; he was under the influence of alcohol; he did not force entry into the victim's home and he got some of his 'just deserts' when he was attacked by his girlfriend with a knife on discovery of his act. The court conceded that it was to be expected that courts would differ as to what would amount to substantial and compelling circumstances, because the issue was an emotionally and intellectually complex one. The above factors amounted to 'some circumstances that loom large' and were found to justify a deviation from the prescribed life

²⁵ *S v Dithotze supra* (n 24) at 317a.

imprisonment.²⁶ The court held that life imprisonment would be disturbingly inappropriate and a sentence of 18 years' imprisonment was accordingly imposed.

3.1.1.2 Cases decided after S v Malgas²⁷

a) S v Blaauw²⁸

The accused, an 18-year-old man, was convicted of raping a five-year-old girl, in the course of which reasonably serious genital injuries were inflicted. It appeared that there had been a certain measure of planning involved in the crime, as the accused could not explain why he had gone with the complainant to an isolated place. An experienced social worker testified that there was a possibility that the rape would cause permanent emotional, psychological and/or medical problems in the long term.

The accused had two previous convictions for housebreaking and theft and for driving a motor vehicle without the owner's consent and had been sent to a reformatory for these offences, from which he subsequently ran away. The court regarded it as highly probable that his stay in the reformatory had had a negative effect on him, especially in the light of his earlier unfavourable personal background. Moreover, at the time of the commission of the offence, the accused had been under the influence of alcohol. The court described the offence as repulsive and was of the opinion that the interests of the community required a severe sentence. On the other hand, when applying the approach in

²⁶ The court conceded that it was hardly surprising that judgments differed regarding the meaning of 'substantial and compelling circumstances', as issues of great moral and intellectual complexity were involved (*S v Dithotze supra* (n 24) at 316d).

²⁷ *S v Malgas supra* (n 2).

²⁸ *S v Blaauw* 2001 (2) SACR 255 (C).

Malgas,²⁹ there were many factors to be considered, the cumulative effect of which compelled the court to reconsider the prescribed mandatory sentence of life imprisonment. These factors included the very unfavourable background of the accused, the effect of alcohol on him at the time of the commission of the crime and, in particular, his youth, both at the time he committed the offence as well as at the time of sentence. The accused had turned 18 six weeks before the offence was committed. Van Heerden J contemplated the nature of life imprisonment and viewed it as being the most severe punishment in a young man's life. The court held that life imprisonment would overemphasise the deterrent and retributive elements of sentencing, and that the cumulative effect of the mitigating factors justified a lesser sentence. The court therefore imposed a sentence of 25 years' imprisonment and recommended that the accused be placed in a psychiatric treatment and rehabilitation programme in prison as soon as this was possible.³⁰

b) *S v Abrahams*³¹

In this case, the Supreme Court of Appeal had to decide an appeal by the state against a sentence of seven years imposed for rape committed by a father on his 14-year-old daughter. It was found that the manner in which the sentencing court had weighed the factors relevant to determining sentence was materially misdirected and therefore justified intervention. Although the sentence was increased to imprisonment of 12 years, it was held that factors of substance dictated that a sentence other than life imprisonment was appropriate. The

²⁹ *S v Malgas supra* (n 2).

³⁰ This is an ideal example of a case where the presiding officer's order could become meaningless without monitoring (as also suggested by the Law Commission *Report on Sexual Offences* Project 107 (2002) 373 as a non-legislative recommendation).

³¹ 2002 (1) SACR 116 (SCA). See JMT Labuschagne 'Insesverkragting, straftoemeting, die hoogste hof van appel en 'n glimlag van Sigmund Freud' *THRHR* (2003) 100-109 for a discussion of this case, as well as A Van der Merwe 'Guidelines on sentencing in child sexual abuse cases' (2002) 3:2 *CARSA* 20.

general manner in which the sentencing judge had determined whether compelling and substantial circumstances existed had been correct. All factors traditionally relevant to sentencing had been taken into account. They included the accused's personal circumstances, the nature of the crime and the circumstances attending its commission.

However, the trial court, it was stated, had failed to attach sufficient weight to the following aggravating factors:

- the accused's sexual jealousy with regard to his daughter – he had told her that she had reached the stage where she was free to have sex with others and it was clear that he was determined to precede young males in any possible access to his daughter;
- an attitude reflecting an approach to women, and to daughters in particular, in terms of which they were not merely to be used at will, but, once the first entitlement had been exercised, discarded for similar use by others;
- that the accused had abused his position of authority and command over his daughter to obtain forced sexual access to her body, which constituted a deflowering of the most grievous and brutal kind;
- that the victim had been deeply and injuriously affected by the rape (as was evident from her changed behaviour following the incident); and
- that incestuous rape is grievous in that it exploits and perverts the bonds of love and trust that the family relation is meant to nurture.

Mitigating factors taken into account by the court were the following:

- the accused had reached middle age without a criminal conviction;
- the fact that the accused's daughter, apart from the ultimate intrusion and violation that are the essence of rape, had not been physically injured;

- the suicide of the accused's son less than two years before the rape had adversely influenced his conduct within the family and had led to a diminution in the judgement he brought to bear as a father; and
- the fact that this was not one of the worst cases of rape.

In the latter regard, the court referred to *S v Swartz and Another*³² where it was stated that not all rapes deserve equal punishment:

'That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.'

Another important finding in *Abrahams*³³ was that it is an incorrect approach, once substantive and compelling circumstances have been found to exist, to impose a sentence consonant with those applied before the Criminal Law Amendment Act 105 of 1997 came into force. Even where substantive and compelling circumstances are present, the sentences that the Act prescribes create a legislative standard that weighs upon the exercise of the sentencing court's discretion. This includes sentences for the scheduled crimes that are consistently heavier than before. The Act thus creates a legislative 'benchmark',³⁴ and previous precedents are not relevant any more as far as the length of the sentence is concerned. This is the reason why the Court of Appeal found that the sentencing court had misdirected itself in relying on *S v B*³⁵ as guidance for the length of imprisonment considered appropriate.

³² 1999 (2) SACR 380 (C) at 386b-c.

³³ *Supra* (n 31) at 126b.

³⁴ *S v Malgas supra* (n 2).

³⁵ 1996 (2) SACR 543 (C). See discussion below.

*c) S v Mahomotsa*³⁶

The accused was convicted of two counts of rape. He had engaged in non-consensual sexual intercourse with two 15-year-old complainants more than once (two months apart). He had confronted both complainants while they were walking peacefully in a street. He had threatened both (the first complainant with a firearm and the second with a knife), and had pulled them to his room. The accused had raped the first complainant four times, keeping her a prisoner in his room. The second complainant was raped twice.³⁷

The high court sentenced the accused to six years on count one and to 10 years on count two, to run concurrently. On appeal, the sentence on the first count was increased to eight years and, on the second count, to 12 years. It was found that the cumulative effect of the court *a quo's* sentence did not adequately reflect the seriousness of the offences.

The appeal court found the aggravating factors to be the following:

- the accused had committed the second offence while awaiting trial on a similar offence (he had been released in the custody of his grandmother);
- the accused was a sexual thug who considered young girls as objects to be used to satisfy his lust;
- the repeated rapes showed that the accused had exploited his position of power to the full;
- the accused had fought the complainant's father when he came to rescue her (thus displaying a certain attitude); and
- the accused had a previous conviction of contravening s 14(1)(a) of Act 23 of 1957.

³⁶ 2002 (2) SACR 435 (SCA).

³⁷ The age of the complainants was not proved, but the case nevertheless fell under minimum-sentence legislation because of the repeated rape of the two complainants.

Mitigating factors taken into account by the court were the following:

- the accused was relatively young, being only 23 years of age;
- both complainants had already been sexually active, so there was no loss of virginity as a result of the rapes; and
- the accused had already spent eight months in prison.

It was found that the trial judge had erred. In spite of the probation officer's report indicating that no harm had been inflicted, the finding of no physical injury or psychological harm whatsoever was found to be highly unlikely. Furthermore, a man's virility could never be mitigating when he chose to satisfy his lust by sexually violating a woman against her will. Also, the fact that the first complainant had engaged in sexual intercourse two days before she was raped was irrelevant. Lastly, the accused's initial lie about his age (17 years old and not 23 years old) did not constitute an aggravating factor; it was neutralised by the accused's own correction of it before sentence.

On both counts, substantial and compelling circumstances were found to exist in order to justify a departure from the prescribed sentence. A life sentence would be disproportionate to the crime (though very serious, it did not fall into the worst category of rape), the criminal and the legitimate interests of society.

d) Rammoko v Director of Public Prosecutions³⁸

The Supreme Court of Appeal observed that the prosecutor in both the regional court and the high court had presented the case of the state in a casual manner. Amongst other things, the prosecutor had neglected to ask the mother or the medical doctor about the after-effects of the rape on the complainant, and no other witnesses were called to testify to that effect. Since life imprisonment was the heaviest sentence a person could be legally obliged to serve, the above

³⁸ 2003 (1) SACR 200 (SCA).

omission therefore led to a risk for the accused where s 51(1) of Act 105 of 1997 applied:

'... that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present.'³⁹

The accused, a 34-year-old neighbour, had raped the complainant who was 13-and-a-half years old. It was held that the fact that a victim may be under the age of 16 years was not the only criterion necessary for the imposition of a life sentence.⁴⁰ Not only did the objective gravity of the crime play an important role, but also the present and future impact of the crime on the victim. The court held, further, that evidence relating to the extent to which the complainant had been affected by the rape, and would be affected in future, was relevant and indeed important. The case was referred back to the high court in order to obtain the necessary information on the impact of the crime before punishment was imposed.

On 29 August 2003, the complainant, aged 18, testified again in the high court, five years after the incident. She testified that she was in a traditional relationship and was living with a man. At first, their sexual relationship had caused anxiety and problems, but it had improved to a great extent. She was asked by the state what she would have said to the accused if she had had such an opportunity. She answered: 'wat jy gedoen het was nie reg nie', and started crying. At first, she was reluctant to face the accused, but was visibly relieved

³⁹ *Rammoko v Director of Public Prosecutions supra* (n 38) at 205e.

⁴⁰ *Rammoko v Director of Public Prosecutions supra* (n 38) at 205b.

after giving evidence.⁴¹ The fact that she seemed to have overcome the emotional trauma was taken into account as mitigating, and was accorded substantial weight.

At the time of the incident, the complainant was living with her uncle so that she could attend school, since her parents lived in a rural area far away from schools. After the incident, the uncle sent her back and she was never able to complete her schooling. This was considered to be an aggravating factor. The fact that the Supreme Court of Appeal had referred the case back was viewed by the court as an indication that life imprisonment was not a suitable sentence. The accused was therefore sentenced to 21 years' imprisonment.

*e) S v Njikelana*⁴²

The accused, aged 24, was convicted of twice raping a girl aged 16 years and eight months, who was his friend and neighbour. The court was satisfied that the cumulative effect of certain circumstances qualified them as substantial and compelling, thereby justifying a sentence less than life imprisonment. The accused was fairly young, was relatively uneducated and unsophisticated and had no previous convictions. On the night of the offence, both he and the complainant were to some extent under the influence of intoxicating liquor and he committed the rapes on the spur of the moment. The complainant had no permanent physical injuries, except for one hardly visible scar on her forehead. Although the court in this context reminded itself that the complainant had suffered a considerable amount of mental trauma and distress, these do not appear to have been accorded much weight, since they were not indicated under the aggravating factors. The after-effects of the crime on the victim caused her

⁴¹ Telephonic conversation with state advocate E le Roux, at Bloemfontein, on 29 September 2003.

⁴² 2003 (2) SACR 166 (C).

to become emotionally unstable, forgetful, withdrawn and unable to focus on her schoolwork. She was ostracised by some members of the community for sleeping with men and was intimidated by the accused's family and friends.

A final mitigating factor taken into account was the fact that the accused had been in custody for the unnecessarily long period of 35 months, having the mental anguish of the prospect of life imprisonment hanging over his head.

The aggravating factors included the fact that the accused had used a certain amount of force by pushing the complainant off a bridge, as well as the fact that a considerable degree of force had been used during the rape (which was evident from the injuries to the genitalia; however, these, it was found, were not very serious, nor were they permanent). The accused had further played a leading role in the commission of the offence, with another person joining in after the first rape. In addition, the relationship of friendship had been abused. The prevalence of the offence of rape was also emphasised.

It was held that life imprisonment would be unjust and disproportionate in this case. The court followed precedents⁴³ suggesting a sentence of 18 years in this instance. However, the court reduced the final sentence, taking into account the period of time awaiting trial and sentence. Thus the sentence imposed was imprisonment for 14 years.

*f) S v G*⁴⁴

The accused, aged 32 and unemployed, was convicted by the regional court of raping his girlfriend's daughter, almost 10 years of age, while being alone at home. They lived together as a family most of the time and the complainant

⁴³ *S v Jansen supra* (n 12); *S v Swartz and Another supra* (n 32); *S v Dithotze supra* (n 24).

⁴⁴ 2004 (2) SACR 296 (W).

trusted the accused and affectionately regarded him as her father. The high court, on receiving the case for sentence, displayed noteworthy insight into the impact of the crime and found the aggravating factors to be the following:

- Despite the appearance that the victim was coping well, (as testified by the probation officer and mother) she had suffered serious and lasting psychological harm and emotional pain, and so had her mother and immediate family. The accused had robbed the complainant, who came from a loving and caring family, of a carefree and happy childhood to which she was entitled. In addition, after the incident of rape, she had had to live at her grandmother's house, separated from her mother, in a poverty-stricken area and the prospects of access to therapy were very slim.
- The complainant was a young, sexually immature child and a virgin. This fact was found to make the rape more dreadful than that of a sexually mature and possibly sexually attractive teenager, because the degree of sexual perversity on the part of the offender was greater. Instead of protecting the young complainant, as a decent person would have done, the accused had harmed her.
- The accused had raped the complainant in the safety of her own home and had violated the trust of the complainant and her mother.
- The accused had shown no remorse and was unrepentant until the end.

Mitigating factors taken into account by the court were the following:

- The accused was a first offender.
- The violence that the accused had used was not excessive, neither had he caused serious physical injuries. The court however qualified this by admitting that little force would be required to overcome a 10-year-old girl.
- The accused had been in custody for almost two years at the time of sentencing.

In searching for guidance on sentencing, the court compared the factors of this case with those in the cases of *Abrahams*,⁴⁵ *Mahomotsa*⁴⁶ and *Rammoko*,⁴⁷ pointing out important similarities and differences. Consequently, it was found that, though this was a very serious offence, it was not one of the most serious manifestations of rape/among the worst cases of rape that had been brought before the courts of South Africa. Life imprisonment would therefore, despite the court not being convinced of the mitigating factors amounting to substantial and compelling circumstances, be disproportionate to the gravity of the offence and unjust. A sentence of 18 years' imprisonment was therefore deemed an appropriate and just sentence.

3.1.2 Schedule 2, part III, offences

3.1.2.1 *S v Fatyi*⁴⁸

Although the accused had initially been charged with rape, he was found guilty of indecent assault on a six-year-old girl. The accused was a taxi driver engaged in after-care transport. He had collected the girl at school, alone, and had taken her to a wooded area where he indecently assaulted her. Thereafter, he took the complainant to the after-care centre where her grandmother fetched her late in the afternoon. Injuries to the victim's genitalia included bruising of the labia minora, the vestibule and vagina, as well as tearing of the hymen and *fouchette*, with mild haemorrhaging. The court assumed that the accused's fingers, not his penis, had penetrated the victim's vagina.

⁴⁵ *Supra* (n 31).

⁴⁶ *Supra* (n 36).

⁴⁷ *Supra* (n 38).

⁴⁸ 2001 (1) SACR 485 (SCA).

The accused was 51 years old and had no previous convictions. He had a moderate to severe asthmatic condition and required constant medication. He owned a taxi business, was married, had children and supported an extended family.

A sentence of 10 years in terms of Act 105 of 97 was imposed. An important finding was made, namely that 'bodily harm' covered every kind of physical injury, however trivial it might appear.

The court found the following to be aggravating factors:

- the tender age of the victim;
- the nature of the assault (it was directed at the victim's genitals with sufficient force to cause injuries that were not severe, but which were also not trivial);
- there was psychological and emotional trauma caused by the assault; and
- the accused was in a position of trust:

'... his conduct was appalling ... for own sexual gratification the accused took advantage of a little girl entrusted to his care.'⁴⁹

No substantial and compelling circumstances were found to exist which would justify a lesser sentence. The court followed the principles in *S v Malgas*⁵⁰ *supra* and the sentence was confirmed on appeal.

⁴⁹ *S v Fatyi supra* (n 48) at 23.

⁵⁰ *Supra* (n 2).

3.2 RAPE CASES NOT APPLYING THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

3.2.1 *S v M*⁵¹

The accused, aged 36, was convicted of raping his six-year-old daughter on a number of occasions during 1989 over a period of about six months. She was 13 years old when she gave evidence in 1997. During 1989, she stayed with her father and aunt, her parents being divorced. She and her aunt shared a bed. At night, her father would come and take her, often half asleep, to his room. There he would have sexual intercourse with her. She, not having an understanding of what was happening, did not protest, although she suffered initial bleeding and severe pain. Though she complained to her aunt and wrote a letter to her grandmother six years later in 1995, it was only through following up an advertisement of Child Line that she succeeded in laying a charge in 1996.

The district surgeon testified that the examination of the complainant was painful for her. She had no hymen and there were physical injuries to her genitalia caused by persistent trauma to the same area. The injuries would have long-term consequences in that intercourse would always be painful, impacting significantly on her future relationships. The accused persistently denied that he was guilty and offered different motives as to why the complainant would falsely implicate him.⁵² He was sentenced to 10 years' imprisonment.

⁵¹ 2002 (2) SACR 411 (SCA).

⁵² The accused successfully applied for the reopening of the trial, at which the conviction and sentence were confirmed. Thereafter, he appealed to the Supreme Court of Appeal, but the appeal was dismissed on 31 May 2002: case no 397/01 (unreported).

3.2.2 *S v Jackson*⁵³

The accused was found guilty of the attempted rape of a 17-year-old, slimly-built girl by forcing himself upon her. Late one night, he arrived at a park where the complainant and her friends were having fun and offered to give driving lessons to her and her friends. Once he had dropped off the friends, he told her to stop and started to force himself upon her. There was no evidence of penetration, but the accused placed his fingers in the complainant's vagina and private parts. She kicked, screamed, cried and pleaded with him not to rape her, then managed to break loose and run away in a hysterical state. Her mother testified about the after-effects of the incident. The child was withdrawn and had dropped out of school. During the medical examination, she was in a condition of shock. The offender was 24 years old, well built and a policeman, who was known to the complainant.

He was sentenced to 18 months' imprisonment in terms of s 276(1)(i), plus 18 months' imprisonment suspended for five years. The sentence was confirmed on appeal, but it was pointed out that the trial court had erred on the side of leniency. The fact that the accused was a policeman, whose duty was to uphold law and order and not subvert it, was considered to be an aggravating factor. His treatment of the victim was regarded as a despicable abuse of physical strength and a violation of friendship and trust:

'He acted in a manner unacceptable to our society, which is committed to the protection of the rights of all persons, including, pertinently, the right of women to their physical and moral integrity. Moreover, his actions had serious detrimental effects on the psyche of the complainant.'⁵⁴

⁵³ 1998 (1) SACR 470 (SCA).

⁵⁴ *S v Jackson supra* (n 53) at 478c per Olivier JA dismissing the appeal.

Although the psychological impact of the crime was recognised by the appeal court, it does not seem to have been accorded enough weight by the court *a quo*.

3.2.3 *Attorney-General, Eastern Cape v D*⁵⁵

The accused, aged 29, was convicted of raping an 11-year-old girl. The rape took place in a squatter camp at about 07:00. The accused was a member of the Defence Force and was accompanied at the time by colleagues who knew the family. They had been drinking alcohol. The complainant was lying on a bed in a shack when the accused entered the room, bolted the door behind him and threatened to kill her if she were to tell anyone what he was about to do to her. He placed a piece of material in her mouth and gagged her with a handkerchief. He then pulled off her nightdress, forcibly held her down on the bed and raped her. A woman, who was banging on the door and who ultimately gained access to the room, interrupted the rape.

The complainant sustained a tear in her vagina as a result of the accused's forceful penetration of her body. While giving evidence almost two years after the incident, she broke down in tears. The court accepted, from this behaviour, that she must have been traumatised by her experience, 'and indeed it would be surprising if that were not the case'.⁵⁶ The court found this to be a serious crime:

'This was obviously a callous and brutal crime accompanied by threats against the complainant and the frightening action of the respondent gagging her so as to cut off her screams. The respondent acted with callous disregard to the rights of the complainant and the sanctity of her body. The crime was a heinous one, the severity of offence being aggravated by the tender age of the complainant who had been a virgin. Society demands that persons who make themselves guilty of offences of this

⁵⁵ 1997 (1) SACR 473 (E).

⁵⁶ *Attorney-General, Eastern Cape v D* (n 55) at 477f. This once again supports the theory that the presiding officer is often swayed by the emotions displayed by the complainant in court, and, in the absence thereof, the opposite is assumed.

nature be severely dealt with. In the imposition of sentence in a case such as this the elements of retribution and deterrence rather than the interests of the criminal himself come to the fore when it comes to the assessment of what would be a suitable sentence.⁵⁷

The regional court sentenced the accused to six years' imprisonment, wholly suspended for five years on certain conditions. The state appealed on the grounds that the sentence was shockingly light, and the high court agreed:

'The trial magistrate erred by really having regard to little else other than the interests of the respondent in the hope that a suspended sentence would keep him out of trouble in future. ... I would mention that in fact I found the sentence imposed to be bizarre.'⁵⁸

Apart from the age of the victim, further aggravating factors taken into account were the measure of premeditation, the escalation of rape and the public outcry in cases where too lenient a sentence had been imposed by the courts. The sentence was changed to one of 10 years' imprisonment.⁵⁹

3.2.4 S v T⁶⁰

The accused was convicted of rape and indecent assault. The complainant was a 15-year-old virgin and was repeatedly and savagely raped and sodomised by the accused over a period of four to five hours. She suffered severe physical injuries and psychological trauma.

⁵⁷ *Attorney-General, Eastern Cape v D* (n 55) at 477g.

⁵⁸ *Attorney-General, Eastern Cape v D* (n 55) at 477j and 478c.

⁵⁹ Leach J remarked that, had the accused been charged in the Supreme Court, a sentence in excess of 10 years might have been entertained, but that he was bound by the regional court's maximum jurisdiction of 10 years at that stage (*Attorney-General, Eastern Cape v D* (n 55) at 478g).

⁶⁰ 1997 (1) SACR 496 (SCA).

The accused was 23 years old, tall and strong, and a first offender. He was diagnosed with a mixed personality disorder and fitted the profile of a dangerous offender. Based on evidence from experts, namely two psychiatrists and a clinical psychologist, the court *a quo* found that there was little prospect of rehabilitation and that, upon release from prison, he would be a danger to the public (*inter alia* because there would be no treatment in prison). He was sentenced to life imprisonment, the counts having been taken together for purposes of sentencing.

On appeal, the majority of the court referred the case back for consideration of s 286A and B of the Criminal Procedure Act, in the interests of both justice and the accused. The trial court, it was held, had misdirected itself in finding that the accused would repeat his conduct and that, given a similar situation, it was probable that he would act in the same way. This was only a possibility, and the possibility was further that, either as a result of treatment or as a result of greater maturity, his condition could improve to such an extent that he would no longer pose a danger to society. The trial court was also found to have misdirected itself by taking comfort in the fact that the appellant might in future be released on parole,⁶¹ which indicated that such court was of the opinion that the sentence imposed could prove to have been inappropriate.

This crime itself, it was stated, was not so serious as to warrant a sentence of life imprisonment because the convicted person represented such a danger to the physical and mental wellbeing of other persons as to warrant detention for an indefinite period. There was also a possibility that his condition could improve to such an extent that there would no longer be such danger. Furthermore, the expert evidence of a psychologist indicated that the appellant's prognosis for

⁶¹ In terms of the Correctional Services Act 8 of 1959.

treatment was positive. The minority however dissented and found the sentence to be appropriate.

3.2.5 *S v Plaatjies*⁶²

A 15-year-old girl was raped by two co-students, who tore her windbreaker and then held her down while they raped her. She sustained a torn vagina. The offenders were scholars, aged 17 and 18 years, and both pleaded guilty.

The regional court sentenced the first accused to four years' imprisonment, of which one year was suspended for four years, and the second accused was sentenced to three years' imprisonment, of which one year was suspended for four years. The sentence was confirmed on appeal and the crime was described as a very serious one with gang-like elements, which was perpetrated on a minor complainant. The youth of the accused and the fact that they had no previous convictions were not considered to be sufficiently mitigating.

3.2.6 *S v V*⁶³

The accused pleaded guilty to two counts of attempted rape on his 10-year-old daughter while under the influence of alcohol. As regards the first count, the appellant entered the girl's room and started to touch her. He ordered her to take off her panties, took out his penis and pushed it against her private parts. He came to his senses and left. The second incident occurred in a caravan at a holiday resort. He pulled off the girl's panties and touched her private parts before he once again came to his senses.⁶⁴ At the time, the accused was

⁶² 1997 (2) SACR 280 (O).

⁶³ 1996 (2) SACR 133 (T).

⁶⁴ *S v V supra* (n 63) at 136c-e. The high court referred to the fact that, on both occasions, the accused had not really done much before abandoning his intention to have intercourse with his daughter. It should be noted that the accused was convicted on his own version of the

experiencing problems in his marriage and his wife was denying him conjugal rights. As a result, he suffered from sexual frustration. The offences were not repeated and the appellant continued living with his wife and children for another two years. By the time of the trial, the appellant's wife had left him and had taken the children with her. He had no contact with them.

The sentence was passed in the regional court nearly three-and-a-half years after the incident and another six months later the appeal against sentence was heard. The accused was sentenced by the regional court to 18 months' imprisonment in terms of s 276(i) of the Criminal Procedure Act 51 of 1977. A further 18 months' imprisonment was suspended for five years. The practical implication was that the accused had to serve an actual period of imprisonment in addition to the suspended sentence.

A report in terms of s 276A(1) of the Criminal Procedure Act 51 of 1977 was obtained regarding the desirability of correctional supervision. The correctional officer, who had a BA (Social Work) degree, rejected correctional supervision as a suitable sentencing option. The essence of her report was that the appellant had failed to accept responsibility for his action; that he had tried to shift the blame to his wife; that he had not shown any remorse; and that he displayed no insight into the seriousness of the offence. Consequently, the prognosis regarding treatment would not be good. The expert witness further mentioned the fact that the accused had abused his position of trust towards his daughter and that the community should be protected from people like the appellant.⁶⁵

facts without being cross-examined by the prosecution. This would nevertheless constitute serious indecent assault where the conduct could not be minimised.

⁶⁵ *S v V supra* (n 63) at 137a.

The correctional officer was cross-examined by defence counsel. Southwood J found that her answers indicated that her investigation had been extremely superficial. The facts upon which she based her evaluation of the appellant had not been adequately investigated or established. The report was further criticised for not taking into account the fact that the offences had not been repeated and that the appellant apparently did not constitute a danger to society. Further shortcomings pointed out regarding the report included the omission to investigate the appellant's family or social background and a failure to explore the possibility of the appellant's rehabilitation. The impression created in the report was that no attempt had been made to investigate the relevant facts objectively. It appeared to the court that the correctional officer was prejudiced and had decided at the outset that the offences were very serious and that they merited imprisonment. As a result, the facts contained in the report could not be accepted as reliable.⁶⁶

The vagueness of the report led to difficulty in determining whether rehabilitation was possible and no reasons were given as to why the lack of insight and remorse on the part of the accused would make treatment unsuitable. The regional court magistrate had therefore erred in not rejecting the report and requesting a proper one containing correct and objective facts. Only then would he have been in a position to exercise his discretion judicially. The high court found indications of insight and remorse, especially in the offender's own decision to cease his attempts and in the fact that he had apologised to his daughter.⁶⁷

⁶⁶ *S v V supra* (n 63) at 137e.

⁶⁷ *S v V supra* (n 63) at 139c.

The sentence was set aside and the matter was remitted to the regional magistrate so that a proper report could be obtained and evidence could be heard to enable the court to impose a suitable sentence. If correctional supervision were to be found to be appropriate, the magistrate should impose it and not leave the matter in the hands of the Commissioner.⁶⁸

3.2.7 *S v R*⁶⁹

The accused was convicted of the rape and assault of the complainant, who was known to him. He offered her a joyride on his motorcycle after his own girlfriend had had a turn, but, instead, took the complainant to the show grounds, stopped, took her off the bike, tripped her, took her jeans off and raped her. He threatened to kill her, started hitting her because she was screaming, and, afterwards, pulled out a gun, put it in the complainant's mouth, then took it out, fired a shot in the ground near her head and left her in that deserted area afterwards. The victim, aged 14, was a virgin and her physical appearance showed signs of severe assault. She had suffered psychological trauma and displayed symptoms of psychiatric illness according to the clinical psychologist and the psychiatrist. She had undergone therapy and had requested further therapy.

⁶⁸ *S v V supra* (n 63) at 139e. The court examined the principles applicable to correctional supervision as set out in *S v Croukamp* 1993 (1) SACR 439 (T) and *S v Omar* 1993 (2) SACR 5 (C) and pointed out that it was obvious that the report should refer to the various options of correctional supervision (all outside prison), and to its applicability to the accused in order to meet the aim of this sentencing option. The report should further contain an evaluation of the accused, should indicate if and why he would benefit from correctional supervision, and should indicate the reaction/impact on his family, the community and the victim. The available facilities should be taken into account and the monitoring, community service and house arrest should be described based on the specific accused's liberty, employment, and domestic arrangements. These could be so designed to be sufficiently severe and satisfy the deterrent and retributive needs of society, but, at the same time, not disrupt the accused's employment and family life, or endanger the prospects of rehabilitation, or subject him or her to the potential harmful consequences of the prison environment (*S v Omar supra* (n 68) 15h-16c).

⁶⁹ 1996 (2) SACR 341 (T).

'The trauma suffered by the complainant as a result of the appellant's actions forms part of the evaluation of an appropriate sentence. The indications are, as stated above, that the complainant will respond to therapy.'⁷⁰

The accused was 19 years old, was under the influence of alcohol during the commission of the offence, was a first offender and was employed.

The trial court imposed a sentence of 16 years' imprisonment on the charge of rape and one year of imprisonment on the assault charge (to run concurrently with the 16 years). Although the appeal court found that there was no misdirection by the court *a quo*, it indicated that a striking disparity existed between the sentence imposed by the trial judge and that which the court of appeal would have imposed. The sentence was found to be startlingly severe and inappropriate and it was reduced to 10 years, of which two years were suspended for five years. The second count was confirmed. Aggravating factors were found to be:

- a lack of remorse;
- the use of violence; and
- the fact that the accused had left the victim in a deserted spot.

The following were considered to be mitigating factors:

- the accused's youth;
- the effect of alcohol;
- the fact that the accused was a first offender; and
- the accused's potential for development, as testified to by the probation officer.

⁷⁰ *S v R supra* (n 65) at 345a. The judge then referred to the process of weighing up the aggravating factors against the appellant's personal circumstances. Earlier in the judgment, at 343i, the judge commented that, as in the case of rape victims, 'she will always experience stress in respect of her sexuality'. However, Navsa J does not seem to have borne this in mind in the final evaluation. The question that once again needs to be raised is how the impact of the trauma suffered by the victim will be weighed up, and what weight can be attached to it.

As to the nature of the crime, the court quoted from *N v T*:⁷¹

'Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims ...'

The Court added:

'Rape is indeed a heinous crime and in this instance, where the victim is a 14 year-old child, it assumes even more horrific proportions.'⁷²

3.2.8 *S v B*⁷³

The accused was charged with the rape of his daughters over an extended period from the age of 13 and was convicted on two counts. Before that, he had touched and inserted his fingers into their vaginas for a period of about six years. There was no direct physical threat, but neither was there any explicit consent. In the light of his aggressive and dominating nature, the children did not really have any other choice. He also displayed no emotion or compassion in that 'sy inlywing tot die seksdaad was simpatieloos'.⁷⁴ The court of appeal however doubted whether the sexual intercourse was in fact non-consensual towards the end of the period.⁷⁵ The offender was 44 at the time of sentence, was a first offender, was married and showed no remorse or feelings of guilt.

The accused was sentenced by the regional court to eight years on one count and to seven years on the second count. On appeal, both counts were taken

⁷¹ 1994 (1) SA 862 (C) at 862g-h.

⁷² *S v R supra* (n 69) at 344j.

⁷³ *Supra* (n 35).

⁷⁴ *S v B supra* (n 35) at 553h.

⁷⁵ Foxcroft J however differed on this point (*S v B supra* (n 35) at 553c).

together and a sentence of eight years' imprisonment was imposed, of which two years were suspended for five years.

Aggravating factors were said to include:

- the fact that the crime was committed over an extended period;
- the fact that the complainants were his own daughters, whom he raped from a tender age; and
- the fact that he also intentionally impregnated the one daughter.

Mitigating factors were found to be:

- the finding of no actual physical threat ('oorweldiging'); or
- no obvious psychological harm.

As far as the aims of punishment are concerned, it was found that only deterrence of others, rehabilitation of the accused and retribution were relevant, since the accused had never ventured outside the family context and his daughters had, by that time, already left home. In short, the punishment had to reflect the seriousness of the offence and show respect for the law.⁷⁶

3.2.9 S v C⁷⁷

The accused was convicted of raping three young women (their ages were not specified) over a period of three days. Counsel for the defence argued, as a mitigating factor, that the accused had suffered a brain injury as a result of a car accident during the trial, and that the trial court had overemphasised the seriousness of the offence while underemphasising the accused's personal circumstances. Extensive psychiatric evidence was led to indicate, and persuade

⁷⁶ *S v B supra* (n 35) at 555c.

⁷⁷ 1996 (2) SACR 181 (C).

the court, that imprisonment would be an inappropriate sentence for the accused. The high court was however not convinced that imprisonment was not appropriate and found that the accused was by no means a mentally subnormal person:⁷⁸

'In his evidence, the appellant displayed great insight and cunning. He lied and lied intelligently. He showed no remorse for his conduct. Instead, he maligned his victims as lying, immoral woman, who, in the case of the first and second complainants, had sexual intercourse with a complete stranger simply to spite their boyfriends. He displayed a complete lack of contrition and did not invoke stress or any psychological disorder to explain his sudden transformation from an ostensibly quite normal and privileged young man with a clean record and good background into a serial rapist who violated three young women in the course of three days.'

The court did not find correctional supervision to be an appropriate sentence and indicated that rape was regarded by society as the most heinous of crimes:⁷⁹

'A rapist does not murder his victim – he destroys her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life. Serial rapists and murderers are regarded by society as inherently evil beings. They are the most feared and loathed criminals in our community. Society demands protection in the form of heavy and deterrent sentences from the courts against such atrocious crimes.'

The regional court sentenced him to seven years on each count, with the sentence in respect of the first count being ordered to run concurrently with the sentence in respect of the second and third counts. No misdirection or error was found in the reasoning of the magistrate and the sentences were confirmed.

⁷⁸ *S v C supra* (n 77) at 186c.

⁷⁹ *S v C supra* (n 77) at 186e.

3.2.10 *S v A*⁸⁰

The appellants were convicted in a regional court of rape and were each sentenced to seven years' imprisonment. The complainant was, at the time of the incident, 19 years old and a virgin who still lived with her parents and who had had no experience of boyfriends. She knew the second appellant well as a family friend and trusted him. On the day of the incident, the appellants had spent the afternoon at the house of the complainant's parents, where they had been drinking. At about 21:30, the complainant accompanied the appellants to take another person home. After that person had been dropped off, they drove a bit further to a place where the complainant attempted to get out of the car after the first appellant began touching her hair. The appellants pulled her back into the car and promised to take her home, but in fact drove to another place. Then the second appellant said to her that she should play along with the first appellant, as he had two revolvers with him and would shoot both her and the two-year-old child who had accompanied them. She believed this threat. Later, the first appellant, and then the second appellant, had intercourse with her on the back seat of the car. She cried out in pain when the first appellant penetrated her. The complainant suffered a black eye and her arms were swollen and bruised. The trial court found, however, that she did not suffer any psychological harm and the high court and appeal court did not question this.

The first appellant was 24 years old, was married, had two children and had no previous convictions. The second appellant was 33 years old, was married, had three children and had three previous convictions for crimes of dishonesty. In a second appeal to the appeal court it was held that the sentence was inappropriate if all the circumstances were taken into consideration. The court held that this was not to say that rape was not a serious crime, but that it could be surrounded by circumstances which, on a scale of abhorrence

⁸⁰ 1994 (1) SACR 602 (A).

(‘weersinwekkendheid’), made it more or less serious. Olivier AJA referred to *S v Sauls en 'n Ander*⁸¹ where Van den Heever J stated the following:

‘Even rape can vary from “ ‘n betreklike nietigheid” to a capital crime.’

The court reminded itself that sentencing officers are cautioned against anger and emotionality⁸² as being irreconcilable with judicialness. It appeared from the magistrate’s judgment that he had focused on retribution only, and not on rehabilitation of the offenders or on the broad interests of the community, thus overemphasising the seriousness of the offence. The magistrate had, however, paid insufficient attention to: the fact that the rape was aimed not so much at violence⁸³ as at sexual gratification; the question whether the complainant had a real reason for serious anxiety; the somewhat strange actions of the complainant;⁸⁴ the fact that she had suffered no psychological harm; and the fact that she was not raped by total strangers.⁸⁵ Not only was the second appellant a

⁸¹ 1982 PH H131.

⁸² *S v A supra* (n 80) at 608d.

⁸³ The violence used was found to be of a very low order. There also seems to have been a lack of understanding of the true nature of rape and of the psychological violence involved. See *S v C supra* (n 77) at 186e where the psychological nature of violence during rape cases was in fact understood.

⁸⁴ The court referred to the fact that, after being raped by the first appellant, she continued to lie without panties when the second appellant joined her, and that there was also no evidence of her crying or being in shock. It would appear, however, that her own explanation that she was afraid and that she realised that it would not help to resist, was not entertained. The fact that, having realised during the second rape that the appellants had no firearms, she had escaped and had waited all night at a block of flats for someone to take her home also carried no weight in her favour. This case illustrates the lack of insight on the part of some judicial officers, which further emphasises the need for training.

⁸⁵ This assumption seems to have been based on judicial notice of a fact which has recently been proved to be incorrect by research conducted by the Sentencing Advisory Panel in the United Kingdom: Sentencing Advisory Panel *Research Report – 2: Attitudes to Date Rape and Relationship Rape; A Qualitative Study* (May 2002) at <http://www.sentencing-advisory-panel.gov.uk/research/rape/forward.htm> (accessed 13/04/03). See, further, chapter 5 par 5.3.3.1.

family friend, and she had spent several hours in the first appellant's company, but she was raped by people from the same social milieu. The court was of the opinion that, in the circumstances, the new option of correctional supervision in terms of s 276(1)(h)⁸⁶ should receive serious attention and the case was therefore referred back to the trial court for sentencing.

3.2.11 *S v M*⁸⁷

The accused was convicted of the rape and murder of a baby girl. Nienaber JA summarised the facts as follows:

'The deceased was only eight months old when she died. The appellant, 20 years old at the time, was accompanying her parents and carrying the child when he slipped away from them in order, so he admitted, to have sexual intercourse with her. Twice he tried to penetrate her. Her vagina was torn open as far as the rectum. Then he abandoned her in the open veld. This was at night, in the winter, on the Highveld. Her body was discovered some two days later.'⁸⁸

The accused was sentenced to death twice. The court *a quo* found this to be the only proper sentence based on the fact that the aggravating features greatly outweighed the mitigating features and that 'this (is) the type of case where ... retribution should come to the fore'. It found that the demands, and hence the interests, of society acted as an overriding factor in deciding on the death penalty. The accused's conduct was described as depraved, perverse, subhuman and amounting to an extreme case which merited the extreme penalty.⁸⁹

⁸⁶ Criminal Procedure Act 51 of 1977.

⁸⁷ 1994 (2) SACR 24 (A).

⁸⁸ *S v M supra* (n 87) at 25j.

⁸⁹ *S v M supra* (n 87) at 29g.

The Appellate Division set the death sentences aside, confirmed the rape and murder counts and considered them together for the purposes of sentencing.⁹⁰ Life imprisonment was imposed. It was held that, in the context, the accused's youthfulness and the alcohol that he had consumed had rendered the crime marginally less reprehensible. The state did not discount this as a mitigating factor and show that these factors had not materially affected the appellant's behaviour. Further, it was found that there was a possibility that the alcohol which the appellant had consumed during the day, combined with his immaturity, had impaired his faculties and loosened his grip on events. He knew what he was doing, but he was less in command of himself than he would have been had he not been drinking. One could therefore not say that this did not contribute to the unfolding of events. It was possible that he had lost his head when he realised that the child was injured and that he would be held accountable. The court *a quo*, it was held, had erred in finding that the alcohol had not played a significant role. Though the accused's lack of remorse was evident from the fact that, when he noticed the blood on his trousers the next morning, he made no effort to find out about the deceased, it was no indication that the alcohol had not affected his better judgement the night before.⁹¹

⁹⁰ Nienaber JA argued (at 31e) that none of the objections to the practice of taking counts together for sentencing purposes existed in this matter, and that this was indeed a case of exceptional circumstances. He stated that, where similar counts are closely connected, or are similar in point of time, nature, seriousness or otherwise, this was sometimes a useful, practical way of ensuring that the punishment imposed was not unnecessarily duplicated or that its cumulative effect on the accused was not too harsh. In spite of these arguments, the practice was, he stated, seen as undesirable in the light of the difficulties it might create on appeal or review, as referred to in *S v Young* 1977 (1) SA 602 (A).

⁹¹ *S v M supra* (n 87) at 30d-f.

3.2.12 *S v M*⁹²

The appellant was convicted of raping a 14-year-old girl (in addition to being convicted of housebreaking with the intent to steal, robbery and the rape of the mother). The appellant and a henchman had entered the home of the complainant, Lee-Ann, and, at knife-point, had ordered her, her father, her mother and her eight-year-old brother to take off all their clothes. The appellant then raped the mother and daughter in full view of the rest of the family. When the mother resisted, she was hit in the face with a fist and the appellant further told his henchman to kill the father if he should try to stop him. The mother was also raped by the other man. The appellant then pushed Lee-Ann against the wall in an attempt to rape her and then penetrated her partially on the bed. She was a virgin and the hymen, though bruised, was still intact.

It was found that no-one had sustained actual physical injuries, but that the whole family had suffered psychological harm. They refused to ever go back to the house and moved immediately. The husband and his wife found it difficult to sleep and also experienced unpleasant thoughts for months. Lee-Ann's performance at school initially deteriorated, but it was found at the trial, almost eight months after the crimes, that she had recovered both with regard to her schoolwork and her interpersonal relationships.⁹³

Aggravating circumstances included the following:

- the appellant had several previous convictions, including one for an attempted rape;

⁹² 1993 (2) SA 1 (A).

⁹³ The mother testified that the eight-year-old son showed more symptoms of severe psychological impact after the incident of violence and after having had to watch his mother and sister being raped (*S v M supra* (n 92) at 7h). It is thus not only the victims who are directly involved who are traumatised by such an event.

- the appellant had forced himself into the home of the complainant in the middle of the night;
- the mother and daughter were raped in the presence of the father;
- the appellant's threats of violence and the execution thereof during the rapes and robbery;
- the uprooting of the family, as highlighted by their moving house; and
- the fact that Lee-Ann was still a virgin.

The trial court sentenced the appellant to 15 years' imprisonment for the rape of Lee-Ann and to 23 years for the rape of her mother. The court of appeal however found that the circumstances of the two incidents were basically similar and that the mother was coping with the mental trauma. Though the crime was a serious one and the court took into account the humiliating nature of the whole ordeal, a sentence of 15 years' imprisonment for the rape of the mother was found to be appropriate. The sentence of 15 years' imprisonment for the rape of Lee-Ann was confirmed.⁹⁴

⁹⁴ An important consideration that was dealt with was whether the cumulative total of imprisonment was disturbingly inappropriate and whether, in the circumstances, the sentences were excessively severe. It is of further interest that this case was dealt with shortly after the death sentence became discretionary (Act 107 of 1990). It was held that references to a 'new dispensation' were inappropriate and that the natural consequence of the legislation was that, where the death sentence had now become discretionary, and would be imposed only where it was the only proper sentence and where life imprisonment would not be a proper sentence, cases calling for long periods of imprisonment would occur more frequently than was previously the case. A sentence of 20 or 25 years would then more frequently replace the death sentence. Imposition of sentence, however, remained a matter for the discretion of the trial judge and only considerations of fairness and justice would fetter that discretion. The court of appeal stated clearly that there could be no instance of a maximum sentence of imprisonment and that the notion that a sentence of 25 years' imprisonment would only be imposed in 'extreme cases' or 'particularly serious cases' should be guarded against (*S v Tyatyame* 1991 (2) SACR 1 (A) at 10f). Taking into consideration the 'category of worst rapes' being developed regarding Act 105 of 1997, the above findings of Eksteen JA might still be relevant.

3.2.13 *S v Tyatyame*⁹⁵

The appellant was convicted of rape in the Provincial Division and was sentenced to death. The complainant was a seven-year-old girl. She was sent by her grandmother to a shop in the late afternoon and the appellant, aged 29, accosted her on her way. Holding her by the hand, he forced her to walk with him to a bush. On arrival there at dusk, he took off her clothes and assaulted her by hitting and kicking her. He took off his pants, pushed her to the ground and forcefully raped her. He then left the girl helpless on the ground and bleeding severely. The accused pointed her out to the police near midnight. She was in a state of shock, could not stand on her own, and was unable to walk at all. As a result of the injuries she sustained during the rape, she had to be admitted to hospital where she was kept for approximately three-and-a-half months and had to undergo five operations. According to the medical evidence, some of her injuries were of a permanent nature, for example she would have lifelong problems with controlling her bowel movements, causing her discomfort and embarrassment. There was a further possibility that she might not be able to have children one day as a result of sepsis in the abdominal area. Dr Bass testified as an expert on child abuse and observed that the complainant had, in his experience, suffered one of the most serious injuries ever:

'The injury is of such severity that I have no doubt in saying that if intercourse was committed with the child, then it was extremely violent without any regard to the child's feelings at all, and the intercourse must have been extremely painful to her.'⁹⁶

Another medical doctor testified that she was terrified on admittance and that she would have bled to death without medical treatment.⁹⁷

⁹⁵ *Supra* (n 94).

⁹⁶ *S v Tyatyame* (n 94) at 4c.

⁹⁷ *S v Tyatyame* (n 94) at 3e.

On appeal against sentence, the court had to decide whether the death sentence was the proper sentence in the light of the changes brought about by s 13(b) of the Criminal Procedure Amendment Act 107 of 1990.⁹⁸ Hoexter JA found the following to be aggravating factors:⁹⁹

- the appellant had two previous convictions for rape involving eight-year-old girls;
- the complainant was a young girl;
- the fact that the crime committed by the appellant showed 'volslae wreedaardigheid en gevoelloosheid';
- the fact that the complainant had endured/suffered extreme pain and anxiety during and after the rape;
- the fact that the appellant had caused very serious injuries to the complainant;
- the permanent nature of some of the physical injuries ('behouswakte' and possible infertility);
- the fact that the complainant had suffered psychological trauma during and after the rape and the lack of bowel control would constantly remind her of this horrifying experience.

It was found that the alcohol intake of the appellant could have affected his inhibitions, but that, from the facts, it was clear that he knew what he was doing and that he had acted in a goal-orientated manner. The fact that he led the police to the girl was also not a sign of remorse, but was only done in order to

⁹⁸ The effect of the amendment was that, where there was a possibility of the death sentence being imposed, the court of appeal from then on had an independent discretion. It would be able to judge, taking into account the mitigating and aggravating factors appearing from the record, whether the death penalty would be the 'gepaste vonnis' (*S v Tyatyame* (n 94) at 6a). This amounted to a departure from the general rule that an appeal court could interfere with the sentence only when the trial court had not exercised its discretion properly.

⁹⁹ *S v Tyatyame* (n 94) at 6e-h.

escape an angry mob. The psychiatric report explained as mitigating his history and background:

'He comes from a severely disturbed family background with alcohol abuse, physical violence and ongoing conflict between the parents, leading to several periods of separation over the years.'¹⁰⁰

The court was of the opinion that, in the light of the seriousness of the rape and of the appellant's slim chances of rehabilitation, the few mitigating factors carried little weight and that the death sentence was the only proper sentence in the circumstances:

'Die verkragting waaraan die appellant hom skuldig gemaak het is 'n afgryslike vergryp van uitsonderlike erns. Dit is die dure plig van ons howe om jong kinders teen gewetenlose geweldenaars te beskerm. Waar 'n weerlose dogtertjie van sewe jaar verkrag word, tree uiteraard die gemeenskapsbelang sterk na vore.'¹⁰¹

The appeal was accordingly dismissed.

3.2.14 *S v Ven 'n Ander*¹⁰²

The appellants, together with two other accused, were convicted in the regional court on two counts of rape and, on each count, were sentenced to three years' imprisonment, which was not to run concurrently, and, in addition, to a whipping of five strokes.

This was a gang-rape of two complainants, the first aged 16 years and a virgin and the second aged 15 years and 4 months, who was not a virgin and who was menstruating at the time. The complainants had attended a discotheque with

¹⁰⁰ *S v Tyatyame* (n 94) at 7d.

¹⁰¹ *S v Tyatyame* (n 94) at 7f.

¹⁰² 1989 (1) SA 532 (AA).

two young male friends to celebrate another friend's birthday. The two accused had posed as policemen, had taken the complainants by force to Bloudam in Langlaagte, and had laughed at and mocked the complainants while they took turns in raping them. The arrival of the police put a stop to the ordeal. The court emphasised:

'Die vergryp wat die appellante en sy genote teen die klaagsters begaan het, is ongetwyfeld baie ernstig en weersinwekkend. Dit was soos tereg opgemerk het, 'n bende-verkragting wat met laggende minagting teenoor en vernedering van die klaagsters gepaard gegaan het. ... toegeslaan het soos uile op muise in die nag. Die feit dat hulle in Hillbrow was buitekant 'n diskoteek in die vroeë oggendure het hulle nie ontnem van hulle regte op persoonlike ongeskondenheid en privaatheid nie. ... Die klaagsters het die beskuldigdes en Nepgen geen aanleiding gegee om op hulle toe te slaan nie. Meisies wat laatnag onskuldiglik in Hillbrow op straat is, is nie te beskou as gepaste prooi vir die wellus van elke Jan Rap en sy maat nie. Hulle is geregtig om daar te wees en om beskerm te word al is hul laat opbly nie goed te keer nie. Die ernstigheid van die vergryp teen die klaagsters is verskerp deur die feit dat daar ook 'n element van ontvoering daarin aanwesig was. Sulke optrede verdien gedugte bestraffing selfs in die geval van jong oortreders.'¹⁰³

With regard to the psychological impact, the trial judge accepted rape as being the worst form of humiliation for a woman.¹⁰⁴

The appeal court held that the trial court had not accorded the following mitigating factors sufficient consideration:

- the fact that the second appellant, at the age of 17 years and 11 months, was at the time of the commission of the offence more than a year younger than his youngest co-accused (the first appellant was 21 years old);
- the fact that his behaviour that night was chiefly attributable to immaturity and to vulnerability to the bad influence of older persons; and
- the fact that he was a first offender and did not engage in any cruelty and unnecessary violence in this instance.

¹⁰³ *S v V en 'n Ander supra* (n 102) at 542i-543b.

¹⁰⁴ *S v V en 'n Ander supra* (n 102) at 539 h-i. See chapter 5 par 5.3.3.2 a), text of (n 61), for the quotation from the case.

One year on each count of the second appellant's sentence was conditionally suspended. Steyn JA discussed the nature of corporal punishment and the changing attitudes to it, and set such punishment aside in the case of both appellants.

It was further held that the trial court was entitled to proceed with sentencing in the absence of a report by a probation officer, since it had sufficient information *inter alia* from the fathers of both appellants.

3.2.15 *S v J*¹⁰⁵

The appellant and M were convicted of raping a slender-built, 19-year-old girl who had been overpowered, stabbed and raped by another in a footpath in the veld. The appellant passively watched another man, as well as M, raping her before him, then raped her in succession while she was lying helpless on the ground. The stab wound was fatal and she died shortly after the rape in the veld, where she was left to be found later by the friend who had managed to run away during the incident.

The appellant was almost 27 years old when the crime was committed and had the following previous convictions: two for common assault, one for assault with intent to do grievous bodily harm, four for housebreaking with the intent to steal and theft, one for theft, and one each for rape and sodomy. On the previous conviction of rape five years prior to the present offence, he had been sentenced to five years' imprisonment and had been released after two years. The appellant was sentenced to death¹⁰⁶ and appealed against his sentence on two grounds, namely that the trial judge had erred in imposing sentence in that:

¹⁰⁵ 1989 (1) SA 669 (A).

¹⁰⁶ M was sentenced to 10 years' imprisonment. He was 21 years old when he committed the crime and he also had previous convictions, but relating only to dishonesty. He had already had nine years of conflict with the law and had suffered imprisonment.

- he had accorded undue emphasis to the accused's previous convictions; and
- because he did not give sufficient consideration to the role played by alcohol in the perpetration of the crime.

On appeal, the following aggravating factors, apart from his previous convictions, were found: it had been a gang-rape of a slightly-built and defenceless woman; and when the appellant had realised that she was dead, he had callously left her and had gone unconcernedly to visit a friend.

Hoexter JA and Kumleben JA found that counsel's argument, namely that the appellant's previous convictions had been overemphasised because he had only one previous conviction for rape, was wrong and without foundation in law. Counsel had implied that, in considering an appropriate sentence in the case of rape, only previous convictions for rape, or previous convictions indicating a tendency to perpetrate sexual crimes against women, could be taken into account. However, the court was of the view that the relevance and importance of previous convictions depended upon the elements they had in common with the crime in question. Whenever it came to rape, those previous convictions characterised by the use of violence and disregard for life and limb (which seem to be indicative of attitude), and also such crimes as indicated a tendency to sexual deviation, immediately came to the fore in imposing sentence.

Previous convictions which bore no relation whatsoever to the crime came under consideration in a limited sense only, and simply with a view to determining to what extent, if any, the forms of punishment imposed for those crimes had served as effective deterrents to the appellant in his career of crime. Further, in considering an appropriate sentence for a rapist who had on a previous occasion, or occasions, been found guilty of rape, one of the questions that arose was whether his chances of reform were so slight that, in a case other than the death

sentence, the accused at the time of his eventual release from prison would constitute a danger to the community. It was found that the appellant in this instance had an uncontrollable urge to engage in lawlessness that reduced his chances of being reformed.

With regard to the submission that the trial court had underestimated the role of alcohol in the perpetration of the crime, it was held that the court had to determine: 'to what degree did the liquor in fact affect the appellant's state of mind?' On the facts, the appellant had consumed a quantity of wine long before the perpetration of the crime and it was noteworthy how coherent his chronicle of everything that had happened before, during and after the rape had been. With regard to the role played by alcohol in the perpetration of the crime, there was accordingly no room for the contention that there had been any misdirection on the part of the trial judge. The appeal was accordingly dismissed.¹⁰⁷

¹⁰⁷ Nicholas AJA dissented on the following grounds: he pointed out that it was clear that the trial judge had imposed the death sentence on the appellant, not as retribution for the atrocity of his crime (although, in the trial judge's own words, it was a 'crime that fills one with revulsion'), but because of his criminal record, which had been the decisive factor (at 683i). Nicholas AJA accepted that the fact that an accused who had not been deterred by his previous punishment for rape from committing the offence again might aggravate the subsequent offence, but argued that the force of such consideration in the appellant's case was greatly reduced in the light of the analysis of his convictions. It was found that it was unlikely that a sentence in 1980 for rape (of which he effectively served only two of the five years) was in September 1986 operating on his mind as much of a deterrent. Moreover, Nicholas AJA found that the trial judge had not given sufficient weight to the effect upon the appellant of the alcohol he had consumed (*S v J supra* (n 105) at 686h). It was not sufficient that the appellant was not so drunk as not to know what he was doing, or as to affect his ability to tell the court what he did. What should have been considered were the probable effects of the large quantity of wine which the appellant had consumed, such as loss of self-control and reduced inhibitions. After a discussion of the history of the death sentence for rape and the interpretation of 'uiterste geval' (*S v J supra* (n 105) at 680e-683f), it was found that the case did not call for the imposition of the ultimate penalty and the appropriate penalty was therefore found to be 25 years' imprisonment.

3.2.16 *S v S*¹⁰⁸

The accused, a 21-year-old coloured man, was convicted of raping a 19-year-old white university student.¹⁰⁹ She was at home alone and studying on the veranda of her parents' house when the accused walked past, noticed her and decided to have intercourse with her. He walked past the house, jumped over the wall and approached her from behind. He held a knife against her throat. She got such a fright that she wet her pants. He threatened to stab her if she did not remove her pants and then proceeded to rape her on the floor in the lounge. He asked her to kiss him and hold his private parts, which she refused to do. The telephone rang and the accused jumped up and ran away. Her stepfather rushed home after being informed of what had happened. He found that she had locked herself in the toilet and was in a hysterical state.

The complainant received psychological treatment for anxiety and for, as she put it, '... my sosiale lewe ... die verhouding met my vriend'.¹¹⁰ The stepfather testified that she had become very afraid and suffered from severe depression:

'... altyd baie bang, vernameklik in die nagte. Dan dink sy altyd daar is iemand wat om die huis loop of daar is gevaar ... Sy ly aan hewige depressie en sy bel dikwels haar ma en huil dan op die telefoon en dan is haar ma ook baie ontstig en omgekrap.'¹¹¹

As mitigating factors, the court took into account the following:

- that the accused had had an unhappy background and had passed only Standard 3;

¹⁰⁸ 1988 (1) SA 120 (A).

¹⁰⁹ This is the way in which the accused was described. At that time, people were perceived in terms of their race and this certainly played a role, either consciously or subconsciously, during sentencing in most cases.

¹¹⁰ *S v S supra* (n 108) at 122e.

¹¹¹ *S v S supra* (n 108) at 122f.

- that the complainant was not seriously injured and that the rape had been of short duration;
- that the accused had also pleaded guilty, was relatively young and had thrown the knife away when the complainant expressed her fear of it.

On the other hand, the aggravating factors were found to include the following:

- the accused's conduct, which showed cunning and planning;
- that the complainant's anxiety must have been noticed by the accused, and that he had used a knife during the offence, which must have been very humiliating;
- that the psychological impact of the crime was as intense nine months after the incident;
- that the crime took place in her own house, which ought to have been a safe haven;¹¹² and
- that the court *a quo* had regarded the complainant as a well-educated, refined ('welopgevoede en beskaafde') student and had found her to be a virgin at the time.

The trial court imposed the death sentence and the court of appeal confirmed it. It was conceded that this case constituted a true borderline case,¹¹³ where either the death penalty or life imprisonment could reasonably have been imposed. However, the trial judge had exercised his discretion in a reasonable manner. He had rightly taken into account the fact that the appellant had committed another rape six weeks before this incident (without having been convicted and sentenced, thereby not experiencing the retributive effect of the sentence in the first rape) and shortly after had been released on bail for the first offence. The

¹¹² *S v S supra* (n 108) at 124d.

¹¹³ *S v Pieters* 1987 (3) SA 717 (AA) at 734i-735a.

court *a quo* found that this showed that he had no respect for women or the law.¹¹⁴ On appeal, Nestadt JA held:

'Die feit dat hy slegs ses weke tevore iemand anders verkrag het, is aanduidend van appellant se karakter en gesindheid en dit is altyd van belang tydens vonnisoplegging.'¹¹⁵

3.2.17 *S v Pieters*¹¹⁶

The accused was convicted of rape and was sentenced to death. The complainant was 16 years old and seven months' pregnant. She was not attending school at the time (she subsequently married the father after the birth of the child). The 35-year-old accused, a casual farm labourer, had entered the house under false pretences on a Saturday morning when the complainant was there alone. He had brutally assaulted her (by kicking her with his shoes while she was crouching to protect her unborn baby, hitting her with a stick, breaking a bottle over her head, and strangling her) before, during and after¹¹⁷ the offence, which consisted of raping her twice. She had to stay in hospital for six days and even her own father did not recognise her. The doctor testified about serious head injuries (bruises, lacerations, concussion) and bruises over her whole body. The doctor commented:¹¹⁸

'Ons sien baie beseerde mense, maar selde dat 'n mens iemand sien met sulke veelvuldige beserings.'

¹¹⁴ *S v S supra* (n 108) at 123b.

¹¹⁵ *S v S supra* (n 108) at 123g.

¹¹⁶ *Supra* (n 113).

¹¹⁷ It is of interest to note that the appellant's advocate argued that the trial judge was not entitled to take into account the assault on the victim after the second rape. The court (*S v Pieters supra* (n 113) at 736g) however found that the trial judge was indeed entitled to take into account the whole picture of the appellant's conduct, since it amounted to one ongoing assault on the complainant.

¹¹⁸ *S v Pieters supra* (n 113) at 725i.

One of the bruises was potentially life-threatening for her and her unborn baby and her head injuries could lead to long-term neck problems and pain.

Regarding the psychological impact of the crime upon the complainant, the complainant testified that, in her daily life, she was often reminded of the incident by, for example, certain sounds, and had nightmares. The psychologist testified that the complainant seemed to have adjusted well to her marriage and motherhood, but was in fact falsely pretending to be calm and happy. She was suffering from what he referred to as 'definitiewe vermydingsgedrag' in order to suppress the anxiety she was experiencing.¹¹⁹ Further therapy was essential and her prognosis was uncertain. The trial judge found:

'Wat die uitwerking van hierdie voorval op haar emosionele en geestelike lewe gaan wees, kan ook nie nou bepaal word nie, maar dit is duidelik dat die effek van die daad op die gemoed van die klaagster geweldig moes gewees het.'¹²⁰

The trial judge also referred to the fact that the court should take into account the age, background and character of the complainant and remarked as follows:

'In hierdie verband sien ek nie oor die hoof dat sy op die jeugdige ouderdom van 16 jaar en as 'n ongehude persoon, alreeds verwagend was nie. Daarvan moet egter nie afgelei word dat dit 'n faktor is wat sterk teen haar tel nie. Sy het geensins voorgekom as 'n goedkoop of losbandige meisie nie.¹²¹ Inteendeel, sy het die hof beïndruk as 'n verfynde, beskaafde en ordentlike persoon wat klaarblyklik uit 'n goeie ouerhuis kom. Jou misdryf het haar in haar vroulike eer, integriteit en privaatheid aangetas op 'n wyse wat waarskynlik moeilik begryp kan word deur iemand wat nie so 'n ondervinding ondergaan het nie. Die gebeure moes vir haar 'n afgryslike ondervinding gewees het.'¹²²

¹¹⁹ *S v Pieters supra* (n 113) at 726d.

¹²⁰ *S v Pieters supra* (n 113) at 727b.

¹²¹ It appears that the court's perception was that a 'cheap girl' is better equipped to deal with sexual violence. This is linked to the question of whether or not the victim was a virgin, which is a factor that is always taken into account.

¹²² *S v Pieters supra* (n 113) at 726i-727a.

Neither the conduct nor the attitude of the appellant was explained, as he did not testify. According to the testimony of one of his co-workers, he was aware that the complainant was pregnant, or at least had a strong presumption that she was. He was of mature age and the only mitigating factor was that he was slightly under the influence of alcohol, but this only played a minor role.¹²³

On appeal against the sentence (after a plea of guilty), it was contended on the appellant's behalf that a long period of imprisonment would be a suitable sentence and that the death sentence for rape should be imposed only when it was the only suitable sentence in the circumstances of the case. The death sentence, it was therefore argued, was a shockingly inappropriate sentence in the present case. The appeal court however commented that the approach reflected by such a contention was incorrect and that it negated the fundamental premise that the trial judge is vested with the discretion to decide on a suitable sentence. Such an argument, it was held, was furthermore illogical and unrealistic, as it presupposed that it was objectively possible to draw a clear dividing line between instances of rape, where a long period of imprisonment would not be suitable, so that the death penalty would be the only suitable alternative, and cases where this was not the position. In practice, such a clear distinction did not exist. The principle that the death penalty for rape could be imposed only where it was the only suitable sentence had to be rejected. The argument was, in reality, an attempt to resurrect, in a different guise, the ghost of 'extreme cases', which had been exorcised by the judgment in *S v Tshomi en 'n Ander*.¹²⁴

¹²³ *S v Pieters supra* (n 113) at 727c.

¹²⁴ 1983 (3) SA 660 (A) at 666f as referred to in *S v Pieters supra* (n 113) at 729d. However, the minority judgment in *S v Pieters supra* (n 113) at 736i differed in this regard. It was argued that the trial court had indicated, by implication, that the death penalty was the only suitable sentence (*S v Pieters supra* (n 113) at 739c).

According to Botha JA, to interfere with a sentence, an appeal court had to ask itself the following:

'Did the trial judge exercise his discretion in a proper and reasonable manner?'¹²⁵

This question also forms the basis of the 'striking disparity test'. It was pointed out that it would be unrealistic not to acknowledge the fact that a specific period of imprisonment in a particular case cannot be determined according to any exact, objectively applicable standard, and it was recognised that there would often be an area of uncertainty wherein opinions regarding the suitable period of imprisonment might validly differ. In such a case, even if the Appellate Division were of the opinion that it would have imposed a considerably lighter sentence, it would nevertheless not interfere, as the required conviction, namely that the trial judge could not reasonably have imposed the sentence which he did, was lacking. There were, it was indicated, instances which were borderline and where it would be impossible to state categorically that one or other sentence would be the suitable one – in other words, cases where there was room for valid differences of opinion and where a discretion could reasonably be exercised in one direction or another.¹²⁶ The appeal was accordingly dismissed and the death sentence was upheld.

3.2.18 *S v M*¹²⁷

The accused, a 25-year-old man, was convicted of raping an eight-year-old girl. The girl was on her way to school when the accused grabbed her from the street and pulled her into his car. He drove for 26 kilometres, carried her into a maize

¹²⁵ *S v Pieters supra* (n 113) at 734e.

¹²⁶ See *S v Pieters supra* (n 113) at 729-736 for a detailed discussion of the appellant's arguments and of the principles applicable to an appeal against sentence, as well as for a discussion of *S v Bapela and Another* 1985 (1) SA 236 (A) and *S v M* 1976 (3) SA 644 (A).

¹²⁷ 1985 (1) SA 1 (A).

field, brutally raped her and left her there by herself. She managed to walk to a nearby farm where she was helped. She was seriously injured and in a critical condition when she was admitted to hospital. She had lost a lot of blood, was in a severe state of shock, and had to have a blood transfusion and an intravenous tube inserted before she regained consciousness. An emergency operation had to be performed by a gynaecologist and a surgeon to stitch up the extensive tears in, and cuts to, her private parts and the surrounding area. The doctor was of the opinion that the operation saved her life. She was bruised on her right temple and was in great pain. The damaged fibre of her private parts would probably lead to fibrosis, resulting in painful intercourse and difficult child birth as an adult.

With regard to the psychological impact, her mother and aunt testified that she was very nervous and scared, slept badly and that her schoolwork had deteriorated. There was, however, an improvement in her condition.

The accused was sent for observation to Sterkfontein Hospital. The psychiatrist testified that the accused was not mentally ill, but suffered from a mental condition that resulted in him not being able to exercise the same degree of control as a normal person:

‘Volgens die verslag is wel gevind dat die appellant ‘n “ontoereikende persoonlikheid met ‘n afhanklikheid van alkohol” het ... Ten opsigte van die vraag of die appellant, vanwee sy besondere geestestoestand, in staat was om homself te beheer, het Dr Salmond gesê dat die beskuldigde baie sterk drange ervaar om aggressiewe dade soos die huidige te pleeg, welke drange vir hom minder beheerbaar is as wat die geval is vir ‘n gewone mens.’¹²⁸

¹²⁸ *S v M supra* (n 127) at 6g-i.

The trial court imposed the death sentence. The court of appeal found that, based on the seriousness of the crime, it could not be said that the death sentence was not appropriate. Aggravating factors included the following:

- the complainant was only eight years old;
- she was taken to an isolated spot to be raped and left behind;
- the appellant had enough time on their way to the spot to reconsider;
- extreme violence was used; and
- the injuries sustained by the complainant were so serious that she would have died without medical assistance and would suffer long-term physical and psychological consequences.¹²⁹

However, it was found that too little weight had been attached to the appellant as an individual and to his mental condition. It was stated that, when the discretionary death sentence for rape was considered, any mental condition which resulted in the accused not being able to exercise the same degree of control as a normal person was relevant, even if it did not arise from a mental illness or defect.¹³⁰ The accused could thus be seen as less blameworthy. The appeal court found imprisonment of 20 years to be appropriate, taking the triad of sentencing into consideration.¹³¹

¹²⁹ *S v M supra* (n 127) at 9d.

¹³⁰ *S v M supra* (n 127) at 8h. It is of interest to note that this case is in direct contrast to that of *S v N* 1979 (3) SA 308 (A) where expert testimony as to the accused being a paedophile, which reduced his ability to resist urges, was not accepted as mitigating (see *infra* for full details).

¹³¹ What is of further interest in this case is the testimony of the clinical psychologist that the accused had confessed to him two weeks prior to the court case and had informed him that he had raped several girls under the age of 12 years during the preceding three years (*S v M supra* (n 127) at 7c). Although the trial judge could not take this into account, since no proof existed, the question arises as to what extent a therapist can now reveal information for purposes of mitigation where such information is to the detriment of the accused and has been obtained during therapy.

3.2.19 *S v M*¹³²

The accused, a casual farm labourer, pleaded guilty to, and was convicted of, raping the 17-year-old daughter of the farmer for whom he worked. The rape occurred late one Friday afternoon in 1978, just before Christmas. Activities on the farm ceased over Christmas. The accused had gone to town and, after having had some beer and wine, returned to the farm to fetch his belongings and then catch the bus. He came across the complainant near the main road, struggling to get her motorbike started. He offered to assist her, dropped the bike a few times and then grabbed her by the arm. He struck her, threw her on the ground and pulled her pants down. He then pulled her into the banana plantation, where he raped her by holding her by the throat and striking her continuously.

The accused was 20 years old and had one previous conviction for a non-violent crime. He had seen the complainant on previous occasions, but had had no sexual desire for her. He blamed the rape on his intoxication.

The state called the complainant and her parents, and handed in the medical report of the district surgeon. Though the complainant had bruises on her neck, her hymen had not been torn. She was hysterical after the event, was very nervous and had nightmares, but she stated that her condition had improved. She however felt uneasy when she entered a shop where black people were present. Her relationship with her boyfriend had remained unaffected. The complainant impressed the court as being level-headed and sensible.

The trial judge found this to be a very serious case, referring to it as a 'bad case'. The accused knew perfectly well what he was doing, although the alcohol had, to

¹³² 1982 (1) SA 590 (A).

some extent, affected his self-control. He was sentenced to 10 years' imprisonment.

On appeal, it was found that the trial judge had not committed an irregularity, nor had he misdirected himself. However, when having regard to all the circumstances, there existed a 'striking disparity' between the sentence imposed by the trial judge and that which the appeal court would have imposed. The following mitigating factors were taken into account:

- the rape was not premeditated;
- the appellant went to assist the complainant with her motor-cycle;
- it was on the spur of the moment, and in a state of intoxication, that the devil had 'taken over his mind'¹³³ and he had decided to rape her;
- the rape was committed with very little physical force and violence;
- the complainant had sustained only slight physical injuries, which were of a mere temporary nature; and
- the complainant had, mentally and cognitively, made great progress in overcoming the traumatic consequences of the rape.¹³⁴

Jansen JA was of the opinion that an appropriate sentence for the accused would be seven years' imprisonment. Such a sentence, he stated, differed sufficiently

¹³³ *Supra* (n 132) at 592b.

¹³⁴ It is furthermore interesting to note that counsel for the accused mentioned the character of the complainant as a specific factor to be taken into account in cases of rape and that the state inferred that the several good characteristics of the complainant had contributed to the humiliation suffered by her. The appeal judge, however, did not specifically refer to this aspect. As indicated by the appellant's counsel, other factors, apart from the character of the complainant, deserve specific consideration in rape cases, and these are: the degree of violence used; the physical or psychological injuries of the complainant and the extent thereof; the age and mental state of the complainant; and premeditation on the part of the accused (PMA Hunt *South African Criminal Law and Procedure* vol 2 (1982) 414 and E Du Toit *Straf in Suid-Afrika* (1981) 228-229 referred to in *S v M supra* (n 132) at 590a).

from the sentence imposed by the trial judge as to warrant interference by the appeal court, and the sentence was thus reduced to seven years.

3.2.20 *S v N*¹³⁵

The accused was convicted of raping an eight-year-old girl, whom he overpowered in an open field. The child was very small and weighed only 18 kilograms. She sustained severe injuries. As a result of bleeding and shock, she died shortly afterwards at the scene of the crime. The trial judge found it to be a 'wrede aanval wat mens met weersin vervul'.¹³⁶

Two psychiatrists testified that the accused had 'n verminderde weerstandvermoë'. There was also expert evidence that he was a paedophile (which the trial court accepted) and could not resist abnormal urges the way ordinary people would be able to do. However, Rumph CJ found that the accused had displayed normal thought patterns:¹³⁷

'Appellant ... (se) vrywillige verklaring en 'n brief wat hy aan 'n kaptein Engelbrecht geskryf het (om sy gewete skoon te maak) toon dat hy heeltemaal normaal gedink het en ook dat hy wesentlik nie anders opgetree het as 'n verkragter wat 'n vrou op 'n eensame plek aanval, behalwe dat dit in hierdie geval 'n kind was en hy met brute geweld te kere gegaan het.'

It was accordingly found that the trial judge had not misdirect himself in finding that no mitigating circumstances existed, and the appeal against the death sentence was dismissed.

¹³⁵ 1979 (3) SA 308 (A).

¹³⁶ *S v N supra* (n 135) at 311g.

¹³⁷ *S v N supra* (n 135) at 312d.

3.2.21 *S v M en Andere*¹³⁸

Four accused were found guilty in the regional court of housebreaking with intent to rape, and of rape and theft. The counts were taken together for purposes of sentencing. Accused number one was 20 years old and was sentenced to seven cuts. Accused numbers two, three and four were sentenced to five years and four cuts. The age of the complainant is not clear from the record.

The high court confirmed the sentence and found the most aggravating factors to be the following:¹³⁹

- it was a gang-rape (all four raped the complainant successively while the others held her), causing humiliation in the highest degree;
- 'dit is 'n beesagtigheid wat in ons oordeel nog swaarder gestraf kon gewees het';
- the high incidence of rape in South Africa; and
- the fact that the accused broke into the complainant's house and assaulted her to such an extent that her teeth were loosened and lesions could be seen on her face.

3.2.22 *S v M*¹⁴⁰

The accused, a 21-year-old teacher was convicted of raping a 17-year-old pupil at a school picnic. The sentence of four years was confirmed on appeal and the argument of counsel for the appellant that too much weight had been attached to the seriousness of the crime was dismissed. Hofmeyer JA stated the following:

'It is important in my opinion, that the crime of rape, committed by a teacher upon one of the pupils entrusted to his care, should be severely punished, as a deterrent

¹³⁸ 1979 (4) SA 1044 (BH).

¹³⁹ *S v M en Andere supra* (n 138) at 1051e-f.

¹⁴⁰ 1975 (1) SA 424 (A).

and a warning to other persons similarly placed in positions of trust *vis-à-vis* young girls.¹⁴¹

3.2.23 *S v P*¹⁴²

The accused, a 20-year-old, married man, was convicted of raping a young married woman, aged 17. The incident took place on the banks of a river that formed the boundary between a ranch occupied by the appellant's father and a tribal trust area where the complainant lived. The appellant had a young child and no great violence was used. The appeal judge however dismissed the appeal against sentence:

'The sentence of two years imprisonment with hard labour is a light sentence for the crime of rape, and in my view takes sufficient account of all the mitigating circumstances mentioned. The sentence errs, if it errs at all, on the side of leniency.'¹⁴³

3.2.24 *S v V*¹⁴⁴

The appellant, aged 20 years, pleaded guilty to five counts of rape, four of attempted rape, *crimen iniuria* and theft. He pleaded not guilty to a charge of robbery. He was found guilty on all counts and the trial judge did not consider him to be a psychopath. The judge was satisfied on the evidence that the accused was an irresponsible young sexual criminal and nothing else, and indicated that he intended to deal with him as such.

With regard to the first count, the accused raped a 19-year-old virgin, whom he threatened at knifepoint in a dark, basement passage. He abandoned her there

¹⁴¹ *S v M supra* (n 140) at 425a.

¹⁴² 1974 (1) SA 581 (RAD).

¹⁴³ *S v P supra* (n 140) at 583e.

¹⁴⁴ 1972 (3) SA 611 (A).

and she found her way home, very upset and with blood all over her panties.¹⁴⁵ Apart from the first count, the tenth count was considered so serious as to warrant the ultimate penalty. A 14-year-old immigrant virgin was threatened with a screwdriver by the accused, who professed to have a revolver in his pocket that he would not hesitate to use. The accused did not care that the complainant was menstruating and used the same method of gagging her with a sock, tying her arms to the bed and then raping her. He used a pair of stockings with which to wipe himself afterwards.¹⁴⁶

All the victims were young, very attractive woman (some aged 20 and married with children) and seemed to have been selected by the accused. Except for the first count, he posed as an electrician and, in that way, gained access to the premises of the various victims, where the offences were committed.

The trial judge took an extremely grave view of the enormity of the offences and sentenced the accused to death, as he wished to 'protect the public'.¹⁴⁷ The applicant applied for leave to appeal against this sentence based *inter alia* on medical evidence as to the possible rehabilitative effect of brain surgery with his consent. The court of appeal examined his life history of rejection, institutions, dyslexia and conflict with the law,¹⁴⁸ and found a singular lack of enforced discipline.¹⁴⁹

¹⁴⁵ *S v V supra* (n 144) at 618b.

¹⁴⁶ *S v V supra* (n 144) at 619b.

¹⁴⁷ *S v V supra* (n 144) at 620h. Also per Jansen JA: 'On the question of the gravity of an offence, opinions may legitimately differ. Suffice it to say that, taken individually, worse cases of rape can well be imagined.' Thus, apart from the youth of the accused, the act of rape was seemingly graded in deciding on the appropriate sentence. See chapter 5 par 5.6 for a discussion of the grading process.

¹⁴⁸ See *S v V supra* (n 144) at 615h-616h.

¹⁴⁹ *S v V supra* (n 144) at 621e.

It was held that the trial court's finding that the applicant was an irresponsible young sexual criminal and nothing else, was a misdirection, as it dismissed any remedial and preventative effect of long-term imprisonment as only a 'remote' and 'problematic' possibility. It was because of this finding that the trial court had considered the risk to the public so grave as to exclude any sentence other than death and to make irrelevant any mitigating factor such as the youth of the offender.

It was held that the proposed new evidence would not appreciably affect the appeal court's discretion and it proceeded with the appeal immediately. The accused had, amongst his previous convictions for housebreaking and theft, one conviction for indecent assault and attempted rape committed earlier in the same year. On being confronted by his sister about the present case, the accused had admitted it. He had explained that he could not help himself as he was becoming very, very dangerous and would like to hand himself over.¹⁵⁰ The death sentence was set aside and was substituted with a sentence of 20 years' imprisonment.

'This would be commensurate with the enormity of the offences committed, not disregarding the safety of the public, and make due allowance for the appellant's youth. In regard to the appellant's rehabilitation, the proper authorities, being better equipped to deal with the problem, will no doubt take full cognisance of the matters mentioned in the affidavits filed with the application to lead further evidence.'¹⁵¹

In a concurring judgment, Holmes JA remarked on the severity of long-term imprisonment as follows:

'The law operates to protect women against outrage. As to that, if there be any who doubt whether a massive sentence of imprisonment for 20 years will not be a sufficient expiation for the gravely ill misdeeds of this youth, let them cast their

¹⁵⁰ *S v V supra* (n 144) at 617h.

¹⁵¹ *S v V supra* (n 144) at 623c. It is of interest that, today, the Department of Correctional Services is no longer regarded as suitable to deal with rehabilitation in sexual offence matters (Law Commission *op cit* (n 30)).

minds back in their own lives over that period, and consider how much has happened to them in those two decades, and how long ago it has seemed, although enlivened by domestic happiness and the free pursuit of their avocations. No such ameliorations attend the slow tread of years when you are locked up.¹⁵²

3.2.25 *S v D*¹⁵³

The accused was found guilty of incest in that he had engaged in carnal intercourse with his 14-year-old daughter. He was sentenced to six months' imprisonment and to six cuts. On appeal, the cuts were set aside, because, in terms of s 344*bis* of Act 56 of 1955, incest was not specifically included among the crimes for which cuts could be imposed. The term 'grave indecent act', it was held, referred only to conduct between men. The sentence of six months' imprisonment was confirmed. No further details are available about the surrounding circumstances of the offence or of the factors taken into account by the sentencing court.

3.2.26 *S v V*¹⁵⁴

The accused was convicted of raping a seven-year-old girl. He pleaded guilty and the state provided a summary of events that was confirmed by defence counsel.¹⁵⁵ The court however requested evidence to establish a proper factual basis for sentencing and to enable it to adopt an active approach in terms of its discretion.¹⁵⁶

¹⁵² *S v V supra* (n 144) at 614h. (Ogilvie Thompson CJ however dissented on the basis of the number of crimes and their premeditated nature, and on the basis of the degree of criminality consistently exhibited by the appellant over a considerable period.)

¹⁵³ 1972 (3) SA 202 (O).

¹⁵⁴ 1971 (2) SA 626 (E).

¹⁵⁵ Hofmeyer J was wise enough to realise that calling the complainant would merely cause her to relive the traumatic incident (*S v V supra* (n 154) at 629b).

¹⁵⁶ In terms of s 258(1)(a) of the previous Criminal Procedure Act of 1955.

'Dit is natuurlik ondenkbaar dat 'n Hoërhof ... 'n persoon sou vonnis sonder om ingelig te word aangaande die besonderhede waaronder die misdaad gepleeg is.¹⁵⁷

The accused had six previous convictions for sexual offences. Although these offences were of a less serious nature, they also involved young girls. The superintendent of Oranje Hospitaal vir Sielsiekes testified that the accused was a psychopath, but was able to control his conduct to a certain extent (notwithstanding the fact that such control may have been diminished),¹⁵⁸ although he would in all likelihood repeat the conduct. He was further convinced that the accused would be a continuing threat to society in the absence of being detained. A sentence of life imprisonment was therefore imposed.

3.3 SEXUAL CRIMES OTHER THAN RAPE

3.3.1 *S v O*¹⁵⁹

The accused had pleaded guilty to three charges of indecent assault and to one of attempted indecent assault on four boys between the ages of eight and twelve. The offences were committed during the period from 1983 to 2000. At the time of the trial, the accused was 40 years old, had no previous convictions, was unmarried and was a full-time gymnastics coach. While on tours, and in the course of coaching, he fondled the boys.

The state called a clinical social worker to testify as to aggravation, and she classified the accused as a paedophile in a 'high-risk' category who would in all probability never rehabilitate completely. She, however, recommended an initial period of incarceration and, on release, participation in a structured rehabilitation programme that would diminish the risk of recidivism.

¹⁵⁷ *S v V supra* (n 154) at 628a. Evidence was requested by the court and this illustrates the wide powers which the courts had in exercising their discretion in terms of s 258(1)(a) of the Criminal Procedure Act of 1955.

¹⁵⁸ *S v V supra* (n 154) at 629f.

None of the complainants was called and no evidence was led as to the physical injuries or psychological harm caused to the boys as a result of the accused's actions.

The magistrate emphasised the 'interests of the community' and sentenced the accused to two-and-a-half years' imprisonment on each of the three charges of indecent assault and to one year of imprisonment on the charge of attempted indecent assault. Cumulatively, the sentence amounted to eight-and-a-half years' imprisonment.

In an appeal against sentence, Thring J summarised relevant reported decisions since 1955 and pointed out that a sentence of more than two years' imprisonment had been imposed on only five occasions. In three of these cases, the facts were more serious than the present case and, in the others, the sentences had been pronounced in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977. Further, in four cases, three of which were Appellate Division cases, a sentence with no direct imprisonment had been imposed or confirmed.

The court held that it was true that there were no two cases where the facts and circumstances were precisely the same and indicated that each case had to be decided on its own merits. This, it stated, was especially true with regard to sentence. However, the decisions referred to in the present matter represented the collective wisdom of a long series of distinguished judges of different divisions and regions of South Africa who had handed down their judgments over a period of nearly 50 years. In addition, many of the cases were also decisions of the Appellate Division or of the Supreme Court of Appeal. Accordingly, they could not merely be wished away or be criticised as being a single decision that could

¹⁵⁹ 2003 (2) SACR 147 (C).

not be followed.¹⁶⁰ As a result, the magistrate in the court *a quo* was criticised for being completely out of line with the decisions concerned and for thereby creating a perception of inconsistency on the part of the courts.

The court further held that, despite comments that sexual assault cases involving children had been on the increase over the past few years,¹⁶¹ and that heavier sentences were required,¹⁶² it was not necessary to determine whether such cases were really on the increase or were merely a matter of increased reporting.¹⁶³ The court simply held that the nature, character and elements of the crime had not changed in the past 50 years, though the terminology might have been changed slightly by legislation.¹⁶⁴

The court further warned against giving in to public expectations in a civilised country and indicated that moral and professional courage were required. A presiding officer, it stated, had to be constantly vigilant against taking the easy way out by simply joining the ranks of the mob and imposing the sentence for which the crowd in the street was screaming. Instead, the court should properly consult its own calm judgement and experience. Thring J conceded that this did not mean that a court could completely ignore the wishes and expectations of the community, for these were clearly a relevant factor that a court would ordinarily take into account when imposing sentence.¹⁶⁵

¹⁶⁰ *S v O supra* (n 159) at 156f-h. See chapter 5 par 5.6 for further discussion on this point.

¹⁶¹ *S v L* 1998 (1) SACR 463 (SCA) at 257f.

¹⁶² *S v McMillan* 2003 (1) SACR 27 (SCA) at 134f.

¹⁶³ See chapter 5 par 5.6 (the 2nd part).

¹⁶⁴ It seems, however, that the judge did not take cognisance of the fact that both the community and the legislator are now viewing this type of offence in a more serious light.

¹⁶⁵ *S v O supra* (n 159) at 158f-g and 159a-c.

‘Wat ’n geregtelike amptenaar egter soos die plaag moet vermy is dat hy toelaat dat die publiek met sy krete vir bloed hom aan die neus lei. Howe moet eerder daarvoor streef om self die leiers van die openbare mening te wees.’¹⁶⁶

It was further held that the magistrate had misdirected himself in that he had overemphasised the element of retribution when sentencing the accused and had underemphasised the accused’s personal circumstances, including his chances of rehabilitation. Accordingly, the sentence imposed by the magistrate had been excessively harsh.¹⁶⁷

Aggravating factors taken into account by the high court were the following:

- the accused had abused his position of trust as a gymnastic coach and as an adult in whose care the parents had placed their children when the children occasionally toured to other parts of the country;
- the accused had indecently assaulted the children over a long period of time and had never taken any steps to seek help in order to cure or limit his unnatural sexual desires; and
- the accused had repeated his indecent conduct on many occasions.

The magistrate was also criticised for another misdirection, in that the mere possibility of psychological harm to the complainants had been taken into consideration as an aggravating factor. In fact, the prosecutor did not lead any evidence on harm and left it to the magistrate to call an available therapist of one of the boys, which option the magistrate then refused to exercise. It was held that the accused in this instance had to be sentenced on the factual basis

¹⁶⁶ The court referred to *S v Mhlakaza and Another* 1997(1) SACR 515 (SCA) at 518i-j. See also T Cloete ‘Sentence: Public expectations and reaction’ (2000) 117 *SALJ* 618 referring to the same case and attempting to answer the question of the court’s legitimacy in sentencing by standing between the individual and the mob.

¹⁶⁷ *S v O supra* (n 159) at 159f-g and 160f-161a.

that none of his victims had suffered any injury, or material prejudice or harm.¹⁶⁸ This was a mitigating effect, especially in the light of the presiding officer not having the expertise to generalise about the psychological impact of sexual offences.¹⁶⁹

'As die staat verswarende omstandighede van die aard wou bewys, het dit die staat natuurlik vrygestaan om die tersaaklike getuienis voor die hof te plaas. Die staat het verkies om nie so te doen nie. In plaas daarvan is die getuienis van die terapeut aan die landdros beskikbaar gemaak, maar hy het ook verkies om hierdie getuienis nie aan te hoor nie.'

The fact that there was no evidence of undue influence, threats or promises on the part of the appellant to influence the boys so that they would allow him to touch them also seems to have been taken into account by the high court as being mitigating.¹⁷⁰

The high court also found the accused's genuine remorse for his crimes to be a mitigating factor. In addition, what was considered to be even more of a mitigating factor was the clear and undisputed evidence that the accused had insight into his condition, namely that he was sexually attracted to young boys, had accepted that it was a deficiency on his part and wanted to be cured of it, if possible. He had even gone so far in his evidence as to state that he was prepared to remain in prison should it be necessary to attend a treatment programme there. That was telling evidence for the high court.¹⁷¹

¹⁶⁸ *S v O supra* (n 159) at 161f-162c.

¹⁶⁹ *S v O supra* (n 159) at 162b-c. The court referred to *S v Gerber* 2001 (1) SACR 621 (W) at 623j-624b.

¹⁷⁰ *S v O supra* (n 159) at 162d-e. The court quoted from *S v D* 1989 (4) SA 225 (C) at 229b to support its finding that there had been no force on the part of the accused in the present case: 'There was never any question of violence in the normal sense of the word. In the one case where the boy indicated that his advances were not welcome, he desisted.' See chapter 5 par 5.4.

¹⁷¹ *S v O supra* (n 159) at 162f-g.

In the view of the high court, the rehabilitation of the accused was the primary concern when the interests of the community were considered. Long-term imprisonment would naturally have satisfied the elements of retribution and deterrence, but, against these, had to be weighed the danger that the accused would be freed after eight-and-a-half years and would continue with his sexually deviant behaviour because his paedophilia had not been treated.¹⁷²

Although it had been within the discretion of the magistrate to impose separate periods of imprisonment in respect of each charge, the effect thereof was a very harsh, cumulative sentence – excessively harsh.¹⁷³ In the circumstances of the case, it was preferable to take all four charges together for the purposes of sentence. The sentence of the trial court was accordingly set aside and substituted with:

- 12 months' imprisonment, and
- three years' imprisonment suspended for five years on the following conditions:
 - that the accused not be found guilty of any sexual offence committed during the period of suspension;

¹⁷² *S v O supra* (n 159) at 164f-165b.

¹⁷³ *S v O supra* (n 159) at 165c-d. The court once again relied on the dictum from *S v D supra* (n 70), at 232h-j, where three charges were taken together for the purpose of sentencing, because 'all stem from the same course, namely the appellant's paedophilia ... and the modus operandi throughout was the same'. Munnik JP, at 230h-231c, found that the behaviour of the appellant was undoubtedly compulsive and compared it with that of the better-known alcoholic.

What is of further interest is that Thring J appears not to have understood the expert testimony that paedophilia would not be cured entirely, thereby doubting such evidence. It is clear that our courts are not educated about this condition and that training has to be provided regarding the condition of paedophilia in general, as well as regarding the potential harm that can be caused by a paedophile to his victim through his modus operandi. It is hoped that magistrates will then make use of an available witness who can testify to this fact.

- that, during the period of suspension, the accused not be involved in coaching any sports where any boy or girl younger than the age of 19 years would have contact with the accused;
- that, during the period of suspension, the accused not live in any accommodation where any boy or girl younger than the age of 19 years lived;
- that the accused report, within 14 days after being released from prison, to the Child Abuse Therapeutic and Training Service CC in Kenilworth;
- that, during the period of suspension, the accused subject himself to any psychotherapeutic programme for sexual offenders. 'Miss MP Londt or Dr A Jedhaar can determine the period and type of programme. He has to attend and participate to the satisfaction of the said Miss Londt as well as perform any assignment and undergo any prescribed therapy.'¹⁷⁴

3.3.2 *S v McMillan*¹⁷⁵

The accused was convicted on five counts of indecent assault. He indecently assaulted boys between nine and 12 years of age, one of whom was his stepson. He touched and rubbed their private parts on five separate occasions. No sodomy or physical injuries however occurred.

The accused was 32 years old, was a first offender and pleaded guilty. He was classified as a paedophile (suffering from a sexual deviance) and it transpired

¹⁷⁴ The court indicated that it hoped that the accused, who had been in Pollsmoor Prison for almost 12 months at the time of the appeal, had attended the in-house programme for sexual offenders, but was sceptical about this. In the court's view, no real statistics were available about the success rate of the programme and the programme was presented in group format once a week by four social workers, which, in its view, further contributed to doubts regarding its efficacy. See chapter 5 (n 130).

¹⁷⁵ *Supra* (n 162).

during the course of the evidence that he himself had been sexually molested by his stepbrothers as a child.

For the purpose of sentencing in the regional court, the counts were taken together and a sentence of 10 years' imprisonment was imposed. On appeal, this sentence was set aside and was replaced with a period of five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 55 of 1977, because the accused had already served almost four years. The court imposed conditions in order to enhance treatment and monitor the appellant's conduct outside prison.

In the appeal court's view, in determining a suitable punishment, it was not only the appellant's best interests which needed to be considered, but also, in the present case, the protection of young children, for whom the appellant in his unrehabilitated condition was a danger, as well as the seriousness of the crime. When these considerations were taken into account, the trial court could not be faulted for taking the view that direct imprisonment was the most appropriate sentence.¹⁷⁶

With regard to the term of imprisonment, it was held that the trial court could not be criticised for its obvious starting point that a short term of imprisonment would not be an appropriate sentence. The crimes of which the appellant had been convicted were undeniably serious. It was to be expected that the courts, through the sentences they imposed, should reflect the community's repugnance. Further, insofar as it was possible, the court should, in sentencing, prevent the recurrence of that type of conduct, either by the particular offender or by others.¹⁷⁷

¹⁷⁶ *S v McMillan supra* (n 162) at 33j-i.

¹⁷⁷ *S v McMillan supra* (n 17562) at 33j-34a and 34c.

It was also held that, in spite of a stricter approach by the community and the courts, the sentence was still too severe if compared with *inter alia S v R*.¹⁷⁸ Although it was true that each case had to be decided on its own facts and that sentences imposed in similar cases did not bind the sentencing officer's discretion, but rather provided guidelines for sentencing, there was an unmistakable consideration, namely that sentences be perceived as consistent. The interests of justice did not allow for the imposition of a sentence that was completely out of line with sentences in comparable cases.

Prior to sentence, a forensic criminologist testified on behalf of the accused and a probation officer testified on behalf of the state. Both, however, focused on the accused only and on his need for psychotherapy, but disagreed on the desirability of a prison sentence.¹⁷⁹ The specific nature of the crime and the circumstances and effect thereof on the boys were only incidentally referred to. This again illustrates how difficult it can be in the case of a plea of guilty to obtain information on the surrounding circumstances of the commission of the offence, and that the impact of the crime on victims is not accorded sufficient weight.

¹⁷⁸ 1995 (2) SACR 590 (A) as referred to in *S v McMillan supra* (n 17562) at 34d and 34d-f.

¹⁷⁹ The forensic criminologist's argument was that conditions outside prison were more conducive to psychotherapy than those inside. Brand JA (*S v McMillan supra* (n 162) at 33e-f) then referred to the different, and certainly more complex, role of the judicial officer as compared with that of experts from the psychological profession (as per the dictum in *S v Lister* 1993 (2) SACR 228 (A) at 232g-h). (See chapter 5 par 5.5.1.1 c).

It is twelve years since this dictum and, to a great extent, the legislature is compelling the judiciary to focus on rehabilitation as a main concern (ie once the Criminal Law (Sexual Offences) Amendment Bill 2003 comes into operation), yet, on the other hand, there are the promulgated minimum sentences for sexual offences. This further illustrates the hybrid approach to sentencing aims in South Africa. Rehabilitation programmes within special, secure units thus seem to be an urgent need in the Department of Correctional Services.

3.3.3 *S v Gerber*¹⁸⁰

The accused was convicted of indecent assault for sucking the private parts of his 10-year-old daughter. He was 30 years old, was a first offender and pleaded guilty.

No evidence was led to prove that the victim suffered from any psychological after-effects and the presiding officer rightly expressed his dilemma in this regard:

'n Hof beskik nie oor die nodige kundigheid om te veralgemeen oor die nagevolge, indien enige, vir 'n slagoffer in 'n saak soos die huidige nie.¹⁸¹

According to the social worker who testified, the appellant was not a suitable candidate for correctional supervision and this evidence was not challenged on appeal.

The magistrate commented on the seriousness of the crime and stated that 'onsedelike aanranding word in enige gemeenskap regoor die wêreld, nie net in Suid-Afrika, gesien as een van die mees ernstige misdrywe wat daar wel is'. In doing so, the magistrate referred to the community's outrage when the courts do not deal with such offences adequately.¹⁸² The regional court accordingly sentenced the accused to six years' imprisonment, of which two years were suspended.

¹⁸⁰ *Supra* (n 169).

¹⁸¹ *S v Gerber supra* (n 169) at 624a.

¹⁸² *S v Gerber supra* (n 169) at 624f-g.

The appeal was against sentence only and the court of appeal reminded itself of the difference between public expectation and public interest.¹⁸³ It was of the opinion that an appropriate sentence in this case was one of three years' imprisonment, of which one year should be suspended for five years. This sentence differed to such an extent from the sentence imposed by the court of first instance that interference was justified.

3.3.4 *S v Manamela*¹⁸⁴

The accused was referred to the high court for sentencing after conviction on two counts of rape of girls aged six and three years, the latter being the accused's own daughter. There was however insufficient medical evidence to indicate that there had been penetration. The accused was then convicted of contravening s 14(1)(b) of Act 23 of 57 after a finding that he had sought to gratify himself sexually, in some way other than intercourse, with his three-year-old daughter.

The accused had two children and had a previous conviction for rape. He showed no remorse and denied responsibility. He was sentenced to six years, the statutory maximum, which the court found not to be sufficient in the circumstances of a serious and repulsive crime as the present one. Further, the court found that the accused as a father had abused his position of trust towards a child of three years whom he had duty to protect. The abuse of young children, stated the court, was endemic in society and society looked to the courts to protect children against this type of abuse.

¹⁸³ *S v Gerber supra* (n 169) at 624h-i.

¹⁸⁴ 2000 (2) SACR 176 (W).

3.3.5 *S v L*¹⁸⁵

The accused was convicted of contravening s 14(1)(a) of Act 23 of 1957. He had had sexual intercourse on three occasions with the 13-year-old daughter of his mistress, after she (the mistress) had, according to his own explanation, refused his sexual advances. His actions became known only when the complainant became pregnant and gave birth to his child. He was a first offender and had an excellent employment record. The court had no further particulars at its disposal. Again, the prosecutor placed no evidence before the court as to the psychological impact of the crime, and the court requested a report from a probation officer regarding the victim.¹⁸⁶

The sentence of four years was confirmed on appeal. Although the appeal court found that it was a severe sentence, it was not convinced that it was excessively so in the circumstances. In present times, it stated, sexual molestation of children was a serious social problem causing uproar in the community.¹⁸⁷

3.3.6 *S v B*¹⁸⁸

The accused was convicted of six counts of attempted sodomy, attempted rape, indecent assault and assault of her son and of her daughter of four years. She was present when her husband attempted to sodomise their son, assaulted him when he screamed and also fondled and touched his private parts. She also approved of her husband's attempted rape of their daughter, assaulted her for the same reasons during the sexual assault and fondled the daughter by placing her fingers in her private parts. She was sentenced to an effective 16 years'

¹⁸⁵ *Supra* (n 161).

¹⁸⁶ *S v L supra* (n 161) at 467b-c.

¹⁸⁷ *S v L supra* (n 161) at 469h-i.

¹⁸⁸ 1996 (2) SACR 611 (O).

imprisonment. The magistrate referred the case for special review, because another court (after a separation of trials) had sentenced the husband to an effective 11 years only, which the review court then found to be too light a sentence. Despite the aim of consistency, the wife's sentence could thus not be matched to that of the husband.

The review court held that these offences were grave. Further, the court, it stated, had a duty to protect children from the monstrous and perverted behaviour of persons such as the accused, as well as to send a message to the community that this type of behaviour would not be tolerated. A long term of imprisonment was considered to be appropriate and the accused was sentenced to an effective term of 13 years' imprisonment.

3.3.7 *S v K*¹⁸⁹

The accused was convicted of seven counts of contravening s 14(1)(b) of Act 23 of 1957. He had committed indecent acts with boys under the age of 19 years, whom he enticed to his house. They were street children and the deeds were committed for payment. Both the defence (suggesting correctional supervision) and the state (suggesting imprisonment) called expert witnesses before sentence and the court emphasised that it was not bound to follow their opinion.¹⁹⁰

The accused, aged 54, was unmarried, had no dependants and had fixed, private employment. He was a homosexual who had three previous convictions for the same offence between 1981 and 1989.

¹⁸⁹ 1995 (2) SACR 555 (O).

¹⁹⁰ *S v K supra* (n 189) at 559b.

The sentence imposed was 18 months on each count, with six months in respect of each count to run concurrently, which meant an effective seven years of imprisonment. The sentence was confirmed on appeal and the appeal court found the accused to be a danger to society and one who should be removed for a considerable time. The appeal court took into account the fact that the boys with whom the deeds had been committed had begun to display deviant behaviour and that the appellant's behaviour had resulted in the boys committing the same deeds with one another.

3.3.8 *S v R*¹⁹¹

The accused was convicted of six counts of indecent assault. He had indecently assaulted boys aged between 11 and 13, and had watched them committing indecent acts with one another. He was a 25-year-old teacher, was a paedophile and had himself been sexually molested as a child.

The counts were taken together for sentencing and a sentence of five years was imposed, of which two years were suspended. The sentence was confirmed on appeal and the appeal court emphasised, as an aggravating factor, his abuse of his position of trust.

3.3.9 *S v D*¹⁹²

The accused was convicted of the offence of indecent assault. He had gratified himself between the complainant's legs. The complainant was an eight-year-old street child, and this was considered to be aggravating.

¹⁹¹ *Supra* (n 178).

¹⁹² 1995 (1) SACR 259 (A).

The accused, aged 37 years, was a first offender and was married with two children. He had been educated up to Standard 4 and was a taxi driver. However, since he had lost his employment as a result of the case, he only earned R720 per month.

The regional court imposed a sentence of six years, of which two years were suspended for five years. On appeal, this was replaced with a sentence of three years in terms of s 276(1)(i) of the Criminal Procedure Act 55 of 1977, with a further two years suspended for five years. The case was distinguished from *S v R*¹⁹³ on the facts. The appeal court indicated that the magistrate had not appeared to have attached sufficient weight to the offender's personal circumstances. The minority however believed correctional supervision to be an appropriate sentence, as opposed to imprisonment.

3.3.10 *S v S*¹⁹⁴

The accused was convicted of incest. He had twice had sexual intercourse with his 17-year-old daughter. The family circumstances were such that the whole family slept and performed its ablutions in one cramped room where privacy was impossible. The daughter disputed consent, but the trial court made a finding of incest and not rape. The appeal court however held that, even if the daughter's conduct been intentionally provocative (which the court doubted), this could not excuse the conduct on the part of a father. The accused further admitted that he had used the girl, who had been a virgin, simply as an outlet for his sexual inclinations, seemingly without any genuine affection for her. He also disapproved of the complainant having any male friends. He was an aggressive

¹⁹³ 1993 (1) SA 476 (A).

¹⁹⁴ 1995 (1) SACR 267 (A). It was pointed out that it is an extremely difficult task for the court to sentence in cases of incest. The appeal court sought guidance from a case in England and Wales, namely *Attorney-General's Reference No. 1 of 1989* [1989] 3 All ER 571 (CA). See, further, chapter 8 par 8.3.2.2.

person whom everyone feared, a heavy drinker and a smoker of dagga. His wife refused to share a bed with him because of these reasons. On the first occasion, the accused threatened the complainant by stating that he would repeat his conduct should she tell her mother. The court accepted that the complainant's withdrawn behaviour and wan appearance indicated the harm experienced by her.

The offender was 37 years old and a first offender with a steady employment record, despite the fact that he had a drinking problem. He did not show any remorse and attempted to shift all the moral blame onto his daughter. The accused's conduct amounted to an abuse of power and a betrayal of trust.

For sentencing purposes, the two counts were taken together and a sentence of three years was imposed in terms of s 276(1)(i) of the Criminal Procedure Act 55 of 1977, with a further two years suspended. The decision, focusing on the aim of deterrence, was confirmed on appeal by the majority, although the minority considered correctional supervision to be appropriate. It was further held that the offence of incest was serious and affected the family unit. An attempt to keep the family intact in the present case would merely increase the father's opportunities to repeat his conduct.

3.3.11 S v V¹⁹⁵

The appellant, a police constable, pleaded guilty to having committed immoral or indecent acts with a girl younger than 16 years, thereby contravening s 14(1)(b) of the Sexual Offences Act 23 of 1957. He had met a girl, aged 11, on her way home and, after walking with her for a while, had decided to go behind a shopping centre to make love.¹⁹⁶ He put his finger in her private parts and

¹⁹⁵ *Supra* (n 160).

¹⁹⁶ The accused conceded that he did not know her age, but that he foresaw the possibility that she was younger than 16 years.

started to insert his penis when he realised that she was still too young. He testified:

'Ons het gesels en nadat ons agter 'n winkel sentrum ingestap het, te wete by AVBOB, het ons besluit om te vry. Daar het ek toe nadat sy teenoor my kom staan het met my vinger in haar geslagsdeel gespeel en ek my privaatdeel binne haar geslagsdeel ingeplaas; oppervlakkig; nadat sy haar bene oopgemaak het en ek haar broekie weggetrek het. Ek het toe onmiddelik gevoel dat sy nog klein is en vir haar gesê ons moet dit los en dat sy moet huistoe loop. Daar is ek ook huistoe.¹⁹⁷

This was the only version of the events placed before the court, and there was no evidence as to whether or not there were strangers present. No evidence was presented before sentence. Defence counsel however addressed the court *inter alia* on the personal circumstances of the accused. He had nine years' service, was in his uniform when he committed the offence, and was married with three children. The sentence imposed in the regional court was five years' imprisonment, of which two years were suspended for five years.

The main argument on a second appeal to the Appellate Division was based on the magistrate's referral to the long-term effect of child sexual abuse, which the Appellate Division found to have been a misdirection. Grosskopf JA however disagreed and found that this was a generally known fact of which a court could take judicial notice, but that evidence was necessary for an inference of grievous harm in a specific case:¹⁹⁸

¹⁹⁷ *S v V supra* (n 160) at 599g-h. The accused made a statement in terms of s 112(2) of the Criminal Procedure Act 55 of 1977.

¹⁹⁸ *S v V supra* (n 160) at 600j. The magistrate acknowledged that no evidence had been presented on the impact of the indecent assault and did not accept grievous harm as an inevitable consequence in this case (*S v V supra* (n 160) at 600g). No harm, as some courts (eg *S v O supra* (n 159)) find in the absence of evidence in this regard, thus seems unjustified. It is of interest to note that the basis for the magistrate's belief was evidence in courts and publications in the media (*S v V supra* (n 160) at 600f).

'Vandag word algemeen aanvaar dat kindermolestering ernstige skade aan slagoffers daarvan kan berokken. Dit is om hierdie rede, onder meer, dat die publiek sulke dade verafsku en, trouens, dat wetgewing soos die waarmee ons tans te doen het, op die wetboek verskyn. Dit sou natuurlik verkeerd wees van die landdros om van die veralgemening dat sulke dade erg skadelik kan wees af te lei dat daar inderdaad in die onderhawige geval ernstige skade was ... Dit is vir my ook feitlik ondenkbaar as 'n saak van algemene waarskynlikheid dat 'n daad van hierdie aard, gepleeg deur 'n volwasse man op 'n elfjarige kind, geen psigiese skade of, minstens, beïnvloeding ten slegte, sou veroorsaak het nie.'

There was thus no misdirection. The last question that needed to be considered was whether the sentence was so severe as to indicate an unreasonable exercise of the magistrate's discretion. The sentence was indeed found to be severe, especially in the light of the maximum sentence of six years which could be imposed. The following aggravating factors were taken into account:

- the prevalence of the offence;¹⁹⁹
- the public abhorrence it elicited;
- the fact that the appellant was a constable whom the community should have been able to rely on for protection;
- the young age of the complainant;
- the nature of the specific conduct.

After careful consideration of all the factors, Grosskopf JA found that the sentence he would have imposed would not have differed so much as to justify a finding that the magistrate had not exercised his discretion judicially. The sentence was therefore not inappropriate. The possibility of correctional supervision in terms of s 276A(3) of the Criminal Procedure Act 51 of 1977, initiated by the Commissioner of Correctional Services, was however suggested.

¹⁹⁹ The magistrate furthermore rightfully took the prevalence of the offence into consideration as a fact, being aware of this from own experience. This is in contrast to *S v W* 1994 (1) SACR 610 (A) where newspapers were considered not to be a reliable source.

3.3.12 *S v W*²⁰⁰

The accused, who was 35 years of age and a first offender, pleaded guilty to two charges of indecent assault on his stepdaughter of seven years. As is typical in most cases of a plea of guilty, almost nothing was known about the circumstances of the crime, except what the accused told the court. Apparently, the girl was asleep on both occasions when he touched her indecently, although she did wake up the first time.

Unlike the situation in many other cases, the magistrate requested a probation officer's report focusing on the victim, and the office head of the Department of Health and Welfare submitted a 'psychosocial' report after giving evidence. The accused was unrepresented, did not dispute anything in the report and was sentenced on the contents of it. The standard of the report was, however, strongly criticised on appeal as being vague and ambiguous and as further containing an indefensible proposal, namely that unsuspended imprisonment would be the only appropriate sentence.²⁰¹ This, in turn, had led to the magistrate making two findings which were subsequently criticised as misdirections. The first finding related to the question of harm suffered by the victim in the absence of any direct or tested evidence regarding trauma or psychological harm. In addition, no causal connection was established between the trauma symptoms and the accused's conduct.²⁰² The second misdirection

²⁰⁰ *Supra* (n 199).

²⁰¹ *S v W supra* (n 199) at 611i-j. Olivier AJA referred to a statement in *S v M* 1991 (1) SACR (T) at 101e stating that the courts depend heavily on 'vakkundige hulp' to enable them to be objective and thorough, and to substantiate their findings. 'Uiteraard verskil die werksmetode van geesteswetenskappe onderling. Waar 'n vakkundige egter forensies optree, dit wil sê met die oog op getuienis of verslaglewering aan 'n geregshof, word dit van so 'n vakkundige verwag om darem die feitebeoordelingsmetode van 'n geregshof in gedagte te hou.'

²⁰² *S v W supra* (n 199) at 612c-i. Referring to reports from the school and clinical psychologist, the probation officer testified about the long-term impact of the crime: 'Dit is duidelik dat hier te make is met 'n kind wat geskaad is vir die res van haar lewe, veral gesien dat 'n diagnose gemaak is dat haar prognose te swak is vir psigoterapie.' This was described as vague in that it was not clear whose initial finding it was. Moreover, there was no clarity as to what exactly

related to the lack of remorse on the part of the accused, based on out-of-court conversations with his wife and the probation officer in which the accused denied guilt, thereby complicating the diagnostic evaluation. This finding had led the court to believe it to be impossible to consider treatment within the community. The magistrate had also simply assumed that the conversation had taken place after the plea procedure without any clarification, and had interpreted it to indicate the absence of any remorse.²⁰³

The magistrate was further criticised for not exercising his discretion properly in that he only considered direct imprisonment based on the probation officer's report and did not consider the disparity thereof in relation to sentences in other similar cases.²⁰⁴ In referring to the high prevalence of indecent assault in the area, the trial court also relied on an irregularly submitted, sensational page from the *Sunday Times*. Lastly, the magistrate had unfairly concluded that the accused had no psychological problems because he had not displayed any symptoms of confusion, inconsistency or uncertainty while in court.²⁰⁵

The punitive value of correctional supervision, as opposed to short-term imprisonment, was emphasised, as was the ideal of rehabilitation of the accused and the family within the family in this type of case.²⁰⁶ The sentence of 12

the long-term effect would be and why she displayed all the patterns of behaviour. It was said to be unfair to assume that the accused's conduct was the cause of it. It further seems that the probation officer gave profile or syndrome evidence about the symptoms associated with child sexual abuse trauma, which not all presiding officers are prepared to accept (at 612f). See chapter 4 par 4.5.11 and par 4.5.12 in this regard.

²⁰³ *S v W supra* (n 199) at 612j-613e. This was equated with a degree of moral indignation.

²⁰⁴ *S v W supra* (n 199) at 613g.

²⁰⁵ *S v W supra* (n 199) at 614a. It should once again be noted how the appeal court can take judicial notice of something – in this case, of the fact that the mere nature of the offence is indicative that the accused has psychological problems per se.

²⁰⁶ *S v W supra* (n 199) at 614d-e.

months' imprisonment was set aside and the case was referred back to the trial court for a new sentence after consideration of reports in terms of s 276(1)(a) of the Criminal Procedure Act 51 of 1977 and all other relevant evidence.

3.3.13 *S v R*²⁰⁷

The appellant pleaded guilty to contravening s 14(1)(b) of the Sexual Offences Act 23 of 1957 in that he had committed, at the age of 28 years, indecent acts with a 15-year-old boy by persuading the latter to engage in fondling and masturbation. The appellant had a previous conviction for the same crime committed barely four months before, for which he had received a sentence of a fine of R1 000 or six months' imprisonment, plus a further 18 months' imprisonment suspended for five years on condition *inter alia* that he undergo psychiatric treatment. The appellant had lost his job in the police force as a result of the conviction and was subsequently employed by a supermarket at a meagre salary. A probation officer prepared a pre-sentence report, wherein she expressed the opinion that the appellant's problem stemmed from personality defects and an accompanying drinking problem. He seemed, however, to have responded positively to the brief period of therapy after the previous appearance. The probation officer's recommendation was a totally suspended sentence, subject to the appellant continuing with the psychotherapy programme. The regional court however imposed a sentence of 18 months' imprisonment, against which sentence the appellant appealed to the Provisional Division, which amended the sentence by suspending half of it on condition that the appellant undergo psychiatric treatment.

In a further appeal against sentence, the Appellate Division considered the suitability of a sentence of correctional supervision in terms of s 276(1)(h) of the

²⁰⁷ *Supra* (n 193).

Criminal Procedure Act 51 of 1977. Defence counsel filed additional heads of argument and obtained a report from a correctional official. The appellant had gone for a psychiatric evaluation just before his first conviction and it was found that he was neither a homosexual nor a paedophile, but that he suffered from an inferiority complex which led to his inability to form sexual relationships with people of his own age, and that he used alcohol to bolster his ego. The correctional official was of the opinion that the appellant required a further three years of psychotherapy and that he should be subjected to a strict correctional regime entailing *inter alia* that he not use alcohol for three years and that he remain under house arrest outside of his working hours.

The Appellate Division found that it was justified in interfering with the sentence,²⁰⁸ for two reasons. The first was that the court *a quo* had misdirected itself as to the facts when it found, based on an assumption of harm caused to the boy, that the retributive aim of sentencing must be emphasised:

'Die klem deur vonnis moet verskuif van 'n herstrukturering en hulp aan die mens na straf in die eng sin van die woord, naamlik vergelding omdat hy so anti-sosiaal opgetree het en klaarblyklik skade aan die seun toegebring het. Ten spyte van die landdros se terloopse opmerking dat daar nie skade aan die seun toegebring is nie, was daar egter geen werklike sodanige getuienis waarop hy hierdie bevinding kon grond nie. Dit kom my voor dat enige seun van 15 jaar oud wat deur 'n ouer man seksueel gemolesteer word een of ander vorm van sielkundige skade moet ly, maar daar was ongelukkig geen psigiatriese dienste vir die seun aangebied of peiling gedoen op grond waarvan die Hof so 'n bevinding kon maak nie.'²⁰⁹

²⁰⁸ *S v R supra* (n 193) at 219f. The court referred to *S v Pillay* 1977 (4) 531 (A) at 535e-g for the test as to when it is lawful to interfere with sentence: 'As the essential inquiry in an appeal against sentence, however, is not whether the sentence was right or wrong, but whether the court in imposing it, exercised its discretion properly and judicially, a mere misdirection is not by itself sufficient to entitle the Appeal Court to interfere with the sentence; it must be of such a nature, degree, or seriousness that it shows, directly or inferentially, that the court did not exercise its discretion at all or exercised it improperly or unreasonably. Such misdirection is usually and conveniently termed one that vitiates the court's discretion on sentence.'

²⁰⁹ *S v R supra* (n 193) at 219g-h.

Secondly, the court *a quo* had further misdirected itself as to the interpretation of the opinion of the probation officer that the offender's personality shortcomings, and consequent behavioural deviations, necessitated intensive therapy by finding, nonetheless, that he was not a paedophile without any control over his sexual desires:

'Die getuienis is dat appellant nie 'n pedofiel is nie. Dit kom voor asof dit nie 'n onbeheerste drang by hom is om seuns seksueel te molesteer nie. Hy het, al is dit dan beperk, nogtans beheer daaroor, en volgens die proefbeampte, verg dit slegs groter inspanning en karakter om homself van hierdie soort van gedrag te weerhou.'²¹⁰

The Appeal Court found substantial misdirection and accorded substantial weight to the evidence of the probation officer:

'Dit is met eerbied, 'n miskiening van die kern van die proefbeampte se mening, naamlik dat appellant se karakter ontoereikend is, en 'n verontagsaming van die wese van haar aanbeveling dat langdurige terapie ondergaan moet word juis om die gebreke aan te vul. Ook in die geval van die onderhawige mistasting blyk dit dus dat die hof a quo se besluit dat gevangenisstraf aangewese is, uitgaan van 'n wanvertolking van die getuienis.'²¹¹

The court held that it was empowered to impose a sentence of correctional supervision, despite the fact that the offence had been committed before the coming into operation of s 276(1)(h) of the Criminal Procedure Act 51 of 1977.²¹² What is of importance is that the Appeal Court in this case followed a contextual approach by taking notice of the new phase introduced by the legislature, that is, the introduction of the new sentencing option of correctional supervision. This, in the court's view, was a new phase in punishment that indicated a shift in

²¹⁰ *S v R supra* (n 193) at 220c.

²¹¹ *S v R supra* (n 193) at 220d.

²¹² *S v R supra* (n 193) at 218j. The court referred to *Prokureur-generaal, Noord-Kaap v Hart* 1990 (1) SA 49 (A) at 55c-f as authority for a sentencing option 'synde straftemperend, in beginsel terugwerkend'.

emphasis from imprisonment to rehabilitation.²¹³ The legislature had clearly distinguished between two types of offenders, namely those who ought to be removed from society by means of imprisonment, and those who, although deserving of punishment, should not be so removed from society. Furthermore, stated the court, sentencing, be it rehabilitative or, if needs be, highly punitive in nature, was not necessarily or even primarily attainable by means of imprisonment. Correctional supervision further presented the opportunity of imposing finely tuned sentences without resorting to imprisonment with all its known disadvantages for both prisoner²¹⁴ and the broader community. A wide variety of measures could be applied outside of prison and it would be left to the sentencing officer to give content and form to the concepts of monitoring, community service, house arrest, placement in employment and any other form of treatment, monitoring or supervision.

The court held that correctional supervision was a particularly appropriate sentence in the present case in the light of *inter alia* the following factors: at the age of 32, the appellant was still relatively young, had strong family ties and a sound work pattern; his criminality had its origin in his personality defects, which responded favourably to therapy; and imprisonment would have a negative

²¹³ *S v R supra* (n 193) at 220i-j.

²¹⁴ Of interest is the fact that this judgment was pre-constitutional. Kriegler AJA commented on the undesirability of imprisonment for the offender owing to personal factors: 'Appellant het 'n gediagnoseerde persoonlikheidsgebrek wat manifester in homoseksuele neigings. Om hom met sy *verdagte seksuele oriëntering* maandelank in 'n uitsluitlik manlike omgewing af te sonder sou slegs as laaste uitweg die gekose vergeldings- en persoonlike afskrikkingsmiddel wees' (at 222b) (own italics). Eleven years later, Bertelsman J again voiced concern about the undesirability of imprisonment (although in a different context), and about possible unconstitutionality because of prison conditions, and suggested that one option would be to further develop correctional supervision to address the crisis in South Africa ('Future developments' Unpublished Paper ARMSA and Department of Criminal and Procedural Law UNISA Symposium *The Impact of the Bill of Rights on the Criminal Justice System: 1994 – 2004* 22 March 2004 Pretoria). Ten years after this case, SS Terblanche still shared the same enthusiasm as Kriegler AJA for correctional supervision as a sentencing option (Paper 'Correctional supervision' Law Teacher's Conference, Grahamstown, January 2002).

impact on these defects and would interrupt the therapy.²¹⁵ The court was further of the opinion that the offence was a serious one,²¹⁶ and one that was on the increase, and that the recent previous conviction should be considered as an aggravating factor. However, mitigating factors also played a role, namely that the victim was not a defenceless child, but a boy of 15 for whom masturbation was probably no shocking revelation, and that there was also no question of an assault having occurred. The sentence should further emphasise remedial treatment rather than retribution. The appeal was therefore upheld, the sentence was set aside and the case was referred back to the trial court for the imposition of a sentence of correctional supervision in terms of s 276(1)(h) of Act 51 of 1977.²¹⁷

3.3.14 *S v Ndaba*²¹⁸

The accused was a teacher, aged 28, who, under false pretences, asked a girl of nine years, who was playing with a friend during the lunch-break at school, to accompany him to his classroom at a neighbouring school. He inserted something into her vagina while she was bending over, gave her R1,20 when done, and sent her home. On reporting the incident to her family, family members gave him 'n drag slae' and took him to the police. Owing to a lack of

²¹⁵ Defence counsel addressed the court extensively on the suitability of correctional supervision at 214-215, referring to LP Carney *Introduction to Correctional Science* 2nd ed (1979) 372; R Morris 'Creative alternatives to prison' (Quaker's Committee on Goals and Justice, Toronto).

²¹⁶ *S v R supra* (n 193) at 220g: 'Hier was bepaald 'n ernstige vergryp teen openbare sedenorme, 'n vergryp wat deur die wetgewer so ernstig beskou word dat art 22(f) van die Wet 23 van 1957 'n maksimum vonnis van ses jaar gevangenisstraf en 'n boete van R120 000 daarvoor voorskryf.'

²¹⁷ It is of interest to note that the appeal court acknowledged the lack of authority to make an order concerning the suspended sentence. However, it indicated that it trusted that the trial court would use 'gesonde oordeel' and stated that the effectiveness of correctional supervision would be erased by putting the suspended sentence into operation (at 188j).

²¹⁸ 1993 (1) SACR 637 (A).

evidence, he was convicted only of indecent assault in the regional court and was sentenced to six years' imprisonment, of which two years were suspended for five years. The sentence was confirmed by the high court on appeal and the accused further appealed to the Appellate Division.

Although the appellant appeared intelligent and was the breadwinner for his wife and child, a psychologist testified on his behalf that he was a regressive paedophile who was emotionally immature, unstable, hypersensitive and excessively submissive and weak.²¹⁹ The expert suggested long-term therapy and predicted a good prognosis. However, the expert doubted the availability of the envisaged treatment programme in prison and opined that the accused would reoffend in the absence of treatment. Both the accused and his wife also testified in mitigation. The state did not dispute any of this evidence under cross-examination, nor did it call any witnesses to testify to the contrary.

Kriegler AJA found that the accused's conduct was 'n eenmalige en kortstondige vegryp, sonder enige geweld, deur 'n jong eerste oortreder, onder aandrif van 'n sieklike drang'.²²⁰ Unlike the trial court and the court *a quo*, the appeal court disagreed that the expert had focused unduly on the accused and had negated the seriousness of his behaviour. The appeal court also held that there had been very little harm done to the victim, yet it is not clear on what basis this finding was made.²²¹ The accused was referred back to the regional court for imposition of correctional supervision, since the condition of the accused was either curable or controllable and a suspended sentence was not appropriate. The magistrate

²¹⁹ *S v Ndaba supra* (218) at 639.

²²⁰ *S v Ndaba supra* (218) at 640.

²²¹ *Ibid.*

had to determine all the components of correctional supervision, yet could leave the detail to the correctional officer.

3.3.15 *S v V*²²²

The appellant was convicted of contravening s 14(1)(b) of the Sexual Offences Act 23 of 1957 and was sentenced to three years' correctional supervision. The appellant had committed indecent acts with his stepdaughter over a period of seven years, from the time that she was five years old. His wife discovered his conduct one night. They were in the living room and he thought his wife was asleep. He asked the girl to touch and rub his penis; she refused and he then ordered her to do it and put her hand in his pants. The wife reported the matter to the police.

The appellant, aged 30, was a first offender, had three adopted children and one of his own, and had a stable work record. The fact that he pleaded guilty was interpreted as a sign of remorse. Despite the fact that he had never sought help before the case, it was accepted by the court that the appellant had only then realised his need for treatment and that he was willing to undergo it.²²³

The benefits of correctional supervision would be that the appellant could keep his job and thereby provide for his family, and could undergo psychological treatment and marriage counselling, thereby possibly saving the marriage. In this way, family therapy could take place and the complainant could be helped.²²⁴

²²² 1993 (1) SACR 736 (O).

²²³ Once again the sudden insight regarding the need to rehabilitate in the face of a possible prison sentence seems questionable to the author.

²²⁴ *S v V supra* (n 222) at 738a. Although objective recognition was given to the fact that the victim would need help, this is another example of the victim's version not being recognised and of no evidence on harm being tendered or asked for.

The high court confirmed the imposition of the maximum period of correctional supervision, as opposed to a suspended sentence. It was deemed a serious offence in view of the lengthy duration thereof and the fact that the victim was a defenceless young girl:

'Ek is van mening dat hierdie 'n geval is waar 'n substansiele periode van verpligte gevangenisstraf ook gepas sou gewees het. ... In die onderhawige saak staan die vergeldingsvereiste nie weens enige vorige vonnis op die voorgrond nie maar weens die langdurige pleging en voortsetting van die misdaad teen 'n klein weerlose dogtertjie wat volgens alle beskaafde norme geregtig was op beskerming en nie op uitbuiting en misbruik deur haar stiefvader nie.²²⁵

Despite the fact that reports by both a correctional officer and probation officer were submitted and that the latter testified, no recommendations were made regarding the specific provisions of the correctional supervision. The matter was simply referred back to the magistrate to describe the regime under which the correctional supervision was to be served.

3.3.16 S v E²²⁶

The appellant was convicted of 10 counts of immoral or indecent acts in contravention of s 14(1)(b) of the Sexual Offences Act 23 of 1957, as well as one count of contravening the Indecent or Obscene Photographic Matter Act 37 of 1967. He was a compiler and organiser of musical programmes at the SABC who had invited boys between the ages of 14 and 17 to his home where he would offer them alcohol, show them pornographic videos and then indulge in masturbation with them. The offences were committed between 1983 and 1988, with the accused being 35 at the outset thereof.

²²⁵ S v V *supra* (n 222) at 738e and 738i.

²²⁶ 1992 (2) SACR 625 (A).

The regional court magistrate found that, in spite of the mitigating factors and the appellant's urgent need for non-custodial treatment, a short-term prison sentence was called for, as nothing less would be a sufficient deterrent to others.²²⁷ The 10 counts were taken together for sentencing purposes and the appellant was sentenced to four years' imprisonment, of which three years and six months were conditionally suspended. An appeal and cross-appeal to the Witwatersrand Local Division were unsuccessful.

In the Appellate Division, Howie AJA found that the magistrate had misdirected himself in relation to the question of compulsion by finding that the appellant did have control over his attraction to boys and that this problem could not be likened to an illness.²²⁸ This finding it found to be in conflict with the expert witness's testimony (a clinical psychologist) who had diagnosed the appellant as 'innately homosexual and a paedophile having sexual urges causing conflict with the law which he was unable to control'.²²⁹

'... appellant was unable to resist seeking sexual contact with boys. The existence of that inability is strongly consistent with the frequency and persistence with which appellant's sexual contact with the appellants recurred. The fact that there was no evidence to show that appellant had indulged in similar conduct subsequent to his arrest ... conveys ... that appellant appeared to have abstained from sexual contact. His problem, as the evidence showed, was that when he sought sexual contact his tendencies compelled him to obtain satisfaction with boys.'²³⁰

A further misdirection was the finding of a good prognosis, after commencement of psychotherapy by the appellant, based on hearsay evidence by the community

²²⁷ *S v E supra* (n 226) at 629i.

²²⁸ *S v E supra* (n 226) at 630e. The magistrate was however also lauded for balance, careful consideration of the issues and sympathetic concern for the conflicting interests of the offender and the community in this *awkward and worrisome case* (own italics).

²²⁹ *S v E supra* (n 226) at 628a.

²³⁰ *S v E supra* (n 226) at 630f-g.

service coordinator of NICRO.²³¹ The magistrate's misdirections had led him to find aggravation where he should in fact have found mitigation, and this, in turn, had influenced his assessment of the offender and the nature of his crimes.²³² The magistrate had also erred in giving insufficient weight, not only to the prospect that direct imprisonment would lead to the appellant losing his job, but also to the expert evidence that direct imprisonment was contra-indicated having regard to the appellant's attributes and particular personality.²³³ The Appellate Division was thus entitled to impose sentence afresh.

The following aggravating factors were found:²³⁴

- the appellant was a mature adult and was aware that his sexual predilection led him to unlawful behaviour, yet he did not take steps over the years to obtain professional help;
- the offences were not committed in situations of sudden temptation – the climate for their commission was deliberately engineered;
- the appellant had told one of the complainants not to assist the police;
- the appellant had abused the reliance placed on him by one of the complainants whose music career he had promised to advance; and
- the appellant employed pornographic films to arouse the complainants sexually.

The following mitigating factors were found:²³⁵

²³¹ *S v E supra* (n 226) at 629i. It should be noted that the accused pleaded guilty and did not testify, but called four witnesses, while the state called three witnesses and five of the complainants.

²³² *Ibid.*

²³³ *S v E supra* (n 226) at 631a.

²³⁴ *S v E supra* (n 226) at 631d-f.

²³⁵ *S v E supra* (n 226) at 632a. It is of interest to note that the court also listed factors that had been argued to be extenuating, but which the evidence showed to be of neutral effect.

- no previous convictions;
- the victims were late adolescents and were less vulnerable than far younger boys;
- the appellant's susceptibility to compulsion;
- the appellant's personal qualities; and
- the appellant's impressive employment history.

The sentence was set aside and the matter was referred back to the trial court for the imposition of correctional supervision as an appropriate sentence, as this form of sentence was not available during the initial sentencing procedures. In this way, the appellant could be punished and rehabilitated within the community.²³⁶ The court noted that

'... the primary need in this type of case ... is, to my mind, where at all reasonably feasible, to try first and foremost to achieve, in the long term interests of society, the offender's rehabilitation.'²³⁷

Among other things, the court referred to the fact that the complainants had not suffered adversely. This was, the court held, purely coincidental and not a result of any precaution or consideration on the appellant's part. Moreover, the court found that the expert testifying on the after-effects of the crime had not made a good impression. Accordingly, it found such evidence wanting and rejected it as being contradictory. A further factor mentioned related to the argument that the complainants were willing and consenting parties. However, both the trial court and the Appellate Division emphasised that the relevant statutory provision was there specifically 'to protect minors from their inherent impressionability and gullibility and their lack of judgment and control' (at 631i). The fact that the minors had acted as the legislature expected them to was, it was held, no mitigating circumstance. Further, in the light of the nature of the offence, the absence of violence or coercion was not mitigating – the presence thereof would, however, have been aggravating.

²³⁶ *S v E supra* (n 226) at 633a.

²³⁷ *S v E supra* (n 226) at 632c. It is of interest to note that the clinical psychologist, on behalf of the accused, estimated the success rate of treatment to be roughly 65 percent, which treatment would entail psychotherapy aimed at subliming his sexual needs and diverting him to lawful sexual behaviour. In contrast to this, it was testified 11 years later in *S v O supra* (n 159) that a complete cure was almost impossible.

3.3.17 *S v V*²³⁸

The accused, aged 43, offered to give his slightly retarded 11-year-old cousin a lift, with her mother's consent, to a house around the corner where her father was visiting. Instead, he drove off to a remote, dark spot, switched off the car's lights, got out to urinate, got back into the car and took off both the girl's panties and his own trousers. He performed the sexual act between the girl's legs and stopped when other family members drove past. The regional court convicted him of attempted rape and sentenced him to seven years' imprisonment, with two years suspended conditionally. On appeal, the conviction was altered to one of indecent assault and the sentence imposed was changed to three years' imprisonment, of which 18 months' imprisonment was suspended for five years on condition that the appellant was not again convicted, during the period of suspension, of rape, a contravention of s 14(1) of the Sexual Offences Act 23 of 1957, indecent assault or an attempt to commit one of these offences.

The following factors were taken into account in considering the appropriate sentence:

- the complainant had played no part in the commission of the offence and was obviously an innocent, passive object upon whom the appellant wished to satisfy his lust;²³⁹

²³⁸ 1991 (1) SACR 59 (T).

²³⁹ *S v V supra* (n 238) at 67d-e. It is of interest and concern to note that Kriegler J made this finding after having been referred to another 'similar' case – *S v Vermaak* (case no A1221/89) – by the defence as a guideline in deciding on the appropriate sentence (at 67b-c), in respect of which he stated the following: 'Ek weet ook uit die bestudering van die uitpraak dat dit 'n geval was wat hemelsbreed van die onderhawige verskil. Daar was dit die geval van 'n 60-jarige oupa wat oor 'n langdurige tydperk met 'n Lolita-agtige kleindogter van hom in noue aanraking was en uiteindelik geswig het voor die kind se seksuele of kwasi-seksuele uitlokkings. Hy het haar nie met sy penis probeer penetreer nie, maar wel, volgens die getuienis, met sy vinger in haar skaamdeel gepeuter.' That a child can actually 'seduce' an adult and play a role in a case of indecent assault seems a disturbing point of view to hold. It is also interesting to note how literature can play a role in creating a perception, which then becomes the basis of a bias influencing the way a witness may be categorised. See KD Muller and IA van der Merwe 'Judicial bias: Towards a contextual approach' in *The Judicial Officer and the Child Witness* at (2002) 203 discussing the stereotyping of child witnesses.

- the appellant had taken the child from her parental home at night to a lonely spot where he had sexually molested her, thereby breaching the position of trust placed in him by his own cousin and her parents – the distance he travelled and him getting in and out of the car also indicated a measure of planning;
- the community's abhorrence of the sexual molestation of children had been repeatedly emphasised in court judgments;²⁴⁰
- the appellant's offence was so reprehensible that the element of retribution had indeed to play a part, in that the complainant family's reasonable expectations had to be taken into account;
- others, apart from the appellant himself, had to be deterred, by way of a stiff sentence, from the commission of similar offences;
- the appellant was no longer married and had no dependants;
- that it would be difficult for a 43-year-old man to adjust to prison life, but that the element of mercy could not be taken too far:

'... ons kan nie toelaat dat die genade-element tot soetsappige insiklikheid gereduseer word nie.'²⁴¹

3.3.18 *S v V*²⁴²

The appellant, aged 37 years, was convicted of nine contraventions of s 14(1)(b) of the Sexual Offences Act 23 of 1957 and was sentenced to five years'

²⁴⁰ *S v V supra* (n 238) at 67h. It is once again obvious that Kriegler J had a very cautious approach based on personal opinion: 'Dit is so dat daar in die afgelope jaar of twee-drie, aansienlike openbare belangstelling in die onderwerp van seksuele molestering van kinders was. Dit is ongelukkig so dat 'n aangeleentheid wat 'n *cause célèbre* geword het, geneig is om die gesonde oordeel op die agtergrond te stoot.' It is not clear why he made this remark; was it because he wanted to warn himself not to overreact under pressure? He however went on to state: 'Ewewigtig beskou, in die helder daglig, is en bly wat die appellant hier gedoen het so laakbaar ...'. In *S v N infra* (n 324), the judge prided himself on being calm and unemotional.

²⁴¹ *S v V supra* (n 238) at 68b.

²⁴² 1991 (1) SACR 68 (E).

imprisonment, of which two were suspended. He submitted a written plea of guilty and both the state and defence led evidence with regard to sentence.

The appellant was a married man with two children of his own and was in steady employment in a responsible position. The victims were all boys between the ages of seven and 12 years. They were invited to spend nights or weekends at the appellant's home, always after prior arrangement had been made with their parents. The wife of the appellant testified that they provided a fun-filled environment and gave the children a lot of love and affection.²⁴³ The indecent conduct occurred late at night when the children were in bed. There was no sodomy or attempted sodomy involved in the acts committed by the appellant, and there was also no suggestion of any violence or physical harm to any of the boys.

The boys' parents all testified that they had observed certain behavioural changes in their children during the year prior to the appellant's arrest. Examples of such changes referred to by various parents included antisocial behaviour, a lack of interest, introversion, reduced sporting activity, reduced academic performance, disobedience, loss of confidence and concentration, bedwetting and aggressiveness.²⁴⁴

One of the boy's parents reported sleep-walking and talking and a mild deterioration in the boy's conduct over the previous six to nine months. A specialist psychiatrist, who had consulted with two of the boys, testified that, in the case of the first boy, aged 11 years, he had found no 'overt psychopathology',²⁴⁵ and that, in the case of the second, aged seven years, he

²⁴³ *S v V supra* (n 242) at 71c.

²⁴⁴ *S v V supra* (n 242) at 71f.

²⁴⁵ *S v V supra* (n 242) at 71a.

had found no behavioural or emotional disturbances.²⁴⁶ The father of the second boy testified that, since the appellant's arrest, and presumably after the consultation with the psychiatrist, the boy seemed to have lost interest in social and sporting activities and had a new, introverted personality.²⁴⁷ The expert witness further testified that the long-term prognosis was good in both cases and that no additional psychiatric treatment was necessary.²⁴⁸

On appeal against sentence, the court held that the evidence did not establish that the behavioural changes alleged by the parents were caused by the appellant's conduct, and took judicial notice of child development:

'It is almost impossible to determine to what extent their association with the appellant is responsible for any of these behavioural and personality changes in each of the complainants. No doubt, the parents, very understandably, are convinced that they were entirely due to the appellant's conduct. Such conviction on their part, no matter how strong such conviction might be, is not, however, sufficient proof thereof in deciding what the appellant's punishment should be. Behavioural and personality patterns in children are not absolute and immutable, and it is *common knowledge* that there are such changes during the normal growing-up process, whether this is due to approaching puberty or not. If I were one of the parents, I would no doubt feel as they do, but a judicial officer must be satisfied that the evidence establishes that appellant's conduct caused the said changes before that factor can be taken into account as an aggravating feature in the passing of sentence.'²⁴⁹

²⁴⁶ *S v V supra* (n 242) at 71c.

²⁴⁷ The expert witness was not asked to comment on this and Mullins J found it 'unfortunate' (in the light of the expert evidence) that the state had relied solely on the lay evidence of the parents in regard to the other complainants (*S v V supra* (n 242) at 71d).

²⁴⁸ The psychiatrist conceded that many other factors are involved in a person's development, and the father of the first boy conceded that the behavioural changes could be due to the growing-up process.

²⁴⁹ *S v V supra* (n 242) at 71h-i (own italics). It is submitted that judicial notice of child development can be very dangerous in the absence of expert evidence and personal examination of the child. If one looks at the holistic picture, where all the boys had shown a change in behaviour during the same period, it is suggested that this in itself justifies a finding of a causal connection between the appellant's conduct and the after-effects displayed by the boys. Compare *S v Abrahams* (n 31) and chapter 5 par 5.3.3.1.

In considering sentence, the magistrate referred to the after-effects of the crime on the victims:

'Then there is the damage caused to the victims which I have to consider. Taking into account their tender ages and the nature of the assault, I have heard that the long time prognosis in respect of the two boys treated by Dr Woods is good and indicate that they require no further psychiatric treatment. It is only to be hoped that the other boys will also be treated in time and that their parents be counselled on supportive management in the sexual education of their sons.'²⁵⁰

The appeal court reacted in a way that suggested that the harm caused to the other boys was a matter of speculation:

'This appears to suggest that treatment for a condition caused by the appellant is necessary in the case of the other seven complainants, a finding which in my view is not satisfactorily proved by evidence of the parents alone.'²⁵¹

The appellant had not testified and the court had no information as to the reason for his conduct:

'... the cause of the appellant's departure from the norms of sexual behaviour and his reasons for seeking gratification with the help of young boys remains unknown. As far as is known in all other respects the appellant appears to be normal, both physically and mentally.'²⁵²

The offence of sexual molestation of children was said to be generally condemned:

²⁵⁰ *S v V supra* (n 242) at 71e.

²⁵¹ *S v V supra* (n 242) at 71f.

²⁵² *S v V supra* (n 242) at 72j. The court found itself in the position of having to pronounce on normality.

'It (child abuse) remains an offence which not only the legislature but the public at large abhors and condemns ... Children must ... be protected against those who seek to use them as a vehicle for their sexual urges and desires.'²⁵³

It was found that the offences in question were not the most serious of those encompassed by s 14 of the Sexual Offences Act 23 of 1957. In striving for consistency, the court compared the sentence with that in *S v D*²⁵⁴ and reached the conclusion that a striking disparity had occurred between the sentence imposed and that which the high court would have imposed.²⁵⁵ A new sentence of four years' imprisonment was imposed, of which two-and-a-half years were suspended for five years on condition that the appellant did not contravene s 14(1) of Act 23 of 1957. Further psychiatric treatment did not form part of the conditions.²⁵⁶

3.3.19 *S v N*²⁵⁷

The appellant's wife had a day-care centre and the accused targeted two six-year-old girls over a period of two months in order to satisfy his sexual desire. He was convicted of two counts of attempted rape relating to incidents where he

²⁵³ *S v V supra* (n 242) at 72i. The question is what role can sex education in schools and compulsory classes on parenting play? The court also referred to the fact that child abuse in various forms appeared to be becoming more and more prevalent, but immediately continued by attributing this to an increase in detection rather than to an increase in the crime. It was further doubted whether there was a basis for accepting its prevalence throughout the country.

²⁵⁴ *Supra* (n 170).

²⁵⁵ This would indicate that the magistrate had erred in his quantitative assessment of the relative importance of the various relevant factors – *S v V supra* (n 242) at 72g.

²⁵⁶ *S v V supra* (n 242) at 74b. It is of interest to note how the appeal court can assume certain things without there being a factual basis, for example the assumption that the appellant was receiving treatment in prison, that this would continue until his release, and that it would be effective. This seems to be a case where very little was known about the appellant, about the cause of his conduct and about the possible risk he posed to society on his release.

²⁵⁷ 1991 (1) SACR 271 (C).

had attempted to insert his penis into their private parts.²⁵⁸ He stopped in both instances, because the one child complained that it was sore and the other threatened to tell someone about it. He was further convicted of two counts of indecent assault which related to the fondling of the same girls' private parts. He was sentenced to an effective eight years' imprisonment.

Both mothers testified that none of the children had received any psychological treatment. The first girl had since gone to boarding school where she had been performing well. Her mother gave the girl love and attention and was of the opinion that she had coped well with the sexual incidents. The second girl's mother testified that she had not displayed any visible emotional or psychological problems, despite the fact that she seemed afraid of all males. The court thus refused to make a finding of serious or long-term harm to the complainants.²⁵⁹

The accused himself testified, and a clinical psychologist testified on his behalf. After eight consultations (four in the presence of the accused's wife), the psychologist testified about his very limited intellectual capacity and poor communication skills. Imprisonment would not only cause the family's disintegration, but the accused himself would disintegrate psychologically. She recommended 12 to 14 months of psychotherapy outside prison. She did however indicate the prognosis and the future risk he would pose to children.²⁶⁰

²⁵⁸ It is of interest to note the language of the judge in substantiating that the sentence imposed was excessive and out of proportion to the seriousness of the matter: 'Die voorval het bestaan uit een enkele poging deur die appellant om sy penis in die privaatdeel van die klaagstertjie in te druk, wat laat vaar is toe sy gesê het dat sy seerkry.'

²⁵⁹ *S v N supra* (n 257) at 274b-c (see chapter 5 par 5.3.3.2 b, text of (n 38), for the quotation from the case). The testimony of the mother also illustrates the difficulty encountered by family members in determining the impact of sexual offences on their own children.

²⁶⁰ *S v N supra* (n 257) at 274e-f. He and his wife however already had separate bedrooms. In addition, it is also to be doubted whether, in the light of his low intellect, he would respond favourably to treatment.

The appellant's personal circumstances were emphasised. He was 45 years of age, had been married for 24 years and had three children. He had worked for 29 years for the same employer (with only three days off sick) and had an exemplary employment record.

On appeal, the court remarked that it had to be emphasised that this type of offence should never be approached as a stereotyped crime and that the personal circumstances of the offender, in the case of such offences, who was often a first offender, and the desirability of, or necessity for, psychotherapy for his rehabilitation should never be underemphasised. The judicial officer accordingly had to guard against overemphasising the element of deterrence at the cost of the offender's rehabilitation and of the prospect of returning him and his family to the community.²⁶¹

In the present case, the appeal court stated, the magistrate had overemphasised the deterrent element, had erred in accepting that effective psychotherapy was available within the prison, and had erred in assuming that the appellant had not been truly remorseful. In addition, the magistrate had attached too little weight to the drastic consequences of long-term imprisonment as well as to the appellant's mitigating circumstances:

'Die feit dat die beskuldigde intellektueel 'n taamlik onderontwikkelde persoon was, wat sy hele lewe lank in een of ander betrekking gestaan het en 'n onbesproke rekord gehandhaaf het en toe om een of ander rede (moontlik 'n gebrekkige

²⁶¹ *S v N supra* (n 257) at 275a-c. Van Deventer J relied heavily on two recent cases, namely *S v D* 1989 (4) 709 (T) and *S v D* 1989 (4) SA 210 (C) and referred to their guidance regarding the nature of the crime as well as the approach that should be followed in the difficult task of sentencing 'om heeltemal objektief en onemosioneel te bly in die uitvoering van sy plig in hierdie soort gevalle'. In evaluating the regional court magistrate's judgment, he found the latter to have a 'rustige, onemosionele en objektiewe benadering. Hy het myns insiens egter aan verskeie aspekte of te min of te veel gewig geheg' (at 275c).

seksuele verhouding binne sy huwelik) vir slegs twee tot drie maande lank die smal paadjie byster geraak het, het oenskynlik nie genoeg gewig gedra nie.²⁶²

The sentence was set aside (the counts were taken together for the purpose of sentence) and was replaced with a sentence of six years' imprisonment, of which five years were suspended on various conditions, *inter alia* that the appellant underwent psychiatric treatment and reported on his progress.

3.3.20 *S v B*²⁶³

The accused, aged 21, pleaded guilty and was convicted of indecently assaulting a seven-year-old girl. He lived with the girl and her mother and maintained them. He had kissed the girl's genitalia and had inserted his finger therein. The girl had no serious injuries and the prosecutor did not present any evidence to the court establishing any other suffering as a result of the indecent assault. Although the crime was regarded as serious, the absence of any harm to the victim seems to have considerably influenced the high court.

'The crime is a serious one. Child abuse in whatever form it manifests itself is to be condemned. The sentences imposed in cases of child abuse often contain an element of deterrence intended to demonstrate to the offender and the community that the abuse of young defenceless victims will not be tolerated. Each case must however be adjudicated on its own facts. The personal circumstances of the accused as well as the circumstances and the consequences of the crime must be weighed carefully before sentence is decided upon.'²⁶⁴

Despite the fact that a jail sentence was found to be appropriate, on review the court found the above factors to be strongly mitigating and the sentence of 12 months' imprisonment to be excessive. It was said that society would best be

²⁶² *S v N supra* (n 257) at 275d-e. Here, again, the judge himself made an assumption as to the cause of the crime.

²⁶³ 1990 (1) SACR 541 (C).

²⁶⁴ *S v B supra* (n 263) at 542j-543a.

served by suspension of a major part of the sentence, because that would deter the accused from repeating his unacceptable behaviour.

Nine of the 12 months were suspended for five years on condition that the accused was not convicted of a crime of which assault of a sexual nature was an element. In the light of the fact that no explanation was offered for the accused's behaviour, a further condition was included which was aimed at getting him to seek help in ascertaining whether or not he had a problem and should receive treatment. In terms of this condition, he had to report to the district surgeon with a copy of the judgment, which required the doctor to submit a report on his/her findings to Selikowitz J and recommendations for treatment of the accused, or regarding further assessment.

3.3.21 *S v D*²⁶⁵

The accused, aged 43, pleaded guilty to, and was convicted in terms of s 14(1) of the Sexual Offences Act of, seven counts of indecent assault on boys aged from 12 to 13 years. He was a drama teacher and all the counts, but one,²⁶⁶ involved the touching by the accused of the boys' genitals. In addition, some involved him instructing them to touch his genitals and/or masturbating him, and one involved mutual masturbation. He was sentenced to a fine on one count and to 12 months' imprisonment on each of the other six counts, of which three months on each count were suspended on condition *inter alia* that he submitted to treatment at the prison during the period of suspension.

In this case, the prosecutor called several witnesses in order to put the relevant information before the court. First, the question of the after-effects and of the

²⁶⁵ *Supra* (n 170).

²⁶⁶ In the magistrate's court, the accused averred that this count involved only kissing, but, after evidence being led, the court was satisfied that it constituted an immoral and indecent act within the meaning of s 14(1) of the Sexual Offences Act.

offender's *modus operandi* were addressed. Four of the boys, including their mothers, were called before sentence (the child who had been kissed was heard before conviction). It is interesting to note that the effect of the accused's offence (although the nature of the effect was not clear) was accorded enough weight to justify punishment first and then rehabilitation. The court said:

'However, I do not think a completely suspended sentence is appropriate in the circumstances of this case. I say this for various reasons. When dealing with this type of offender, ie a compulsive paedophile, *the main object of sentence should be to strike a balance between his punishment and his possible rehabilitation*, the latter being not only in his own interest, but in the interests of young children with whom he may come into contact. Despite the arguments advanced by his counsel as to the deleterious effect imprisonment would have on the appellant, *it would be wrong to allow the appellant to escape* – by merely submitting to treatment, something which he could have done voluntarily – *the consequences of his acts*, having regard to the effect those acts must have had, and according to evidence did have, on the children concerned.

This case differs from cases of sexual violence, but, nevertheless, there is some evidence, in one case at least, of mental scars, and it is probable that the memory of what occurred and the concomitant humiliation will remain with these children for the rest of their lives – not a pleasant prospect for them.²⁶⁷

As far as his *modus operandi* was concerned, 'he would single out a young boy in the group, lavish attention on him in various forms, such as encouraging him, awarding him parts in plays, etc.²⁶⁸ When taking the boys home after rehearsals, he would manipulate the situation. The boy in question would be the last to be dropped off and then he would drive to an isolated spot where he would touch the boy's genitals or perform masturbation, and vice versa. The judge mentioned that there was no 'violence in the normal sense of the word'.²⁶⁹

²⁶⁷ *S v D supra* (n 170) at 232c-e (own italics).

²⁶⁸ *S v D supra* (n 170) at 228h-229a.

²⁶⁹ *S v D supra* (n 170) at 229b. This makes one realise that very little is known about subtle, psychological violence and the effects thereof.

The prosecutor furthermore called two witnesses who testified about events which had taken place a few years before when the accused had been caught performing the same acts. The accused, at that time, was given a chance, provided that he complied with certain conditions, *inter alia* that he not to be involved in the teaching of young children, which condition he ignored after a while and soon started a drama group at a new school.

Four expert witnesses were called, namely a psychiatrist who was Superintendent of Valkenberg Hospital, a psychologist who was actively involved in the Child Welfare Society treating abused children, a prison psychologist in charge of the Department of Clinical Psychology at Pollsmoor Prison, and a police officer heading up the Child Protection Unit. Such witnesses testified regarding the prevalence of child molestation, the various forms it takes and the patterns found in the behaviour of paedophiles. The investigating officer also testified about difficulties regarding the case, namely in finding the potential complainants and in obtaining their cooperation and that of their parents in making statements and giving evidence in court.

The defence also called a psychiatrist and a clinical psychologist, as well as several work acquaintances of the accused and the accused's minister. The court was educated about the definition of a paedophile and about the various types of paedophiles.²⁷⁰

The high court acknowledged the real dilemma of the sentencing court in seeking to balance all the relevant factors in order to arrive at the appropriate sentence, but pointed out two errors. Treatment in prison, it stated, should not be equated with that provided in Valkenberg Hospital, and long-term imprisonment was not the best form of protecting children in the long run.

²⁷⁰ At 229c-e. See chapter 5 par 5.5.1.1 a).

Munnik JP compared the compulsive behaviour of the appellant to that of an alcoholic and reached the conclusion that, by analogy, a specialised institution would be the best option for his sickness. While the alcoholic was primarily an embarrassment to his family and society, the paedophile committed offences against vulnerable children. These different consequences seem to have been taken into account when the court decided that a wholly suspended sentence would not be appropriate.

The sentence was set aside and all counts were taken together for purposes of sentencing because they arose from the same cause and because the same *modus operandi* had been resorted to in all cases. Six years' imprisonment was imposed, of which four-and-a-half years were suspended for five years, provided that certain conditions relating to recidivism, job situation, living conditions, and reporting for therapy and to the Child Protection Unit were complied with.

3.3.22 *S v D*²⁷¹

The accused, a 36-year-old man, pleaded guilty and was convicted of indecently assaulting his two stepdaughters over a period of two years. The abuse started when the children were six and eight years of age. He inserted his fingers in their private parts and they had to touch him.

He explained that he and his wife had had sexual problems and that he wanted stimulation. On review, the judge doubted if the proceedings were in accordance with the principles of justice. First, the accused was arrested, brought before court and sentenced to 12 months' imprisonment, all on the same day.²⁷² Secondly, information on surrounding circumstances that was of vital importance

²⁷¹ 1989 (4) SA 709 (T).

²⁷² *S v D supra* (n 271) at 712h: 'Ten eerste het dit my opgeval hoe snel, summier en oënskynlik oppervlakkig dit gegaan het.'

for sentencing purposes was absent, and, lastly, the reviewing judge suspected that the sentence had been imposed in anger, and therefore not in a judicial manner. Reasons were requested from the magistrate as to why a probation officer's report had not been obtained, what the reasons for sentence had been, whether consideration had been given to possible alternatives to direct imprisonment and, if these had been considered, whether pathology (psychosexual or social/domestic) might not be present.

According to the reviewing court, the magistrate's reasons manifested anger and emotionalism which were not reconcilable with the judicial function and which had led to him adopting points of view in an unscientific and improper manner. The reviewing court cautioned against this and, apropos of further defects in the court proceedings and the magistrate's substantiation of sentence, stated that sexual assault of children was, by its very nature, unique insofar as its possible causes, future prevention and the healing of its consequences were concerned:

'Seksuele molestering van kinders is 'n heel besondere vorm van sosiaal afwykende gedrag, enersyds vanwee die proteaanse verskyningsvorme, aanleidende psigoseksuele, maatskaplike en gesinsoorsake, asook van die voorkoming van herhaling daarvan en die herstel van die gevolge daarvan.'²⁷³

In addition, it was stated, society reacted to the abuse of children with shock, with abhorrence and judgementally, and, in doing so, its own ignorance and inscrutable psychosexuality played a role ('ondeurgronde psigoseksualiteit'). Furthermore, this was an extremely complex psychological occurrence. From the time of Freud, more questions had been asked than answers provided. A judicial officer could acquire only a certain amount of book knowledge and should

²⁷³ *S v D supra* (n 271) at 714d.

caution himself or herself that this was an area 'where fools rush in but angels fear to tread'.²⁷⁴

The judge referred to the subject literature in general, pointing to the need, in a case such as the present one, to look further than the perpetrator. In doing so, the judge indicated that sexual interference with children within a family context was often a manifestation of family pathology. Therefore, attention should be given to the family, its composition and dynamics, since the prospects of rehabilitation could hardly be ascertained without such information. A jurist conducting such an investigation should allow himself or herself to be led by appropriately qualified experts in this regard.²⁷⁵

Sexual abuse of children, it was further stated, was without doubt currently a cause célèbre, but a judicial officer ought to maintain a proper balance in this respect. Sexual conduct between adults and children was certainly abhorrent in the eyes of South Africans today, but this was not always the case and was certainly not a universal view of right-minded people even today.²⁷⁶ However, even according to modern South African norms, the magistrate's highly

²⁷⁴ *S v D supra* (n 271) at 714f.

²⁷⁵ The magistrate made certain findings about the accused's level of education, intelligence and the presence of deviations ('afwykings') after observing him in court. This was criticised as exceeding his jurisdiction. However, it was stated that it had to be conceded that an experienced judicial officer was allowed to form broad impressions of the accused or any witness, because knowledge of human nature was an essential component of his or her make-up, but this did not extend to sociological, psychometric or psychological opinions (*S v D supra* (n 271) at 715d).

²⁷⁶ Kriegler J (*S v D supra* (n 271) at 715j) refers to authoritative (seemingly according to himself) sources indicating that sexual intercourse between adults and children took place within ancient Greek and Roman communities, and still occurs in diverse cultural communities, namely Doek 'Sexual abuse of children: An examination of European criminal law' in PB Mrazek and CH Kempe (eds) *Sexually Abused Children and Their Families* (1981) 80; and JM Giovannoni and RM Becerra *Defining Child Abuse* Oxford (1979)158.

emotional description of the offence²⁷⁷ could not be supported. Each case had to be judged on its own merits without *a priori* labelling.

The reviewing court held that it had long been trite law that, in a civilised criminal justice system, as existed in South Africa, a sentence should also address the future. The person imposing the sentence should ask himself or herself whether, both in regard to the particular individual he or she was dealing with and in regard to the interests of the community, it was possible or desirable to act in a reformist (ie a constructive) manner. As in the present case of father/daughter incest, the family was very pertinently the focus of attention. Summary imprisonment²⁷⁸ of the father, who is in most instances also the breadwinner, with resultant fragmentation of the family and destruction of its socioeconomic infrastructure, could cause the young complainants further incalculable harm and create a dilemma of which the person imposing sentence should take note. He or she should therefore, in this regard, obtain the advice and assistance of appropriately qualified experts.

Kriegler J also referred to a further defect in the magistrate's substantiation of sentence, namely his assumption that the accused's behaviour towards the complainants had caused them physical and emotional trauma, as well as causing permanent psychosexual scars, which would prevent them from having a successful marriage in future because of their lack of trust in men.

The conviction was confirmed, but the sentence was set aside. The case was referred back to the trial court so that the latter could determine the sentence *de*

²⁷⁷ The magistrate found this to be 'een van die afskuwelikste misdade wat ooit kan bestaan' *S v D supra* (n 271) at 715g.

²⁷⁸ As a result of 'die tussenkoms van die strafreg' (*S v D supra* (n 271) at 716f).

novo with the help of expert evidence. Treatment orders in principle were approved of and recommended.

3.3.23 *S v Muvhaki*²⁷⁹

The accused was convicted of indecent assault. His conduct of lifting up the complainant's leg happened after conflict with members of her family. It appears that he approached her with the dominant intention of mortifying and degrading her without there being any element of lust.²⁸⁰ Her father-in-law witnessed the shame of her private parts being exposed. This was a relatively serious matter and was aggravated by the substantial element of *contumelia* (shame and humiliation) that was present.

The accused was sentenced by the trial court to 12 months' imprisonment with labour. The high court found the sentence to be grossly excessive²⁸¹ and changed it to six months' imprisonment with labour, of which three months' imprisonment with labour were suspended for three years on condition that the accused did not, within this period, commit any offence of which assault, indecent assault or *crimen iniuria* were an element and for which a sentence of imprisonment without the option of a fine could be imposed.

3.3.24 *S v B*²⁸²

The accused, who was 26 years old with a wife and children, was convicted on four counts of *crimen iniuria* and was sentenced to four months' imprisonment

²⁷⁹ 1985 (4) SA 317 (ZHC).

²⁸⁰ Her age is not clear from the record.

²⁸¹ The judge agreed with the state that severe sentences in cases of indecent assault were exclusively reserved for assaults which are gravely injurious, or perpetrated against young children, or which are persistent (at 322e).

²⁸² 1980 (3) SA 851 (A).

on each count. He had parked in front of a school and had exposed his private parts to four girls between the ages of 14 and 17. The accused had *inter alia* one similar, previous conviction. He pleaded guilty. He was unrepresented and no details were obtained either by the prosecutor or the magistrate about the circumstances of the offence itself²⁸³ or about possible, harmful after-effects of the exposure on the complainants. All four of the complainants simply said that they were shocked and that their dignity had been infringed. The appeal court in fact doubted the degree of shock experienced by the girls and relied on the oral testimony of the appellant's psychiatrist (who was questioned during the hearing of the appeal)²⁸⁴ to confirm its own doubt.²⁸⁵ A certificate was handed in from the psychiatrist regarding the accused's problem of exhibitionism and regarding a treatment programme being undertaken at the trial court. During the appeal hearing, the psychiatrist further testified that the appellant had psychosexual problems in his marriage owing to an overinhibited state of mind during adolescence, and that his condition could be treated by means of combined therapy outside prison at least once a month together with his wife.

The case was found to be one with special circumstances in that not only the relative youth and family of the accused, but also the special interests of society, required that rehabilitation be the primary aim. The sentences were accordingly set aside and the following substituted:

²⁸³ The trial judge regarded the planning of the offence, that is, the parking of the car by the accused in front of the school, as aggravating, but the appeal judge (mistakenly?) equated this with *dolus malus* and stated that the parking related to the circumstances of the offence (*S v B supra* (n 282) at 849).

²⁸⁴ At the hearing of the appeal, oral evidence was given by the psychiatrist under oath in terms of s 22 of Act 59 of 1959.

²⁸⁵ 'If I may be permitted to comment on the matter of irreparable harm in general, to girls viewing such exhibitionistic exposures, it is my experience that well-balanced girls without undue pre-existing psychological problems would react either by mirth, scorn or contempt. Any harmful reaction could be equally due to pre-existing psychological problems within themselves' (*S v B supra* (n 282) at 851a).

'For purposes of sentence the four convictions are to be taken as one, and the accused is sentenced to 12 months' imprisonment which is suspended for five years, on the following conditions:

- (1) that accused commits no offence of which indecency is an element during the period of suspension; (2) that accused undergoes psychiatric treatment in the Welfare Services Unit of the Chamber of Mines once a month for two years ... with a monthly progress report to be sent to the trial magistrate at Virginia.
- (2) ...'

3.3.25 *S v S*²⁸⁶

The accused was a primary school teacher and was convicted of committing indecent acts, under Act 53 of 1957, with three girls in his class, aged 10 years. He initially pleaded not guilty, but changed his plea after the evidence of the first girl. He was also convicted of contravening the provisions of Act 26 of 1963 in that he had taken photographs of one of the girls from an angle below his desk in class, showing her sitting with her legs apart and her one hand pulling away her pants, thus revealing her private parts. He was an amateur photographer who had developed the film himself. He was sentenced to a fine of R300 in respect of the charge under the 1963 Act and to 18 months' imprisonment in respect of the other three counts, 12 months of which were suspended, subject to certain conditions, on each of the three counts. The effective sentence was 18 months' imprisonment. The appellant appealed to the Transvaal Provincial Division, but his appeal failed. He then appealed to the Appellate Division.

The first girl was asked to sit at the accused's table at the back of the class after she had broken an arm. He later covered the front of the desk with brown paper under the pretence that his feet were cold. The first girl told the court that, a few times during the day, the appellant would put his hand under the desk and pat her private parts, and that he had made her pat his private parts over his pants. It seemed that the appellant, on at least one occasion, had removed his penis from his pants and had ejaculated in front of the girl. It is not clear what was

²⁸⁶ 1977 (3) SA 830 (A).

meant, but the girl also testified that her teacher sometimes used to 'bring his hand into my body and sometimes he used to pat my body'.²⁸⁷ The appellant gave the girl examination papers in advance in order to work out the answers and asked her to keep quiet about the whole thing. However, 'the smutty business came out'²⁸⁸ after the girl had shown them to other girls and the mothers had spoken to one another. The indecent acts were committed over a period of about four months.

The second and third girls were also called, after it was announced that the plea would be changed, to testify briefly about what had happened. The appellant had touched the second girl's private parts on at least one occasion and the third girl's on several occasions. The Appellate Division stated that 'details were not examined for obvious purposes'.²⁸⁹

The appellant did not give evidence under oath, but, instead, a psychiatrist was called whom the court referred to as 'fully-qualified and experienced'.²⁹⁰ The psychiatrist submitted a report and testified. The first observation of Rumpff CJ was that the crime was

'obviously ... the result of a character defect, an abnormal interest in small girls, which unfortunately, is not an extremely rare phenomenon. The laymen would call him a typical dirty old man because the appellant was in fact already 55 years old.'²⁹¹

²⁸⁷ *S v S supra* (n 286) at 834g.

²⁸⁸ *S v S supra* (n 286) at 834h.

²⁸⁹ *S v S supra* (n 286) at 834i. It was assumed that it was no longer necessary to prove the crime, but the consequence of this was that little became known about the precise circumstances under which the touching took place. The worst factor, however, is that neither of the girls was asked about the impact that the crime had had on her.

²⁹⁰ *S v S supra* (n 286) at 834j.

²⁹¹ *Ibid.*

The psychiatrist explained the personality problems of the accused: He was born in the United Kingdom, his father had died when he was young and he had been raised by an 'aggressive and competent' mother.²⁹² He grew up as insecure, undersized, solitary and timid. He left school at the age of 14, could not keep a job, and eventually joined the Royal Air Force at the age of 16 as a wireless operator. He was discharged after a few years because of cowardice and acute claustrophobia. After being married for four years, the appellant immigrated with his wife to South Africa and here she motivated him to study further and he eventually obtained his teacher's diploma with distinction. They had a mentally retarded son and a complicated home life. His wife dominated their marriage and he felt sexually inadequate:

'... the kind of marriage that this man has and as so often happens, your Worship, undersized, frightened and incompetent little men often marry very strong, tough, powerful females as in the same way as he saw his mother as when he was a little boy and this is what he did. I found her to be a very determined person. She was a demanding person and she was a controlling person. Now from the sexual point of view he has never been competent and for a long time in the early stages of the marriage he suffered a good deal of difficulty. He just could not cope. I don't think it is necessary to go into all the details. And as the years went by things between them became more and more of a problem from a sexual point of view and eventually it all but ceased. There was very little going on between them. He failed to make advances to her, whatever advances were made by her.'²⁹³

It was further indicated that the appellant had suffered from depression since childhood, which had become worse after he had been discharged from the air force, and that such depression had continued over the years.²⁹⁴

²⁹² *S v S supra* (n 286) at 835a. The court summarised the psychiatrist's evidence over the next few pages up to 337d.

²⁹³ *S v S supra* (n 286) at 835d-f.

²⁹⁴ *S v S supra* (n 286) at 835g-i. See chapter 5 par 5.5.1.1.a), text of (n 115).

The psychiatrist explained that the visit of the appellant's niece, coupled with his wife's jealousy, precipitated the abusive events and he opposed a sentence of imprisonment on the grounds of the appellant's claustrophobia:

'I go on to say, your Worship, that although the mentally ill are not certifiable in terms of the Mental Disorders Act, and I talk about, with respect, my feelings about this man's future and I say that sending an individual like this to prison would because of his personality structure, the claustrophobia particularly would cause him to experience extreme anxiety and panic and he may well respond with suicide or gestures and I must say that when I first met him, this was uppermost in his mind and I have in fact whilst undertaking the psychiatric evaluation, I have been treating him, I have put him on to anti-depressive medication and we have been talking about his life and his problems and I think in a kind of way I could say that treatment has already started.'²⁹⁵

It was explained by the psychiatrist that the appellant could cope with the film-developing room, as well as his classroom, because he did not feel trapped and therefore did not suffer the anxiety that he would during imprisonment. It was further emphasised that the approach to the kind of psychiatric treatment used at the time was focused on family treatment and not on the patient only. The wife would have to gain insight into her husband's as well as her own behaviour and be part of the therapeutic process.

The appeal court found that the magistrate had misdirected himself in not taking the most important parts of the evidence into consideration, namely the evidence regarding the appellant's acute anxiety state, which was overwhelming, the claustrophobia, and treatment in conjunction with his wife. The expert had diagnosed his behaviour as pathological paedophilia with a severe illness. The appellant would need treatment, not only in his own interest, but also in the interest of society, and would not be able to undergo it in prison. He was not even in a position to visit the psychiatrist at his rooms, and they had to meet at a

²⁹⁵ *S v S supra* (n 286) at 836c-d (see chapter 5 par 5.5.1.1.b), accompanying text of (n 134), for further quotation from, and discussion of, this case).

sanatorium where they worked virtually in the open. The evidence of Dr Shubitz was not challenged in any way.

It is of interest to note how the issue of harm to the complainants was dealt with. The trial magistrate questioned (quite correctly according to Rumpff CJ) the defence psychiatrist to obtain information concerning the effect of the appellant's conduct on the little girls.²⁹⁶ Rumpff CJ assumed that the first girl must have experienced a severe mental trauma, but then relied on hearsay from the dicta of the same defence expert in order to find, seemingly as mitigating, recovery after examination by another psychiatrist and no future trauma.²⁹⁷

The seriousness of the offences, which were described as disgusting and horrible, and an abuse of trust, justified a period of imprisonment. However, in the light of the above, the sentence was set aside and replaced with a reduced and wholly suspended sentence:

'Counts 2, 3 and 4: nine months' imprisonment on count 2 and three months' imprisonment each on counts 3 and 4. The sentence on each of counts 2, 3 and 4 is suspended for three years on condition (1) that during suspension the appellant subject himself to such regular treatment as may be ordered for him by Dr Shubitz and (2) that appellant is not convicted of any offence involving indecency.'

3.3.26 *S v T*²⁹⁸

The accused was convicted of indecent assault on a 13-year-old girl. She testified that the accused had chased her, had caught her and had then thrown her to the

²⁹⁶ *S v S supra* (n 286) at 836j-837a-d (see chapter 5 par 5.3.2 for the quotation from the case). See, further, the research the magistrate undertook on his own regarding the aims of punishment.

²⁹⁷ *S v S supra* (n 286) at 839e-g. See chapter 5 par 5.3.2, text of (n 34).

²⁹⁸ 1976 (3) SA 107 (T).

ground and pulled down her panties. He had done nothing else, because a woman named Sesama had appeared and had asked him what he was doing.²⁹⁹

He was sentenced to R120 or 120 days' imprisonment suspended for three years, on condition that, during such period of suspension, he did not commit a similar offence. On review, it was held that the words 'similar offence' were too vague and would create immense difficulties and pitfalls should the question of the imposition of the suspended sentence arise in the future. The condition of suspension was therefore altered to 'an offence of which sexual intercourse or an indecent act involving a female is an element'.³⁰⁰

3.3.27 *R v Z*³⁰¹

The accused, a 19-year-old man, had sexual intercourse with an 11-year-old girl. He was charged and found guilty of rape in the court *a quo*, but, on appeal, this was changed to a conviction under s 14(1)(a) of Act 23 of 1957. The victim was tall for her age and the doctor estimated, after examining her, that she was between 13 and 14, or even older. The complainant's 'knowledge and intelligence was of such that she at the time realised the nature and consequence of the act of intercourse' and 'it was not proved that the complainant did not in fact consent to the intercourse'.³⁰² The sentence of two years, of which one year was suspended for three years, and five cuts, was confirmed on appeal.

²⁹⁹ *S v T supra* (n 298) at 108b.

³⁰⁰ The condition specifically referred to the 'commission' of an offence instead of being 'convicted' of an offence. This was done in the light of the fact that, within the court's jurisdiction, people were mainly unsophisticated, and often illiterate or semi-illiterate (*S v T supra* (n 298) at 109h).

³⁰¹ 1960 (1) SA 742 (A).

³⁰² *R v Z supra* (n 301) at 743.

3.3.28 *R v C*³⁰³

In this case, Ramsbottom J commenced his judgment on appeal by stating that this was 'a very distressing and difficult case'.³⁰⁴

The case involved an accused who was a highly respected and intelligent man, and one who lived a useful life. It was only at the age of 54 that his long-time practice of homosexuality was discovered. This is the first reported case of this nature and it is not clear what complicated the matter for the judge – whether it was the fact that the accused was a high-profile person, or that he engaged in homosexual activities, or that the first count involved a black man, or that the black man had been given permission by his superiors to perform indecent acts in order that a conviction could be secured.³⁰⁵ What is however clear is that the two counts relevant for the purposes of this thesis were acts of sodomy upon two boys, whose ages were not stated.

³⁰³ 1955 (2) SA 51 (T).

³⁰⁴ *R v C supra* (n 303) at 51g. At 52b, and before evaluating the evidence of the expert witness, he states once again: 'This is a difficult type of case and the present case is one of the more difficult examples.'

³⁰⁵ In 1955, homosexuality was viewed as a definite taboo. Maybe it was the cumulative effect of 'an aberration of this kind' (at 54f) extended to the youths that gave rise to the complexity. The offence of sodomy was removed from the law books only after the Constitutional Court held, in *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1998 (2) SA 557 (CC), that the crime of sodomy was unconstitutional. The reason for it so holding is that the existence of such a crime is incompatible with the right to equality (which includes the right not to be discriminated against on the ground of sexual orientation), the right to dignity and the right to privacy, and because the violation of these rights cannot be justified in terms of the limitation clause in s 36 of the Constitution.

On the first count, the appellant was charged with, and convicted (on a plea of guilty) of, contravening s 15(2) of Act 27 of 1914, as amended, in that he 'did wrongfully and unlawfully incite, command or procure a native male, E, to commit the crime of sodomy upon him, the said appellant, and to permit him, the said appellant, to commit the crime of sodomy upon the said E'. Both judges strongly disapproved of the fact that E, a native constable, was allowed, after he had reported that acts of immorality might be committed against him, to continue and subject himself to the possibility of further such acts (*R v C supra* (n 303) at 54e-f and 55a).

The accused was sentenced on each of the three counts to four months' imprisonment with compulsory labour (ie twelve months in total), but appealed on the ground that the sentence was excessive. No evidence was available on the circumstances of the crime, nor of its effect on the children. The focus during the sentencing process was, as in the majority of cases of this nature, on the accused and his condition, and the possibility of rehabilitation.

An expert witness, a medical superintendent at the Pretoria Mental Hospital, testified that the accused suffered from a biological condition which was very difficult to cure.³⁰⁶

He was further of the view that punishment would not have any important deterrent effect upon the appellant, nor would other persons be deterred. The magistrate regarded this as unfortunate and emphasised that, in view of the fact that the appellant's conduct was regarded as a serious crime, a judicial officer was required to impose punishment – and that this might possibly deter others who had not yet reached the stage in this kind of conduct that the accused had reached.³⁰⁷ In his reasoning, the magistrate referred to *R v K*,³⁰⁸ holding that,

³⁰⁶ *R v C supra* (n 303) at 52b. It is not clear whether the expert was referring to the appellant's homosexuality or to what is known today as paedophilia, namely a sexual attraction to children. It is assumed that it was the first mentioned.

³⁰⁷ *R v C supra* (n 303) at 52c.

³⁰⁸ This was a case that had then recently been decided (also by Ramsbottom J) where the accused, aged 26, had been convicted of sodomy on a little European boy of eight years. Apparently, the accused had been sentenced to a term of imprisonment, plus a whipping. The procedure, however, related to an application for reopening of the case on the basis of the evidence of the prison doctor, and the same expert as in the present case, who opined that a whipping would not alter the inherent sexual nature of the accused and that doubt existed as to whether a prison sentence would have a deterrent effect. The application was denied on the basis that the sentence was not improper: '... But whether or not punishment of this kind would deter the accused from practising homosexuality with young children, which is what he has done in this case, it may certainly deter other persons from committing crimes of this nature' (at 53a). It is of interest to note the expert witness's comment during the evidence on sentencing: 'His offence of course makes it more difficult to decide what punishment should be meted out as he interfered with a young child. Punishment of some kind is indicated as he

even though a term of imprisonment might not deter the appellant, it might have a deterrent effect on other people.

Counsel's main argument, apart from the fact that the man's life had been ruined, revolved round the fact that the expert witness, although he had thought it very unlikely that the appellant would yield to treatment, had not entirely rejected the possibility.³⁰⁹ Ramsbottom J grasped this remote possibility of rehabilitation:

'... that treatment may lead this unfortunate man away from this practice ... is worth exploiting ... it is a case in which it is worth trying.'³¹⁰

Eight months of the accused's sentence were suspended for three years on condition that the accused complied with certain conditions intended to induce him to submit himself to treatment:

'... if he were to go to prison for a year, while he would be kept out of harm's way for most of that period, he would, when released, be let loose upon the public again. So far as the protection of the public is concerned it is possible that youths and men who might otherwise be induced to commit sexual acts with the accused might better be protected by a suspended sentence ...'³¹¹

This was done despite the fact that the magistrate's sentence was found not to be excessive. It was done because it was 'calculated to promote the ends of justice'.³¹²

cannot be allowed to go about interfering with children and ruining their lives for the sake of gratifying himself' (at 52g).

³⁰⁹ *R v C supra* (n 303) at 53d. Of interest is the choice of words, namely that 'there is little hope of the accused's redemption' and that there was a possibility of 'reformation'.

³¹⁰ *R v C supra* (n 303) at 53e-g.

³¹¹ *R v C supra* (n 303) at 53i-j.

³¹² The court followed *Rex v Sharpe* 1930 TPD 790 in applying s 98(2) of the Magistrates' Courts Act 32 of 1944.

3.3.29 *Rex v Khumalo*³¹³

The accused was charged with, and pleaded guilty to, contravening s 2(1) of Act 3 of 1916.³¹⁴ He was sentenced to a fine of 30 pounds or, in default of payment, eight months' intensive hard labour. The court held that it was not permissible to impose a sentence of a fine only.³¹⁵ However, in view of the doctor's evidence that the complainant, although only 14 years of age, had had previous intercourse (and was thus not a virgin), the sentence was altered to eight months' intensive hard labour, of which five months were suspended for two years on condition that the accused was not convicted of any sexual offence during that period.

3.4 CONCLUSION

In this chapter, a descriptive evaluation of 36 rape cases and 30 indecent assault cases involving children, spread over 58 years, was undertaken. This evaluation of precedents in cases of child sexual abuse has shown that the offence is a 'unique form of deviant social behaviour'³¹⁶ which is approached by courts in a diverse manner.

Although life imprisonment was introduced in 1998, by the Criminal Law Amendment Act 105 of 1997, as a minimum prescribed sentence for rape of children, the courts sometimes imposed such sentences prior to this. Life imprisonment was in fact imposed in three cases, with the earliest example (involving the rape of a seven-year-old girl) being in 1971. In five instances, the

³¹³ 1947 (1) 739 (O).

³¹⁴ Girls' and Mentally Defective Women's Protection Act.

³¹⁵ The penalty imposed by s 2(1) of Act 3 of 1916 was 'imprisonment with or without hard labour for a period not exceeding 6 years with or without whipping not exceeding 24 lashes and with or without a fine not exceeding 500 pounds in addition to such imprisonment and lashes'. Corporal punishment as a sentencing option for juvenile male offenders was abolished by the case of *S v Williams* 1995 (2) SACR 251 (CC).

death penalty for rapists was imposed and confirmed on appeal.³¹⁷ However, in the remainder of cases during the period before 1998, the sentences varied dramatically. There were two instances of correctional supervision. In addition, short periods of imprisonment (such as six or 18 months up to two years), medium terms of imprisonment (of four, five, six and seven years) and long-term imprisonment (from 10 to 20 years) were imposed. What is of importance is that the length of sentences imposed in rape cases during this period should not serve as guidelines any more, but only the practice with regard to aggravating and mitigating factors.³¹⁸ After the introduction of a more stringent benchmark in terms of the legislation indicated above, sentences for rape in general increased dramatically.³¹⁹ Life imprisonment has been linked to the principle of proportionality and has been reserved for only the worst cases.³²⁰

Courts have often focused only on the physical injuries to the victim to determine the seriousness of child sexual abuse cases. In addition, they have incorrectly emphasised and interpreted the absence of any injuries, or permanent physical injuries, as outweighing the recognition of mental harm. Despite the fact that, in many instances, the courts appeared ignorant of the psychological after-effects of the crime on the victim, the Supreme Court of Appeal has engaged in a paradigm shift in recent judgments.³²¹ The court's acceptance and interpretation of the symptoms of trauma, as well as the weight attached to a finding of serious

³¹⁶ *S v D supra* (271) at 714d (own translation).

³¹⁷ In three of the instances, the victims died as a result of the injuries caused during the rape: see chapter 1 par 1.1.5 (n 64).

³¹⁸ *S v Abrahams supra* (n 31) at 126c.

³¹⁹ In this study, life imprisonment was imposed in one case only, which was a case that followed the narrow approach to the interpretation of 'substantial and compelling circumstances' adopted prior to *S v Malgas supra* (n 2). In *S v G supra* (n 44) at 301e the court explicitly referred to this guideline with regard to heavier sentences and followed it. See par 3.1.1.2.

³²⁰ See chapter 5 par 5.6 for a discussion of the grading of cases.

harm, display noteworthy insight and sensitivity. It is furthermore not only the objective gravity of offences of child rape that plays a role in the imposition of the prescribed minimum sentences, but also the present and future impact of the crime on the victim – which are considered an essential factor in the determination of substantial and compelling circumstances.³²²

With regard to indecent assault on children, the sentences imposed ranged from suspended sentences, through both correctional supervision options, to periods of effective imprisonment of between three months and four years, with conditions pertaining to rehabilitation added in many, but not all, instances. The cases involved textbook paedophiles, intra-familial indecent assault and once-off incidents attributed to low self-esteem,³²³ but the courts did not appear to distinguish between these cases when precedents were examined. It is submitted, however, that notice should be taken of the various categories of indecent assault during sentencing so as to enhance consistency amongst judicial officers, and to contribute to certainty and enhanced deterrence amongst members of the public.

This chapter will serve as a resource for the more detailed analysis undertaken, in chapter 5 below, of developments, trends, problems and shortcomings in sentencing practice relating to child sexual abuse cases.

³²¹ *S v Abrahams supra* (n 31). See chapter 6 par 6.5 for a detailed analysis.

³²² *Rammoko v Director of Public Prosecutions supra* (n 38) at 205e. See also chapter 2 par 2.2.

³²³ *S v O supra* (n 159). In this case, the judge researched precedents dating back to 1955 that involved cases of paedophiles, intra-familial indecent assault and once-off incidents because of low self-esteem.

CHAPTER 4

PERCEPTIONS: AN EMPIRICAL STUDY

*'... there is an undisclosed self which is never expressed, and which consists of layers of personal information, history, social circumstances, values, biases and preferences. These layers ... [significantly influence] legal decision-making.'*¹

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¹ J Fedler and I Olckers *A Draft Model for Social Context Revisioning of Legal Materials* (2000) 4.

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ANNEXURE A

4.1 INTRODUCTION

As part of this thesis, a study was conducted among 104 regional court magistrates to determine their underlying attitudes and perceptions with regard to child sexual abuse cases which would influence their sentencing decisions. The study was conducted amongst magistrates who attended the annual general meeting of ARMSA (Association for Regional Court Magistrates of South Africa) in November 2002. The meeting provided an ideal opportunity to conduct such a study, as it is not often that so many regional court magistrates from across South Africa are together at the same time at one venue. A further advantage was that the meeting allowed for personal interaction with the magistrates to explain the purpose and ambit of the study. Finally, it ensured that the interviews could be completed within a short period.

4.2 OBJECTIVES OF THE STUDY

The main objective of the study was to explore how judicial officers perceive and approach the grading process with regard to the seriousness of child sexual abuse cases. As part of the study, the following aspects were investigated:

- the recognition of, and weight attached to and interpretation of, mitigating and aggravating factors that impact on the imposition of a more severe or lighter sentence;

- the perceptions of judicial officers as to why some rapes are more serious than others;
- what judicial officers understand by the phrase 'substantial and compelling circumstances' as contained in s 51 of the Criminal Law Amendment Act 105 of 1997, with special reference to sentencing in child rape cases;
- the experience and attitude of judicial officers regarding victim impact statements;
- the perceptions of judicial officers as to the practice and value of obtaining expert evidence before sentence;
- the attitude of judicial officers to assuming a more active role during the sentencing stage by obtaining evidence in order to impose a proper sentence;
- difficulties experienced by judicial officers with regard to sentencing in child sexual abuse cases; and
- guidelines in terms of which judicial officers operate when sentencing the sex offender.

4.3 METHOD AND SCOPE

4.3.1 Questionnaire

The study took the form of a questionnaire, which has been attached as Annexure A. The questionnaire was designed on the basis of an initial mini-study undertaken amongst 13 regional court magistrates in the Eastern Cape during April 2002. The mini-study initially arose from the desire to develop a needs-specific lecture and workshop on the sentencing process in child sexual abuse cases. It formed part of a four-day course for judicial officers on various aspects related to the child witness offered by the Unit for Child Witness Research and Training.² It was also realised that, though the majority of child sexual abuse

² The Unit for Child Witness Research and Training was then situated at Vista University, Port Elizabeth Campus, and is at present the Institute for Child Witness Research and Training, P O Box 19553 Linton Grange 6025 (Port Elizabeth).

cases were being dealt with in regional courts, very little was known about the sentencing practice in these courts. The aim was thus broadened to find out more about the factors which determine the severity of sentence with regard to child sexual abuse offences, especially after the introduction of the minimum-sentence legislation.³ Further, the attitude and practice with regard to the South African Law Commission's (hereafter the 'Law Commission') proposals concerning formal victim impact statements and sentencing guidelines were tested.⁴ The present questionnaire was developed from this⁵ and was extended to include more questions on the judicial officers' personal profiles, as well as additional questions focusing on the use and value of expert evidence for sentencing purposes and on the judicial officer's role in obtaining relevant information.

The present questionnaire consists of 20 questions and is divided into two parts. The first part focuses on the profile information of the respondents, while the second part contains 14 questions that focus on the objectives of the study as outlined above. The questions relating to profile information are designed to elicit information from the judicial officer regarding his or her geographical location, gender, home language and experience with regard to child sexual abuse cases. In the second part of the questionnaire, the type of question varies. Questions 7 to 9 provide a range of possible answers to be evaluated, with space for adding

³ Section 51 of the Criminal Law Amendment Act 105 of 1997 came into operation in May 1998.

⁴ Law Commission (2000a) *Report: Sentencing (A New Sentencing Framework)* Project 82; Law Commission (2001) *Sexual Offences: Process and Procedure* Discussion Paper 102 Project 107.

⁵ The following questions/instructions were included in the mini-study: What difficulties do you encounter in sentencing the offender in child sexual abuse cases?; What questions do you have as far as your sentencing discretion is concerned?; What factor plays a role in imposing a more severe sentence?; What factors play a role in determining 'substantial and compelling' circumstances?; Formulate three sentencing guidelines for judicial officers in sexual offence cases where the victim is a child.; What is your experience of victim impact statements and what weight do you attach to them?; Approximately how many cases of child sexual abuse do you deal with per month, and since when?

and explaining any other relevant aspects. Questions 10, 12 to 15, and 19 are open-ended questions, while questions 16 to 18 are of a semi-closed nature, but do provide an opportunity to substantiate, or comment on, the foregoing response.

4.3.2 Sample group

The study was conducted amongst regional court magistrates from all nine provinces in South Africa, with the largest percentage from Gauteng and the Western Cape. Two-thirds of the magistrates were based in urban areas. The majority of the respondents were male (84,6%) and the home language of 61,5% of the magistrates was Afrikaans. About one-third of the respondents stated that they handle five or less child sexual abuse cases per month, while 39,4% deal with six to 15 cases per month. (See par 4.5.2, *tables 1 to 6*, for detailed information on the sample group.)

4.3.3 Completion of questionnaires

Each magistrate attending the ARMSA Conference was provided with a questionnaire and the purpose thereof was explained to him or her. The magistrates were given the opportunity to complete the questionnaires overnight by themselves and to hand them in the following day.

4.3.4 Processing

The data was initially captured on computer by a Vista University data capturer. The final editing was however performed by the Bureau for Market Research at Unisa and the captured data set of data was cleaned for possible coding and data-capturing errors. The data was processed by means of computer.

4.4 VALIDITY OF THE DATA

4.4.1 Sampling error

It should be borne in mind that the information for this study was gathered by means of a sample survey in which a judgement (non-probability) sampling method for the selection of the regional court magistrates was used, that is, only magistrates who attended the Conference were included in the study. The calculation of a possible sampling error in respect of information obtained by means of a non-probability sample is of little value.

4.4.2 Reporting errors

It was virtually impossible to eliminate reporting errors completely. Every possible precaution was however taken in the construction of the questionnaire and during the oral explanation given to the respondents regarding the questionnaire. The fact remains, however, that respondents tend to overstate acceptable behaviour, as when referring to the *Zinn* triad,⁶ and to understate, or even refuse to indicate, possible, underlying negative perceptions and attitudes that play a role in sentencing. In many instances, the respondents themselves may even have been unaware of their own perceptions and of what role these play in the process of sentencing.⁷

4.4.3 Sample group

The study was conducted amongst regional court magistrates. These magistrates have jurisdiction to hear cases involving the indecent assault and rape of

⁶ In *S v Zinn* 1969 (2) SA 537 (A) the Appellate Division stated the practice of the time with regard to the factors relevant to the sentencing process, namely the accused, the crime and the interests of society. This has since been accepted and quoted by the courts as an essential guideline in the sentencing process.

⁷ Fedler and Olckers *op cit* (n 1) explain that the judicial officer's undisclosed self significantly influences legal decision making. See KD Müller and A van der Merwe 'Judicial bias: towards a contextual approach' in K Müller *The Judicial Officer and the Child Witness* (2002) 201-204 for an exploration of this theory with specific reference to decisions impacting on the child witness.

children. At the time of completion of the questionnaire, the procedural practice, that is, compulsory or optional referral to the high court for the possible imposition of the prescribed life imprisonment for child rape cases, had not yet been clarified. This gave rise to the situation where many regional court magistrates dealt with child rape cases by regarding them as not meriting the prescribed minimum sentence, and by finding substantial and compelling circumstances to exist. In those instances, a deviation from the prescribed life imprisonment as a minimum sentence was justified and the sentence was then imposed by the regional court. Question 11 in the questionnaire therefore became irrelevant, since this option no longer exists, as explained in chapter 2, paragraph 2.1.3.

Decisions of regional courts are not per se recorded and reported, as is the case with high court decisions. Therefore, the perceptions of this group of role-players are extremely important, as they were responsible for the majority of all child sexual abuse sentences that were imposed up to March 2003. They are still responsible for sentencing of schedule 2, part 3, offences under the Criminal Law Amendment Act 105 of 1997, apart from the other sexual offences against children which fall outside the ambit of minimum-sentence legislation.

In the light of the *stare decisis* principle, regional court magistrates are bound by decisions of higher courts with regard to general principles and procedures. It is, however, not always clear to what extent high court judgments actually guide regional courts in the imposition of sentences.⁸ Gathering information from regional court magistrates will contribute to clarifying what guidelines of the higher courts they consider to be the most important and applicable, which will, in turn, have an influence on their sentencing decisions. In addition, the

⁸ SS Terblanche *The Guide to Sentencing in South Africa* (1999) 11.

magistrates' personal perceptions and guidelines that play a role in sentencing in respect of child sexual abuse cases can be determined.

4.4.4 Response rate

Of the 192 questionnaires that were handed out, only 104 were returned. Some questionnaires were completed in more detail than others.

4.4.5 Summary

As indicated earlier in paragraph 4.1, sampling was effected by distributing questionnaires to regional court magistrates at their annual national conference. The reader is therefore reminded that the findings of the study should be viewed as those of a baseline study and to regard such findings as qualitative rather than quantitative, although they have been presented in statistical terms.

4.5 FINDINGS OF THE SURVEY

4.5.1 Introduction

The Criminal Law Amendment Act 105 of 1997 elevated *inter alia* the rape of children under 16, gang-rape and the repeated rape of a child younger than 18 to a position where these are considered to be amongst the most serious of offences.⁹ However, by relying on the provision of s 51(3) of the Criminal Law Amendment Act 105 of 1997, judicial officers to a large extent failed in practice to impose the prescribed minimum sentence. A deviation from the prescribed minimum sentence is possible when the cumulative effect of the mitigating factors in a case outweighs the aggravating factors. This would justify a finding that 'substantial and compelling' circumstances exist that make the prescribed sentence grossly disproportionate in the circumstances. The presiding officer then has the jurisdiction to impose a sentence which he or she considers to be appropriate. A further reason why the prescribed minimum sentence of life

imprisonment was not imposed seems to relate to the unofficial 'grading' of rape cases. The purpose of this study, then, was to gain some insight into the judicial officer's cognitive process and to provide some answers relating *inter alia* to the grading of rape cases and the weighing and weighting of mitigating and aggravating factors.

4.5.2 Geographical distribution of respondents

Tables 1 to 3 show the geographical distribution of the respondents. The highest number of respondents (21 or 20,2% of the 104 respondents) came from Gauteng, while respondents from both Limpopo and the Northern Cape completed only three questionnaires respectively (*table 1*). Eight questionnaires were completed by respondents working in the Johannesburg court and six each by magistrates working in the courts of Pretoria and Wynberg (*table 2*). Almost one-third (32,7%) of the 104 questionnaires were completed by magistrates operating in 'rural' courts (*table 3*).

Table 1: Number of questionnaires by province (Question 1A)

Province	Number	Percentage
Eastern Cape	12	11,5
Free State	7	6,7
Gauteng	21	20,2
KwaZulu-Natal	16	15,4
Limpopo	3	2,9
Mpumalanga	7	6,8
Northern Cape	3	2,9
North West	11	10,6
Western Cape	21	20,2
Unknown	3	2,9

⁹ See chapter 2 par 2.1 for a discussion of the impact of the Criminal Law Amendment Act 105 of 1997 on sentencing in child sexual abuse cases.

Province	Number	Percentage
Total	104	100,0

Table 2: Number of questionnaires by city/town (Question 1B)

City/town	Number	Percentage
Bellville	1	1,0
Benoni	2	1,9
Bethlehem	1	1,0
Bloemfontein	4	3,8
Brits	1	1,0
Cape Town	4	3,8
Durban	5	4,8
East London	2	1,9
Ermelo	2	1,9
Ga-rankuwa	2	1,9
George	1	1,0
Germiston	1	1,0
Grahamstown	1	1,0
Heidelberg	2	1,9
Johannesburg	8	7,7
Kimberley	2	1,9
Klerksdorp	2	1,9
Krugersdorp	1	1,0
Ladysmith	1	1,0
Lydenburg	1	1,0
Middelburg	1	1,0
Mitchell's Plain	1	1,0
Mmabatho	2	1,9
Mogwase	2	1,9
Mount Frere	1	1,0
Nelspruit	2	1,9

City/town	Number	Percentage
Newcastle	1	1,0
Oudtshoorn	1	1,0
Paarl	1	1,0
Parow	1	1,0
Port Elizabeth	3	2,9
Pietermaritzburg	4	3,8
Polokwane	1	1,0
Pretoria	6	5,8
Queenstown	1	1,0
Randburg	1	1,0
Scottburgh	2	1,9
Soweto	1	1,0
Stanger	1	1,0
Temba	1	1,0
Tzaneen	2	1,9
Uitenhage	1	1,0
Umlazi	1	1,0
Umtata	3	2,9
Upington	1	1,0
Vereeniging	1	1,0
Vryburg	1	1,0
Welkom	1	1,0
Witbank	1	1,0
Worcester	1	1,0
Wynberg	7	6,8
Zwelitsha	1	1,0
Unknown	5	4,8
Total	104	100,0

Table 3: Number of questionnaires by urban/rural area (Question 2)

Area	Number	Percentage
Rural	34	32,7
Urban	70	67,3
Total	104	100,0

4.5.3 Profile of the respondents

Table 4 shows that the vast majority of the respondents (84,6%) are male and *table 5* shows that the predominant home language is Afrikaans (61,5%).

Table 4: Gender of respondents (Question 5)

Gender	Number	Percentage
Male	88	84,6
Female	16	15,4
Total	104	100,0

Table 5: Home language of respondents (Question 6)

Language	Number	Percentage
Afrikaans	64	61,5
English	15	14,4
Xhosa	6	5,8
Zulu	6	5,8
Setswana	6	5,8
N-Sotho	1	1,0
Tsonga-Shangaan	6	5,8
Total	104	100,0

4.5.4 Experience in child sexual abuse cases

Table 6 shows that just more than one-third (34,6%) of respondents indicated that they deal with five or less child sexual abuse cases per month, while 39,4% deal with between six and 15 cases per month.

Table 6: Number of child sexual abuse cases dealt with per month (Question 3)*

Number of abuse cases	Number	Percentage
0-5	36	34,6
6-15	41	39,4
16-30	12	11,5
31-50	6	5,8
51 or more	3	2,9
None	5	4,8
Total*	103	100,0

* One not answered

As can be seen from *table 7*, the majority of the magistrates who took part in the study had between six and 10 years' experience at a district magistrate's court, while 26 (25,0%) indicated that they had less than six years' experience and 30 indicated that they had more than 10 years' experience. Seven respondents did not answer this question (*table 7*).

Table 7: Years of experience in a district magistrate's court (Question 4A)

Years	Number	Percentage
1-5	26	25,0
6-10	41	39,4
11-19	26	25,0
20-25	2	1,9

26+	2	1,9
Not answered	7	6,7
Total	104	100,0

Almost half (48,1%) of the magistrates indicated that they only had between one and five years' experience in a regional magistrate's court (*table 8*).

Table 8: Years of experience: regional magistrate's court (Question 4B)

Years	Number	Percentage
1-5	50	48,1
6-10	27	26,0
11-19	23	22,1
20-25	1	1,0
Not answered	3	2,9
Total	104	100,0

Table 9 shows that 16 of the 104 magistrates did not answer the question on how many years' experience they had in adjudicating child sexual abuse cases. Almost half of the remainder (48,9% of the 88) had only between one and five years' experience in adjudicating child sexual abuse cases.

Table 9: Years of experience in adjudicating child sexual abuse cases (Question 4C)

Years	Number	Percentage
1-5	43	41,3
6-10	27	26,0
11-19	16	15,4
20-25	1	1,0
26+	1	1,0

Not answered	16	15,4
Total	104	100,0

4.5.5 Difficulties experienced when sentencing offenders

Magistrates were asked what difficulties they encounter when sentencing offenders in child abuse cases (question 7 in the questionnaire – see annexure A). *Table 10* shows that 12 (11,5%) of the magistrates indicated that they do not have any difficulties when sentencing offenders. The difficulty that received the highest score was limited information (or the lack thereof) on the psychological effect of abuse on the child (83 or 79,8% of the 104 respondents). The difficulty that scored next highest related to the fact that prosecutors make a minimal contribution to the sentencing phase (59,6%), followed by no expert evidence being available (52,9%) and a lack of case detail (47,1%).

Table 10: Difficulties experienced when sentencing offender (Question 7)

Difficulties	Number	Percentage
None	12	11,5
No expert evidence	55	52,9
Limited sentencing options	21	20,2
Lack of case detail	49	47,1
Statutory rape relationship	10	9,6
No information about psychological effect on child	83	79,8
Minimal contribution by prosecutor	62	59,6

Other difficulties indicated by the magistrates, apart from the judicial officer's frustration at having to refer a case to the high court for sentencing, included the following:

- 'Juvenile offenders pose problems when sentencing them – few options.'

- 'In all cases referred to the high court the *complainants are recalled*. They are traumatised yet again sometimes 3 years after they had resigned themselves to putting the ordeal behind them.'
- 'If referred to the high court, the cases are delayed, causing *stress* to the victims and families.'
- 'No profile of the child or offender.'
- 'It is the defence who would obtain expert evidence in order to place mitigating factors before the court, whereas the state does the minimum or they are placed in a position where they don't have the evidence available.'
- 'Prosecutors are not interested and evidence is not available.'
- 'There is very little time in the regional court to spend on proper sentence.'
(*Words in italics the emphasis of the author*)

From the above it is clear that sentencing of juvenile offenders poses a problem, as does a lack of information on the surrounding circumstances of the offence. In addition, there is the problem of the trauma and stress endured by both victims and their families owing to compulsory referral of the case to the high court. Lastly, the sentencing phase is not allotted the amount of time and attention that it should be.

4.5.6 Factors impacting on the imposition of a more severe sentence

Magistrates were asked to evaluate, on a scale of 1 to 5 (with 1 being very important and 5 being the least important) the influence (impact) that 10 factors have on the imposition of a more severe sentence (question 8). The percentages are set out below:

- psychological harm 51,9% (*table 11*)
- age of victim 48,1% (*table 12*)
- period of the offence 37,5% (*table 13*)
- violation of trust 29,8% (*table 14*)
- more than one victim 36,5% (*table 15*)

- physical injuries 40,4% (*table 16*)
- premeditation of offence 35,6% (*table 17*)
- severity of offence 43,3% (*table 18*)
- degree of force used 44,2% (*table 19*)
- *modus operandi* 21,1% (*table 20*)

Table 11: Factors impacting on the imposition of a more severe sentence: psychological harm to the victim (Question 8)

Importance	Number	Percentage
Very important	54	51,9
Important	17	16,3
Neutral	4	3,8
Less important	3	2,9
Least important	16	15,4
Total	94	90,4
Unknown	10	9,6
Total	104	100,0

It is of importance to note that the percentage of magistrates regarding psychological harm to the victim as the least important factor, is still relatively high. This is indicative of a divided attitude and approach amongst judicial officers when one considers that 51,9% of respondents also listed it as a very important factor impacting on the imposition of a severe sentence.

Table 12: Factors impacting on the imposition of a more severe sentence: age of the victim (Question 8)

Importance	Number	Percentage
Very important	50	48,1
Important	16	15,4
Neutral	9	8,7

Less important	4	3,8
Least important	14	13,5
Total	93	89,4
Unknown	11	10,6
Total	104	100,0

Table 13: Factors impacting on the imposition of a more severe sentence: period of the offence (Question 8)

Importance	Number	Percentage
Very important	39	37,5
Important	18	17,3
Neutral	11	10,6
Less important	7	6,7
Least important	16	15,4
Total	91	87,5
Unknown	13	12,5
Total	104	100,0

Table 14: Factors impacting on the imposition of a more severe sentence: violation of trust (Question 8)

Importance	Number	Percentage
Very important	31	29,8
Important	25	24,0
Neutral	15	14,4
Less important	8	7,7
Least important	9	8,7
Total	88	84,6
Unknown	16	15,4
Total	104	100,0

Table 15: Factors impacting on the imposition of a more severe sentence: more than one victim (Question 8)

Importance	Number	Percentage
Very important	38	36,5
Important	17	16,3
Neutral	12	11,5
Less important	5	4,8
Least important	14	13,5
Total	86	82,7
Unknown	18	17,3
Total	104	100,0

Table 16: Factors impacting on the imposition of a more severe sentence: physical injuries (Question 8)

Importance	Number	Percentage
Very important	42	40,4
Important	20	19,2
Neutral	13	12,5
Less important	3	2,9
Least important	11	10,6
Total	89	85,6
Unknown	15	14,4
Total	104	100,0

Table 17: Factors impacting on the imposition of a more severe sentence: premeditation (Question 8)

Importance	Number	Percentage
Very important	37	35,6
Important	19	18,3
Neutral	15	14,4

Less important	5	4,8
Least important	11	10,6
Total	87	83,7
Unknown	17	16,3
Total	104	100,0

Table 18: Factors impacting on the imposition of a more severe sentence: severity of offence (Question 8)

Importance	Number	Percentage
Very important	45	43,3
Important	20	19,2
Neutral	6	5,8
Less important	3	2,9
Least important	12	11,5
Total	86	82,7
Unknown	18	17,3
Total	104	100,0

Table 19: Factors impacting on the imposition of a more severe sentence: degree of force used (Question 8)

Importance	Number	Percentage
Very important	46	44,2
Important	17	16,3
Neutral	11	10,6
Less important	4	3,8
Least important	8	7,7
Total	86	82,7
Unknown	18	17,3
Total	104	100,0

Table 20: Factors impacting on the imposition of a more severe sentence: *modus operandi* (Question 8)

Importance	Number	Percentage
Very important	22	21,2
Important	17	16,3
Neutral	25	24,0
Less important	9	8,7
Least important	9	8,7
Total	82	78,8
Unknown	22	21,2
Total	104	100,0

It is possible to compare, by means of an index, the relative importance of the above factors as rated by the magistrates. Where the magistrates had to rate the factors, a rating of 1 (very important) was allocated a value of 5, a rating of 2 a value of 4, a rating of 3 a value of 3, a rating of 4 a value of 2 and a rating of 5 (least important) a value of 1. The indexes in respect of the factors were calculated by using the formula:

$$I = \frac{\sum F_n}{\sum F_1} \times 100$$

where I = index

$\sum F_n$ = total value of n^{th} factor

$\sum F_1$ = total value of factor with highest value

Table 21 shows that the factor rated as the most important in imposing a more severe sentence is the degree of force used (index = 100), while *modus operandi* received the lowest rating (index 84,5). However, the index values do

not differ much, indicating that all the factors in the table do play an important role in imposing a more severe sentence.

Table 21: Index in respect of importance of factors impacting on the imposition of a more severe sentence

Question 8	Index
Degree of force used	100,0
Severity of the offence	98,2
Psychological harm to the victim	98,0
Age of the victim	96,7
Physical injuries	96,3
Premeditation	92,9
More than one victim	91,7
Violation of trust	91,4
Commission of offence over period	89,9
<i>Modus operandi</i>	84,5

Apart from the factors indicated in the questionnaire, the respondents introduced further factors. Two respondents referred to the lack of remorse on the part of the accused, the existence of previous convictions and the bigger picture of the crime as such. Only one respondent referred to factors that contributed *to the complainant's humiliation*, namely:

- letting her walk naked after having, or before having, sex;
- group rape;
- inserting objects such as a beer bottle into the vagina; and
- keeping the complainant in custody.

The same respondent also referred to:

- sexual intercourse taking place more than once; and
- the offender having a sexually transmitted disease.

This respondent also believed that the force used by the offender contributes to the severity of the offence, and gave the following examples:

- threatening to kill the victim after having sex;
- cutting the vagina open with a knife; and
- stabbing the victim.

Other factors mentioned by respondents included the following:

- the age difference between perpetrator and victim;
- the defencelessness or vulnerability of the victim;
- whether the accused is known, or a stranger, to the victim; and
- the accused's relationship with the victim.

The last factor mentioned seems to be open to interpretation, since it is not clear what exactly is meant by it. It could include only extra-familial positions of trust or it could include only intra-familial positions of trust and/or authority, for example involving the father or stepfather.

The factor referring to the perpetrator as being known or being a stranger is also not clear. This could be interpreted to be aggravating only where the judicial officer believes that it is worse for the victim to be raped by a stranger than an acquaintance.¹⁰

4.5.7 Factors impacting on the imposition of a lighter sentence

In question 9 of the questionnaire, respondents were asked to assess which factors they regarded as having an impact on the imposition of a lighter sentence. They had to evaluate seven factors on a scale ranging from 1 to 5,

¹⁰ See chapter 5 par 5.5 for a discussion of recent research in the United Kingdom indicating that acquaintance rape is as serious as stranger rape and is, in most cases, even worse.

where 1 is very important and 5 is the least important. *Tables 22 to 28* show the results of the rating.

The most important factor contributing to a lighter sentence is the youth of the offender (26,0% in *table 27*), followed by being a first offender (13,5% in *table 28*). The least important factor was identified as being a man's virility (69,2% in *table 24*), followed by the victim's loss of virginity (50,0% in *table 25*).

Table 22: Factors impacting on the imposition of a lighter sentence: no physical injuries (Question 9)

Importance	Number	Percentage
Very important	5	4,8
Important	15	14,4
Neutral	39	37,5
Less important	13	12,5
Least important	21	20,2
Total	93	89,4
Unknown	11	10,6
Total	104	100,0

Table 23: Factors impacting on the imposition of a lighter sentence: relationship with the victim (Question 9)

Importance	Number	Percentage
Very important	11	10,6
Important	9	8,7
Neutral	29	27,9
Less important	12	11,5
Least important	30	28,8
Total	91	87,5
Unknown	13	12,5

Importance	Number	Percentage
Total	104	100,0

One of the respondents elaborated further as to the effect of the relationship on the sentence:

'If no relationship, it's a neutral factor. If there was a relationship, that would probably be an aggravating factor and not a mitigating factor in terms of breach of trust or misuse of a position of authority.'

Table 24: Factors impacting on the imposition of a lighter sentence: man's virility (Question 9)¹¹

Importance	Frequency	Percent
Very important	6	5,8
Less important	1	1,0
Least important	72	69,2
Total	79	76,0
Unknown	25	24,0
Total	104	100,0

Table 25: Factors impacting on the imposition of a lighter sentence: loss of the victim's virginity (Question 9)

Importance	Number	Percentage
Very important	6	5,8
Important	4	3,8
Neutral	15	14,4
Less important	8	7,7

¹¹ A man's virility as a possible mitigating factor was included in the study in the light of the then recent judgment in *S v Mahomotsa* 2002 (2) SACR 435 (SCA). The Supreme Court of Appeal held that the regional court and the high court erred in taking this factor into account. It is significant that 10 respondents still rated a man's virility as amongst the most important and important mitigating factors. This again raises the question of the awareness of judicial officers of precedents and of the real influence of precedents on sentencing factors.

Least important	52	50,0
Total	85	81,7
Unknown	19	18,3
Total	104	100,0

Table 26: Factors impacting on the imposition of a lighter sentence: offender abused as a child (Question 9)

Importance	Number	Percentage
Very important	10	9,6
Important	12	11,5
Neutral	42	40,4
Less important	15	14,4
Least important	13	12,5
Total	92	88,5
Unknown	12	11,5
Total	104	100,0

Table 27: Factors impacting on the imposition of a lighter sentence: the youth of the offender (Question 9)

Importance	Number	Percentage
Very important	27	26,0
Important	26	25,0
Neutral	24	23,1
Less important	10	9,6
Least important	8	7,7
Total	95	91,3
Unknown	9	8,7
Total	104	100,0

Table 28: Factors impacting on the imposition of a lighter sentence: accused is a first offender (Question 9)

Importance	Number	Percentage
Very important	14	13,5
Important	25	24,0
Neutral	34	32,7
Less important	14	13,5
Least important	7	6,7
Total	94	90,4
Unknown	10	9,6
Total	104	100,0

When the ratings of the factors that contribute to a more severe sentence (*tables 11 to 20*) are compared with the ratings that contribute to a lighter sentence (*tables 22 to 28*), it is clear that the latter were assigned significantly lower ratings (least important) than the former.

The relative importance of the factors contributing to a lighter sentence, as rated by magistrates participating in the study, is shown in *table 29*. The same method was used for calculating the indexes in *table 29* as was used in *table 21*. Young offenders received the highest rating (index = 100) and a man's virility the lowest (36,9). The difference between the highest value (100) and the lowest (36,9) is considerable and indicates that magistrates seem to believe that the factors at the lower end of the index, namely a man's virility (36,9) and no loss of virginity (52,4), play a very small role in imposing a lighter sentence. It must also be remembered that *table 21* was constructed in order to give an overview of the relative importance of the factors and must be read in conjunction with *tables 22 to 28*, where the actual rating is indicated.

**Table 29: Index in respect of the imposition of a lighter sentence
(Question 9)**

Factor	Index
Young offender	100,00
First offender	91,54
Accused sexually abused as a child	81,34
No physical injuries	75,01
Relationship with the victim	71,50
No loss of virginity	52,42
A man's virility	36,90

Six of the respondents further indicated that real *remorse* shown by the offender was a factor that played a role in the imposition of a lighter sentence. Remorse as a factor also featured twice in questions 8 and 10. Three respondents highlighted a *plea of guilty* as a mitigating factor. A further respondent remarked that another factor taken into account was that where the victim and offender are about the *same age*. Other comments included the following:

- 'Where the accused has been seriously beaten up by the family of the victim.'
- 'Diminished criminal capacity of the offender.'
- 'Where the offender, on his own accord, reports the matter to seek help.'
- 'A complete detailed profile of the offender may have an impact that is the "big picture" of the individual offender.'
- 'No psychological injuries.'

It is of interest to note that the last remark illustrates the perception that rape or sexual abuse can leave a child untouched.

4.5.8 Substantial and compelling circumstances

Magistrates were requested to explain the (cognitive) process they followed in making a finding regarding 'substantial and compelling' circumstances (question 10, annexure A). The result of this open-ended question is summarised in *table 30*.

Table 30 indicates that 23 (22,1%) of the magistrates did not answer the question. The table further shows that the most common approach followed by respondents is to adopt a holistic approach to the offender (27,9%).

Table 30: Process followed in determining substantial and compelling circumstances (Question 10)

Factors taken into account		Rural	Urban	Total
Weighing of mitigating/aggravating factors	Count	4	12	16
	Column %	11,8%	17,1%	15,4%
Personal background of the offender	Count	2	5	7
	Column %	5,9%	7,1%	6,7%
Nature of the offence	Count	0	5	5
	Column %	0,0%	7,1%	4,8%
None	Count	4	19	23
	Column %	11,8%	27,1%	22,1%
Interest of the community	Count	2	1	3
	Column %	5,9%	1,4%	2,9%
If the offender has been sexually abused	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
If the offender suffers from a mental illness	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Case against the offender as a whole	Count	12	17	29
	Column %	35,3%	24,3%	27,9%
Possibility of rehabilitation	Count	1	1	2

Factors taken into account		Rural	Urban	Total
Prior offences committed by the offender	Column %	2,9%	1,4%	1,9%
	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Other	Count	2	0	2
	Column %	5,9%	0,0%	1,9%
Benchmark of minimum sentences (<i>S v Malgas</i>)	Count	5	9	14
	Column %	14,7%	12,9%	13,5%
Total	Count	34	70	104
	Column %	100,0%	100,0%	100,0%

From the responses received (77,9%), three main approaches can be identified. First, the case as a whole is considered. The second approach is to weigh aggravating and mitigating circumstances. Although this factor was listed separately, it could, by implication, also form part of the first approach of viewing the case as a whole. Lastly, as a point of departure, the interpretation of s 51 of the Criminal Law Amendment Act by the Supreme Court of Appeal in *S v Malgas*¹² is used as a benchmark in respect of minimum sentences.

Other factors mentioned by the respondents were:

- the accused's attitude during the course of the trial (1 respondent);
- the use of drugs or alcohol during the commission of the offence (1 respondent);
- the remorse shown by the accused (2 respondents); and
- provocation (3 respondents).

¹² 2001 (1) SACR 469 (SCA).

It is not clear what exactly is meant by the last remark. It may be interpreted to mean that 'sexy' clothing or dating could be arousing, but this is merely an interpretation by the author.

4.5.9 Severity of the offence of rape

***Table 31: Reasons why some rapes are more serious than others
(Question 12)***

Reasons		Rural	Urban	Total
All rapes are considered to be serious	Count	7	5	12
	Column %	20,6%	7,1%	11,5%
Seriousness depends on the evidence presented	Count	2	1	3
	Column %	5,9%	1,4%	2,9%
Age of the victim	Count	6	21	27
	Column %	17,6%	30,0%	26,0%
Psychological harm	Count	9	22	31
	Column %	26,4%	31,4%	29,8%
Additional humiliation	Count	1	2	3
	Column %	2,9%	2,0%	2,9%
If rape is violent	Count	4	5	9
	Column %	11,8%	7,1%	8,7%
Nature of the relationship between the victim and offender	Count	6	10	16
	Column %	17,6%	14,3%	15,3%
Prior offences committed by the offender	Count	1	3	4
	Column %	2,9%	4,3%	3,8%
Case as a whole	Count	9	14	23
	Column %	26,5%	20,0%	22,1%
None	Count	0	6	6
	Column %	0,0%	8,6%	5,8%
Other	Count	0	2	2

Reasons		Rural	Urban	Total
Total	Column %	0,0%	2,9%	1,9%
	Count	34	70	104
	Column %	100,0%	100,0%	100,0%

It is obvious that determination of the seriousness of the offence of rape is a difficult task for the respondents, and comments included the following:

- 'Hierdie is 'n moeilike bepaling. Bepaal jy nou of dit meer ernstig vir jou as voorsittende beampte is of kyk jy uit die oogpunt van die slagoffer. Verkragting is altyd ernstig, ek kyk eerder watter ekstra omstandighede is daar om sy vonnis wat ek normaalweg oplê te verswaar.'
- 'It violates the girl in a way sometimes difficult to describe and comprehend.'

In highlighting the factors that would add to the seriousness of rape, the killing of the victim was used as an example by one of the respondents. Sixteen respondents considered the nature of the relationship to be important in determining the seriousness of the offence. Of these, three stated that a previous sexual relationship between the offender and the complainant was essential in mitigating the offence. Further, two respondents referred to the scene of the crime and the complainant's clothing as making the offence less serious:

- 'Did the victim wear provocative clothing, was she at a place normally visited by men, etc?'
- 'Did the victim allow herself to be in a position where she should have expected sexual advances and allow and encourage it, but then contrary to the expectations of the accused, suddenly refuse.'

The degree to which additional humiliation contributes to the seriousness of rape was mentioned by only three respondents, and some demonstrated more insight than others with regard to the existence of long-term damage:

'Verkragting maak 'n inbreuk op seksuele privaatheid en menswaardigheid van 'n persoon. Dit het gevolglik 'n groot hoeveelheid skade wat 'n persoon se toekoms totaal beïnvloed.'

The majority of the respondents (29,8%) mentioned psychological harm to the complainant as a factor in determining the seriousness of the offence.

4.5.10 Sentencing guidelines

Table 32: Sentencing guidelines for judicial officers with regard to sexual offences against children (Question 13)

Guidelines	Rural	Urban	Total
Enough time should be available to review sentencing options	9	24	33
Consider all the circumstances of the case	9	5	14
Consider age of the victim	7	8	15
Assess the psychological effect on the victim	11	16	27
Consider the possibility of a maximum sentence	4	5	9
Consider the nature of the relationship between offender and victim	5	11	16
Consider the risk the crime holds for the community	11	7	18
Possibility of deterring future offenders	3	11	14
Consider the minimum prescribed sentence	2	4	6
Take into account the constitutional rights of children	3	9	12
Other	17	46	63
None	7	29	36
Apply the triad of the crime, the criminal and the interests of society	14	34	48
There are no guidelines		1	1

Judicial officers were given the opportunity to formulate three guidelines with regard to the sentencing process in cases of sexual offences against children. This was included in the questionnaire with the aim of drawing on regional court practice and approaches in order to provide assistance with regard to the Law Commission's proposal on sentencing guidelines for each category of offence.¹³ However, 36 respondents did not even attempt to answer the question. Of importance, though, is that almost one-third indicated that the sentencing process in child sexual abuse cases should be allotted adequate time for reflection and should not be rushed. Other responses to be taken into account overlapped with factors that contribute to a more severe sentence, such as the age of the child, the psychological effects on the victim and the nature of the relationship between the offender and the complainant. Further, the judicial officer's responsibility of risk assessment in respect of the offender was mentioned in addition to the aim of general deterrence and the court's constitutional duty to protect children against abuse.¹⁴ The overriding guideline mentioned was still the application of the *Zinn* triad.¹⁵

4.5.11 Victim impact statements

In 2000, the South African Law Commission proposed the general introduction of formal victim impact statements (and this proposal was again made at the end of 2002) with specific reference to sexual offences.¹⁶ Psychological and social harm to victims of sexual abuse have been accepted.¹⁷ Further, it has been argued in

¹³ Law Commission *op cit* (n 4) 82.

¹⁴ Section 28(1)(d). Section 28(2) further provides that a child's best interests are paramount in every matter concerning the child.

¹⁵ *S v Zinn supra* (n 6).

¹⁶ *Op cit* (n 4).

¹⁷ CR Bartol (1995) *Criminal Behaviour: A Psychological Approach* 4 ed 289; *S v V* 1994 (1) SA 598 (A) at 600j.

chapter 1 that information on sentencing is incomplete without evidence on the psychological effect of the crime on the victim. A victim impact statement simply describes the effects of the crime on the victim in terms of the victim's perceptions and expressions of the emotional, physical and economic harm he or she has sustained as a result of the crime.¹⁸ Some jurisdictions allow the victim to suggest an appropriate sentence for the offender, with or without a qualification that it will not bind the court.¹⁹ It is also possible that someone else can make the suggestion on the victim's behalf, such as a mother or behavioural scientist.

Despite the absence of any formal victim impact statement scheme in South Africa, some courts have taken into account evidence of this nature. The purpose of the following two questions was to determine the judicial officer's understanding of the nature and purpose of the victim impact statement, as well as to determine his or her experience of, and attitude to, such a statement.

Table 33: Experience of victim impact statements (Question 14)

Experience		Rural	Urban	Total
They allow victims to speak their minds	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Considered to be inadequate	Count	2	2	4
	Column %	5,9%	2,9%	3,9%
Have had little exposure; however, they could be therapeutic to the victim	Count	4	10	14
	Column %	11,8%	14,5%	13,6%
Indicative of psychological trauma caused by the raping	Count	2	0	2
	Column %	5,9%	0,0%	1,9%

¹⁸ E Erez 'Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice' *Crim LR* (1999) 546.

¹⁹ See chapter 6 para 6.2 and 6.4 for a discussion of the definition of victim impact statements and of the practice relating thereto.

Experience		Rural	Urban	Total
Play an important role in the evaluation of evidence	Count	5	10	15
	Column %	14,7%	14,5%	14,6%
Statements in a state of shock not taken into consideration	Count	1	1	2
	Column %	2,9%	1,4%	1,9%
Could lead to contradictions owing to lapse of time	Count	2	1	3
	Column %	5,9%	1,4%	2,9%
Different experiences with victims	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Statements from guardians and teachers are useful	Count	0	2	2
	Column %	0,0%	2,9%	1,9%
Victim is often forgotten and not taken into consideration	Count	2	0	2
	Column %	5,9%	0,0%	1,9%
Statements are often not produced by state prosecutors	Count	1	6	7
	Column %	2,9%	8,7%	6,8%
Evidence during trial regarding trauma makes them superfluous	Count	1	2	3
	Column %	2,9%	2,9%	2,9%
Victim impact statements are often used	Count	1	11	12
	Column %	2,9%	15,9%	11,7%
No experience	Count	11	23	34
	Column %	32,4%	33,3%	33,0%
Seldom used	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Total	Count	34	69	103
	Column %	100,0%	100,0%	100,0%

Two respondents remarked on the therapeutic value of the victim impact statement to the victim. From the remarks concerned, it would appear that the presentation of the victim impact statement, describing the trauma of the victim, could be more than educational or informative for the judicial officer, as one respondent described it as 'shattering'. In addition, it could also be 'informative'

for the perpetrator by indicating, to him or her, the harmful results of his or her conduct. Other remarks illustrate the conflicting views judicial officers hold on victim impact statements and included the following:

- 'Had a few prepared by NGO's. They should be made compulsory – difficult to sentence without.'
- 'They are just of negative nature.'

This raises doubt as to the understanding by the judicial officer of the purpose and nature of the victim impact statement and illustrates the need for training regarding trauma itself, as well as regarding the different stages of trauma. This need is further illustrated by the following remarks:

- 'They are often made by police in a haste and while the child is still in a state of shock – hardly ever used.'
- Victim impact statements are not very detailed – maybe social workers don't know how important it is.'

Not only do the above remarks emphasise the judicial officer's need for proper training, but also that all people involved with victim impact statements clearly need such training as well.

Table 34: Weight given to a victim's impact statement (Question 15)

Weight		Rural	Urban	Total
A great deal of weight	Count	6	23	29
	Column %	17,6%	32,9%	27,9%
It depends on the evidence	Count	10	3	13
	Column %	29,4%	4,3%	12,5%
Depends on whether the victim testified during the trial	Count	1	2	3
	Column %	2,9%	2,9%	2,9%
If statement is not repetitive, a great deal	Count	0	1	1

Weight		Rural	Urban	Total
of weight	Column %	0,0%	1,4%	1,0%
Not much weight is assigned to the statement	Count	3	3	6
	Column %	8,8%	4,3%	5,8%
Depends on the contents of the statement	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Depends on the circumstances	Count	4	4	8
	Column %	11,8%	5,7%	7,7%
None	Count	6	25	31
	Column %	17,6%	35,7%	29,8%
Other	Count	0	3	3
	Column %	0,0%	4,3%	2,9%
Depends on the trauma caused by the rape	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Equal weight; no overemphasis of factors	Count	2	6	8
	Column %	5,9%	8,6%	7,6%
Depends on the age of the victim	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Total	Count	34	70	104
	Column %	100,0%	100,0%	100,0%

Those who indicated that a great deal of weight is attached to victim impact statements made *inter alia* the following remarks:

- 'A lot, due to the actual suffering a child was made to endure.'
- 'It *inter alia* gives an indication of the victim's indignation and hurt – it is therefore quite important.'
- 'Great weight if uncontested.'
- 'Very important – balances the triad.'

Six respondents raised the question of the *credibility* of the statement and three respondents preferred corroboration by way of *expert evidence* (own italics). It

would appear that, in practice, letters are handed in to the court by the victim explaining the impact which the offence has had on him or her, and that problems are posed by the absence of cross-examination:

'I still use my discretion, as the letter to the court was not subject to cross-examination. So too letters by the accused carry little weight unless tested by *cross-examination*.' (Own italics)

Another respondent indicated that the mere fact that the victim testifies 'face to face' with her rapist contributes to credibility. One respondent adopted a very wary approach by remarking that the circumstances would have to be investigated to determine whether impact statements could be believed, or whether they were not merely a ploy to exaggerate the case against the accused.

A factor that can further complicate the effective implementation of victim impact statements is the child's age and level of intellectual development. Often, the child is not able to express himself or herself, or may be withdrawn and suffer from dissociation as a result of the sexual abuse, which, in turn, would then influence the weight attached to the evidence about harm.²⁰

4.5.12 Expert evidence

Table 35: Find expert testimony helpful in sentencing (Question 16)

Response	Number	Percentage
Yes	98	93,3
No	5	4,8
No response	1	1,0

²⁰ See chapter 5 par 5.5.3 for a discussion of the danger of the judicial officer's perception that tears or distress in court should accompany the victim's testimony in order to make a finding of harm.

Response	Number	Percentage
Total	104	100,0

Almost all the respondents found expert evidence to be helpful in sentencing, with only five of them experiencing the opposite.

Table 36: Reasons for finding expert testimony helpful in sentencing (Question 16)

Expert testimony		Rural	Urban	Total
Expertise outside of court's knowledge gives background	Count	3	6	9
	Column %	8,8%	8,6%	8,7%
Indicative of the extent of trauma experienced	Count	5	6	11
	Column %	14,7%	8,6%	10,6%
Especially in the case of correctional supervision	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Yes, I might lack the needed terminology	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
It elicits information from young children	Count	0	2	2
	Column %	0,0%	2,9%	1,9%
It assists with the verification of facts	Count	0	3	3
	Column %	0,0%	4,3%	2,9%
Especially in cases dealing with paedophiles (prognosis, perversion, sexual kinkiness)	Count	0	2	2
	Column %	0,0%	2,9%	1,9%
It provides an objective perspective	Count	3	5	8
	Column %	8,8%	7,1%	7,7%
It is indicative of the psychological harm inflicted	Count	1	1	2
	Column %	2,9%	1,4%	1,9%
Assists in delivering appropriate sentences	Count	2	6	8
	Column %	5,9%	8,6%	7,7%
No, it is one-sided	Count	3	3	6
	Column %	8,8%	4,3%	5,8%

Expert testimony		Rural	Urban	Total
No, no experts are available in the area	Count	2	0	2
	Column %	5,9%	0,0%	1,9%
Other	Count	1	2	3
	Column %	2,9%	2,9%	2,9%
None	Count	14	30	44
	Column %	41,2%	42,9%	42,3%
Provides background on the make-up of the offender	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Background on the victim	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Total	Count	34	70	104
	Column %	100,0%	100,0%	100,0%

Magistrates had many divergent viewpoints in this regard. Most of them relied on expert evidence before sentencing for information on the impact of the crime on the victim:

- 'I am not in a position to evaluate the impact the incident might have had on the victim.'
- 'I am not properly trained to hold a real enquiry into the real effects of sexual transgression on the victim.'
- 'Long term trauma is a factor in sentencing and I cannot find that as a fact without evidence to that effect.'
- 'Victims do not always realise the impact of the event(s) until much later in life.'

However, several problems were experienced with the presentation and value of expert evidence, as is evident from the following statements:

- '(Expert testimony is helpful) if it really makes sense. Sometimes it is more a rattle of learned theories than anything else.'

- 'They tend to be general and uniform with no specific reference to a particular individual.'
- 'Evidence by a psychiatrist or psychologist *not* reacting on hearsay, is especially helpful.'
- 'Seldom well motivated and one-sided. Focus on the accused or his family.'

Despite the problems raised, any information that is of assistance to the judicial officer would appear to be of value in contributing to better sentencing practice:

- 'Kinders het dikwels nie die vermoë om hul emosies oor te dra nie. Dit kan wees weens 'n gebrek aan woordeskat of enige ander rede. Sielkundiges (ens) kan jou inlig oor watter toestand hulle die kind gesien het (aanvanklik) en fases wat die kind deurgaan. 'n Voorsittende beampte wat ingelig is, se vonnis sal dit weerspieël.'

In fact, one respondent referred to the possibility of conducting his own research rather than calling for expert evidence:

- 'A lot of research is done and one can easily come to the preferred decision.'

The danger that however remains is: What body of research is accessed – outdated or new research, or even mainstream or alternative research?

4.5.13 Role of the presiding officer in obtaining information before sentence

Judicial officers indicated (see par 4.5.5 above) that the greatest difficulties experienced during sentencing were a lack of information on the psychological harm done to the victim, case detail and expert evidence, and tend to blame all of these difficulties on the passivity of the prosecutor. For various reasons, the judicial officer does not seem to realise that the dilemma could be addressed by him or her assuming a more active role in terms of s 274 of the Criminal

Procedure Act 51 of 1977.²¹ Questions 17 and 18 were aimed at investigating the judicial officer's attitude and practice with regard to taking responsibility for obtaining all relevant information in order to impose a proper sentence.

Table 37: Frequency in requesting evidence in order to impose a proper sentence (Question 17)

Frequency	Location				Total	
	Rural		Urban			
	N	%	N	%	N	%
Never	1	2,9	10	14,9	11	10,9
Sometimes	17	50,0	30	44,8	47	46,5
Often	16	47,1	27	40,3	43	42,6
Total	34	100,0	67	100,0	101	100,0

Table 38: Reasons why evidence was never requested (Question 17)

Reason	Location		Total
	Rural	Urban	
Time constraints		2	2
Severe sexual abuse		1	1
Clear mitigating and aggravating circumstances	1		1
No reason		7	7
Total	1	10	11

Table 39: Reasons why evidence was sometimes requested (Question 17)

Sometimes	Location		Total
	Rural	Urban	
Time constraints	2		2

²¹ See chapter 7 par 7.3 for a discussion of the quasi-inquisitorial nature of the sentencing phase that puts the judicial officer at the centre of the proceedings.

Sometimes	Location		Total
	Rural	Urban	
Not always needed after a full trial	1	3	4
For the purpose of a proper sentence imposition	1	1	2
If highly qualified prosecutors are not available	1		1
If the severity of psychological harm is evident		1	1
Need for evidence on mitigating and aggravating circumstances		2	2
Lack of funds		1	1
Youthful offender living with parents		3	3
No reason	12	18	30
For evidence		1	1
Total	17	30	47

An interesting explanation was offered by one of the respondents as to why evidence was only sometimes obtained in these cases:

'I regard this type of offence as serious and it has more often than not a serious psychological impact on the victim. I do not necessarily need the victim (or someone else) to put it on record.'

This raises the question whether one can state that a judicial officer is allowed to take judicial notice of the severe impact of the crime on victims of sexual offences. Despite a ruling to the contrary by the Appellate Division,²² it certainly appears to be the case in this instance.

Table 40: Reasons why evidence was often requested (Question 17)

Often	Location		Total
	Rural	Urban	
Time constraints	1		1

²² *S v V supra* (n 17) at 600j. See chapter 5 par 5.5.5 for a discussion on evidentiary issues relating to harm.

Often	Location		Total
	Rural	Urban	
In the case of juveniles	1	2	3
Not always needed after a full trial		1	1
Experts are not always available		2	2
For the purpose of a proper sentence imposition	1	1	2
If highly qualified prosecutors are unavailable	1		1
If the severity of psychological harm is evident		1	1
Need evidence on mitigating and aggravating circumstances		1	1
In the case of sexual offences against children		1	1
No reason	12	17	29
In the case of a guilty plea		1	1
Total	16	27	43

Some judicial officers realise that they must play a more active role when sentencing the accused. By playing a more active role, they will also be able to learn more about the victim and the impact of the crime on the victim:

- 'The accused would always do everything in his power to soften the horrendous detail of his acts to put himself in a better light. The state prosecutor is these days prompted by me to get a social worker report with an interview with the complainant to give you the other side of the picture.'

Table 41: Conducting own research in order to understand the impact of sexual offences on children (Question 18)

		Rural	Urban	Total
Yes	Count	17	39	56
	Column %	50,0%	55,7%	53,8%
No	Count	12	22	34
	Column %	35,3%	31,4%	32,7%
Yes, very limited	Count	0	4	4

		Rural	Urban	Total
No, cannot do own research	Column %	0,0%	5,7%	3,8%
	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
No, no time	Count	1	1	2
	Column %	2,9%	1,4%	1,9%
No, regional magistrates under pressure	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Yes, if it is necessary	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Yes, generally consult articles and reports	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Yes, if applicable in a particular case	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
None	Count	1	2	3
	Column %	2,9%	2,9%	2,9%
Total	Count	34	70	104
	Column %	100,0%	100,0%	100,0%

Two respondents strongly expressed the view that a judicial officer may not conduct his or her own research and that only the Supreme Court of Appeal (such as in *S v Abrahams*²³) may do so. They were of the opinion that no regional court magistrate would be allowed to conduct such an investigation. However, the majority of the respondents indicated that they do in fact do some form of reading to improve their knowledge, although some caution was expressed.²⁴

²³ 2002 (1) SACR 116 (SCA).

²⁴ See chapter 5 par 5.1 for a brief discussion of the judicial officer's own research in both rape and indecent assault cases.

- 'One must be careful to infer that it is necessarily applicable in a particular case – without evidence it cannot be relevant.'

4.5.14 Perceptions of the effect of sexual offences on children

One respondent in the mini-study²⁵ indicated that, when offences are graded, it is all about how the judicial mind works in interpreting relevant factors. The way the judicial officer generally perceives the impact of sexual offences on children would thus influence the interpretation of any evidence on harm, as well as the weight attached to it. Therefore, it was felt necessary to investigate the understanding of magistrates in this regard in order to determine the need for future training.

Table 42: Perception of the impact of sexual offences on children (Question 19)

		Rural	Urban	Total
It is irrefutable	Count	6	7	13
	Column %	17,6%	10,0%	12,5%
Negatively impacts on the development of the victim	Count	3	18	21
	Column %	8,8%	25,7%	20,2%
It is traumatic	Count	15	26	41
	Column %	44,1%	37,1%	39,4%
It negatively impacts on the community as a whole	Count	1	7	8
	Column %	2,9%	10,0%	7,7%
It is devastating if it is a family member	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Sexual offences are akin to murder	Count	0	3	3
	Column %	0,0%	4,3%	2,9%
Destructive	Count	1	0	1

²⁵ See par 4.3.1 above.

		Rural	Urban	Total
None	Column %	2,9%	0,0%	1,0%
	Count	5	7	12
	Column %	14,7%	10,0%	11,5%
Harm needs to be researched	Count	1	0	1
	Column %	2,9%	0,0%	1,0%
Young children have a better chance of recovery	Count	0	1	1
	Column %	0,0%	1,4%	1,0%
Other	Count	1	1	2
	Column %	2,9%	1,4%	1,9%
Total	Count	34	70	104
	Column %	100,0%	100,0%	100,0%

The overwhelming response to the above question illustrates that the majority of judicial officers are aware of the trauma and harm that children experience as a result of sexual abuse. The following represent some of the views:

- 'All children are affected by it – it is necessary for the adjudication of the matter to find out how much with each complainant.'
- 'It has a life long negative effect with recurring manifestations.'
- 'Destroys the future of children and their perception of life.'
- 'An adult once testified about being abused as a child and said: "He stole my conscience."'
- 'The children's lives are destroyed and shattered. It is not enough to sentence the offender. Steps should be put into place that the child receive compulsory psychological treatment as well.'
- 'There cannot be a more serious offence.'
- 'If this cannot be stopped in time, we will one day sit with a very weird society.'

One of the magistrates further indicated that the following symptoms are experienced by children who are abused:

- 'Fear of men in general, loss of social interaction with others, long term effect on person and relationships, change in personality and self-esteem, demoralisation, sad and angry, loss of their childhood.'

This remark demonstrates an understanding of the potential long-term impact of this offence on the lives of victims.

4.5.15 Personal contact with other rape victims

Question 20 was not taken into account for purposes of this thesis.

4.5.16 Conclusion

The grading of cases of child sexual abuse and rape appears to be a complex exercise which some judicial officers find difficult to describe. Although the psychological harm caused to the complainant is recognised to be a key factor in determining the seriousness of rape, conflicting views seem to exist about the concept and value of victim impact statements. However, it would appear that the impact of the crime on the victim is playing an increasingly important role in sentencing, thereby contributing to a much-needed paradigm shift.

With regard to aggravating factors, judicial officers appear to be fairly neutral about the abuse of trust as a factor influencing a more severe sentence. It further appears that it is not fully understood that the offender's *modus operandi* in indecent assault cases, that is, the grooming process, entails the creation of deceptive trust as well as careful planning of the offence.²⁶ It is also noteworthy that only one respondent had the sensitivity and insight to recognise that further humiliation, apart from the rape itself, is an aggravating factor. As far as

²⁶ See chapter 5 par 5.6 for a discussion of the grooming process.

mitigating factors are concerned, the youthfulness of the accused weighs heavily in sentencing the accused, as it does in all other cases. A matter of concern, however, is that, despite a contrary finding by the Supreme Court of Appeal,²⁷ six respondents still recognised a man's virility as an important mitigating factor.

Though the greatest difficulties experienced by judicial officers during the sentencing process all relate to a lack of information, the majority only sometimes use their powers to request evidence in terms of s 274 of the Criminal Procedure Act 55 of 1977. On the other hand, it is quite surprising to find that more than half of the respondents conducted some form of research on their own. This practice could be valuable, depending on how reliable the sources consulted are, but it also has to be disclosed to the defence when it influences the sentencing outcome.

However, it would appear that, in answering the questionnaire, respondents to a large extent gave reasons similar to those that they would provide when called upon to do so by an appeal court; in other words, what they are legally expected to provide. In order to obtain a more accurate indication of actual perceptions, transcripts of the sentencing process would have to be analysed.

²⁷ *S v Mahomotsa supra* (n 11).

ANNEXURE A

QUESTIONNAIRE: SENTENCING IN CHILD SEXUAL ABUSE CASES

PROFILE INFORMATION

1. Geographic location: province and town/city

--

2. Indicate the correct location

RURAL	
URBAN	

3. Indicate the approximate number of child sexual abuse cases dealt with per month

0 – 5	
6 – 15	
16 – 30	
31 – 50	
51 +	

4. Please indicate years of experience as a magistrate within the following categories:

District court magistrate	
Regional court magistrate	
Adjudicating child sexual abuse	

5. Gender

Male	
Female	

6. Home language

--

SENTENCING

7. What difficulties do you encounter in sentencing the offender in child abuse cases?

None	
No expert evidence available	
Limited sentencing options	
Lack of case detail (i.e. grooming)	
Limited or no information regarding psychological effect on child	
Statutory rape in relationship	
Prosecutors do minimum	
Other: please explain	

8. Indicate the factors you regard as having an impact on the imposition of a more severe sentence. Evaluate on a scale from 1 to 5 where 1 is very important and 5 the least important.

Psychological harm to victim			
Age of victim			
Commission of offence over period			
Violation of trust			

More than one victim	
Physical injuries	
Premeditation	
Severity of offence	
Degree of force used	
<i>Modus operandi</i>	
Other: please explain	

9. Which factors do you regard as having an impact on the imposition of a lighter sentence? Evaluate on a scale from 1 to 5 where 1 is very important and 5 the least important.

A man's virility	
No loss of virginity	
Accused sexually abused as child	
No physical injuries	
Relationship with victim	
Young offender	
First offender	
Other: please explain	

10. Explain the (cognitive) process you personally follow in determining 'substantial and compelling' circumstances.

--

--

11. Do you always refer a case for sentencing to the High Court when the accused has raped a girl younger than 16 years?

Yes	
No	

Substantiate:

12. Indicate why some rapes are more serious than others.

13. Formulate three guidelines for judicial officers relating to sentencing in respect of sexual offences involving children.

14. What is your experience of victim impact statements?

--

15. What weight do you give to a victim impact statement?

16. Do you find expert testimony helpful in sentencing?

Yes			
No			
Substantiate:			

17. How often do you ask for evidence to inform yourself as to the proper sentence to be imposed?

Never			
Sometimes			
Often			
Comment:			

18. Do you ever conduct your own research in trying to understand the impact of sexual offences on children?

Yes			
No			

19. What is your general perception of the impact of sexual offences on children?

20. Do you know any relative or friend who was a victim of rape or indecent assault?

Yes			
No			

CHAPTER 5

ANALYSIS AND COMMENT

*'Sy is nie deur wildvreemdes verkrag nie. Sy het tweede appellant lank as 'n familiefriend geken en 'n hele paar ure in eerste appellant se geselskap deurgebring. Insgelyks is hul persone wat uit dieselfde sosiale milieu as die klaagster kom.'*¹

5.1 INTRODUCTION

5.2 BEHAVIOURAL SCIENCE IN THE SENTENCING PHASE

5.3 HARM

5.3.1 Harm as an independent factor

5.3.2 Haphazard approach to harm

5.3.3 The role of perceptions

5.3.3.1 Perceptions of judicial officers as to when harm has been caused

5.3.3.2 Perceptions of judicial officers as to what kind of harm is caused by sexual offences against children

a) Rape

b) Indecent assault

5.3.4 Research findings on the harm caused by child sexual abuse

5.3.5 Evidentiary issues relating to harm

5.4 MODUS OPERANDI: THE GROOMING PROCESS

5.5 THE USE OF EXPERT EVIDENCE IN THE SENTENCING PROCESS

5.5.1 South African case studies on extra-familial paedophiles

5.5.1.1 Expert evidence with regard to the accused

a) The condition of paedophilia

b) Rehabilitation and recommendation with regard to sentence

c) The interpretation of, and weight attached to, expert testimony

¹ *S v A* 1994 (1) SACR 602 (A) at 608j. This quotation illustrates that the judicial officer's perception of when psychological harm is caused can contribute to the subjective and incorrect determination of the seriousness of the crime. See, further, par 5.3.3.1 as well as par 5.3.4 below.

5.5.1.2 Expert evidence with regard to the victim

5.6 JUDICIAL DISCRETION: 'GRADING' OF THE SERIOUSNESS OF CHILD SEXUAL ABUSE CASES

5.7 AGGRAVATING AND MITIGATING FACTORS

5.7.1 Rape

5.7.1.1 Aggravating factors

- a) Circumstances related to the commission of the crime*
- b) The accused*
- c) Society's interests*
- d) The interests of the victim*

5.7.1.2 Mitigating factors

- a) Circumstances related to the commission of the crime*
- b) The accused*
- c) The interests of the victim*

5.7.2 Indecent assault

5.7.2.1 Aggravating factors

- a) Circumstances related to the commission of the crime*
- b) The accused*
- c) Society's interests*
- d) The interests of the victim*

5.7.2.2 Mitigating factors

- a) Circumstances related to the commission of the crime*
- b) The accused*
- c) Society's interests*
- d) The interests of the victim*

5.8 DISPARITY IN SENTENCING

5.8.1 Unjustified disparity in child sexual abuse cases

5.8.1.1 Sentencing patterns in extra-familial paedophile cases

5.8.1.2 Further causes of unjustified disparity

5.9 PLEA OF GUILTY

5.9.1 Plea of guilty and remorse

5.9.2 The need for information and role-players' responsibilities

5.10 CONCLUSION

5.1 INTRODUCTION

An analysis of chapters 2 to 4 is undertaken here in order to identify the main trends, developments, problems and shortcomings in current sentencing practices in child sexual abuse cases in South Africa.

5.2 BEHAVIOURAL SCIENCE IN THE SENTENCING PHASE

The sentencing phase has been described as 'a new trial'² with separate issues. As indicated below, these issues are often of a psychological nature. Currently, very little statutory provision is made in South Africa for the use of psychological expertise in sentencing. The Criminal Procedure Act 51 of 1977 does not give any explicit recognition to the importance of information from behavioural scientists in the sentencing phase, except that it requires a report from a probation or correctional officer before the imposition of correctional supervision.³ After conviction of the accused, the court has a fairly broad discretion to impose an appropriate sentence within the legal framework.⁴

² H Daniels *Morris: Technique in Litigation* 5 ed (2003) 346.

³ Section 276A of the Criminal Procedure Act 51 of 1977.

⁴ Section 274(1) of the Criminal Procedure Act 51 of 1977 (see chapter 1 (n 18)). The court will have to take statutory provisions and guidelines from precedents into consideration, as discussed in chapters 2 and 3.

However, in order to exercise such discretion, the court first has to make certain factual findings, for example that a particular aggravating or mitigating factor exists. The sentencing discretion can only be exercised properly if all the facts relevant to the matter before the court are known.⁵ The information required in this phase thus extends beyond the elements of the crime and the question of guilt or innocence.

This need for information is even more acute in the case of a plea of guilty, as discussed below, which would appear to be the trend in the majority of cases involving paedophiles and indecent assault charges. In these cases, the accused often does not testify under oath before sentence. Instead, a report from an expert is submitted and the expert is required to testify,⁶ thereby acting as the voice of the accused.

As indicated above, the courts have traditionally approached the question of sentencing from the viewpoint of the *Zinn* triad⁷ and have focused their attention on the offender, the offence and the interests of society. In terms of this triad, the accused as an individual becomes more important and his or her future is considered. The questions posed here relate *inter alia* to the reason why the offence was committed,⁸ to the degree of culpability,⁹ and to the dangerousness

⁵ SS Terblanche *The Guide to Sentencing in South Africa* (1999) 99.

⁶ For example *S v S* 1977 (3) SA 830 (A) at 834j.

⁷ 1969 (2) SA 537 (A).

⁸ In *S v Martin* 1996 (1) SACR 172 (W) at 174a it was held that, for more serious crimes, there is no more important question that can be put to the accused than: 'Why did you do it?'. In the absence of an answer to this question, a harsher sentence could be imposed, as no reason is provided for the commission of the offence and no finding of remorse can be made.

⁹ J Engelbrecht 'Kindermolestering en verkrachting: Die howe se rol' (1995) April *Consultus* 22 notes that, in cases of child sexual abuse, it is the 'laakbare gesindheid wat die oortreder openbaar het' that constitutes the most important factor in sentencing, and the court can only determine whether this is mitigated in some way by considering expert evidence on the

of the offender.¹⁰ The issues of risk assessment and risk management feature to a great extent in international jurisdictions¹¹ and these issues are echoed in the emphasis with regard to sex offenders in South Africa accordingly shifting to matters of treatment, long-term supervision and rehabilitation. For example, the Criminal Law (Sexual Offences) Amendment Bill 2003 provides, as a guiding principle, that, in determining appropriate sanctions in all sexual offence cases, the possibility of rehabilitating the sexual offender should be taken into account.¹² The rationale for rehabilitation relates to the long-term goal of safety of victims, their families and communities. However, it would almost appear as if the offender now has a right to rehabilitation – at least in theory.¹³

Expert evidence is necessary in the following instances:

- The South African Law Commission (hereafter 'the Law Commission') envisaged that, as part of the original sentence of the court, all sex offenders should, when released on parole or under correctional supervision, be required to undergo treatment by way of an accredited

psychodynamic features of the child abuser; also, A Ashworth 'Criminal justices and deserved sentences'(1989) 36 *Crim L Rev* 340-355 asserts that the sentencing process is a public, judicial assessment of the degree to which the offender may rightly be ordered to suffer legal punishment.

¹⁰ NN Kittrie, EH Zenoff and VA Eng *Sentencing, Sanctions, and Corrections* 2 ed (2002) 285; D van Zyl Smit *Taking Life Imprisonment Seriously (In National and International Law)* (2002) 201 asserts that there must always be an element of dangerousness to justify life imprisonment in non-murder cases.

¹¹ C Hood, H Rothstein and R Baldwin *The Government of Risk: Understanding Risk Regulation Regimes* (2001) 217; G Pinard and L Pagani (eds) *Clinical Assessment of Dangerousness: Empirical Contributions* (2001) 286; Virginia Criminal Sentencing Commission *Assessing Risk Among Sex Offenders in Virginia* (2001); Section 229 of the England and Wales Criminal Justice Act 2003.

¹² Schedule 1(l)(v).

¹³ Compare P Stella (2001) 'The purpose and effects of punishment' 9:1 *European Journal of Crime, Criminal Law and Criminal Justice* 57 (see chapter 1 (n 30)).

treatment programme specifically related to sex offences.¹⁴ In this instance, the court will need expert information to indicate whether the convicted person has the potential to benefit from treatment.¹⁵

- When determining the type of treatment programme for a sex offender, the court should also consult expert opinion.¹⁶
- Long-term supervision orders are proposed for offenders who are declared dangerous sex offenders, and this order can be made only after an expert's report has been obtained.¹⁷

The concept of a 'dangerous sex offender' is not defined and it will in all likelihood give rise to much debate between experts, to different interpretations by the courts as well as to academic criticism.¹⁸ It would further appear that the envisaged role of behavioural scientists with regard to the sex offender in South

¹⁴ *Report on Sexual Offences* Project 107 (2002) 373. The Law Commission recommended that the Department of Justice and Constitutional Development give due regard to *inter alia* non-legislative recommendations regarding offender treatment and implement them as a matter of priority.

¹⁵ Section 276A (2A) of the Criminal Procedure Act 51 of 1977 when amended by s 12(b) of Schedule 2, Criminal Law (Sexual Offences) Amendment Bill 2003.

¹⁶ Law Commission *op cit* (n 14) 373.

¹⁷ Section 20 of the Criminal Law (Sexual Offences) Amendment Bill 2003. See T Thomas 'Supervising child sex offenders in the community – some observations on law and practice in England and Wales, the Republic of Ireland and Sweden' 9:1 *European Journal of Crime, Criminal Law and Criminal Justice* at 69-90 for an insightful discussion which concludes that supervising child sex offenders is a difficult and demanding activity that needs appropriate education, training and a degree of devolved autonomy.

¹⁸ See A Von Hirsch and A Ashworth 'Protective sentencing under section 2 (2) (B): The criteria for dangerousness' (1996) *Crim LR* 175; also AE van der Hoven ('Sentencing the Sex Offender: A Criminological Perspective on Section 286A of the Criminal Procedure Act 51 of 1977 (as amended)' (2005) 1:6 *Sexual Offences Bulletin* 61) who points out that an assessment of the offender's risk is a different and more feasible task than the assessment of his or her dangerousness

Africa will be a twofold one, namely evaluation for legal purposes as well as dealing with issues of management and treatment.¹⁹

As indicated in part I, the emotional state of the victim in sexual abuse cases is slowly being recognised in both draft legislation and case law as being relevant before sentencing. Recently, in the case of the rape of a child younger than 16 years, evidence with regard to the present and future impact of the crime on the child victim was recognised as peremptory when a decision on the imposition of life imprisonment is taken.²⁰ For some time, the perception existed amongst some judicial officers that a finding of harm could be made only on the basis of psychiatric or psychological testimony.²¹ This led to the untenable result that a finding of no harm was made in the absence of such testimony. The position was then clarified by the Supreme Court of Appeal, which held that it is not only the behavioural scientist who can testify about the harmful effect of a sexual crime on the victim.²² However, when available, experts will often be involved.

The Law Commission proposed a statutory guideline to protect the victim's interests during sentencing. This guideline entails that, for purposes of imposing an appropriate sentence, evidence of the impact of any sexual offence upon the complainant may be adduced in order to prove the extent of the harm suffered

¹⁹ See A Buchanan 'Reviews: R Rosner (ed) "Principles and practice of forensic psychiatry"' (2004) 15:1 *The Journal of Forensic Psychiatry and Psychology* 180 for an explanation of the role of psychiatrists in America and the United Kingdom.

²⁰ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205e. See chapter 2.

²¹ The court *a quo* in *S v Abrahams* 2002 (1) SACR 116 (SCA) at 121a refused to make a finding on harm in the absence of a psychiatric report.

²² In *S v Abrahams supra* (n 21) at 124c the Supreme Court of Appeal clearly indicated that the undisputed evidence of the mother or teacher regarding the symptoms of harm could be accepted and interpreted by the court in the absence of a psychiatric report.

by the victim.²³ A further proposal is that not only bodily harm be taken into account when considering the infliction of grievous harm to be an aggravating factor. The severe psychological impact of rape on a girl between the age of 16 and 18 years will bring the offence within the ambit of s 51(1), namely life imprisonment.²⁴ It would thus appear that the traditional approach of determining the seriousness of the crime by often focusing only on the visible injuries has been expanded to include information on psychological harm.

From the above it is clear that, in contrast to the scant provision made therefor in the Criminal Procedure Act 51 of 1977, both the Criminal Law (Sexual Offences) Amendment Bill 2003 and the Supreme Court of Appeal have given greater recognition to the importance of psychology in the sentencing phase. However, as will be shown below, law and psychology differ not only in the way that they construe norms and pathology, but also as regards the reasoning associated with these.²⁵ Psychology as a science dealing with human beings perceives its task as discovering, describing and explaining the individual. Law, on the other hand, reflects a certain value system in legislating 'rules of social life'.²⁶ Law functions mainly at the crossroads of the individual's and society's interests and perceives these interests as existing by virtue of the value systems accepted by the law, and not as existing objectively. Thus, law deals with a

²³ Section 17(b) of the Criminal Law (Sexual Offences) Amendment Bill 2003. The use of victim impact statements is also advocated in the form of non-legislative recommendations and the use of a child psychologist is proposed for this purpose (Law Commission *op cit* (n 14) 372). See chapter 6 for an investigation of victim impact statements.

²⁴ Section 26 of the Criminal Law (Sexual Offences) Amendment Bill 2003.

²⁵ W Domachowski 'Guilty or not guilty: Assertions of social psychology *vis-à-vis* the law' in A Czerederecka, T Jaskiewicz-Obydzinska and J Wojcikiewicz (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 305.

²⁶ *Ibid.*

situation that cannot exist in psychology.²⁷ In practice, this will often lead to negative responses by the court to behavioural science evidence, and to the court having difficulty in understanding and accommodating such evidence.

5.3 HARM

5.3.1 Harm as an independent factor

As indicated above, both draft legislation and case law reveal that the focus in sentencing has been expanded to include the impact of the crime on the victim. It was argued in chapter 1, paragraph 1.2, that this wider focus suggests that the traditional sentencing triad has acquired a fourth dimension. Although a possible counter-argument is that this is simply a case of 'fleshing out' the offence and not a new element of the triad as such, it is submitted that the courts have always viewed the interests of society as a separate element and that the emphasis on the victim is merely developing this into a consideration of its own. With the harm experienced by the victim having acquired a new focus, it is important to determine in what way this has been applied and perceived by the courts in sexual offences against children.

5.3.2 Haphazard approach to harm

Despite the finding in the empirical study²⁸ that the psychological harm caused to the complainant is a key factor in sentencing, an analysis of case law reveals that pre-sentence presentation of harm caused to victims has been approached in a

²⁷ *Ibid.* See also J le Roux and I Mureriwa 'Paedophilia and the South African criminal justice system: A psychological perspective' (2004) 17:1 *SACJ* 50 who argue in favour of a finding of diminished responsibility in terms of s 78(7) of the Criminal Procedure Act 51 of 1977 with regard to the fixated paedophile, and therefore a lighter sentence. See also Developments in the Law 'Confronting the new challenges of evidence' 108 *Harv LR* (1995) 1481 where it is explained that science is a descriptive pursuit which does not define how the universe should be, but rather describes how it actually is. Therefore law should constantly reinvent its responses to novel scientific evidence. Compare also KW Fiske 'Sentencing powers and principles' in JE Pink and D Perrier *From Crime to Punishment* 2 ed (1992) 238.

²⁸ Chapter 4 par 4.5.6.

haphazard way. In 11 out of 33 rape cases,²⁹ the court did not refer to harm at all. In nine of the other cases where harm was in fact considered, it was found not to be serious or of a long-lasting nature, or it was found that the victim had recovered from the trauma or was making good progress, or no substantial weight was attached to the mental trauma as an aggravating factor. Thus, in only 13 out of 33 of the rape cases evaluated (ie in just more than a third of the cases) was substantial weight attached to the harm caused by the offence for sentencing purposes.

As opposed to the situation in rape cases, an analysis of sexual offences other than rape in chapter 3 above indicates that, in the majority of cases (16 out of 30), neither the presiding officer nor any of the other parties made any inquiry or mention about harm caused to the complainant. This highlights the fact that the emphasis was mostly on the accused and that only half of the version relevant to sentencing was presented to the court. For example, in *S v V*³⁰ objective recognition was given to the fact that the victim was defenceless when exploited by her stepfather and would need help. Yet, this is one of many examples where no evidence on the victim's harm was tendered or requested.

In the investigation in paragraph 5.5 below, the state presented evidence on the impact of the indecent conduct on the children concerned in only two of the seven extra-familial indecent assault cases where the perpetrators were all diagnosed as paedophiles. Both a psychologist and one complainant testified about the after-effects of the crime in *S v E*,³¹ but did not convince the court. In

²⁹ For the purpose of this analysis, the three cases where the victims died as a result of the injuries caused during the rapes, were excluded.

³⁰ 1993 (1) SACR 736 (O) at 737g.

³¹ 1992 (2) SACR 625 (A). The psychologist did not make a good impression and her evidence was rejected as wanting and contradictory (at 629c), while the court found that the accused's

S v D,³² the boys and their mothers were called to testify about the harmful effect of the offence, and their testimony was accorded enough weight to justify punishment first and then treatment.

In another instance, the defence expert was asked by the court to comment with regard to the effect of the teacher's conduct on three 10-year-old girls:

'I think that if the situation is managed properly and that is an investigation into the current emotional state of the child, if the situation is ventilated, talked about with the children, that if the homes are satisfactory homes and secure homes and loving homes in which the child need not feel guilty or feel that the child has done something terribly wrong, then the outlook is extremely good because children have a natural capacity for recovery from all sorts of terrible things that might happen to them ... So if there is no intervention, what is the term you use, inhibition or traumatic scars can be left in the sub-conscious, that could have serious repercussions in later life. Yes, if it is left in the sub-conscious, that is why I say if it is talked about, the thing is discussed, it is much better and the children are aware why the thing is being talked about and the parents co-operate in the whole scheme of things, then the outlook is extremely good. In other words, it never goes into the sub-conscious, it remains there and the child knows it, it is accepted, the family understands, the social welfare worker understands, it never goes into the sub-conscious. In other words, it is faced by the entire family as any problem should be as far as possible.'³³

Rumpff CJ took *judicial notice* of the fact that the first girl must have experienced severe mental trauma, but then relied on *hearsay* from the dicta of the same defence expert in order to find, seemingly as mitigating, recovery and no future trauma.

'Fortunately, the father of this child had her examined by another psychiatrist. About this, Dr Shubitz said in reply to questions by the court: "...the psychiatrist ... had indicated to (the parents) that everything was alright with the little girl and that he did not anticipate that there would be any trauma in the future, but that he would like to see her again, I think it was in two or three years time for a recheck and I think this is really the answer. The other thing that pleased me personally that (the

conduct had, only to a certain degree, contributed to one of the complainant's psychological problems (at 627h).

³² *S v D* 1989 (4) SA 225 (C) at 232c-f.

³³ *S v S supra* (n 6) at 836j-837d.

father) describes his home life as a happy one and that the child felt secure and that in fact recently the child appeared to be a much happier child, because, obviously the thing had been brought out into the open and had been discussed. So in some strange kind of way after bad comes good.³⁴

Although Rumpff CJ hereby demonstrated an active approach in trying to obtain essential information needed to make a decision, the source should be questioned. The defence will always try to minimise the effect and is not necessarily the best source to consult for valid and reliable information with regard to possible aggravating factors.³⁵ Parents are also often not equipped to interpret trauma symptoms, or are too involved to make accurate assessments about harm.³⁶ In *S v N*,³⁷ the court fully accepted the testimony of the mother that her six-year-old daughter had not displayed any visible, emotional or psychological problems, despite the fact that she seemed afraid of all males. The court thus made the following finding:

'Volgens haar moeder toon sy *slegs* 'n skuheid vir mans en seuns, wat haar ouers klaarblyklik nie in so 'n ernstige lig beskou dat hulle die hulp van 'n sielkundige nodig ag nie ... Dit kan bepaald dus nie aanvaar word dat die klaagstertjies in die geval enige ernstige fisiese of emosionele trauma ervaar het en blywende psigoseksuele letsels opgedoen het nie.'³⁸

It remains to be seen to what extent the fear of men will impact negatively on the future relationships of the second girl. It is clear that the mother had no insight into the situation. In addition, the child received no therapy.

³⁴ *S v S supra* (n 6) at 839e-g.

³⁵ However, some judicial officers realise that the accused will do anything 'to soften the horrendous detail of his act and put himself in a better light' (see chapter 4 par 4.5.13).

³⁶ Law Commission *op cit* (n 14) 348.

³⁷ 1991 (1) SACR 271 (C). The accused attempted to rape, and indecently assaulted, two girls attending his wife's day school.

³⁸ *S v N supra* (n 37) at 274b-c (own italics). The testimony of the mother further illustrates the difficulties encountered where family members have to interpret and determine the impact of sexual offences on their own children.

In *S v O*,³⁹ the prosecutor informed the court of the availability of the therapist of one of the boys, but left it to the magistrate to call her. However, the magistrate refused to exercise this option because he was unaware of what the evidence would involve. On appeal, it was held that the accused in this instance had to be sentenced on the factual basis that none of his victims had suffered any injury, material prejudice or harm.

Evidence of the impact of child sexual abuse thus appears to be presented in an inconsistent and arbitrary manner. The result is that the court is not provided with a balanced version of the crime in order to determine a proper sentence. Furthermore, there is no clarity as to whose responsibility⁴⁰ it is to seek evidence on the impact of child sexual abuse, and emotion in court is allowed with regard to the accused, but not with regard to the victim.

5.3.3 The role of perceptions

Fedler and Olckers⁴¹ point out that there is an undisclosed self of the judicial officer that is never expressed. This consists of layers of personal information, history, social circumstances, values, biases and preferences. Further, the thoughts and opinions of the judicial officer, as well as the reason for being a magistrate or a judge and intuitive responses, all play a role in, for example, understanding and interpreting evidence presented about harm or the lack thereof. Personal attitudes and perceptions can thus, throughout criminal proceedings, influence any decision or finding made by a court. The following investigation focuses on the perceptions of judicial officers as to when harm has been caused to child victims, as well as regarding the kind of harm caused by

³⁹ 2003 (2) SACR 147 (C) at 153h-i and 162a-c.

⁴⁰ *S v Gerber* 2001 (1) SACR 621 (WLD) at 623j-624b; *Rammoko v Director of Public Prosecutions supra* (n 20) at 205g-h.

⁴¹ *A Draft Model for Social Context Revisioning of Legal Materials* (2000) 4.

sexual offences against children. In view of the fact that it is argued that psychological harm now constitutes an independent factor in child sexual abuse cases, it is important to determine prevailing perceptions amongst judicial officers. Biased perceptions will simply continue to negate any recognition of the victim, as well as the constitutional values of dignity and equality to which the victim is entitled.

5.3.3.1 Perceptions of judicial officers as to when harm has been caused

While judicial officers often remind themselves not to be emotional in imposing sentences in child sexual abuse cases, they tend to look for some form of emotion on the part of the victim to make a finding of trauma, especially in the absence of any other evidence in this regard. It would appear that the perception exists that, in the absence of tears⁴² or distress⁴³ during the victim's testimony, there is no real or long-lasting harm done. Research has, however, shown that the abused child often suffers from dissociation and that very little emotion is displayed.⁴⁴ In *S v Pieters*,⁴⁵ an expert explained to the court that, although the victim appeared calm and happy, she was suffering from denial and was experiencing inner turmoil.

The problem relating to interpretation of harm based on the emotion displayed by the victim is further illustrated in *S v Gqamana*.⁴⁶ Here, the court found,

⁴² *Attorney-General, Eastern Cape v D* 1997 (1) SACR 473 (ECD) at 477f.

⁴³ *S v Ven 'n Ander* 1989 (1) SA 532 (AA) at 539h-i; compare *S v Gqamana* 2001 (2) SACR 28 (CPD) at 35f.

⁴⁴ K Hollely 'Examining the impact of childhood trauma' in K Müller *Introducing the Child Witness* (2000) 116; K Hollely 'Examining the impact of childhood trauma: The legacy of child sexual abuse' in K Müller *The Judicial Officer and the Child Witness* (2002) 104.

⁴⁵ 1987 (3) SA 717 (AA) at 726d.

⁴⁶ *Supra* (n 43) at 37a.

notwithstanding testimony by the victim, the mother and a probation officer before sentence, that the effect of the abuse on the girl was neither serious nor of a lasting nature. This finding was made despite the fact that evidence was led that the girl was fearful, distrusted men, and was easily shocked when someone shouted at her, was forgetful and had a nervous state of mind generally. These symptoms were all relevant at the time of sentence two years and nine months after the crime, even though the complainant had moved away from the town where the crime had occurred, to her mother's house. The court in this case was of the opinion that the complainant was 'an intelligent, well-spoken person with considerable self-assurance'.⁴⁷ She had also passed Standard 8 at the end of the year, had completed her schooling successfully and had plans to study further.

It is clear that impressions assume more significance during the sentencing phase.⁴⁸ It is believed by some judicial officers that, particularly in rape cases, the court should have the opportunity of observing the complainant in order to assess the degree to which she or he has been harmed by, and may still be suffering as a result of, the crime.⁴⁹ However, it is extremely dangerous for a presiding officer to make findings on the impact of the sexual offence based on his or her observations of the victim. The after-effects of sexual abuse can be lasting and of such a nature that they will not be easily discernable by mere observation. The loss of trust and the serious implications of the complainant's fearfulness seem not to have been accorded appropriate weight in *S v*

⁴⁷ *S v Gqamana supra* (n 43) at 34e. Compare *S v G* 2004 (2) SACR 296 (W) at 297j-298b where the court accepted the testimony of the probation officer and mother that the 10-year-old victim had only superficially overcome the trauma if one considered her schoolwork and friends. The trauma had persisted not only with regard to the victim, but also with regard to the mother and immediate family.

⁴⁸ Terblanche *op cit* (n 5) 79.

⁴⁹ *S v Mkhondo* 2001 (1) SACR 49 (WLD) at 57-58.

Gqamana,⁵⁰ especially in view of the possible long-term effect on future relationships. In addition to the court's lack of understanding of the symptoms of trauma, Erez⁵¹ highlights a further *problem regarding interpretation* of harm, namely unbelief:

'Research has also documented that harm descriptions which legal professionals have considered exaggerated or unbelievable are indeed common experiences which those acquainted with crime's impact on victims view as within the range of "normal" reactions to victimisation.'

In the analysis of the case law it was further indicated that the Appellate Division considered the fact that the girl had been raped by a *family friend*, and his friend, whom she had met several hours before, as mitigating.⁵² In other words, the fact that they were *not complete strangers* was perceived to be less harmful or traumatising than if they had been strangers, despite the fact that she was a virgin and had no experience of boyfriends. The court also questioned her belief that the accused had two guns, and therefore also any substantial anxiety or fear experienced by her. Yet, she escaped only once having realised that there was no gun and then hid all night to wait for help in the morning. This assumption that rape by an acquaintance is not experienced as harmful seems to be based on a judicial perception which has recently been proven to be incorrect by international research. In such research it has been found that the experience of the victim in acquaintance rape could be compared with that of stranger rape.⁵³

⁵⁰ *Supra* (n 43) at 37a-b.

⁵¹ 'Who's afraid of the big bad victim? Victim impact statements as victim empowerment *and* enhancement of justice' (1999) *Crim L Rev* 554.

⁵² *S v A supra* (n 1) at 608h.

⁵³ Sentencing Advisory Panel *Research Report – 2: Attitudes to Date Rape and Relationship Rape; A Qualitative Study* (May 2002) at <http://www.sentencing-advisory-panel.gov.uk/research/rape/forward.htm> (accessed 13/04/03).

It is the sense of betrayal when a relationship of trust or friendship is breached that plays a significant role in this instance.

A further perception detected about harm relates to that regarding boys between the ages of 14 and 17 years. It would appear that boys are presumed to practise masturbation themselves and will therefore not really be affected by similar sexual activity with an older man. In *S v R*,⁵⁴ the court held that the boy involved was not a defenceless child, but a boy of 15 for whom masturbation was probably no shocking revelation and that there was also no question of assault. This approach highlights the court's striking lack of psychological knowledge with regard to the more damaging effect of enticement into participation in sexual activity, as opposed to the use of brute force.⁵⁵ Further, no recognition was given to feelings of badness, shame or guilt incorporated into the child's self-image through the enforced secrecy of the abusive events. In addition, no recognition was given to the boy's possible confusion regarding his sexual identity.

5.3.3.2 Perceptions of judicial officers as to what kind of harm is caused by sexual offences against children

Even in cases where the court makes a finding about present and future emotional and psychological harm caused, and regarding the weight to be attached to it, it is uncertain what the court understands this to entail. The following discussion provides a brief analysis of perceptions expressed by various courts over the years. Rape cases are dealt with first.

⁵⁴ 1993 (1) SACR 209 (A) at 222i.

⁵⁵ D Finkelhor and A Brown 'The traumatic impact of child sexual abuse: A conceptualisation' (1985) 55:4 *American Journal of Orthopsychiatry* 65.

a) Rape

In *S v S*,⁵⁶ evidence of the victim's state of anxiety, constant fear, severe depression and problems in her relationship with her boyfriend was accepted nine months after the rape as being proof of intense psychological harm. Nightmares, anxiety and constant reminders of the ordeal by certain sounds were experienced by the 16-year-old victim in *S v Pieters*.⁵⁷ The court then expressed its own opinion about the effect of rape in its address to the accused.

'Jou misdryf het haar in haar vroulike eer, integriteit en privaatheid aangetas op 'n wyse wat waarskynlik moeilik begryp kan word deur iemand wat nie so 'n ondervinding ondergaan het nie. Die gebeure moes vir haar 'n afgryslike ondervinding gewees het.'⁵⁸

In *S v M*,⁵⁹ the victim, aged eight, was very nervous and scared, slept badly and could not concentrate on her schoolwork and, even though there was an improvement, a finding of long-term psychological consequences was made. With regard to the psychological impact, the trial judge in *S v V and Another*⁶⁰ accepted rape as being the worst form of humiliation for a woman or girl and gave his own opinion as to whether rape leaves emotional scars:

'Verkragting is seker iets wat baie vroue vrees. Verkragtings word dikwels, word ruim in die pers gepubliseer. Dit is seker die diepste vernedering wat 'n vrou kan ondergaan om verkrag te word. Hierdie hof sal nooit kan sê wat die geestelike letsel is wat gelaat is op hierdie meisies nie. Op die oog af nie veel nie, maar veral die eerste klaagster het in die getuiebank 'n baie moeilike tyd beleef. Dit is vir die hof baie duidelik dat dit vir haar pynlik was om hierdie onaangename ondervinding weer in herinnering te roep. Dit is iets wat 'n vrou of meisie seker so gou moontlik wou vergeet. Maar niemand kan sê of hulle dit ooit sal kan vergeet nie. Die hof se

⁵⁶ 1988 (1) SA 120 (AA) at 124d.

⁵⁷ *Supra* (n 45).

⁵⁸ *S v Pieters supra* (n 45) at 726i-727a.

⁵⁹ 1985 (1) 1 (AA) at 9d.

⁶⁰ *Supra* (n 43).

ondervinding is dat verkragting sy letsels laat ... daarom word die misdaad deurgaans in 'n ernstige lig beskou.⁶¹

In *S v C*,⁶² the court's perceived consequence of the heinous crime of rape was described as a fate worse than the loss of life:

'A rapist does not murder his victim – he destroys her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life.'

In *S v R*,⁶³ the 14-year-old victim displayed symptoms of psychological illness after a brutal rape and the court acknowledged that she, 'as is the case with rape victims, will always experience stress in respect of her sexuality'. It then quoted from *N v T*⁶⁴ in describing the general nature and impact of rape:

'Rape is a horrifying crime and is a cruel and selfish act in which the aggressor treats with utter contempt the dignity and feelings of his victims ...'

A further remark was made about the nature of the crime on a girl aged 11 in *Attorney-General, Eastern Cape v D* (in which the effect of the crime was also hinted at):⁶⁵

'This was obviously a callous and brutal crime accompanied by threats against the complainant and the frightening action of the respondent gagging her so as to cut

⁶¹ *S v V en 'n Ander supra* (n 43) at 539h-i.

⁶² 1996 (2) SACR 181 (C) (CPD) at 186e.

⁶³ 1996 (2) SACR 341 (T) at 343i.

⁶⁴ 1994 (1) SA 862 (C) at 862g-h.

⁶⁵ *Attorney-General, Eastern Cape v D supra* (n 42) at 477g. In another case of rape of an eleven-year-old victim, the Zimbabwe Supreme Court held that, despite differing degrees, rape always implies vicious assault, which, in most cases, remains with the victim for life (*S v S* 1995 (1) SACR 50 (ZS) at 61b). It was further acknowledged by the court that this memory would, 'in all probability, influence, perhaps drastically, the victim's attitude towards society in general, and men in particular, as long as she lives' (at 61b).

off her screams. The respondent acted with callous disregard to the rights of the complainant and the sanctity of her body.'

The most recent Supreme Court of Appeal case in which a description of harm is encountered is that of *S v Abrahams*,⁶⁶ where the specific harm caused by incest was acknowledged and the nature thereof described as follows:

- forced sexual access obtained to a daughter's body constitutes a deflowering of the most grievous and brutal kind;
- the victim was deeply and injuriously affected by the rape (she changed from a diligent student to one who was rebellious, disobedient and aggressive; she refused to sleep alone, repelled physical contact and rejected her mother with whom she previously had a very close bond); and
- incestuous rape is grievous in that it exploits and perverts the bonds of love and trust that the family relation is meant to nurture.

b) Indecent assault

In indecent assault cases, the courts have generally referred to the abuse of trust involved and to the abhorrent acts of the perpetrator, especially where younger children have been involved. In *S v V*,⁶⁷ the court refused to make a finding of severe, long-term effects of child sexual abuse in the absence of evidence, yet vaguely referred to the likely effect of the attempted act of penetration:

'Dit is vir my ook feitlik ondenkbaar as 'n saak van algemene waarskynlikheid dat 'n daad van hierdie aard, gepleeg deur 'n volwasse man op 'n elfjarige kind, geen psigiese skade of, minstens, *beïnvloeding ten slegte*, sou veroorsaak het nie.'

⁶⁶ *Supra* (n 21) at 123d; 124d and 125d. See also *S v G supra* (n 47) at 301b where the court acknowledged the fact that the accused robbed the ten-year-old victim, who came from a caring and loving family, of her right to be carefree and happy at that age.

⁶⁷ 1994 (1) SACR 598 (A) at 600j (own emphasis).

In *S v K*,⁶⁸ it was recognised that the street children involved in the indecent acts had begun to display deviant behaviour by committing the same deeds with one another, although it is not clear as to what exactly the deeds entailed. This conduct was probably the result of the traumatic sexualisation of the children, a matter that is further discussed below.

The Supreme Court of Appeal, in *S v McMillan*,⁶⁹ briefly highlighted the harmful effect caused by indecent assault and linked this to society's repugnance with regard to the act:

'... Gevolglik word die aftakeling van die moraliteit en geestelike welsyn van kwesbare en jong kinders waarmee die misdade waarvoor die appellant gestraf moet word gepaard gaan, deur elke regdenkende lid van die gemeenskap met wrewel en weersin bejeen.'⁷⁰

The above examination of the perceptions of the courts with regard to rape, and particularly indecent assault, shows that the courts have very little knowledge of the real nature of the impact of sexual offences upon children. This lack of knowledge plays an important role in the evaluation of victims and contributes to inaccurate grading of the seriousness of offences, based on underlying, incorrect perceptions. It is therefore necessary to examine briefly some research findings with regard to the legacy of child sexual abuse.

⁶⁸ 1995 (2) SACR 555 (O).

⁶⁹ *S v McMillan* 2003 (1) SACR 27 (SCA).

⁷⁰ *S v McMillan supra* (n 69) at 34b.

5.3.4 Research findings on the harm caused by child sexual abuse

Finkelhor and Browne⁷¹ assert that the combination of trauma symptoms experienced by victims of child sexual abuse makes this a unique and different form of trauma. Such trauma alters the child's cognitive and emotional orientation to the world, and the resultant, distorted self-concept of the child, worldview and inability to show emotion create ongoing trauma for the child. The four dynamics of child sexual abuse are categorised as traumatic sexualisation, betrayal, powerlessness and stigmatisation.

Traumatic sexualisation refers to the process by means of which a child's sexuality (including his or her sexual feelings and sexual attitudes) is shaped in a developmentally inappropriate and interpersonally dysfunctional way. This can be the result of repeated use of the child for sexual behaviour inappropriate to his or her level of development, of the exchange of affection, of attention, of gifts or privileges for sexual behaviour,⁷² of a distorted focus on the child's body parts, of the offender's transmission to the child of misconceptions about sexual behaviour and sexual morality, and of the child's association of very frightening memories and events with sexual activity. The extent to which traumatic sexualisation is experienced will depend on factors such as the sexual response expected from the child, enticed participation as opposed to brute force, and the child's understanding of the sexual implications of the activities.

The effects of traumatic sexualisation include sexual preoccupation and repetitive sexual behaviour. Developmentally inappropriate knowledge of, and interest in,

⁷¹ *Op cit* (n 55) 64. See also A Miller 'The newly recognized shattering effects of child abuse' in C Itzen (ed) *Home Truths about Child Sexual Abuse (Influencing policy and practice: A reader)* (2000) 163.

⁷² This may lead to further confusion about sexual norms and standards, such as the role of sex in appropriate relationships, because the child is used in order to trade sex for something he or she wants.

sexual activity are displayed. Depending on the age of the victim, he or she might engage other children in similar activities, might display sexual aggression, might victimise peers or younger children, or might become promiscuous and sexually compulsive. Further, both genders experience a heightened awareness of sexual issues, for example boys wonder whether or not they are homosexual or girls wonder about the impairment of their desirability and whether future sexual partners will be able to tell that they have engaged in the activities concerned. Negative emotions associated with sex, such as revulsion, fear, anger and powerlessness may also contaminate later intimate relationships.⁷³

A feeling of betrayal arises after the child realises that he or she has been manipulated through lies or misrepresentation about moral standards, or that the person he loves or trusts treats him or her with disregard. The extent of the betrayal is further influenced by whether the offender is a family member, a trusted person or a stranger. The child's own initial feelings of distrust of the perpetrator and a negative reaction from the person to whom disclosure is made, also contribute to feelings of betrayal. The child's later reaction to feelings of betrayal may vary and may assume the form of extreme dependency, vulnerability to future abuse (especially in the case of female victims), hostility, aggression or isolation from intimate relationships.

Powerlessness is caused by the repeated invasion of the child's body space without his or her consent and is further aggravated by any coercion or manipulation used by the offender. The extent to which the powerlessness is experienced depends on fear, a trusted person's lack of understanding or disbelief that the abuse has happened, and feelings of dependency that trap the child in the situation. The victims may experience nightmares, phobias, hypervigilance, stomachaches, depression, despair, suicidal behaviour, learning

⁷³ Finkelhor and Browne *op cit* (n 55) 69.

problems, or may even develop aggressive toughness to compensate for the basic feelings of powerlessness.⁷⁴

Stigmatisation can be caused by the negative connotations of badness, shame or guilt that become part of the self-image of the child. These may have been communicated to the child directly by the abuser. Often, however, they are the result of the secrecy enforced during the abusive events or are caused by the reaction of shock or disgust on disclosure. In some cases, the offender overwhelms the child with responsibility by intimating that he (the offender) will not survive without the love of the child. The result of these feelings of stigmatisation is that the child experiences isolation, self-destructiveness (sometimes), low self-esteem and rejection.⁷⁵

5.3.5 Evidentiary issues relating to harm

Despite the assumptions referred to above that no, or very little, harm has been caused, the appeal courts have criticised trial courts' assumptions or speculation that real harm has been done to the victim. In *S v V*,⁷⁶ the Appellate Division held that a court can indeed take judicial notice of the fact that child sexual abuse has long-term effects, but that evidence is necessary for an inference of grievous harm in a specific case. The evidence in that case varied in nature, and so did the interpretations thereof. A further requirement that has been laid down is that direct and tested evidence is required to establish a causal connection between the trauma symptoms and the accused's conduct.⁷⁷ However,

⁷⁴ Finkelhor and Browne *op cit* (n 55) 70. See also L Caine and R Royston *Out of the Dark* (2004) 249.

⁷⁵ Finkelhor and Browne *op cit* (n 55) 69.

⁷⁶ *Supra* (n 67) at 600j.

⁷⁷ *S v W* 1994 (1) SACR 610 (A) at 612c-i (see chapter 3 (n 197). See chapter 4 par 4.5.11 and par 4.5.12 in this regard.

behavioural and personality symptoms manifested during the normal growing-up process have, for a long time, been perceived as being similar to trauma symptoms and have therefore been regarded as insufficient to establish a causal connection.

'Behavioural and personality patterns in children are not absolute and immutable, and it is *common knowledge* that there are such changes during the normal growing-up process, whether this is due to approaching puberty or not. If I were one of the parents, I would no doubt feel as they do, but a judicial officer must be satisfied that the evidence establishes that *appellant's conduct caused the said changes* before that factor can be taken into account as an aggravating feature in the passing of sentence.'⁷⁸

In *S v Abrahams*,⁷⁹ the trial court, some years later, followed the same approach and questioned whether it was not in fact teenage rebelliousness that had caused the symptoms displayed by the rape victim after the rape.

'Daar is wel getuienis in hierdie saak dat hierdie jong dogter haar konsentrasie verloor het; dat sy 'n bietjie opstandig geraak het, maar ek weet nie of dit so buitensporig is nie, en 'n mens weet dat seuns en dogters van daardie ouderdom daardie soort tekens toon. Ek weet nie, want daar was nie volledige psigiatriese getuienis voor my oor presies wat die gevolge van hierdie daad was nie.'⁸⁰

This finding was criticised and was strikingly reinterpreted by the Supreme Court of Appeal to indicate obvious and deep harm. It was held that undisputed evidence by parents and teachers also constituted sufficient evidence of harm.⁸¹ As stated earlier on, judicial notice of child development can however be very dangerous in the absence of expert evidence and personal examination of the

⁷⁸ *S v V* 1991 (1) SACR 59 (T) at 71h-i (own emphasis).

⁷⁹ *Supra* (n 21) at 121a.

⁸⁰ *Ibid.*

⁸¹ *Supra* (n 21) at 124d.

child.⁸² If one considers the holistic picture in *S v W*,⁸³ where all the boys had shown a change in behaviour during the same period, it is suggested that this in itself justified a finding of a causal connection between the appellant's conduct and the after-effects displayed by the boys.

The Law Commission indicated that there is no strict onus on either party during the sentencing phase, but that the court has to be satisfied or convinced.⁸⁴ It would appear that, whether the judicial officer is 'satisfied' or 'convinced', will again depend on the judicial officer himself or herself, and on his or her own suspicions and perceptions regarding child sexual abuse.

5.4 MODUS OPERANDI: THE GROOMING PROCESS

The courts have in the past referred to the *modus operandi* of the accused in cases of indecent assault. By '*modus operandi*' is meant the psychological process of grooming used by the paedophile to access his victim(s). It would appear that our courts struggle to understand the grooming process, as well as the potential harm that can be caused by the interaction and actions involved in that process.⁸⁵ Recently, a magistrate displayed his ignorance of such process in not making use of an available witness who could testify to the extent thereof. Moreover, he did not question any of the expert witnesses called by the parties regarding the *modus operandi* of the perpetrator in order to obtain the necessary information on the impact of the grooming process. Instead, he simply stated:

⁸² See also K Müller *Preparing Children for Court: A Handbook for Practitioners* (2004) 52, and further, for a discussion of the social-emotional development of children and the specific characteristics of adolescents.

⁸³ *Supra* (n 77).

⁸⁴ *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000a) 86; also Terblanche *op cit* (n 5).

⁸⁵ See also chapter 4 par 4.5.6 where the *modus operandi* was ranked the lowest in terms of its influence on sentencing.

'Ek gaan nie 'n getuie roep wat ek nie weet waarom dit gaan nie.'⁸⁶

*S v O*⁸⁷ raises further concerns about judicial perceptions with regard to the matter of *consent*. The court looked for violence in the normal sense of the word,⁸⁸ or undue influence on the part of the perpetrator to persuade the victims 'to allow' him to start touching them. The subtleness and planning that go into the grooming process in order to get access to the child are not taken into account. In this case, the fact that there was no evidence of undue influence, threats or promises on the part of the appellant to persuade the boys to allow him to touch them also seems to have been considered by the high court as mitigating.⁸⁹ This is a factor that is often put forward (and exaggerated) by defence counsel in order to try to indicate to the court that the child wanted to have the sexual relationship with the accused, thereby making the accused less culpable. In *S v E*,⁹⁰ the defence also argued that the complainants were willing and consenting parties. In this instance, however, both the trial court and the Appellate Division emphasised that the relevant statutory provision existed specifically in order 'to protect minors from their inherent impressionability and

⁸⁶ *S v O supra* (n 39) at 153f. See chapter 1 par 1.1.2 for a discussion on the quasi-inquisitorial nature of the sentencing phase, which requires that a more active role be played by the judicial officer.

⁸⁷ *S v O supra* (n 39).

⁸⁸ *S v O supra* (n 39) at 162d, as is evident from the court's reference to *S v D supra* (n 32). See also PW Pfefferli 'Forensic education and training of judges and law enforcement magistrates' 17th International Conference of the International Society for the Reform of Criminal Law, 24-28 August 2003, *Convergence of Criminal Justice Systems: Building Bridges - Bridging Gaps* (2003) where he argues for forensic, educational programmes on the interacting processes, specifically in relation to evidentiary value and the evaluation of evidence.

⁸⁹ *S v O supra* (n 39) at 162d-e. The court quoted from *S v D supra* (n 32) at 229b to affirm the present scenario: 'There was never any question of violence in the normal sense of the word. In the one case where the boy indicated that his advances were not welcome, he desisted.' See also *S v B* 1996 (2) SACR 543 (C) where the court assumed consent in a case of incest over a period.

⁹⁰ *Supra* (n 31).

gullibility and their lack of judgment and control'.⁹¹ The fact that the minors acted as the legislature expected them to act was therefore no mitigating circumstance. Further, in the light of the nature of the offence, it was held that the absence of violence or coercion was not mitigating. The presence thereof would however be aggravating. The court in *S v O*⁹² did not seem to take cognisance of this finding that ostensible consent is no consent. The reason for the law recognising ostensible consent seems to lie in the fact that one of the parties to the relationship is in such a position of power over the other that the sexual activity is wrong and should fall within the realms of the criminal law.⁹³

New offences acknowledging the problem with regard to ostensible consent have been created in England and Wales to cover the situation where an adult intentionally engages in sexual activity with a child, aged 16 to 17, and where there is an imbalance of power, such as in the family unit, or an abuse of trust such as in a teacher/pupil relationship.⁹⁴ Where the child is younger than 16, an adult engaging in a sexual activity with that child, including intentional sexual touching and intercourse, is regarded as acting unlawfully.⁹⁵

It would further appear that courts do not realise that 'monsters do not get children, nice men do'.⁹⁶ Gillespie⁹⁷ explains that the sex offender tends to rely

⁹¹ *S v E supra* (n 31) at 631i.

⁹² *Supra* (n 39).

⁹³ Sentencing Advisory Panel *Sentencing Guidelines on Sexual Offences: Consultation Paper 22* (12 February 2004) par 55.

⁹⁴ *Ibid.*

⁹⁵ *Ibid.*

⁹⁶ B Long and B McLachlan 'The hunt for Britain's paedophiles' (2000) 6.

on befriending a child and gaining a hold over him or her, thus allowing the offender to control the victim. Gillespie admits that grooming is difficult to define and that psychologists do not even agree on the issue, but she explains that it is an ongoing process aimed at the child accepting sexual activities:

'Grooming is a transient feature that is difficult to capture and virtually impossible to decide when it begins and ends. What is more certain is that grooming is neither new, nor restricted to online behaviour. It is generally seen as a cycle of abuse, and can include for example befriending a potential victim to allow the child to acquiesce to sexual activity.'⁹⁸

The grooming process also involves an aspect of deceptive trust created by the offender and manipulation of the child by the adult.⁹⁹ This breach of trust and/or exploitation of vulnerability that is involved in indecent assault could lead to the child experiencing problems with relationships, intimacy and sexual adjustment in adult life.¹⁰⁰ Although Burchell and Milton¹⁰¹ concede that there may well be a considerable difference in the degree to which the abusive act affects the child, they acknowledge that the abuse of power or authority over the child (which is the ethical factor that renders the abuse abhorrent) is the source of emotional trauma and the fundamental reason for punishment. Thus, it is of the utmost importance that courts display sensitivity in assessing relevant factors, such as the grooming process, that could contribute to their understanding of the crime

⁹⁷ "'Grooming": Definitions and the law' (2004) 7124:154 *New Law Journal* 587. See s 15 of the England and Wales Sexual Offences Act 2003, which created the offence of meeting a child following sexual grooming.

⁹⁸ Gillespie *op cit* (97) 586.

⁹⁹ See JD Duncan Brown 'Developing strategies for collecting and presenting grooming evidence in a high tech world' (2001) 14 *American Prosecutors' Research Institute: National Center for Prosecution of Child Abuse Update* Number 11.

¹⁰⁰ See PE Mullen and J Fleming 'Long-term effects of child sexual abuse' *National Child Protection Clearing House: Issues in Child Abuse Prevention* Number 9 Autumn (1998).

¹⁰¹ *Principles of Criminal Law* 2 ed (1997) 625.

and therefore influence sentences. On rare occasions, such sensitivity has in fact been displayed, as in *S v McMillan*:

'Sy optrede het dan ook verskeie van die sosiaal onaanvaarbare kenmerke wat tipies van hierdie afwyking is, geopenbaar. So, byvoorbeeld, het die appellant sy visier veral gerig op jong seuns wat weens fisieke en emosionele verwaarlosing weerloos en kwesbaar was, wat hy dan met aandag en geskenke omgekoop en verlei het.'¹⁰²

A further result of a child's sexual involvement with an accused over a period of time is that, as explained above, the child may become sexualised in a dysfunctional way,¹⁰³ thereby making it appear that the child consented to the activity for which he or she had been groomed. In *S v B*,¹⁰⁴ this perceived consent also carried substantial weight as a mitigating factor, as is evident from the effective sentence of only six years which was imposed on the accused for indecently assaulting both his daughters for years before eventually having intercourse with them. Research however indicates that children do not give consent to sexual abuse, because they do not fully understand what is being proposed.¹⁰⁵ Mostly, as in the above case, they are also not in a position to refuse sexual contact with an authority figure. In addition, like the father in the above case of incest, offenders do not usually begin with sexual intercourse. The sexual activity concerned develops over a number of years and progresses from acceptable hugging, touching and kissing to inappropriate fondling, mutual touching and then intercourse. The grooming process thus confuses the child as regards his or her boundaries of consent.¹⁰⁶

¹⁰² *Supra* (n 69) at 32c-d. See also par 5.5.1.1a) below with regard to the psychiatrist's explanation as to the method (*modus operandi*) adopted by the perpetrator in *S v D supra* (n 32).

¹⁰³ Hollely *op cit* (n 44) 106.

¹⁰⁴ *Supra* (n 89).

¹⁰⁵ KL Kinnear *Childhood Sexual Abuse* (1995) 4.

¹⁰⁶ D Glaser and S Frosh *Child Sexual Abuse* (1993) 47.

It would thus appear that judicial officers do not realise that the grooming process may consist of tricking, bribing or luring the child into a sexual experience. The child is subtly dragged into the perpetrator's plans under the pretence of trust and friendship, only to be betrayed later. In addition, the grooming process has a confusing effect on the victim with regard to the abusive event and his or her sexuality.¹⁰⁷ If the abuse occurs during the period when the child is developmentally determining his or her own sexuality and gender identification, it may be even more confusing.¹⁰⁸ However, the most dramatic and irreversible effect of child sexual abuse that no court has yet acknowledged is the loss of childhood.

The *modus operandi* of the offender poses yet more problems. In cases of paedophiles, the courts generally seem to have taken different counts of indecent assault together for purposes of sentencing, because, in their view, such counts stemmed from the same cause and compulsive pattern and urge. Yet, inherent in the paedophile's *modus operandi* is careful, subtle and manipulative planning. Normally, this is considered to be aggravating, but, in cases where the grooming process is relevant, it is ignored. The legal terminology does not, it seems, fully comprehend and calculate the underlying dynamics and effects of the psychological grooming process.

5.5 THE USE OF EXPERT EVIDENCE IN THE SENTENCING PROCESS

It was indicated above that both the Criminal Law (Sexual Offences) Amendment Bill 2003 and the Supreme Court of Appeal have accorded greater recognition to psychology in the sentencing phase. It would appear that, even in the absence of earlier statutory recognition of behavioural science, courts regarded the use of

¹⁰⁷ KD Müller and KA Hollely (2000) *Introducing the Child Witness* 114-115.

¹⁰⁸ *Ibid.*

experts as particularly important in the sentencing of offenders in child sexual abuse cases. Sexual offenders are however not a homogenous group¹⁰⁹ and it is usually the unique circumstances of each accused, the manner of execution of the crime and the circumstances surrounding its commission that will determine the sentence imposed.¹¹⁰ Since the individual facts differ from one child sexual abuse case to another, it is submitted that it is almost impossible to evaluate and compare expert testimony in these cases, or the way in which the courts have used behavioural scientists as experts during the pre-sentence phase. It is for this reason that it has been decided to focus only on cases of indecent assault against children, and then to narrow this down further to the subgroup of extra-familial paedophiles,¹¹¹ thereby ensuring a degree of similarity with regard to the type of offender.

5.5.1 South African case studies on extra-familial paedophiles

In all the cases evaluated, the accused pleaded guilty and were convicted of either the common law crime of indecent assault or of the statutory offence of committing immoral or indecent acts in contravention of s 14(1)(b) of the Sexual Offences Act 23 of 1957.¹¹² With the exception of one case, all the accused appealed against their sentences of imprisonment. The cases have been selected

¹⁰⁹ Law Commission *Sexual Offences: Process and Procedure* Discussion Paper 102 Project 107 (2001) 690.

¹¹⁰ *S v Mohlakane* 2003 (2) SACR 569 (O) at 573f.

¹¹¹ See Le Roux and Mureriwa *op cit* (n 27) 43-47 for a discussion of the concept 'paedophile' and of the characteristics and classification of paedophiles. See also PA Carstens 'Paraphilia in South African criminal case law' (2002) *SALJ* 603.

¹¹² Section 14(1)(b) prohibits the commission of immoral or indecent acts with youths below the age of consent, notwithstanding their consent. The purpose of this provision is to protect the sexual integrity of young people. The maximum prescribed sentence in cases such as these is six years' imprisonment with or without a fine not exceeding R12 000. Paedophiles (fixated and regressive) are most often charged with these crimes, since sexual intercourse with the child-victim is not common. The offender would rather limit his conduct to fondling the child and/or inducing the child to touch his genitals. See CR Bartol *Criminal Behaviour: A Psychological Approach* (1995) 302.

so as to include only offenders in whose cases expert evidence was presented regarding a diagnosis of paedophilia. The present investigation therefore focuses on the evidence of expert witnesses with regard to the condition of paedophilia, the prospect of rehabilitation, recommendations as to sentence, interpretations by the court, and the weight attached to such expert evidence. Finally, the contributions of experts with regard to the impact of indecent assault on victims are also evaluated. The sentences imposed on the different perpetrators are discussed in paragraph 5.8.1.2 below.

5.5.1.1 Expert evidence with regard to the accused

a) The condition of paedophilia

Although paedophilia is not a new phenomenon, the diagnosis of offenders as paedophiles in indecent assault cases featured for the first time in the South African law reports in the 1970s.¹¹³ In *S v S*,¹¹⁴ a psychiatrist testified on behalf of a primary school teacher about the latter's acute and overwhelming state of anxiety and claustrophobia that had developed over the years into a situation where he could no longer function amongst adults:

'I see this all building up to a kind of climax and at this stage where an adult male cannot function as an adult male, unfortunately it happens that he reverts to what one might call an infantile form of behaviour, he becomes a little boy again instead of being a grown man and this is regarded as a sickness and this is what, as I say, led to infantile forms of sexual gratification and he finally indulged in the described paedophilic activity, paedophilic really meaning involvement with children, having

¹¹³ In some cases, it was simply described as 'practising homosexuality with children' and such cases have been excluded for the purpose of this examination. See, for example, *R v C* 1955 (2) SA 51 (T) and *S v K supra* (n 68).

¹¹⁴ *Supra* (n 6). During school hours, and over a period of about four months, a primary school teacher committed indecent acts in his classroom with girls, aged 10. The appellant did not give evidence under oath, but, instead, a 'fully-qualified and experienced' psychiatrist submitted a report and testified in great detail about his tragic personal history, personality problems, sexual incompetence and marriage to a dominant woman. It was further indicated that the appellant had been suffering from depression since childhood, which had become worse after he had been discharged from the air force because of cowardice and acute claustrophobia (at 834j).

things to do with children. Now it seems that it was only in the classroom where he felt fairly happy and contented because it was only at this kind of level of relationship ... relationship of children where he could be big and strong and the children are weak and helpless, whereas in the adult world he felt weak and helpless and everybody else to him appeared to be big and strong, which they in fact were.¹¹⁵

The expert referred to the accused as mentally ill, but not certifiable,¹¹⁶ and diagnosed his behaviour as pathological paedophilia, which was described as a severe illness.¹¹⁷ In *S v D*,¹¹⁸ the court was educated about the definition and various types of paedophilia and summarised paedophilia as follows:

'To be diagnosed as a paedophile there are three requirements: the conduct should present for at least six months; the conduct should be recurrent; and the person should be older than 16 him/herself. Regressive paedophilia stems from stress or frustration in ordinary sexual activity and the conduct will not necessarily persist and is amenable to psychiatric treatment. In contrast, the fixated paedophile's conduct does not stem from stress or frustration, but is a predilection and long-term psychotherapy is needed with a poor prognosis of complete success.'¹¹⁹

The fixated paedophile would then fall into what was referred to in other cases as the 'high-risk' category, a category which would, in all probability, never be completely rehabilitated.¹²⁰

¹¹⁵ *S v S supra* (n 6) at 835g-i.

¹¹⁶ *S v S supra* (n 6) at 836c. Finkelhor *et al A Sourcebook on Child Sexual Abuse* (1986) are of the opinion that most perpetrators of sexual crime are not mentally ill, but have a rational pattern of attitudes, thinking, fantasy and behaviour which therefore makes psychiatry not necessarily the best equipped to assist courts 'to pick their way through a minefield of ignorance and prejudice' (as referred to by C Fortt (2001) 'Child sexual abuse and the UK expert witness' *Solicitors Journal* 2).

¹¹⁷ *S v S supra* (n 6) at 838j-839a.

¹¹⁸ *Supra* (n 32). A drama teacher, aged 43, was involved with seven boys aged 12 to 13 years. Extensive use was made of expert evidence in this case.

¹¹⁹ *S v D supra* (n 32) at 229c-e.

¹²⁰ *S v O supra* (n 39) at 163j. A gymnastics coach fondled four of his pupils aged 8 to 12 during lessons and tours.

In a further effort to educate the court about the methods adopted by paedophiles, the psychiatrist explained the *modus operandi* of the accused as follows: '... he would single out a young boy in the group, lavish attention on him in various forms, such as encouraging him, awarding him parts in plays, etc'.¹²¹ When taking the boys home after rehearsals, the accused would manipulate the situation. The boy in question would be the last to be dropped off and then the accused would drive to an isolated spot where he would touch the boy's genitals/perform masturbation, and vice versa.

The issue of compulsion, that is, whether the accused suffers from an illness justifying rehabilitation as the primary aim,¹²² is an important and difficult issue on which the court requires an answer from experts. Often, such issue is a matter of interpretation. In *S v E*,¹²³ the appellant was diagnosed by a clinical psychologist as 'innately homosexual and a paedophile having sexual urges which he was unable to control, causing conflict with the law'.¹²⁴ After criticising two previous interpretations, the judge of appeal emphasised that the clinical psychologist's evidence should be read as a whole and that his evidence 'that it was not the case that appellant was literally unable to keep himself from physical contact with boys' should be interpreted in the following way:

'... appellant was unable to resist seeking sexual contact with boys. The existence of that inability is strongly consistent with the frequency and persistence with which appellant's sexual contact with the appellants recurred. The fact that there was no evidence to show that appellant had indulged in similar conduct subsequent to his

¹²¹ *S v D supra* (n 32) at 228h-229a.

¹²² *S v E supra* (n 31) at 632c.

¹²³ *Supra* (n 31). The appellant was a compiler and organiser of musical programmes at the SABC, who invited boys, aged 14 to 17, to his home where he would offer them liquor, show them pornographic videos and then engage in masturbation with them.

¹²⁴ *S v E supra* (n 31) at 630e. This case was perceived by the appeal court as an 'awkward and worrisome case'.

arrest ... conveys ... that appellant appeared to have abstained from sexual contact. His problem, as the evidence showed, was that when he sought sexual contact his tendencies compelled him to obtain satisfaction with boys.¹²⁵

In an attempt to explain that the paedophiles dealt with in this mini-study suffered from a sexual deviance,¹²⁶ the court's attention was drawn in two instances to the fact that they had been sexually molested as children themselves.¹²⁷

In order to inform and assist the court, the expert would normally, in the majority of cases, have consulted extensively with the accused¹²⁸ and would probably already have begun therapy before testifying in court.¹²⁹ In one instance, though, the court did accept the evidence of the state's expert with regard to the accused's condition. Here, the expert provided the court with profile evidence on paedophilia, based on a body of literary research.¹³⁰ Both the expert and the court should however be aware of research indicating that clinicians in a therapeutic relationship with their patients give more 'low-risk'

¹²⁵ *S v E supra* (n 31) at 630f-g.

¹²⁶ *S v McMillan supra* (n 69). The accused indecently assaulted five boys aged between 9 and 12 years, one of whom was his stepson.

¹²⁷ *S v R* 1995 (2) SACR 590 (A).

¹²⁸ In *S v E supra* (n 31), the clinical psychologist had seven consultations of at least two hours each with the accused.

¹²⁹ *S v O supra* (n 39) at 836d.

¹³⁰ *S v O supra* (n 39) at 163j. Thring J at first seemed unconvinced by Miss Londt's testimony that, based on the circumstances of the case, these 'would suggest that the accused is a multiple sex offender with exaggerated risk for recidivism', and suggested that such testimony had been given without having consulted with the appellant. He questioned her opinion, which she had indicated was based on 'a body of research literature'. If one, however, looks at cases like *Holtzausen v Roodt* 1997 (4) SA 766 (W) and *S v Kinney* 171 Vt 239 (2000), it is clear that courts have allowed expert testimony about profiling certain categories of people, whether it be the victim or the perpetrator, in order to explain behaviour and therefore assist the court in understanding such behaviour. See G Fisher *Evidence* (2002) 682 for a discussion on profile evidence.

judgements and that positive feelings towards the patient can influence their judgements regarding risk.¹³¹

b) *Rehabilitation and recommendation with regard to sentence*

Consideration of the matter of rehabilitation is of the utmost importance to the court in order to enable it to arrive at an appropriate decision on sentence and to take into consideration the safety of children. From the differing opinions that have been offered to the courts by the experts involved, this would appear to be a contentious issue. In cases of regressive paedophiles, experts appear to be confident about a prognosis based on intensive psychiatric and psychological therapy.¹³² In *S v S*,¹³³ the expert opposed imprisonment because of the accused's extreme claustrophobia:

'... And in any case, imprisonment, in my opinion, would not act as a deterrent because it would not remove any of the deep seated psychological problems from which he suffers and I recommend, with respect to the court, that he be allowed to benefit by extensive and prolonged psychiatric treatment which would involve periodic visits to my consulting rooms over at least a period of a year and that would be at least once a week. On the last page I say that I am confident that, if he were allowed to undergo the benefit of such treatment and he is strongly motivated in obtaining assistance, he would be restored to society eventually as a useful citizen. It is clear that he is as a result of his illness unfit to be in the vicinity of or be employed in any situation where he would come into contact with young children and I have accordingly issued a certificate to the Transvaal Education Department recommending that he is permanently unfit to continue with his normal duties. He is thus effectively debarred from teaching ever again. It is therefore, with respect, recommended to the court that he be allowed to have his treatment and as is customarily recommended by the court, periodic reports regarding his progress and conduct will be made available by me. That is my report, your Worship.'¹³⁴

¹³¹ V de Vogel and C de Ruiter 'Differences between clinicians and researchers in assessing risk of violence in forensic psychiatric patients' (2004) 15:1 *The Journal of Forensic Psychiatry and Psychology* 145.

¹³² *S v S supra* (n 6) at 836c; *S v Ndaba* 1993 (1) SACR 637 (A) at 640a.

¹³³ *Supra* (n 6).

¹³⁴ *S v S supra* (n 6) at 836c-f.

It was further emphasised that the kind of psychiatric treatment available at the time focused on treatment of the family, instead of on the patient only. The wife would have to gain insight into her husband's as well as her own behaviour and be part of the therapeutic process.

In contrast with modern views, long-term treatment was, almost 30 years ago, considered to be for a year only. Today, a minimum period of five years seems to be acceptable, with the addition of long-term supervision of a rehabilitative nature.¹³⁵ To a certain extent, the expert in the above case also contradicted himself in his letter to the Department of Education regarding the estimated success rate pertaining to the accused's rehabilitation. The recommendation that the accused be barred from teaching was of a permanent nature and indicates that it was believed that he would not be fully cured of his paedophilia. In addition, there was no clarity as to whether the appellant was really motivated to undergo the treatment, yet it was stated as being the key to the success of rehabilitation.

In one case, the accused's urgent need for psychotherapy was highlighted and the expert went as far as to estimate that the success rate in respect of treatment was roughly 65 percent¹³⁶ This gives rise to the issue of partisanship or bias among party-introduced experts,¹³⁷ since such a view is in contrast with expert evidence in other cases where it was said that a complete cure was almost impossible¹³⁸ or, at best, a mere possibility.¹³⁹ Another question that

¹³⁵ Law Commission *op cit* (n 14) 258, 264.

¹³⁶ *S v E supra* (n 31) at 628a.

¹³⁷ See L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) 134-136 for a discussion of bias on the part of party-introduced experts. Her discussion refers to the trial phase, but the same problem also occurs in the sentencing phase.

¹³⁸ *S v D supra* (n 32) at 231b; *S v O supra* (n 39) at 164b.

could perhaps be raised is whether the expert concerned was aware of current research at the time.

The forms of treatment for offenders vary and can be divided into three main types, namely behavioural, psychotherapeutic and family therapy.¹⁴⁰ Experts testifying on behalf of the defence agree that the fixated paedophile needs intensive psychotherapeutic treatment aimed at sublimating his sexual needs and diverting him to lawful sexual behaviour.¹⁴¹ They further argue that conditions outside prison are more conducive to psychotherapy than those inside prison.¹⁴² In contrast, a clinical social worker recently called by the state recommended an initial period of incarceration, because perpetrators ordered to undergo treatment outside prison often lose interest and drop out of therapy or therapy programmes. On release, the accused should, she stated, attend a structured rehabilitation programme that would diminish the risk of recidivism.¹⁴³ The expert's concern here was in line with findings in international studies indicating that the main problems with regard to the practical implementation of sex offender treatment are non-participation and drop-out.¹⁴⁴ Yet, it remains to be

¹³⁹ *S v R supra* (n 127) at 592h. This possibility was accorded little weight because the court needed certainty.

¹⁴⁰ Law Commission *Sexual Offences against Children* Issue Paper 10 Project 108 (1997) 71.

¹⁴¹ *S v E supra* (n 31) at 628b.

¹⁴² However, in *S v D supra* (n 32) at 232d, the following was said: 'Despite the arguments advanced by his counsel as to the deleterious effect imprisonment would have on the appellant, it would be wrong to allow the appellant to escape – by merely submitting to treatment, something which he could have done voluntarily – the consequences of his acts, having regard to the effect those acts must have had, and according to evidence did have, on the children concerned.'

¹⁴³ *S v O supra* (n 39) at 164a. In *S v Ndaba supra* (n 132) at 640j it was already realised that some form of pressure ('dwang') was necessary to ensure participation, yet not in the form of initial imprisonment.

¹⁴⁴ F Losel 'Developmental prevention and treatment of delinquency: What we know and what we need to know' Unpublished paper 14th European Conference on Psychology and Law 7-10 July 2004 *Facing the Challenges of a Changing World* Krakow.

seen whether the initial imprisonment will have the desired effect. In addition, the appalling conditions in South African prisons might even exaggerate the problem.

c) The interpretation of, and weight attached to, expert testimony

The court is faced with a real dilemma in balancing all the relevant factors in order to arrive at an appropriate sentence.¹⁴⁵ In evaluating the evidence relating to the paedophile, the court has acknowledged its different and certainly more complex role as compared with that of experts from the psychological profession:

'The approach of a sentencing officer is not the same as that of a psychiatrist. The sentencing officer takes account of all the recognised aims of sentencing including retribution; the psychiatrist is concerned with diagnosis and rehabilitation. To focus on the well-being of the accused at the expense of the other aims of sentencing, such as the interests of the community, is to distort the process and to produce, in all likelihood, a warped sentence.'¹⁴⁶

The paedophile has been observed as being 'meer siek as boos'.¹⁴⁷ In trying to understand information about the paedophile, the courts' perceptions have varied from seeing him as the typical dirty old man¹⁴⁸ to comparing his compulsive behaviour with that of the better-known alcoholic.

'Whereas the alcoholic presents a social problem to his family or society in general, the paedophilia's sickness by definition leads to the commission of crimes against an extremely vulnerable segment of society, namely children. If there were no known

¹⁴⁵ *S v D supra* (n 32) at 230g.

¹⁴⁶ *S v McMillan supra* (n 69) at 33e-f (as per the dictum in *S v Lister* 1993 (2) SACR 228 (A) at 232g-h). Compare also chapter 3 (n 196).

¹⁴⁷ *S v Ndaba supra* (n 132) at 640i.

¹⁴⁸ *S v S supra* (n 6) at 834i.

form of treatment for paedophilia, then incarceration would be the only option to safeguard children from a paedophile's predations.¹⁴⁹

The court, however, later admitted that it did not understand the expert evidence to the effect that the problem of paedophilia could, at best, only be brought under control and could not be cured completely.¹⁵⁰ This clearly illustrates the court's reluctance to accept and accommodate scientific research and highlights the fact that there is often no psychological precision to legal questions.¹⁵¹

In the absence of certainty as regards rehabilitation, it would appear that the courts also do not follow a uniform approach giving preference to rehabilitation outside prison. In *S v R*,¹⁵² the mere possibility of rehabilitation carried little weight because the court needed certainty, and the sentence of imprisonment was accordingly confirmed. Thus, whether or not the accused will escape imprisonment depends on the personal perception of, and subsequent requirements by, the judicial officer. In this way, inconsistency arises in the approach of sentencing officers to accommodating scientific evidence. This problem is further examined in chapter 7 and a possible system of providing guidelines for judicial officers is investigated.

¹⁴⁹ *S v D supra* (n 32) at 230h-231c. Compare also Kittrie *et al op cit* (n 10) 1203 who state that the sexual offender who has completed treatment must remember that his deviant behaviour is only in remission.

¹⁵⁰ *S v D supra* (n 32) at 231b. Also *S v O supra* (n 139) at 163j.

¹⁵¹ A Kuhne 'The psychological view of the best interest of the child – new perspectives and recommendations for psychological expertises' in A Czerederecka, T Jaskiewicz-Obydzinska and J Wojcikiewicz (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 144.

¹⁵² *Supra* (n 127) at 592h. The sentence of five years, of which two years were suspended, was confirmed on appeal.

Yet, despite the inherent differences in roles and disciplines, the evidence of the behavioural expert has, in many instances, been considered to be the most important piece of evidence concerning the accused.¹⁵³ When fully reasoned, persuasive and unchallenged,¹⁵⁴ such evidence has, on appeal, contributed to significant amendments to, or reductions in, sentences.¹⁵⁵

It would further appear to have become practice to include a prohibition order as part of the sentence, thereby preventing the accused from having contact with children or holding a job that might place him in a position of trust or authority in relation to children.¹⁵⁶ In addition, in following a more detailed approach, a court recently stipulated that, during the period of suspension, an accused had to subject himself to any psychotherapy programme for sexual offenders.¹⁵⁷ The state expert and her colleague (who had submitted a written report on behalf of the accused) could determine the programme period and type. The accused was required to attend and participate to the satisfaction of the clinical social worker, as well as perform any assignment and undergo any prescribed therapy.

¹⁵³ *S v S supra* (n 6) at 838h. In *S v E supra* (n 90) at 631a it was held that insufficient weight had been accorded to the expert evidence that direct imprisonment was counterproductive and unhelpful, having regard to the attributes and particular personality of the accused.

¹⁵⁴ *S v Ndaba supra* (n 132) at 639h. The court *a quo* accorded little weight to the evidence of the clinical psychologist, who testified on behalf of the accused, on the ground that such evidence was 'onaanvaarbare toespitsing op slegs die appellant se belange'. However, the Appellate Division found that it was 'a properly motivated report providing a constructive alternative to imprisonment and therefore not' 'n poging tot vergoeliking van die appellant se gedrag' (at 641a-b).

¹⁵⁵ For example, in *S v S supra* (n 6) the sentence was completely suspended, in *S v D supra* (n 44) the term of imprisonment was substantially reduced, and in *S v E supra* (n 90) and *S v Ndaba supra* (n 132) the appropriate sentence was found to be correctional supervision.

¹⁵⁶ *S v D supra* (n 32) at 233a; *S v O supra* (n 39) at 165j.

¹⁵⁷ *S v O supra* (n 39) at 166c.

This appears to be a serious endeavour on the part of the court to exercise some form of monitoring in order to ensure real participation by the accused in rehabilitation programmes and should be welcomed. This attempt was seemingly made because of expert testimony that perpetrators ordered to undergo treatment outside prison often lose interest and drop out of programmes. The court interpreted the evidence of the state's expert to mean that the accused first had to experience a certain amount of pain. However, after a short period of incarceration, the negative influence of prison (with all sorts of sexual offenders and corrupt practices, coupled with gang activities) should be avoided at all costs in order to provide maximum, beneficial conditions for the accused's rehabilitation.¹⁵⁸

5.5.1.2 Expert evidence with regard to the victim

While expert evidence with regard to the accused appears to be essential, in only one of the above cases did the state call for expert evidence to assist in determining the impact of the indecent conduct on the children concerned. However, in this case, the psychologist who testified about the after-effects of the crime did not make a good impression and the evidence was rejected as wanting and contradictory.¹⁵⁹

In another instance, the defence expert was asked by the court to comment with regard to the effect of the teacher's conduct on three ten-year-old girls.¹⁶⁰ The expert witness simply made a long, general comment about the benefit that the girls would derive when the entire family faced the problem and discussed it in

¹⁵⁸ *S v O supra* (n 39) at 164i. Compare Kittrie *et al op cit* (n 10) 1202 for research findings that confirm the need for substantial external controls for sex offender treatment.

¹⁵⁹ *S v E supra* (n 31). One of the complainants testified about psychological problems he was experiencing, but the court found that there were other reasons for such problems and that the appellant's conduct had contributed to the harm only to a certain degree (at 627h).

¹⁶⁰ *S v S supra* (n 6) at 836j-837d.

the open.¹⁶¹ The court took judicial notice of the fact that the first girl must have suffered severe mental trauma, and then relied on hearsay from the dicta of the same defence expert in order to find, seemingly as mitigating, that the girl had recovered and that there was no risk of future trauma.¹⁶² Although, as pointed out earlier, the judicial officer hereby demonstrated an active approach in trying to obtain essential information needed to make a decision, the source should be questioned. It should be reiterated that the defence will always try to minimise the effect of the crime and is not necessarily the best source to consult for valid and reliable information with regard to possible aggravating factors. Parents, as indicated above, are also often not equipped, or are too involved, to make assessments about harm.¹⁶³

In *S v O*,¹⁶⁴ the court, after having been alerted by the prosecutor to the availability of the therapist of one of the abused boys, refused to call the expert because the court was unaware of what the evidence would involve. As a result, the accused in this instance was sentenced on the factual basis that none of his victims had suffered any injury, material prejudice or harm. This approach shows, as indicated earlier, that the court did not understand the psychological process employed by the paedophile or the potential effect thereof. The subtleness and planning that went into the grooming process¹⁶⁵ – which the

¹⁶¹ *S v S supra* (n 6) at 836j-837a-d. See par 5.3.2 above.

¹⁶² *S v S supra* (n 6) at 839e-g. See par 5.3.2 above.

¹⁶³ Law Commission *op cit* (n 14) 348.

¹⁶⁴ *Supra* (n 39) at 153h-i and 162a-c.

¹⁶⁵ See Duncan Brown *op cit* (n 99) for an explanation of the grooming process, specifically as regards the aspect of deceptive trust that is created and as regards manipulation by the adult. Burchell and Milton *op cit* (n 101) concede that there may well be a considerable difference in the severity with which the abusive act affects the child, but acknowledge that the abuse of power or authority over the child (which is the ethical factor that renders the abuse abhorrent) is the source of emotional trauma and the fundamental reason for punishment. This breach of trust and/or exploitation of vulnerability involved in indecent

courts refer to as the *modus operandi* – in order to access the child were not taken into account, nor was the possibility of harm clarified.

With regard to the absence of expert evidence on the impact of the crime in the majority of the above cases, it is clear that the courts are not provided with all relevant information. It is submitted that the use of expert evidence in the pre-sentence phase should be extended to include evidence on the after-effects of indecent assault on the victims. What is further evident is that there is a need to train all role-players in court regarding the characteristics of paedophilia in general, as well as regarding the potential harm that can be caused to a victim through the grooming process and through the actual indecent assault.

5.6 JUDICIAL DISCRETION: 'GRADING' OF THE SERIOUSNESS OF CHILD SEXUAL ABUSE CASES

The Criminal Law Amendment Act 105 of 1997 was introduced on 1 May 1998 in reaction to the public outcry against crime and to the public demand for reinstatement of the death penalty.¹⁶⁶ The minimum-sentence legislation was renewed again in April 2005 for another two years, probably in the light of the Law Commission's proposal that sentencing guidelines not be prioritised for the time being.¹⁶⁷ Van Zyl Smit¹⁶⁸ asserts that the introduction of the concept of minimum sentences signalled the end of unfettered judicial discretion. However, such concept to a certain extent appears to be a theoretical one in that the prescribed minimum sentences are not absolutely mandatory in the true sense of

assault could lead to problems regarding relationships, intimacy and sexual adjustment in adult life (Mullen and Fleming *op cit* (n 100)).

¹⁶⁶ D van Zyl Smit (1999) 'Mandatory sentences: A conundrum for the New South Africa?' 2(2) *Punishment and Society* 208.

¹⁶⁷ Law Commission *op cit* (n 14) 292-293.

¹⁶⁸ *Op cit* (n 166) 208.

the word, since the court may deviate when substantial and compelling circumstances exist.¹⁶⁹ In order to deviate from the prescribed sentence because it is deemed grossly disproportionate or to amount to an injustice, the courts now have to focus on the question whether the cumulative effect of the mitigating factors outweighs that of the aggravating factors.¹⁷⁰ The process may thus seem mandatory, but once the process has been followed, judicial officers retain their discretion to a large extent. Skelton¹⁷¹ is of the opinion that the court is then free to impose any sentence from the range of sentencing options, even a non-custodial sentence. However, it remains to be seen whether an alternative sentence for child rape would be accepted and approved of by the state or society.

In the above case studies of *child rape* that had to be decided in terms of this legislation, the victims ranged from five/six to 10 years of age, to adolescents of 12 to 16 years of age. The offenders varied: 18 and 20-year-old strangers, a 23-year-old co-pupil, a 22-year-old boyfriend of the aunt, a father in his fifties, a 32-year-old trusted boyfriend of the mother, and two neighbours, aged 24 and 34, were but some of the offenders.¹⁷² Although the legislature has listed the rape of a child under the age of 16 years as one of the most serious crimes, all of the courts dealing with the rape charges, with the exception of one, were unwilling to impose the prescribed minimum sentence. However, after some courts had

¹⁶⁹ See s 51(3)(a) of the Criminal Law Amendment Act 105 of 1997. Also note SS Terblanche (2003) 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' *Acta Juridica* 219-220 who points out that 'our courts will not impose sentences that are disproportionate and unjust, not even if prescribed by the legislature'.

¹⁷⁰ *S v Malgas* 2001 (1) SACR 469 (SCA) at 477g. In *S v Boer* 2000 (2) SACR 114 (NCD), life imprisonment was imposed, based on the pre-*Malgas* interpretation.

¹⁷¹ *Alternative Sentencing Review* CSPRI (Civil Society Prison Reform Initiative) Research Paper Series No 6 (2004) 11.

¹⁷² See chapter 3 par 3.1.1.1 and par 3.1.1.2.

initially conducted business as usual, the Supreme Court of Appeal clearly stated that sentences in these cases had to be more severe than before, even in the event of a justified deviation.¹⁷³

If cases of rape within the family are compared, the effect of the legislation on a recent sentencing decision is clearly illustrated. For example, in 1972 in the case of *S v D*,¹⁷⁴ where the victim was 14 years old, the sentence imposed was one of six months' imprisonment. In 1996, the accused in *S v B*¹⁷⁵ was sentenced to an effective six years for raping both his daughters over an extended period, and in *S v M*¹⁷⁶ the accused was sentenced to 10 years for raping his six-year-old daughter over a period of six years. In a recent case, the term of imprisonment was one of 12 years for one incident of rape of a 14-year-old daughter.¹⁷⁷

The limitation of the sentencing discretion as referred to in *S v Malgas*¹⁷⁸ would thus appear to have materialised in the expectation of, and adherence to, the imposition of more severe sentences. A recent reported decision finally resulted in a sentence of 21 years' imprisonment for an accused who had raped his 13-year-old neighbour after a finding that the victim had come to terms with the harm inflicted.¹⁷⁹ This finding was taken as an indication by the high court that

¹⁷³ *S v Abrahams supra* (n 21) at 126c.

¹⁷⁴ 1972 (3) SA 202 (O).

¹⁷⁵ *Supra* (n 89).

¹⁷⁶ 2002 (2) SACR 411 (SCA).

¹⁷⁷ *S v Abrahams supra* (n 21). The sentence imposed by the court *a quo* was seven years (see chapter 3 par 3.1.1.2b)).

¹⁷⁸ *Supra* (n 170) at 481h.

¹⁷⁹ *Rammoko v Director of Public Prosecutions supra* (n 20).

life imprisonment was not appropriate, since, at the time of the appeal in the Supreme Court of Appeal, no impact evidence had been taken into account.¹⁸⁰

The reason for the above deviations from the prescribed life sentence seems to lie in the unofficial grading of rape that is taking place in judgments.¹⁸¹ This has led to the development of the 'worst category of rape' test,¹⁸² a test similar to the much-criticised 'extreme case' test¹⁸³ that prevailed when the death penalty was still applicable. The 'worst category of rape' test is probably the labelling of a process that has been taking place all along in the judicial mind in the absence of any concrete guidance. This test is, however, very vague and is of little assistance to the court in allowing it to adopt a consistent approach to determining the grading/seriousness of child rape. Further, it depends upon the complex value judgement of the judicial officer.

This grading process further takes place in the high court, which, in most cases, has not been involved in the trial as a result of the *divided-case* procedure that was introduced. In terms of this procedure, a case of rape of a child under the age of 16 must be referred, after conviction of the accused in the regional court,

¹⁸⁰ Personal communication with state advocate E le Roux, Bloemfontein (29/09/03). Note that the case had been referred back by the Supreme Court of Appeal to reconsider the sentence (see chapter 3 par 3.1.1.2).

¹⁸¹ For instance, a brutal attack on a 17-year-old girl in an attempt to rape her was graded 'as rape cases go, less than five out of 10'. See C Rickard 'Brutal attack viewed as "5 out of 10" rape case by senior judge' 9 Nov 2003 *Sunday Times (Insight)* for a discussion of this matter with regard to the appeal by the state in *Carmicle v Minister of Safety and Security* 2001 4 SA 938 (CC) and of her plea for sensitivity training for all judges.

¹⁸² *S v Abrahams supra* (n 21) at 127d; *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 443f. See NJ Kubista 'Substantial and compelling circumstances': Sentencing of rapists under the mandatory minimum sentencing scheme' (2005) 18:1 *SACJ* 83 for the view that a false high-water mark has been created through judicial categorisation of rape, which, in turn, has led to the courts having excavated 'an enormous space where "substantial and compelling circumstances" to depart from mandatory sentences may dwell'.

¹⁸³ See *S v Pieters supra* (n 45) at 731f-732a where *S v Tshomi en 'n Ander* 1983 (3) SA 660 (A) is also discussed.

to the high court so that it can consider whether the prescribed sentence of life imprisonment is indeed proportionate. This procedure was created by the legislature despite the fact that it has often been stated that the trial court is in the best position to evaluate a case for sentencing purposes.¹⁸⁴ This raises the question whether the grading would have been the same if the trial had taken place in the high court and the court had been 'steeped in the atmosphere of the trial'.¹⁸⁵

A further important approach which has emerged is that, in following this grading process, the Supreme Court of Appeal has adopted the rare approach of conducting its own research about the after-effects of intra-familial rape.¹⁸⁶ The court, for instance, referred to a source in a footnote, which does not appear to have been introduced by either parties or the *amicus curiae*. By gaining knowledge of the subject, the court recognised the deep harm caused by the act of incest, as well as the nature thereof. This contributed to the grading of the case differing from that which it had been in the high court, where incest was not perceived in the same way.

As opposed to the situation in rape cases, the Criminal Law Amendment Act 105 of 1997 affects *indecent assault cases* in one instance only. Where bodily harm of any kind is caused,¹⁸⁷ the legislator has prescribed a minimum sentence of 10 years for a first offence, with the same process as described above applying in order to justify a deviation. Although the grading process has not been the same with regard to indecent assault cases in general, it has been stated that the

¹⁸⁴ *Rex v Conway* 1948 NPD at 883; *S v Mkhondo* 2001 (1) SACR 49 (WLD) at 57-58.

¹⁸⁵ This expression was used by the court in *S v Gqamana supra* (n 43) at 34a as justification for recalling the complainant, her mother and the probation officer during sentencing in the high court.

¹⁸⁶ *S v Abrahams supra* (n 21) at 125b.

¹⁸⁷ *S v Fatyi* 2001 (1) SACR 485 (SCA) at 488a.

offences in question were not the most serious of those encompassed by s 14 of the Sexual Offences Act 23 of 1957.¹⁸⁸ Further, it is important to note that the court perceived indecent assault cases against children to be a *cause célèbre* and indicated that *a priori* labelling of cases should be avoided. For example, in *S v D*,¹⁸⁹ the court referred to, and appears to have accepted 'authoritative'¹⁹⁰ sources indicating that sexual intercourse between adults and children took place within ancient Greek and Roman communities, and still does within diverse cultural communities. Furthermore, apart from stating that sexual encounters with children had not always been perceived as abhorrent, the court indicated that not all right-thinking people in modern times viewed such encounters with abhorrence. Of further import is that the judge's own research in this instance, unlike the research mentioned above with regard to incest, did not include any research relating to the psychological consequences of indecent assault on children.¹⁹¹ Two years later, the same judge emphasised the public interest in child sexual abuse cases, thereby adopting a cautious approach:

'Dit is so dat daar in die afgelope jaar of twee-drie, aansienlike openbare belangstelling in die onderwerp van seksuele molestering van kinders was. Dit is ongelukkig so dat 'n aangeleentheid wat 'n cause célèbre geword het, geneig is om die gesonde oordeel op die agtergrond te stoot.'¹⁹²

¹⁸⁸ *S v V supra* (n 78).

¹⁸⁹ 89 (4) 709 (TPA) at 715j.

¹⁹⁰ According to his personal, unsubstantiated finding: Doek 'Sexual abuse of children: An examination of European criminal law' in PB Mrazek and CH Kempe (eds) *Sexually Abused Children and Their Families* (1981) 80; JM Giovannoni and RM Vecerra *Defining Child Abuse* Oxford (1979) 158.

¹⁹¹ The magistrate's assumption that the accused's indecent conduct with his two stepdaughters (aged six and eight on commencement of the assaults) over a period of two years caused permanent psychosexual scars, was held to be a defect in his substantiation of sentence.

¹⁹² *S v V supra* (n 78) at 67h.

Despite the judge's finding that a balanced assessment of the accused's conduct still rendered it abhorrent,¹⁹³ the extra-vigilant approach seems to have permeated legal thinking. Notwithstanding the remarks concerned having been made in an intra-familial context, with the first remark being made in the late 1980s, such remarks were by implication reiterated recently:

'The nature, character and elements of the crime have not changed in the past 50 years, though the terminology might have been changed slightly by legislation.'¹⁹⁴

It appears to be for this reason that the courts, when exercising their sentencing discretion, warn themselves to be completely calm, objective and unemotional¹⁹⁵ – almost like a robot as it were. However, not even such an approach results in a perfect exercise of discretion, since the relevant factors may have been accorded the incorrect weight.¹⁹⁶ An evaluation of cases of indecent assault shows that the sentencing task poses greater difficulty for the judicial officer than it does in cases of child rape. In the latter case, a sentence of imprisonment is now almost expected, yet the length thereof will be based on the grading of the incident.

Indecent assault cases are perceived to be unique as regards their nature, possible causes, the prevention of repetition, and the healing of the consequences thereof.¹⁹⁷ Being a 'complex psychological occurrence'¹⁹⁸ and not one, stereotyped offence, it is little wonder that indecent assault has been

¹⁹³ *Ibid.*

¹⁹⁴ *S v O supra* (n 39) at 134f (own translation).

¹⁹⁵ *S v N supra* (n 37) at 275c.

¹⁹⁶ *Ibid.*

¹⁹⁷ *S v D supra* (n 189) at 714d.

¹⁹⁸ *S v D supra* (n 189) at 714f.

described as an area 'where fools rush in but angels fear to tread'.¹⁹⁹ Contrary to observations that the court should be left alone,²⁰⁰ in this category of child sexual abuse cases, namely indecent assault, it appears that there is in fact an acute need for guidance as to how to exercise the sentencing discretion. The court in *S v N*²⁰¹ relied heavily on two cases that had then recently been decided²⁰² and referred to their guidance regarding the nature of the crime and the approach that should be followed in the difficult task of sentencing. In *S v O*,²⁰³ the court held that there were no two cases where the facts and circumstances were precisely the same and indicated that the sentence in each case had to be decided on the case's own merits. However, in this case, where a gymnastic coach had been convicted of indecent assault on boys in his class over a period of time, the court gathered and evaluated numerous decisions. These decisions were viewed by Thring J as representing the collective wisdom of a long series of distinguished judges of different divisions and regions of South Africa who had handed down their judgments over a period of nearly 50 years. Further, it was stated that many of the cases had also been decisions of the Appellate Division or of the Supreme Court of Appeal. Accordingly, the court held that these cases could not merely be wished away or be criticised as a single decision that could not be followed.²⁰⁴ However, despite such recognition, the Supreme Court of

¹⁹⁹ *Ibid.*

²⁰⁰ SS Terblance 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) 120:4 *SALJ* 874. Compare A Ashworth 'Disentangling disparity' in DC Pennington and S Lloyd-Bostock (eds) *The Psychology of Sentencing* (1987) 30 for a criticism of the court's view that the varying facts, especially in sexual cases, do not allow for factual comparisons with precedents.

²⁰¹ *Supra* (n 37) at 275a-c.

²⁰² *S v D supra* (n 189) and *S v D supra* (n 32).

²⁰³ *Supra* (n 39) at 156f. Compare *S v G supra* (n 47) at 300d.

²⁰⁴ *S v O supra* (n 39) at 156g-h. As a result, the magistrate in the court *a quo* was criticised for being completely out of line with the decisions referred to and of thereby creating a perception of inconsistency on the part of the courts. It should be noted that, though there

Appeal's²⁰⁵ indication that sentences in indecent assault cases are currently being viewed in a more serious light by both the legislator and the community, seems to have been ignored.²⁰⁶ This highlights another facet of the process of exercising the sentencing discretion, namely selecting from precedents that which accords with the judicial officer's own perceptions. In addition, it illustrates the attitude of a judicial officer following a positivist approach as opposed to a more contextual approach in which the bigger or invisible picture is taken into consideration.²⁰⁷ What is of further importance is that, in the court's search for authoritative guidance, an Appellate Division²⁰⁸ case in which a stricter approach was adopted, was ignored, namely that an effective term of three years' imprisonment, though severe, was acceptable. The question that can be posed is whether that judgment would have influenced Thring J's decision in the present case. Lastly, it would also appear that, with regard to the search for guidelines from precedents in the grading process, no distinction is drawn between the various groups of offenders committing indecent assault, namely paedophiles, those committing intra-familial indecent assault and those engaged in once-off incidents because of low self-esteem.²⁰⁹ It is submitted that the courts should

will often be honest differences of opinion, the hierarchical structure of our courts demands that, where differences do exist, the view of the appellate court must prevail (*S v Sadler* 2000 (1) SACR 331 (A)).

²⁰⁵ *S v McMillan supra* (n 69) at 34d; *S v L* 1998 (1) SACR 463 (SCA) at 257f.

²⁰⁶ *S v O supra* (n 39) at 156j-157a. The judge in the high court in the present case did not regard the remarks of the Supreme Court of Appeal as serious, despite the hierarchical powers of our courts. Nevertheless, he chose to endorse consistency. It should be noted that in *S v Holder* 1979 (2) SA 70 (A) at 81b it was held that judicial officers should take cognisance of the times in which sentencing takes place.

²⁰⁷ See I Olckers (1999) 'The model of bias' *Curriculum Development Workshop* 88. Also KD Muller and IA van der Merwe 2002 'Judicial bias: Towards a contextual approach' in *The Judicial Officer and the Child Witness* 199.

²⁰⁸ *S v V supra* (n 67).

²⁰⁹ *S v O supra* (n 39) at 154b-156e. In this case, the judge researched precedents dating back to 1955 relating to cases involving paedophiles, intra-familial indecent assault and once-off incidents because of low self-esteem.

take note of these various categories in precedents so as to enhance consistency and thereby contribute to certainty amongst the public.

The analysis of case law further indicates that, in contrast to higher courts, regional courts adopt a much harsher approach to indecent assault cases, although such an approach is mostly 'corrected' on appeal. Yet, what remains clear is that, although the offence of indecent assault is, in terms of the statutory maximum sentence of six years and the courts' implementation of the Sexual Offences Act 23 of 1957, perceived to be a lesser evil than rape, the courts' sentencing task is more difficult and that the courts have expressed the need for guidance. This aspect is discussed in greater detail below with regard to disparity in indecent assault sentencing patterns, as well as in part III where the concept of sentencing guidelines is investigated.

5.7 AGGRAVATING AND MITIGATING FACTORS

Aggravating and mitigating factors influence the 'extent to which the offender is to be blamed for his crime and how much he therefore deserves to be punished'.²¹⁰ Mitigating factors are those factors that are favourable to the accused and generally result in a lighter sentence, while aggravating factors have the opposite effect. Although there has been very little theoretical discussion of the concepts of aggravating and mitigating factors,²¹¹ the Supreme Court of Appeal has referred to them in the context of determining substantial and compelling circumstances as though these concepts have a clear and definite meaning. First, it was held in *S v Malgas*²¹² that the content or meaning of the

²¹⁰ Terblanche *op cit* (n 5) 211.

²¹¹ When the death penalty was still a sentencing option, the difference between extenuating circumstances and mitigating factors received attention, but such difference is not relevant at present (Terblanche *ibid*).

²¹² *Supra* (n 170) at par 9.

term 'substantial and compelling circumstances' in s 51(3)(a) of the Criminal Law Amendment Act 105 of 1997 should be determined by weighing the mitigating and aggravating factors. When the aggravating factors are outweighed by the cumulative effect of the mitigating factors, then the court may deviate from the prescribed minimum sentence. Secondly, in *S v Abrahams*²¹³ it was held that, although precedents in respect of sentences imposed prior to the Criminal Law Amendment Act 105 of 1997 should not be followed with regard to length of sentence, they could still be followed (and used in the above process) with regard to the factors considered to be aggravating and mitigating. The court's acquired insight into the characteristics and effect of incest as referred to above, as well as its sensitivity to, and awareness of, the constitutional values of dignity and equality led to the consideration and recognition of an aggravating factor overlooked by the court *a quo*. The attitude of the father to his daughter, whom he regarded as a chattel, not merely to be used at will, but, once the first entitlement had been exercised, to be discarded for similar use by others, was accorded substantial aggravating weight and contributed to the increase in sentence from seven years' to 12 years' imprisonment.²¹⁴ Thus, where a judicial officer fails to recognise the existence of a particular factor, or wrongly recognises it, or attaches the incorrect weight to a factor in a particular case, the process becomes unbalanced and the sentencing decision may be overturned on appeal.²¹⁵ However, it has been acknowledged that, though many factors may be listed as aggravating or mitigating, some only have a neutral value and do not really influence the process.²¹⁶

²¹³ *Supra* (n 21) at 126b.

²¹⁴ *S v Abrahams supra* (n 21) at 122g; 123c.

²¹⁵ *S v Abrahams supra* (n 21); *S v Mahomotsa supra* (n 182).

²¹⁶ *S v E supra* (n 31) at 632a. The court *inter alia* referred to the fact that the complainants had not suffered adversely. This, it is submitted, was purely coincidental and not as a result of any precaution or consideration on the appellant's part.

In the absence of any other source, such as legislation or sentencing guidelines, case law would thus appear to be the main source for establishing mitigating and aggravating factors. Thus, although the categories of offences selected by the legislature in the schedule on minimum sentencing are qualified by aggravating features and factors in order that the offences concerned may be ranked amongst the most serious of sexual offences against children, in those same categories, other aggravating and mitigating factors will influence the final grading done by judicial officers in court, however strange this may sound.

Normally, factors will be taken into account that were present before, during or after the commission of the crime, but they must exist at the time of sentencing. With the new practice of divided cases under the Criminal Law Amendment Act 105 of 1997, a much longer period than previously elapses between conviction and the date of sentencing. It would appear that, with regard to the victim, the court now has far more information available than used to be the case. Despite the earlier criticism of the practice of divided cases, it would seem that, where evidence regarding future harm is deemed essential,²¹⁷ the court could be able to get a more accurate picture, depending on the way in which such evidence is interpreted.

Traditionally, in South Africa, the factors influencing the imposition of a sentence have, as stated above, been grouped under the factors of the sentencing triad, namely the crime, the offender and the interests of society.²¹⁸ With the victim having been accorded an independent position as a fourth pillar in sentencing, as argued in chapter 1, it is submitted that aggravating and mitigating factors should be divided into four categories, namely factors relating to the

²¹⁷ *Rammokko v Director of Public Prosecutions supra* (n 20) at 205f.

²¹⁸ Terblanche *op cit* (n 5) 213, and further, following *S v Zinn supra* (n 7).

circumstances surrounding the commission of the crime, factors relating to the personal circumstances of the accused, factors having a bearing on society's interests and factors pertaining to the harmful effects of the crime on the victim.

Child sexual abuse offences are divided into two main categories, namely rape and indecent assault. Since it has been acknowledged that each type of offence has its own inherent set of aggravating factors,²¹⁹ rape and indecent assault will be dealt with separately. No attempt has been made, of which the author is aware, to list the most important aggravating or mitigating factors recognised by the various courts over the years in cases of rape and indecent assault against children. The following is therefore a compilation of such factors based on an analysis of case law in chapter 3 and on the empirical study in chapter 4. The factors are divided into four categories, namely circumstances related to the commission of the crime, the accused, society's interests and the interests of the child victim. The latter category addresses the after-effects of the crime, other than physical injuries, since the courts have traditionally taken the physical injuries of the victim into account under the seriousness of the crime. Those aggravating and mitigating factors marked with an asterisk below are criticised for being outdated or incorrect.

5.7.1 Rape

5.7.1.1 Aggravating factors

a) Circumstances related to the commission of the crime

- Use of *force*²²⁰ or *threats*²²¹ by the accused.
- *More than one accused* raped the child.²²²

²¹⁹ *Ibid.*

²²⁰ *S v Jackson* 1998 (1) SACR 470 (SCA) at 478b; *S v V and Another supra* (n 43) at 540a; *Attorney-General, Eastern Cape v D supra* (n 42) at 477e; *S v M supra* (n 59) at 9c.

²²¹ *S v R supra* (n 63) at 343j; *S v M* 1993 (2) SA 1 (A) at 5b.

- *Gang-rape*.²²³
- *Assault of the victim* during commission of the crime.²²⁴
- *Callousness* and no display of feelings.²²⁵
- *Physical injuries* caused to the child.²²⁶
- Physical injuries causing *permanent damage*.²²⁷
- Victim exposed to *further humiliation*.²²⁸
- *Abduction* of the victim, or an element thereof.²²⁹
- Accused *left victim behind in a deserted spot*.²³⁰

²²² *S v Boer supra* (n 170) at 117d; *S v J* 1989 (1) SA 669 (A) at 683h.

²²³ *S v M en Andere* 1979 (4) BH 1044 at 1051e ('Dit is 'n beesagtigheid ...'); *S v V and Another supra* (n 43) at 540a.

²²⁴ *S v Boer supra* (n 170) at 117e; *S v M en Andere supra* (n 223) at 1051f; *S v Pieters supra* (n 45) at 725a-j.

²²⁵ *S v Tatyama* 1991 (2) SACR 1 (A) at 6f; *S v B supra* (n 89) at 553h ('...sy inlywing tot die seksdaad was simpatieeloos').

²²⁶ *S v R supra* (n 63) at 343f-i; *S v Tatyama supra* (n 225) at 6g.

²²⁷ *S v Boer supra* (n 170). In *S v M supra* (n 176) at 418d, a father repeatedly raped his daughter, aged six, over a period of six months and it was said that the trauma caused to her genitals would result in life-long, painful intercourse, with probable problems in adult relationships. In *S v Tatyama supra* (n 225) at 6g-h, it was indicated that a seven-year-old girl would suffer her whole life from lack of bowel control and would not be able to have children. In *S v Dithotze* 1999 (2) SACR 314 (W) at 317b the court referred to another case where a nine-year-old girl had been injured so severely by the act of rape that the flesh between her vagina and her rectum had been perforated. Here, it was indicated that she would in all probability never be able to have a satisfactory sex life in adulthood and would experience difficulties with child birth. See also *S v Blaauw* 2001 (2) SACR 255 (CPD) at 261e-h; *S v M supra* (n 59) at 9d.

²²⁸ *S v Boer supra* (n 170) at 117g (the victim was left naked while witnesses arrived); *S v V and Another supra* (n 43) at 539j (the co-accused laughed at the victim while being raped); chapter 4 par 4.5.6.

²²⁹ *S v V and Another supra* (n 43) at 540a; *S v M supra* (n 59) at 9c.

²³⁰ *S v R supra* (n 63) at 343j; *S v Tatyama supra* (n 225) at 6f; *S v M supra* (n 59) at 9c; *S v J supra* (n 222) at 683h. Also *S v Gqamana supra* (n 43) at 34h where the victim was locked up for several hours after the incident.

- The accused broke into the *victim's house*²³¹ or forced the complainant into her house.²³²
- The victim was a *virgin*.²³³
- The victim was *pregnant or menstruating*.²³⁴
- The victim is *very young*.²³⁵
- The victim is refined/civilised/from a good home.^{236*} This factor is related to that indicated under mitigating factors, namely that the victim is from the same social milieu as the rapist. This viewpoint, it is argued by the author, could not be supported under our present constitutional dispensation where all victims are equal. There is further no research to support the perception that the social class of the victim and perpetrator is a relevant factor in determining the impact of the crime.
- The family *moved house* because it was not able to live in the place where the trauma occurred.²³⁷
- The rape took place in the *presence of the father and the brother*.²³⁸
- A degree of *planning/cunning* was involved in the accused's commission of the offence.²³⁹

²³¹ *S v M supra* (n 221) at 5a.

²³² *S v M en Andere supra* (n 223) at 1051f.

²³³ *S v Boer supra* (n 170) at 117e; *S v G supra* (n 47) at 300h.

²³⁴ *S v V and Another supra* (n 43) at 239b.

²³⁵ *S v Tatyama supra* (n 225) at 6e; *S v Blaauw supra* (n 227) at 261a. See *S v G supra* (n 47) at 300h-i where the court held that the younger the victim the more blameworthy the accused is. The accused shows greater 'sexual perversity' where he rapes a sexually immature and physically underdeveloped child. Compare *S v Gqamana supra* (n 43) at 36b,h where it was held to be mitigating that the accused believed, on the basis of her appearance, that the complainant was over the age of 16 years.

²³⁶ *S v Pieters supra* (n 45) at 726i; *S v S supra* (n 56) at 122i. See *infra* (n 275).

²³⁷ *S v M supra* (n 221) at 7g.

²³⁸ *S v M supra* (n 221) at 7a.

b) *The accused*

- *The abuse of trust or position of authority/command or responsibility* by the accused in a position of trust, such as a father,²⁴⁰ a teacher,²⁴¹ a pastor or a policeman,²⁴² is an important aggravating factor.
- *Abuse of physical strength*, for example by gagging or overpowering the victim.²⁴³
- The accused is *HIV-positive* and life-threatening diseases may be transmitted to the victim.²⁴⁴ Where the accused is aware of his condition, this will play an even more aggravating role.
- It would appear that sensitivity to the constitutional values of dignity and equality have permeated sentencing law, leading to the recognition and formulation of a new aggravating factor. The *attitude* of the accused can be taken into account as an aggravating factor in the following instances: where the attitude/approach of a father is one of possessive jealousy of his daughter and he views her as a chattel, not merely to be used at will, but, once the first entitlement has been exercised, to be discarded for further

²³⁹ *S v Blaauw supra* (n 227) at 261a; *S v S supra* (n 56) at 122h.

²⁴⁰ See par 5.3.3.2a) above. Abusing positions of trust, as well as the repetition of the offence itself over a period of time, can be used to establish the fear of repeated abuse (reoffending). See also *S v B supra* (n 89) at 554a; *S v Abrahams supra* (n 21) at 123d; *S v G supra* (n 47) at 301c (although the accused was not the biological father he assumed that role and was trusted by the victim).

²⁴¹ *S v S supra* (n 65) at 61f-h.

²⁴² *S v Jackson supra* (n 220) at 478b.

²⁴³ *S v Jackson supra* (n 220) at 478a. *S v Pieters supra* (n 45) at 725a-f (the victim was petite and was easily overpowered by the accused).

²⁴⁴ *S v Blaauw supra* (n 227) at 260g.

similar use by others;²⁴⁵ and where a sexual thug considers young girls (15 years old) as objects to be used to satisfy his lust, threatens them, removes them from the streets, locks them up and rapes them.²⁴⁶

- *Repeated* acts of rape of a victim who is locked up are indicative of the exploitation of an accused's position of power to the full.²⁴⁷
- The accused's *sexual jealousy* of his daughter.²⁴⁸
- A youthful offender's consumption of *alcohol* with adults before committing rape.²⁴⁹
- The accused has *previous convictions* for sexual offences against children, or for crimes against the person.²⁵⁰
- The accused is *awaiting trial* for a similar offence when he commits rape.²⁵¹
- *Lack of remorse* by the accused.²⁵²
- The character and attitude of the accused, for example where he has committed another rape only six weeks before.²⁵³

²⁴⁵ In *S v Abrahams supra* (n 21) at 122g the sentencing court was criticised for omitting to consider as an aggravating factor that the accused was possessively jealous and was determined to precede other young males in any possible carnal access to his daughter.

²⁴⁶ *S v Mahomotsa supra* (n 182) at 443d.

²⁴⁷ *Ibid.*

²⁴⁸ *S v Abrahams supra* (n 21) at 122h.

²⁴⁹ *S v Boer supra* (n 170) at 120c.

²⁵⁰ *S v Mahomotsa supra* (n 182) at 444d.

²⁵¹ *Ibid.*

²⁵² *S v R supra* (n 63) at 344j; *S v M* 1994 (2) SACR 24 (A) at 30h; *S v B supra* (n 89) at 553h; *S v G supra* (n 47) at 301d. The courts seem to differ on this aspect (see *infra* (n 270)). Terblanche *op cit* (n 5) 217 further argues that, in the light of the accused's right to plead not guilty, his exercise of such right should never be seen as a lack of remorse to be held against him during the imposition of sentence. See also par 5.9.1 below with regard to a plea of guilty and remorse.

²⁵³ *S v S supra* (n 56) at 123g. Compare also *S v B supra* (n 89) at 553i-j where the accused intentionally impregnated his daughter.

c) *Society's interests*

- The high incidence of rape in South Africa.²⁵⁴
- Escalation of rape and a public outcry in cases where too lenient a sentence is imposed.²⁵⁵
- Children are vulnerable per se and therefore defenceless.²⁵⁶

d) *The interests of the victim*

- The *serious psychological effect* of the incident on the complainant. In rape cases where minimum sentences are prescribed, evidence of the psychological impact is now essential in order to determine the presence or absence of substantial and compelling circumstances for the imposition of life imprisonment.²⁵⁷
- The after-effects of *incest* are more lingering and stigmatising.²⁵⁸
- The victim does *not complete her schooling* as a result of the rape.²⁵⁹
- The victim is *ostracised* by some members of the community for sleeping with men and is *intimidated* by the accused's family and friends.²⁶⁰

²⁵⁴ This was remarked on as early as 1979.

²⁵⁵ *Attorney-General, Eastern Cape v D supra* (n 42) at 478f.

²⁵⁶ *S v S supra* (n 65) at 61f-g. Terblanche *op cit* (n 5) 218.

²⁵⁷ *Rammoko v Director of Public Prosecutions supra* (n 20) at 205e (see chapter 3 par 3.1.1.2d); *S v G supra* (n 47) at 301a. Compare *S v M supra* (n 59) at 9d; *S v R supra* (n 63) at 345a; *S v S supra* (n 56) at 122i-j.

²⁵⁸ *S v Abrahams supra* (n 21) at 125c: 'What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture. Love thus expressed becomes the negation of love, and the violation of the trust that should sustain it extreme. Its effects may linger for longer than with extra-familial rape'. Of further importance is that the harmful effect of incest was held to require particular attention with regard to deterrence and retribution in sentencing.

²⁵⁹ *Rammoko v Director of Public Prosecutions supra* (n 20). The victim was sent back by her uncle, with whom she lived in town, to her parents who lived on a farm without any schooling facilities (see chapter 3 par 3.1.1.2d)).

²⁶⁰ *S v Njikelana* 2003 (2) SACR 166 CPD at 174h.

- The victim becomes pregnant.²⁶¹

5.7.1.2 Mitigating factors

a) Circumstances related to the commission of the crime

- Not one of the worst cases of rape (without clear indicators).²⁶²
- Absence of any cruelty or unnecessary violence (including no actual physical threat by the accused and no use of a weapon).²⁶³
- The rape caused no (serious) physical harm.²⁶⁴

It is submitted that the last two factors should be regarded as neutral factors, with no weight being attached to them, despite the courts' referral to them as mitigating.

b) The accused

- The youth/immaturity of the accused.²⁶⁵
- The accused is less blameworthy.²⁶⁶

²⁶¹ *S v B supra* (n 89) at 554a.

²⁶² *S v Abrahams supra* (n 21) at 127d; *S v Mahomotsa supra* (n 182) at 443f. It has been stated that the degree of abhorrence that the crime elicits must be taken into account. This statement is, however, open to many interpretations, for the degree of abhorrence depends ultimately on the perception of the judicial officer. Consequently, such statement is not of any real assistance.

²⁶³ *S v Gqamana supra* (n 43) at 34f, 34j, 36h.

²⁶⁴ *S v Jansen* 1999 (2) SACR 368 CPD at 378f, thereby being classified as a borderline case. This attitude highlights the fact that the absence of serious physical injuries outweighs the impact of the crime. This also raises the question as to what extent the diverse experiences of different genders influence courts in their perceptions of sexual assault. See also *S v Njikelana supra* (n 260) at 175f-i where the perception is created that a finding of no serious physical injuries neutralises the victim's mental trauma.

²⁶⁵ *S v Gqamana supra* (n 43) at 37c; *S v Boer supra* (n 170) at 119d-f.

²⁶⁶ The effect of alcohol on the accused diminishes his judgement (*S v R supra* (n 63) at 345b; *S v J supra* (n 222) at 686h; *S v M supra* (n 252) at 30c; *S v Njikelana supra* (n 260) at 174d-

- The accused was under the influence of an older accused.²⁶⁷
- Unfavourable background of the accused.²⁶⁸
- The offence was not premeditated.²⁶⁹
- No previous convictions (especially when already in middle age or older).²⁷⁰
- The slightest possibility of rehabilitation.²⁷¹
- The accused has marital problems (sexual frustration).^{272*} It is suggested that this factor can, at most, provide some explanation for the conduct of the accused, but should never be a ground for holding him less blameworthy.
- The accused pleaded guilty.²⁷³
- The accused shows remorse.²⁷⁴

c) *The interests of the victim*

- The 'mental sequelae' of the victim are not of any great seriousness, or lasting.^{275*}

e). Terblanche *op cit* (n 5) 228 submits that diminished responsibility is one of only a few factors that really has a mitigating influence on sentencing.

²⁶⁷ *S v V and Another supra* (n 43) at 542d.

²⁶⁸ *S v Abrahams supra* (n 21) at 126j (the accused's son had committed suicide two years prior to the incident and this signalled the breakdown of the family dynamics); *S v Blaauw supra* (n 227) at 262a-j (the accused had a troubled and neglected childhood); *S v Gqamana supra* (n 43) at 35g-i.

²⁶⁹ *S v M* 1982 (1) SA 590 (A) at 593a.

²⁷⁰ *S v Gqamana supra* (n 43) at 35g.

²⁷¹ *S v R supra* (n 63) at 346b; *S v V* 1996 (2) SACR 133 (T) at 138j-139a.

²⁷² *S v V supra* (n 271) at 136b-c.

²⁷³ In the above analysis, the accused pleaded guilty in only four of the cases, one of which was a case of attempted rape.

²⁷⁴ In *S v Njikelana supra* (n 260) at 175d it was reiterated that lack of remorse on the part of the accused cannot be taken into account as an aggravating factor. Compare (n 252) above.

It is submitted that, in the absence of expert assistance, judicial officers are not equipped to correctly interpret symptoms of trauma. This has been confirmed by the strikingly different interpretation of the Supreme Court of Appeal from that of the court *a quo* in *S v Abrahams*²⁷⁶ where the former conducted interdisciplinary research on the lingering and harmful effects of incest.

- No obvious psychological harm.²⁷⁷
- No loss of virginity.²⁷⁸
- The victim has overcome the after-effects of the rape/is making good progress in that regard.²⁷⁹
- The victim was not raped by total strangers.^{280*}

In paragraph 5.3.3.1 above, it was indicated that research has shown that stranger rape and acquaintance rape are equally harmful. A finding that the rapist is an acquaintance, and that this is a mitigating factor, is thus an outdated and incorrect perception.

- The victim was raped by people from the same social milieu.^{281*}

The recognition of this factor is open to criticism under our present constitutional dispensation where equality is paramount.

²⁷⁵ *S v Gqamana supra* (n 43) at 37a.

²⁷⁶ *Supra* (n 21) at 124c-d. See also par 5.3.3.1 and par 5.3.4 above.

²⁷⁷ *S v B supra* (n 89) at 554a. See par 5.3.3.1 for a discussion of the danger of basing findings of harm on the observation of victims in court.

²⁷⁸ *S v Mahomotsa supra* (n 182) at 441d.

²⁷⁹ *Rammoko v Director of Public Prosecutions supra* (n 20); see chapter 3 par 3.1.1.2 d)).

²⁸⁰ *S v A supra* (n 1) at 608j.

²⁸¹ *Ibid.*

The factor that plays the most important mitigating role in the court's sentencing discretion appears to be the possibility of the accused's rehabilitation. Even if there is only the slightest chance of rehabilitation, the courts are willing to embrace it. The second-most important mitigating factor recognised by the courts in rape cases is the use of alcohol which affects the accused's judgement and, in turn, impacts on his blameworthiness, or degree of culpability.

Judicial officers are influenced by their own perceptions of what amount to mitigating factors. Recently, the regional court and high court were corrected for regarding both the fact that the victim had been sexually active two days before the rape and the virility of the 23-year-old accused as mitigating factors.²⁸²

5.7.2 Indecent assault

5.7.2.1 Aggravating factors

a) Circumstances related to the commission of the crime

- The very young age of the child.²⁸³ (It would appear that indecent assault on young female victims is perceived to be more serious than when the victims are adolescent boys.)
- The use of pornographic material to sexually arouse the victims.²⁸⁴
- The abusive acts were repeated on many occasions, or took place over a long period.²⁸⁵
- The accused used street children who submitted to indecent acts for payment.²⁸⁶

²⁸² *S v Mahomotsa supra* (n 182) at 442c-e.

²⁸³ *S v V supra* (n 30) at 737g.

²⁸⁴ *S v E supra* (n 31) at 631f.

²⁸⁵ *S v O supra* (n 39) at 161d (the abuse took place over 17 years). In *S v V supra* (n 30) at 737f the abuse continued over a period of seven years from the time that the victim was five years of age.

- The specific nature of the conduct, for example when the accused attempts penetration with a girl of 11 years, and then stops on realising that she is still small.²⁸⁷ (It is submitted that, compared with intra-familial abuse over a number of years, the accused's withdrawal might rather be a mitigating factor.)
- The acts were preceded by planning.²⁸⁸
- The victim played no part in the commission of the offence.^{289*}

The court made this finding after having been referred to another 'similar' case²⁹⁰ by the defence as a guideline in deciding on the appropriate sentence. As regards this case, the court remarked as follows:

'Ek weet ook uit die bestudering van die uitpraak dat dit 'n geval was wat hemelsbreed van die onderhawige verskil. Daar was dit die geval van 'n 60-jarige oupa wat oor 'n langdurige tydperk met 'n Lolita-agtige kleindogter van hom in noue aanraking was en uiteindelik geswig het voor die kind se seksuele of kwasi-seksuele uitlokkings. Hy het haar nie met sy penis probeer penetreer nie, maar wel, volgens die getuienis, met sy vinger in haar skaamdeel gepeuter.'²⁹¹

That a child can actually 'seduce' an adult and play a role in a case of indecent assault seems a disturbing point of view to hold. It is also important to note how literature can play a role in creating a perception,

²⁸⁶ *S v K supra* (n 68) at 560c; *S v D* 1995 (1) SACR 259 (A) at 261b.

²⁸⁷ *S v V supra* (n 67) at 599g-h.

²⁸⁸ Some recognition has been given to the fact that the paedophile 'deliberately engineered the climate' for his sexual encounters with the children (*S v E supra* (n 31) at 631e; see also *S v V supra* (n 78) at 67f). This aspect is discussed in more detail in par 5.4 above with regard to the grooming process.

²⁸⁹ *S v V supra* (n 78) at 67d-e. The complainant, a slightly retarded 11-year-old girl, was perceived to be an innocent, passive object upon which the appellant wished to satisfy his lust.

²⁹⁰ *S v Vermaak* (case no A1221/89) as referred to in *S v V supra* (n 78) at 67b-c.

²⁹¹ *S v V supra* (n 78) at 67b-c.

which then becomes the basis of a bias influencing the way a witness may be categorised or stereotyped.²⁹²

b) *The accused*

- Abuse of position of trust towards the child.²⁹³
- Abuse of position of trust of parents/caregivers.²⁹⁴
- Abuse of reliance placed on the accused to make an ideal come true, for example to advance the complainant's music career.²⁹⁵
- The accused never took steps to seek help, despite the fact that the abuse took place over a long period.²⁹⁶
- The accused has previous convictions.²⁹⁷
- The accused shows no remorse.²⁹⁸
- The accused told the victim not to assist the police.²⁹⁹
- Intentional shame and humiliation caused to the complainant.³⁰⁰

²⁹² See KD Muller and IA van der Merwe 2002 'Judicial bias: Towards a contextual approach' in *The Judicial Officer and the Child Witness* 203 for a discussion on the stereotyping of child witnesses in sexual abuse cases.

²⁹³ *S v Manamela* 2000 (2) SACR 176 (WLD) at 180a.

²⁹⁴ *S v O supra* (n 39) at 161d; *S v V supra* (n 78) at 67f; *S v Fatyi supra* (n 187) at 488j: 'The accused's conduct was appalling ... for own sexual gratification he took advantage of a little girl entrusted to his care' (the accused indecently assaulted a six-year-old girl. He was a taxi driver engaged in after-care transport and was in a position of trust).

²⁹⁵ *S v E supra* (n 31) at 631e.

²⁹⁶ *S v O supra* (n 39) at 161d-e; *S v E supra* (n 31) at 631d.

²⁹⁷ *S v Manamela supra* (n 294) at 180b; *S v K supra* (n 68) at 558a-d. In *S v R supra* (n 54) at 217d-g, the accused had a previous conviction, yet correctional supervision was found to be appropriate. It would appear that, the older the children, the less weight the previous conviction carries.

²⁹⁸ Compare (n 251).

²⁹⁹ *S v E supra* (n 31) at 631e.

³⁰⁰ *Rex v Khumalo* 1947 (1) 739 (O). This case differs somewhat from the others in that the accused wanted to hurt the family and lifted the complainant's leg, thereby exposing her naked private parts to her father-in-law.

c) *Society's interests*

- The prevalence of the offence.³⁰¹
- The community's abhorrence of the sexual molestation of children.³⁰²
- Children are vulnerable per se and therefore defenceless.³⁰³

d) *The interests of the victim*

- *Severe, harmful psychological effect* of the crime on the victim.³⁰⁴
- The victims started to commit indecent acts with one another/became sexualised/contracted sexually transmitted diseases.³⁰⁵

5.7.2.2 *Mitigating factors*

a) *Circumstances related to the commission of the crime*

- No sodomy took place.³⁰⁶

It is submitted that, when the Criminal Law (Sexual Offences) Amendment Bill 2003 comes into operation, the required new paradigm set might cause confusion in practice, since all indications are that the definition of rape will be changed to refer to acts of penetration which include acts of sodomy.

³⁰¹ *S v V supra* (n 67). *The Sunday Times* has not been considered to be an appropriate source for statistics on cases of this nature.

³⁰² *S v V supra* (n 78) at 67h: 'It (child abuse) remains an offence which not only the legislature but the public at large abhors and condemns ... Children must ... be protected against those who seek to use them as a vehicle for their sexual urges and desires'; *S v V supra* (n 67) at 601h. Compare *S v D supra* (n 189) at 714f where it was held, however, that the shock, abhorrence and judgement of society are influenced by society's ignorance and its own 'inscrutable psycho-sexuality'.

³⁰³ *S v D supra* (n 286) at 260g-h.

³⁰⁴ *S v D supra* (n 32) at 232e; *S v K supra* (n 68) at 557h.

³⁰⁵ *S v K supra* (n 68) at 557h.

³⁰⁶ *S v McMillan supra* (n 69) at 31i.

Such acts will further resort under the Criminal Law Amendment Act 105 of 1997, which is aimed at ensuring more severe sentences.

- No physical injuries were caused.³⁰⁷
- The victim consented to the acts.^{308*}

In paragraph 5.4 above, it was explained that ostensible consent obtained through manipulation by the accused during the grooming process does not amount to true consent and should not play any mitigating role in the imposition of sentence.

b) *The accused*

- The personal qualities of the accused.^{309*}

It is submitted that this is one of the aspects that makes it so difficult for courts to sentence paedophiles, since they are mostly agreeable people.³¹⁰

However, less emphasis should be placed on the accused previously having had a good character, since it is not unusual for such a factor to be present in cases of familial child abuse or cases where breach of trust is involved.³¹¹

- The accused's chances of rehabilitation.³¹²

The courts do not agree as to whether there should be certainty or a mere possibility in this regard before such a factor is accepted as playing a role in the imposition of correctional supervision.

³⁰⁷ *Ibid.*

³⁰⁸ *S v O supra* (n 39) at 162d-e.

³⁰⁹ *R v C supra* (n 113) at 51i; *S v E supra* (n 31) at 632a.

³¹⁰ See discussion in par 5.4 above with regard to grooming.

³¹¹ Canadian Department of Justice (24/4/2003) 'Sentencing to protect children' *Consultations and Outreach* 3.

³¹² *S v R supra* (n 54) at 222g-h. The cause of the accused's crime was a personality defect and he responded well to therapy. See, also, the case study below on paedophiles, as well as the majority of intra-familial cases dealt with in chapter 3 par 3.3.

- The condition of the accused is an illness or the result of a compulsion.³¹³
- Imprisonment would negatively impact on the accused, or would interrupt therapy.³¹⁴
- The accused pleaded guilty.*
It is submitted that a plea of guilty should be distinguished from mitigating factors and be dealt with as a separate ground for the reduction in sentence.³¹⁵
- The accused shows remorse.*
In almost all cases of indecent assault dealt with in this thesis, the accused pleaded guilty, or changed their plea after the first witness had testified. This has been interpreted as remorse.³¹⁶ However, it is submitted that a plea of guilty does not necessarily indicate remorse, and that only true remorse should be taken into account.
- The accused shows insight into his condition.³¹⁷
- The accused is a first offender.*
In the majority of judgments involving indecent assault, this was the case, and it is submitted that such factor should not carry substantial weight where the conduct concerned took place over a period of time.³¹⁸
- The accused is young, or relatively young.³¹⁹

³¹³ *S v S supra* (n 6) at 839a; *S v E supra* (n 31) at 632a; *S v D supra* (n 286) at 232c.

³¹⁴ *S v R supra* (n 54) at 222h; *S v N supra* (n 37) at 274e; *S v E supra* (n 31) at 633b; *S v S supra* (n 6) at 389c.

³¹⁵ See par 5.9.1 below.

³¹⁶ *S v V supra* (n 30) at 737g (the accused pleaded guilty after having abused his stepdaughter over a period of seven years). In *S v O supra* (n 39) at 162f-g the court was convinced of the accused's remorse by his plea of guilty and by his willingness even to go to prison for the required treatment in order to be cured. Although the court regarded this as telling evidence, a degree of skepticism cannot be helped, since it is strange when, having engaged in the conduct concerned over a period of 17 years which results finally in conflict with the law, the accused suddenly displays this insight. See, further, the discussion in par 5.8.2.1 below.

³¹⁷ *S v O supra* (n 39) at 162f-g (see (n 311) above for comment).

³¹⁸ Canadian Department of Justice *op cit* (n 311).

- The accused has strong family ties.³²⁰
- The accused was sexually molested as a child.³²¹
- The accused has sexual problems in his marriage.³²²
- The accused has a strong work ethic/impressive employment history.³²³
- The accused has lost his job because of the conviction/has taken a drop in salary.³²⁴

c) *Society's interests*

- The family of the accused will suffer if he is sentenced to imprisonment.³²⁵
The preservation of the *family unit*, or of family life, would appear to be an important consideration in sentencing in intra-familial abuse cases. This leads to the preference for correctional supervision as a sentencing option and further indicates sensitivity to the holistic picture and to the additional loss for the victim. However, often, the reality is that the perpetrator is also the main or sole breadwinner. This then influences the court to focus on the advantages flowing from s 276(h) of the Criminal Procedure Act 55 of 1977 and on the aim of rehabilitation. Research, however, has indicated that families in which child sexual abuse occurs are often dysfunctional in more

³¹⁹ *S v R supra* (n 54) at 222g (even the accused's age of 32 was perceived to fall into this category).

³²⁰ *S v N supra* (n 37); *S v R supra* (n 54) at 222g.

³²¹ *S v R supra* (n 127); *S v McMillan supra* (n 69) at 32b.

³²² *S v D supra* (n 189) at 711i (the accused, in the absence of a sexual relationship with his wife, wanted stimulation from his daughter). In *S v N supra* (n 37) at 275e the court speculated about a flawed sexual relationship within the marriage as a possible cause for the abuse of the accused's stepdaughters.

³²³ *S v R supra* (n 54) at 222g; *S v N supra* (n 37) at 275d-e; *S v E supra* (n 31) at 632a.

³²⁴ *S v D supra* (n 286) at 266e.

³²⁵ *S v N supra* (n 37) at 274e-f; *S v V supra* (n 30) at 738a; *S v D supra* (n 189) at 716g.

than one aspect,³²⁶ which raises the question as to what extent such family can really be saved.

d) *The interests of the victim*

- No harm has been experienced by the victim.^{327*}

In the light of research discussed in paragraph 5.3.4 above, this seems highly unlikely.

- The victim is an older boy.^{328*}

5.8 DISPARITY IN SENTENCING

Ashworth³²⁹ explains that disparity in sentencing usually stems from not treating 'like cases alike and different cases differently'. While acknowledging that some disparity is inevitable within the South African context where sentences are designed to suit the circumstances of each individual case, the Law Commission voiced its concern about unjustified disparity.³³⁰ This would occur where sentences are not uniform owing to a lack of consensus across the judiciary on the relative seriousness of offences, on mitigating factors, on aggravating factors, on the relevant circumstances of the offender and on the relative weight to be given to each of these factors.³³¹ A brief analysis is conducted below

³²⁶ DE Pelekis, A Mykletun and AA Dahl 'The relative influence of childhood sexual abuse and other family background risk factors on adult adversities in female outpatients treated for anxiety disorders and depression' (2004) 28:1 *Child Abuse and Neglect* 61-76.

³²⁷ *S v O supra* (n 39) at 161f-g. Also see the discussion in par 5.3.3.1 above regarding judicial officers' perceptions that became apparent from the study.

³²⁸ *S v R supra* (n 54) at 222h. See also par 5.3.3.1.

³²⁹ Ashworth *op cit* (n 200) 24: 'It is a word which calls attention to a form of injustice, to decisions which have resulted in an unfair distribution of burdens or benefits'.

³³⁰ *Op cit* (n 109) 732. Terblanche *op cit* (n 5) 151 also points out that consistency is perceived to be less absolute than uniformity.

³³¹ *Ibid.*

regarding the pattern of sentencing in a subgroup of child sexual abuse, namely extra-familial paedophiles, as well as related matters.

5.8.1 Unjustified disparity in child sexual abuse cases

The problem relating to the approach of the judiciary to the relative *seriousness of offences* as a cause of unjustified disparity emerges when conducting an analysis of the trend in sentencing in indecent assault cases involving children. Sexual offenders are not a homogenous group³³² and the unique circumstances of each accused, the manner of execution of the crime and the circumstances surrounding its commission will determine sentence.³³³ An evaluation of consistency in choice of sentence in cases of indecent assault on children might therefore seem almost impossible. It is for this reason that it has been decided to focus on the same subgroup of *extra-familial paedophiles*³³⁴ as above, thereby providing some homogeneity.

5.8.1.1 Sentencing patterns in extra-familial paedophile cases

For ease of reference, the nature of the case study is briefly repeated here. In all the cases evaluated, the accused were convicted, after a plea of guilty, of either the common law crime of indecent assault or of the statutory offence of committing immoral or indecent acts in contravention of s 14(1)(b) of the Sexual Offences Act 23 of 1957.³³⁵ With the exception of one,³³⁶ they all appealed against their sentences of imprisonment. The cases selected included those where expert evidence was presented on a diagnosis of paedophilia, thereby

³³² Law Commission *op cit* (n 109) 690; Bartol *op cit* (n 112) 289.

³³³ *S v Mohlakane* 2003 (2) SACR 569 (O) at 573f.

³³⁴ The same selection of cases was used for the study conducted in par 5.5 above to determine the use and role of expert evidence in sentencing paedophiles.

³³⁵ See *supra* (n 114).

³³⁶ *S v O supra* (n 39).

providing a further 'category of relevant resemblance'³³⁷ or measure of homogeneity. Of the seven selected cases, only one case did not involve boys as victims, and, in all the cases, the offender was in a position of trust or authority.³³⁸

In *S v S*,³³⁹ a primary school teacher committed indecent acts³⁴⁰ during school hours with three girls, aged 10, in his class over a period of about four months. It was held that the seriousness of the offences³⁴¹ justified a period of imprisonment. However, in the light of expert evidence, the prison sentence was set aside and was replaced with a reduced and wholly suspended sentence, on condition that, during such suspension, the appellant subject himself to such regular treatment as may be ordered by an expert psychiatrist.

In *S v D*,³⁴² a drama teacher, aged 43, was involved with seven of his drama pupils, boys aged 12 to 13 years. The high court acknowledged the real dilemma of balancing all the relevant factors in order to arrive at an appropriate sentence, but pointed out two errors that had been made by the sentencing court: first, treatment in prison should not be equated with that provided in Valkenberg

³³⁷ Ashworth *op cit* (n 200) 24.

³³⁸ The offenders were school or drama teachers, gymnastic or karate coaches, a stepfather abusing his stepson and his friends, or an adult in a position to further the adolescent victim's ambitions.

³³⁹ *Supra* (n 6). See *supra* (n 116).

³⁴⁰ *S v S supra* (n 6) at 834g: The first girl testified that, a few times during the day, the appellant would put his hand under the desk and pat her private parts, and that he made her pat his private parts over his pants. It seems that, on at least one occasion, the appellant removed his penis from his pants and ejaculated in front of the girl. It is not clear what is meant thereby, but the girl also testified that her teacher would sometimes 'bring his hand into my body and sometimes he used to pat my body'.

³⁴¹ In *S v S supra* (n 6) at 838h the appeal judge agreed with the finding of the magistrate that the offences were 'disgusting and horrible and an abuse of trust'.

³⁴² *Supra* (n 32).

Hospital; and, secondly, long-term imprisonment is not the best way of protecting children in the long run. The sentence was set aside and all counts were taken together for purpose of sentencing because the accused's conduct not only stemmed from the same cause, but also the same *modus operandi*³⁴³ was employed in all cases. In attaching more weight to the evidence of the defence expert, the high court substantially reduced the sentence, yet the choice of imprisonment appeared to be unavoidable. It was held that

'despite the arguments advanced by his counsel as to the deleterious effect imprisonment would have on the appellant, it would be wrong to allow the appellant to escape – by merely submitting to treatment, something which he could have done voluntarily – the consequences of his acts, having regard to the effect those acts must have had, and according to evidence did have, on the children concerned.'³⁴⁴

A term of six years' imprisonment was imposed, of which four-and-a-half years were suspended for five years on certain conditions relating to reoffending, job situation, living conditions and reporting both for therapy and to the Child Protection Unit. An effective term of eighteen months' imprisonment was thus imposed.³⁴⁵

In *S v E*,³⁴⁶ the appellant, a compiler and organiser of musical programmes at the SABC, invited ten boys, aged 14 to 17, to his home where he would offer them liquor, show them pornographic videos and then indulge in masturbation with them. The magistrate's misdirection led him to find aggravation where he

³⁴³ See par 5.5.1.1a) above for a reference to his *modus operandi* in order to manipulate situations and obtain access to the victims, whereupon he would touch the boy's genitals/perform masturbation, and vice versa. The judge mentioned that there was no 'violence in the normal sense of the word' (at 2229b).

³⁴⁴ *S v D supra* (n 32) at 232d.

³⁴⁵ This is the first case of extra-familial paedophilia in which a formal prohibition order was included precluding contact with children or the holding of a job that might place the offender in a position of trust or authority in relation to children.

³⁴⁶ *Supra* (n 31).

should have found mitigation,³⁴⁷ and this, in turn, influenced his assessment of the offender and of the nature of his crimes.³⁴⁸ The magistrate also erred in according insufficient weight to the fact that direct imprisonment would lead to the appellant losing his job and to expert evidence that direct imprisonment would be counterproductive and unhelpful, having regard to the appellant's attributes and particular personality.³⁴⁹ The Appellate Division was thus entitled to impose sentence afresh after reinterpreting the expert evidence presented to the court *a quo*. The sentence was set aside and the case was referred back to the trial court for the imposition of correctional supervision as an appropriate sentence, as such form of sentence was not available during the initial sentencing procedures. In this way, the appellant could be punished and, at the same time, be rehabilitated within the community.

In *S v Ndaba*,³⁵⁰ the accused, a teacher aged 28, under false pretences asked a girl of nine years, who was playing with a friend during the lunch-break at school, to accompany him to his classroom at a neighbouring school. He inserted something in her vagina while she was bending over, gave her R1,20 when done, and sent her home. He was convicted only of indecent assault in the regional court and was sentenced to six years' imprisonment, of which two years were suspended for five years. The sentence was confirmed by the high court on appeal, and the accused then appealed to the Appellate Division.

Although the appellant appeared intelligent and was the breadwinner in his family, a psychologist testified on his behalf that he was a regressive paedophile

³⁴⁷ A positive prognosis on commencement of therapy after the laying of criminal charges was interpreted by the trial court as aggravating.

³⁴⁸ *S v E supra* (n 31) at 631a.

³⁴⁹ *Ibid.*

³⁵⁰ *Supra* (n 132).

who was emotionally immature, unstable, hypersensitive, and excessively submissive and weak.³⁵¹ The expert suggested long-term therapy and predicted a good prognosis. However, the expert doubted the availability of the envisaged treatment programme within prison and opined that the accused would reoffend in the absence of treatment. Both the accused and his wife also testified in mitigation. The state did not dispute any of this evidence under cross-examination, nor did it call any witnesses to testify to the contrary.

Kriegler AJ found that the accused's conduct was 'n eenmalige en kortstondige vegryp, sonder enige geweld, deur 'n jong eerste oortreder, onder aandrif van 'n sieklike drang'.³⁵² Unlike the trial court and the court *a quo*, the appeal court found that the expert had not focused unduly on the accused and had not negated the seriousness of his behaviour. The judge also found that there was very little harm done to the victim, yet it is unclear on what basis he made such a finding.³⁵³ The case was referred back to the regional court for imposition of correctional supervision, as the condition of the accused was considered either curable or controllable and a suspended sentence was deemed not appropriate. The magistrate had to determine all the components of correctional supervision, but could leave the detail to the correctional officer.

In *S v R*,³⁵⁴ a 25-year-old primary school teacher who had himself been sexually molested as a child indecently assaulted six boys, aged between 11 and 13, by watching them committing indecent acts with one another. His problem had developed over a long period of time, during which he had sought advice from

³⁵¹ *S v Ndaba supra* (132) at 639.

³⁵² *S v Ndaba supra* (132) at 640.

³⁵³ *Ibid.*

³⁵⁴ *Supra* (n 127).

his pastor. However, he had decided against the recommendation of professional help. The expert witness testified to the remorse of the accused and to his desire to undergo the necessary treatment. Of importance in this case is the fact that a mere possibility of rehabilitation through intensive therapy (as testified to by the expert) was considered not to be sufficient by the court, which required greater certainty in this regard.³⁵⁵ Despite evidence that extra-custodial treatment would be more beneficial for the accused's rehabilitation, the appeal court was not convinced. Without any further evaluation, the appeal court accepted, as a suitable alternative, the mere existence of treatment programmes within a prison context. No further effort was made to persuade the court to reduce the sentence on the basis of precedents in similar cases and the court found that, though the sentence was severe, it was justified on the individual merits of the case.³⁵⁶ The sentence of five years, of which two years were suspended, was confirmed on appeal and the abuse of the appellant's position of trust was considered to be aggravating.

In *S v McMillan*,³⁵⁷ the accused indecently assaulted five boys aged nine to 12 years, one of whom was the accused's stepson. From the evidence it appeared that the accused himself had been sexually molested by his stepbrothers. Prior to sentence, a forensic criminologist testified on behalf of the accused and a probation officer testified on behalf of the state. They focused on the accused only and on his need for psychotherapy, but disagreed on the desirability of a prison sentence. The forensic criminologist's argument was that conditions outside prison would be more conducive to psychotherapy than those inside. In

³⁵⁵ *S v R supra* (n 127) at 592h. It should be noted that it is precisely this mere possibility of rehabilitation that persuaded the court in similar cases to prioritise the aim of rehabilitation and impose correctional supervision or a suspended sentence.

³⁵⁶ *S v R supra* (n 32) at 593f.

³⁵⁷ *Supra* (n 69).

determining a suitable punishment, it was held that not only the appellant's best interests had to be considered, but also the protection of young children, for whom the appellant in his unrehabilitated condition was a danger. Further, it was held that the seriousness of the crime also had to be considered. Direct imprisonment was therefore regarded as the most appropriate sentence. The sentence was replaced with five years' imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 55 of 1977, because the accused had already served almost four years of the 10 years imposed by the regional court.³⁵⁸ In amending the sentence, the court imposed conditions that would enhance treatment and would ensure monitoring of the accused's conduct outside prison.

In *S v O*,³⁵⁹ a gymnastic coach fondled his pupils during lessons and tours. The state presented expert evidence in aggravation, which classified the accused as a paedophile in a 'high-risk' category who would, in all probability, never be rehabilitated completely. The recommendation was an initial period of incarceration, since, it was stated, perpetrators ordered to undergo treatment outside prison often lost interest and dropped out of therapy and/or programmes. On release, the accused should attend a structured rehabilitation programme that would diminish the risk of recidivism.

The sentence of eight-and-a-half years was set aside and was substituted with 12 months' imprisonment (seemingly only because that had been the period of incarceration at the time) and three years' imprisonment, suspended for five years on certain conditions. The conditions involved detailed stipulations that, during the period of suspension, the accused had to subject himself to any

³⁵⁸ A sentence in terms of s 276(1)(i) is one of imprisonment, after which correctional supervision may be imposed. In practice, an accused will be imprisoned for only one-sixth of the sentence.

³⁵⁹ *S v O supra* (n 39).

psychotherapy programme for sexual offenders. The state's expert and her colleague (who had submitted a written report on behalf of the accused) could determine the type and period of the programme. Furthermore, the appellant had to attend and participate to the satisfaction of the said clinical social worker and had to perform any assignment and undergo any prescribed therapy.

The time span over which these selected cases were decided was 26 years and all the accused were male. The most fundamental disparity regarding these cases is that, despite great similarity in the cases, three of the accused escaped any form of imprisonment completely by receiving either a suspended sentence or being made to subject themselves to correctional supervision.³⁶⁰ Although not a reported high court case, a recent regional court case reveals a further sentencing disparity amongst paedophiles. On the recommendation of expert evidence led by the defence, the court opted for a sentence contrary to the recommendation of the Law Commission, namely correctional supervision coupled with an order for chemical castration.³⁶¹ The case involved a karate coach who had fondled and indecently touched his pupils.³⁶²

³⁶⁰ *S v S supra* (n 6); *S v E supra* (n 90); *S v Ndaba supra* (n 132).

³⁶¹ Law Commission *op cit* (n 14) 266. This order can be criticised, as psychological research indicates that, especially older sex offenders, are perfectly capable of offending since penetration (and therefore erection) is not the only method. The problem lies in the psychological make-up of the offender, not his sexual drive. (V Egan Book Review of CR Hollon (2001) *Handbook of Offender Assessment and Treatment* Ebscohost). However, Canadian research which contradicts this is also available and indicates that chemical castration also causes a decrease in erotic fantasies and is most effective for reducing sexual reoffending, thereby making it a viable option for the treatment of sex offenders (K Blanchette 'Sex offender assessment, treatment and recidivism: A literature review' (1996) at http://www.csc-scc.gc.ca/text/rsrch/reports/r48/r48e_e.shtml (accessed 14/10/04). These contradictory research findings once again highlight the difficulty with expert evidence with regard to sentence recommendations, as also referred to above in par 5.5.1.1.b), namely whether an expert is aware of new and reliable research and of different schools of thought, as well as the question of partisan experts. See also Kittrie *et al op cit* (n 10) 738-745 for a discussion of chemical castration as a sentencing option.

³⁶² M Langanparsad 'Child abuser agrees to chemical treatment' (12/7/2003) *Pretoria News*.

The above illustrates that 'the decision which is, at the same time, the most basic and the most difficult for sentencers, is whether to pass a custodial sentence or not'.³⁶³ This appears to be especially true with regard to the sentencing of paedophiles, where the issues of compulsion and rehabilitation are relevant. Whether or not the accused will escape imprisonment, will depend on the *personal understanding and attitude of the judicial officer*. The contrasting decisions in *S v S*³⁶⁴ and *S v R*³⁶⁵ with regard to the acceptance of the possibility of rehabilitation illustrate the inconsistent approach of sentencing officers in accommodating scientific evidence. In the latter case, the presiding officer required a guarantee of rehabilitation. It would thus appear that sentencing that depends on the 'experience, humanity, moral judgment and good sense of judicial officers'³⁶⁶ certainly does not enhance consistency.

In addition, it would appear that the *sentencing aim* prioritised by an individual judicial officer contributes to the above disparity. In *S v D*,³⁶⁷ it was found that the effect of the accused's offence (although the nature of the effect is not clear) was accorded enough weight to justify punishment first and then rehabilitation.

'However, I do not think a completely suspended sentence is appropriate in the circumstances of this case. I say this for various reasons. When dealing with this type of offender, ie a compulsive paedophile, the main object of sentence should be to strike a balance between his punishment and his possible rehabilitation, the latter

³⁶³ M Wasik 'Going round in circles? Reflections on fifty years of change in sentencing' (2004) *Crim L R* 262.

³⁶⁴ *Supra* (n 6).

³⁶⁵ *Supra* (n 127).

³⁶⁶ Quotation from the submission by judges of the WLD objecting to the idea of sentencing guidelines developed by a Sentencing Council, notwithstanding provision for flexibility of application (as referred to by Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000a) 22-23.

³⁶⁷ *Supra* (n 32).

being not only in his own interest, but in the interests of young children with whom he may come into contact.³⁶⁸

The above approach led to an initial period of imprisonment, while in cases where the main focus was on rehabilitation, a suspended sentence or correctional supervision was chosen. Despite the above acknowledgement of a *stricter approach* to crimes of indecent assault by the legislature as well as society, the courts of appeal still seem to follow *S v R*,³⁶⁹ reported 11 years ago, with regard to the then newly introduced sentencing option of correctional supervision. There does not appear to have been any research on this option with specific reference to the rehabilitation of sex offenders or to the effectiveness of correctional supervision as a form of punishment. It appears to be the right time to re-evaluate correctional supervision and to individualise the punitive element for each separate offender in order to address the concern of the court in *S v D*³⁷⁰ above. This might also be appropriate in the light of the recommendation of the Law Commission to, in general, prioritise punishment as the main aim of sentencing.³⁷¹ In this way, punishment can be combined with rehabilitation, which seems to be considered as essential by the Sexual Offences Project Committee.

5.8.1.2 Further causes of unjustified disparity

A further prominent cause of unjustified disparity that emerges from the above case analysis is to be found in the inconsistent *approach of the courts to the impact of the crime on the victim*. While expert evidence relating to the accused appears to be essential, only in one case was expert evidence presented on the

³⁶⁸ *S v D supra* (n 32) at 232c-e (own italics).

³⁶⁹ *Supra* (n 54).

³⁷⁰ *Supra* (n 32).

³⁷¹ *Op cit* (n 366) 43.

after-effects of the crime on the victims.³⁷² In another instance, the defence expert was questioned about the victims' wellbeing. The expert based his opinion on his own views on child sexual abuse as well as on a conversation with a colleague who had consulted with the victims.³⁷³ The court, in accepting this, therefore appeared to be satisfied with hearsay evidence about the impact of the crime on the victims. This trend of marginalising or omitting the victim's version in sentencing is, however, not only typical in cases of paedophilia. Throughout the case studies conducted earlier in chapter 3, there is inconsistency with regard to the victim's version as a relevant factor during sentencing.³⁷⁴ In addition, when evidence on harm is introduced, the interpretation of, and weight attached to, evidence of harm give rise to further inconsistent approaches in the sentencing process in child sexual abuse cases.³⁷⁵

Not only does the above give rise to questions about the equal treatment³⁷⁶ of this subcategory of child sex offenders (and all others), but also as regards the equal treatment of victims in general.³⁷⁷ Further, would not more consistency in sentencing practices with regard to child sex offenders contribute to general

³⁷² *S v D supra* (n 24).

³⁷³ *S v S supra* (n 6).

³⁷⁴ See par 5.3.2 above for statistics on indecent assault cases in general. See chapter 3 par 3.3 for a detailed discussion of indecent assault cases.

³⁷⁵ See para 5.3.3.1 and 5.3.3.2 above. See also chapter 6 par 6.5; A van der Merwe (forthcoming publication) 'Minimum sentences in child sexual abuse cases: The after-effects of rape as a factor in imposing life imprisonment' XV:3 *Criminal Law Forum* Kluwer Publications.

³⁷⁶ Section 9(1) of the Constitution of the Republic of South Africa, 1996.

³⁷⁷ The final question should relate to the safety of the complainants and other children.

deterrence? Lastly, should the aim not be to go beyond mere consistent punishment and effectively stop or curb child sexual abuse?³⁷⁸

Further, the lack of consensus on (and of sensitivity to) *aggravating factors* is aptly illustrated in *S v Abrahams*.³⁷⁹ In this case, the trial judge failed to recognise and take into account the accused's attitude as an aggravating feature in the rape of his 14-year-old daughter. The accused's attitude reflected an approach to his daughter where she was viewed as an object to be used at will and then discarded for further similar use by others. The court of appeal viewed this as a highly material aspect of the crime.³⁸⁰ A further example with regard to *mitigating factors* is that found in *S v Mahomotsa*³⁸¹ where the sentencer took a young man's virility into consideration as a mitigating factor in the repeated rape of two girls. The court *a quo* however stood to be corrected by the Supreme Court of Appeal.

The courts' approach to *hearsay* information relevant to sentencing provides a further example of inconsistency. In *S v E*,³⁸² the evidence of an expert regarding the accused's prognosis in respect of therapy was regarded as unreliable because it was considered to be based on hearsay. Yet, in another instance, as indicated

³⁷⁸ See T Metz (2004) 'Legal punishment' in C Roederer and D Moellendorf (eds) *Jurisprudence* 555 for a philosophical discussion of forward-looking theories justifying sentences aimed at stopping crime.

³⁷⁹ *Supra* (n 21).

³⁸⁰ *S v Abrahams supra* (n 21) at 122h.

³⁸¹ *S v Mahomotsa supra* (n 182).

³⁸² *Supra* (n 31) at 629i. In all other aspects, the expert's evidence was found to be comprehensive, thorough and founded upon a proper investigation of the appellant as a person. Mrs Raath supported the clinical psychologist's contention that the appellant was not a suitable candidate for incarceration and opined that the appellant's reformation and punishment would be best achieved by imprisonment suspended on condition that he underwent psychotherapy and rendered community service (at 628h).

above, the court was willing to accept hearsay testimony from the defence expert on the after-effects of the crime on the victims.³⁸³ The matter of *judicial notice* is yet another area of concern. For example, in *S v V*³⁸⁴ the appeal court held that the evidence did not establish that the behavioural changes alleged by the parents were caused by the appellant's conduct and took judicial notice of child development.³⁸⁵

If one considers the holistic picture in this case, that is, the situation where all the boys had displayed a change in behaviour at approximately the same time, it is submitted that this in itself should have justified a finding of a causal connection between the appellant's conduct and the after-effects displayed by the boys. In *S v Abrahams*,³⁸⁶ the trial court, some years later, adopted the same approach based on its own general knowledge, namely that teenage rebelliousness had caused the symptoms displayed by the rape victim. However, this was reinterpreted by the Supreme Court of Appeal to indicate deep harm. In *S v R*,³⁸⁷ the mitigating factor recognised by the court, namely that the victim was not a defenceless child, but a boy of 15 for whom masturbation was probably no shocking revelation, further illustrates that the court was once again willing to take *judicial notice* of child development when this is to the benefit of the accused, but not when it favours the victim.

³⁸³ *S v S supra* (n 6).

³⁸⁴ *Supra* (n 78).

³⁸⁵ See accompanying text of (n 78) above.

³⁸⁶ *Supra* (n 21).

³⁸⁷ *Supra* (n 54) at 220g.

5.9 PLEA OF GUILTY

5.9.1 Plea of guilty and remorse

Unlike the position in rape cases, the majority of the accused in indecent assault cases pleaded guilty. The courts have often interpreted this plea of guilty as a mitigating sign of remorse, which, as argued here, is not necessarily the case. There might be other reasons why the accused pleads guilty, such as not wanting the court to hear all the details of the case that might come out during a trial, plea bargaining relating to a lesser plea or the hope that a plea of guilty will keep the accused out of prison. It is further indicated below with regard to the grooming process that offenders are very adept at manipulating the child into a false relationship of trust. Accordingly, it is submitted that the court should at all times be aware that the offender has not changed overnight and is still inherently manipulative. It is simply that manipulation may, this time, perhaps be directed at the court.

In England and Wales a plea of guilty is generally not associated with the issue of remorse and is perceived as an issue that is separate from aggravation and mitigation.³⁸⁸ A sliding scale for the reduction of sentence in respect of a guilty plea, starting at a one-third reduction for an early plea of guilty, has also been suggested.³⁸⁹ Reductions in sentence for a plea of guilty are justified on the grounds that a trial is avoided, that the gap between charge and sentence is shortened, and that considerable costs are saved. In addition, an early plea of guilty allows witnesses to avoid the stress of giving evidence. It is submitted that a similar approach should be followed in South Africa.

³⁸⁸ Sentencing Guidelines Council par 2.2:
<http://www.sentencing-guidelines.gov.uk/guidelines/council/final.html> (accessed 4/02/05). See the full and final electronic publication regarding the approach to calculating a reduction in individual cases based on the statutory provision in s 152 of the Powers of Criminal Courts (Sentencing) Act 2000, as replaced by s 144 and s 174(2)(d) of the Criminal Justice Act 2003 that came into force on 4/04/2005 (Annexure 1).

³⁸⁹ Sentencing Council *op cit* (n 388).

5.9.2 The need for information and role-players' responsibilities

As indicated above, in the majority of the above cases of indecent assault, the accused pleaded guilty. A plea of guilty normally provides only the minimum amount of information necessary to justify a conviction and certainly does not solve any underlying disputes. All the facts relevant to the matter are thus not available to enable the court to exercise its sentencing discretion properly. Although the state and the defence should generally provide the court with the necessary information, in many instances this does not happen. In *S v Gerber*,³⁹⁰ the court simply emphasised that the prosecutor had failed to present any evidence on possible psychological problems suffered by the 10-year-old daughter after she had been indecently assaulted by her father:

*'n Hof beskik nie oor die nodige kundigheid om te veralgemeen oor die nagevolge, indien enige, vir die slagoffer nie.'*³⁹¹

Although s 112(3) of the Criminal Procedure Act 51 of 1977 makes provision for the *prosecutor* to present evidence on any aspect of the charge after a plea of guilty, it would appear that prosecutors are only too happy to secure a conviction and do not actively participate in the sentencing process. This is particularly true in cases where the accused has pleaded guilty, with the result that no information is before the court to provide it with a true picture of what happened. Even where the prosecutor participates in sentencing, the state itself is often guilty of focusing only on the accused when expert evidence might be obtained to counter the defence expert in deciding, mostly, whether or not the accused should be imprisoned.³⁹² In openly criticising the passive attitude of the

³⁹⁰ *Supra* (n 40).

³⁹¹ *S v Gerber supra* (n 40) at 624a.

³⁹² *S v McMillan supra* (n 69); *S v O supra* (n 39).

prosecution, the Supreme Court of Appeal³⁹³ recently held that the introduction of impact evidence is no longer optional in the case of minimum sentences. This entails a departure from the traditional role of the prosecution and a role for which not all prosecutors might be equipped. It has been argued that the prosecution of sexual offences has become a new area of specialisation,³⁹⁴ yet, it is submitted that, especially in indecent assault cases, prosecutors often do not understand and appreciate their role and contribution with regard to sentencing, namely to provide the court with all the information to arrive at a proper sentence and to challenge disputed information provided by the defence. There also appears to be no clarity on their exact role, that is, whether it is simply one of assisting the court by providing information and indicating aggravating factors or one of actively advocating the most severe sentence.³⁹⁵ The right in terms of s 310A of the Criminal Procedure Act 51 of 1977 to appeal against too lenient a sentence has however been exercised only on a few occasions.³⁹⁶ This is therefore a further area where greater involvement by the state is called for.

³⁹³ *Rammokko v Director of Public Prosecutions supra* (n 20). The court is also bound to accept the version of the defence expert in the absence of any cross-examination or testing of such evidence by the state.

³⁹⁴ KD Muller and A van der Merwe 'The sexual offences prosecutor; A new specialisation?' (2004) 29:1 *Journal for Juridical Science* 135.

³⁹⁵ Although the role of the prosecutor varies in different jurisdictions, an effort is being made to harmonise the approach to sentencing. See International Centre for Criminal Law Reform and Criminal Justice Policy (2001) 'Model guidelines for the effective prosecution of crimes against children' presented for use at a workshop of the Sixth Annual Meeting of the International Association of Prosecutors – Sydney Australia 2-7 September 2001. Also see *The Prosecutor in the New Millennium* 40 for a recommendation that prosecutors should seek sentences that are commensurate with the seriousness of the offence and the harm caused. Contrast IG Campbell (1985) 'The role of the Crown prosecutor on sentence' *Criminal Law Journal* 9 for a view that the Australian prosecutor should be impartial during sentencing. See also A Ashworth *Sentencing and Criminal Justice* 3 ed (2000) 312 who argues for a change in prosecutorial involvement in England and Wales, yet pleads for an ethical framework where prosecutors strive not for severity, but for a balanced view in the public interest, acting in the spirit of a Minister of Justice as it were.

³⁹⁶ See, for example, *S v Abrahams supra* (n 21); *S v Mahomotsa supra* (n 182); *Attorney-General, Eastern Cape v D supra* (n 42); *S v Tshabalala* case no A1955/03, dated 7 February 2005, (unreported) (TPD).

In order to address the above kind of dilemma, s 274(1) of the Criminal Procedure Act 51 of 1977 provides that the court may, before passing sentence, hear such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. It is submitted that this provision places the court at the centre of the sentencing stage.³⁹⁷ A similar provision is also proposed in s 47(1) of the draft Sentencing Framework Bill 2000 dealing with evidence on sentencing. What should be further emphasised is that a quasi-inquisitorial approach prevails during the sentencing phase, which requires more flexibility and a much *more active role* on the part of the *presiding officer*. Terblanche³⁹⁸ emphasises that the duty to sentence is that of the court, which implies that the court must decide what information is necessary to fulfil that duty. Engelbrecht³⁹⁹ argues that, in order to impose an appropriate and fair sentence in child sexual abuse cases, not only the parties but also the court should, where necessary, play an aggressive role, especially in obtaining expert evidence. Despite the above, it would however appear that *S v L*⁴⁰⁰ is one of the rare instances in which the court in fact adopted an active approach when it refused to proceed with sentencing without being provided with further information on the effect of the offence on the complainant.⁴⁰¹

By not having all the relevant information available, the court may select an inappropriate punishment, something which would be contrary to the interests of

³⁹⁷ Law Commission *Sentencing (A New Sentencing Framework)* Discussion Paper 91 Project 82 (2000) 83.

³⁹⁸ *Op cit* (n 5) 99.

³⁹⁹ *Op cit* (n 9) 26.

⁴⁰⁰ 1998 (1) SACR 463 (SCA).

⁴⁰¹ Only in one other instance of indecent assault did the court call for a report from an expert, which report was then found to be vague, superficial and subjective (see *S v W supra* (n 77)).

justice.⁴⁰² A court can only impose the severest sentence if it is satisfied that aggravating circumstances do exist. The ultimate aim in a criminal trial is the determination of an appropriate punishment. It would however appear that the procedure in place for establishing the facts relevant to sentencing, especially in the case of a plea of guilty, is 'one of the weakest links'⁴⁰³ in the South African system of criminal procedure.

5.10 CONCLUSION

The evaluation and analysis of the legislative framework and case law in previous chapters, as well as the empirical study conducted amongst regional court magistrates, has highlighted three main problems with regard to the sentencing process in child sexual abuse cases. First, the dominant focus in the pre-sentencing stage has, up until now, been on the sexual offender. Secondly, the courts are depending increasingly on another inherently different discipline, namely behavioural science, for decisions relating to the danger and rehabilitation of the offender, as well as the impact of the crime on the victim. Thirdly, judicial officers use an informal grading process in determining the seriousness of sexual offences against children, based on their own perceptions and understanding of the offence.

In practice, the above problems have certain specific consequences. The most important of these is that evidence on the impact of child sexual abuse on the victim is presented in an inconsistent and arbitrary manner. In the absence of any evidence about the harmful effects of the crime, the court does not have access to the holistic picture before imposing a sentence – in other words, it does not have all the relevant information about the crime and cannot approach

⁴⁰² Terblanche *op cit* (n 5) 99.

⁴⁰³ DA Thomas 'Establishing a factual basis for sentencing' in M Wasik *The Sentencing Process* (1997) 80 made this assertion in 1970, an assertion that is still true of South Africa today.

the determination of a proper sentence holistically. This problem is more acute in the case of a plea of guilty, which appears to be the trend in cases involving paedophiles. The situation is further exacerbated by the fact that there is no clarity among judicial officers and prosecutors as to whose responsibility it is to seek evidence on the impact of rape or indecent assault on the child.

Even in cases where evidence on harm is presented, the court's biased perception as to when harm has in fact been caused has contributed to a negating of the importance of the victim. Despite research pointing to the contrary, the courts have often looked for emotion on the part of the victim in court in order to make a finding of harm and have had difficulty in correctly interpreting the trauma symptoms presented. Acquaintance rape and indecent assault of adolescent boys also appear not to have been perceived as harmful. In the present discussion, it has further been shown that courts have very little knowledge and understanding of the real nature of the impact of sexual offences upon children. This is of particular importance with regard to indecent assault cases where the subtle and manipulative grooming process used by the offender is relevant. The judicial officer's lack of knowledge gives rise to underlying, incorrect perceptions, and these thus play an important role in the misdirected evaluation of victims as well as in the inaccurate grading of cases. In addition, the presiding officer is allowed to take into account emotion when evaluating the personal circumstances of the accused, but not when dealing with those of the victim.

An analysis of the use of reports from behavioural experts for sentencing purposes has indicated that they are often conflicting, unreliable and of a low standard. In addition, the courts have had difficulty in understanding and accommodating behavioural science testimony. This difficulty relates in particular to the prospects of the sex offender's rehabilitation.

This chapter has revealed that the most visible effect of the unofficial grading process used to determine the relative seriousness of rape and indecent assault cases against children is the unjustified disparity that occurs in the sentencing of sexual offenders. Life imprisonment as the prescribed minimum sentence for child rapists has been reserved for the subjective and vaguely described category of 'worst cases'. The sentences in the rape cases evaluated varied between 12 and 25 years' imprisonment, with life imprisonment being linked to the principle of proportionality, as indicated above, and being imposed in one reported instance only.⁴⁰⁴

With reference to diagnosed extra-familial paedophiles, it is clear that the sentencing aim prioritised by the court in a specific case, as well as the court's different requirements regarding evidence of possible rehabilitation, have led to initial imprisonment, or a suspended sentence or correctional supervision. It was further indicated that the recognition of, and weight to be attached to, mitigating and aggravating factors relevant to child sexual abuse cases form an inherent part of the grading process. A compilation of aggravating and mitigating factors was therefore made in an effort to evaluate sentencing practice in this regard and to enhance consensus in approach across the judiciary as a matter of vital importance. In addition to new developments, outdated perceptions and misdirections by courts have been pointed out and will, together with new research conducted, form the basis of the guidelines in chapter 9.

In conclusion, it was found that, despite the indication by the legislature and the courts that indecent assault is a less serious offence than rape, the sentencing task in these cases appears to be the most difficult. The use of precedents is

⁴⁰⁴ Life imprisonment has been imposed in a large number of unreported cases in some jurisdictions (personal communication with regional court magistrate, L Wilken, Nelspruit (5/03/05), who reported on the sentencing outcome in child rape cases heard by him and then referred to the high court for sentencing purposes in terms of s 52(1) of the Criminal Law Amendment Act 105 of 1997).

problematic in that such precedents are scattered over the years and individual courts have often opted to select from judgments that which supports their own perceptions. However, the courts have also demonstrated their need for guidance in these matters. What is of further import is that research suggests that indecent assault over a period is indeed as harmful as (and sometimes more harmful than) a once-off rape. Neither the legislature nor the courts appear to have acknowledged this.

PART III: POSSIBLE SOLUTIONS TO PROBLEMS

CHAPTER 6

VICTIM IMPACT STATEMENTS

*'Jou misdryf het haar in haar vroulike eer, integriteit en privaatheid aangetas op 'n wyse wat waarskynlik moeilik begryp kan word deur iemand wat nie so 'n ondervinding ondergaan het nie. Die gebeure moes vir haar 'n afgryslike ondervinding gewees het.'*¹

- 6.1 INTRODUCTION
- 6.2 DEFINITIONS OF 'VICTIM IMPACT STATEMENT' AND 'VICTIM'
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¹ *S v Pieters* 1987 (3) SA 717 (A) at 726i-727a.

6.6.9 Redundant information

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6.7 CONCLUSION

6.1 INTRODUCTION

In recent years victims have questioned their neglected position in the criminal justice system and have raised a number of issues, including those relating to a lack of support, the absence of compensation for harm, the diminished role of the victim in offender-orientated criminal proceedings, and the absence of any constitutional rights for victims.² Moolman argues that, unless victims' rights are constitutionalised, the specific rights of offenders should be eliminated in order that both groups may be protected by the general human rights principles contained in the Constitution of the Republic of South Africa, 1996.³ In response to victims' concerns, numerous reforms have been introduced to accommodate them more effectively in the criminal justice process,⁴ and it is these reforms

² South African Law Commission (hereafter 'the Law Commission') *Sexual Offences: Process and Procedure* Discussion Paper 102 Project 107 (2001) 647.

³ CJ Moolman 'Victim rights in Anglo-American and continental European countries: What can South Africa learn?' (1997) 10 *SACJ* 273, 282.

⁴ Victims of sexual offences are now *inter alia* involved in bail and parole proceedings and must be informed of their rights and of the procedures in the criminal justice system that affect them (see the non-legislative recommendations in Law Commission *Report on Sexual Offences* Project 107 (2002) 355, 374, and the Criminal Law (Sexual Offences) Amendment Bill 2003, Schedule 1, guiding principle (d) and further). Clause 15 of the latter Bill creates a category of vulnerable witnesses, the aim being to improve the quality of the evidence given by witnesses and of witnesses' experiences of testifying in court. The child victim of a sexual offence would mostly qualify as a vulnerable witness and would benefit from the protective measures (such as the appointment of an intermediary) when giving evidence.

which the recent Service Charter for Victims of Crime in South Africa (hereafter referred to as 'the Victims' Charter') aims to consolidate and elaborate upon.⁵

The new victim-centred approach has also been echoed in proposals relating to the reform of sentencing law with the introduction by the South African Law Commission (hereafter referred to as 'the Law Commission') of the concepts of restorative justice (which is integral to a victim focus⁶) and victim impact statements.⁷ The draft Sentencing Framework Bill 2000 provided the first draft, statutory platform for the introduction of the concept of a formal victim impact statement. In terms hereof, a duty is placed on the prosecutor to tender evidence of a victim impact statement where the victim is not called as a witness and such statement is available.⁸ Clause 47(2) provides:

'a victim impact statement may be made by a person against whom the offence was committed and who suffered harm as a result of the offence or by a person nominated by such victim.'

In terms of the Criminal Law (Sexual Offences) Amendment Bill 2003, evidence of the impact of any sexual offence upon the complainant may, for purposes of imposing an appropriate sentence, be adduced in order to prove the extent of the harm suffered by the victim.⁹ The most recent platform for victim participation in sentencing procedures is to be found in the Victims' Charter of

⁵ At <http://www.doj.gov.za/2004dojsite/policy/vc/2004vc.pdf> (accessed 3/01/05) 1. See chapter 1 (n 96).

⁶ Sentencing *Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* Issue Paper 7, Project 82 (1997) 5.

⁷ See chapter 1 par 1.2 for an overview of the Law Commission's debates and proposals.

⁸ Clause 47(3) of the draft Sentencing Framework Bill 2000.

⁹ Section 17(b). See chapter 1 (n 80) for reference to an earlier draft.

2004.¹⁰ Such platform includes the right to participate in, and offer information during, sentencing proceedings in order to bring the impact of the crime to the court's attention.¹¹ A prosecutor may submit a victim impact statement, or may lead further evidence in support of an appropriate sentence.¹²

It should be noted that there are a number of ways in which victims can be integrated into the sentencing process: they can be called to testify as a witness with regard to sentence; or they can provide information for a victim impact statement; or they can receive compensation from the court or restitution from the offender.¹³ The victim impact statement is thus one way of accommodating victims more effectively in the sentencing phase. In addition to the above-mentioned concerns raised by victims and the proposals regarding sentencing law reform, presiding officers have themselves expressed a need to be better informed about the after-effects of the crime on the child victim before sentencing.¹⁴ The purpose of this chapter is to investigate the formal victim impact statement as a method of not only integrating the victim in the sentencing process, but also of enabling the judicial officer to have all relevant information. In this way, a more balanced approach to sentencing is achieved,

¹⁰ *Op cit* (n 5).

¹¹ Clause 2 of the Victims' Charter 2004. Other rights available to victims relate to fair and dignified treatment, receipt of information, protection, assistance, compensation and restitution.

¹² Par 20 of the *Minimum Standards on Services for Victims of Crime* (2004) *supra* (n 5).

¹³ Law Commission *op cit* (n 2) 668-689. As a new draft sentencing option, the sentence of reparation is introduced. The reparation order covers what would otherwise be claimed in a civil case and is meant to avoid multiple court processes and lessen the trauma for the child victim. The rationale underlying such an order is that the child victim's injuries often manifest themselves at a later date and may require more treatment of a psychological nature. See clause 48 of the draft Sentencing Framework Bill 2000, which also provides for a victim impact statement at the time of parole.

¹⁴ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205e; also chapter 4 par 4.5.5.

that is, presiding officers have available information relating to the fourth dimension in sentencing, namely the victim's side of the story.

The law and practice in several international jurisdictions with regard to victim impact statements are researched and evaluated below.

6.2 DEFINITIONS OF 'VICTIM IMPACT STATEMENT' AND 'VICTIM'

The formal use of victim impact statements may be authorised either by way of a statutory enactment¹⁵ or via a victims' charter.¹⁶ This will, in turn, determine the definitions of both 'victim impact statement' and 'victim'. In South Africa, as indicated above, only draft victim impact statement legislation is on the table at present. However, a Victims' Charter has recently been finalised.

The victim impact statement was first defined within the South African context in 1997, which definition read as follows:

'The victim impact statement is a statement made by the victim and addressed to the presiding officer to be considered in the sentencing decisions. The victim impact statement consists of a description of harm, in terms of the physical, psychological, social and economic effect that the crime had, and will have in future, on the victim. Sometimes this statement may include the victim's statement of opinion on his feelings about the crime, the offender and the sentence that he feels is appropriate.'¹⁷

¹⁵ Examples of countries with a legislative basis for victim impact statements include Canada, the United States of America, and the Australian states of Southern Australia and New South Wales. See S Garkawe 'Enhancing the role and rights of crime victims in the South African justice system – an Australian perspective' (2001) 14 *SACJ* 131 for a discussion of the developments in these Australian states and of the lessons to be learnt for South Africa.

¹⁶ Examples of countries where victim impact statements are authorised in terms of a victims' charter include England, Wales and Scotland. It should be noted that the Office for Criminal Justice Reform in England and Wales published a consultation on the Victims' Code of Practice during March 2005 which will give victims of crime statutory rights for the first time (http://www.cjsonline.gov.uk/the_cjs/whats_new-3121.html)⁹ (accessed 10/3/05).

¹⁷ M Hinton 'Valuing the victim: The use of victim impact statements in sentencing' Unpublished paper 8th *International Symposium on Victimology* 22-26 August 1994 Adelaide Australia as referred to by the Law Commission *op cit* (n 5) par 2.30.

The definition later proposed by the Project Committee on Sentencing was slightly shorter and specifically restricted the victim impact statement to the victim's written presentation:

'Victim impact statement means a written statement by the victim or someone authorised by the Act to make a statement on behalf of the victim which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim.'¹⁸

It is however important to note that the victim impact statement is not always confined only to written documents.¹⁹ Although the new Victims' Charter does not provide a definition of a victim impact statement, the Charter impliedly includes both written and oral forms.²⁰ This aspect will be further discussed below under the various forms that a victim impact statement can take.

Erez simply describes a victim impact statement as a statement addressing 'the effects of the crime on the victim, in terms of the victim's perceptions and expressions of the emotional, physical and economic harm he or she sustained as a result of the crime'.²¹ Schmallegger²² defines such a statement as 'the in-court use of victim or survivor-supplied information by sentencing authorities wishing to make an informed sentencing decision'.

It would appear that a victim impact statement may be made not only by a person against whom the offence was committed, and who suffered harm as a

¹⁸ Clause 1 of the draft Sentencing Framework Bill 2000.

¹⁹ Law Commission *op cit* (n 2) 680.

²⁰ Par 2.11.

²¹ E Erez 'Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice' (1999) *Crim LR* 546.

²² F Schmallegger *Criminal Justice Today: An Introductory Text for the 21st Century* 4 ed (1997) 718.

result of the offence, but also by a person nominated by that person.²³ In the case of a child, a parent, guardian or behavioural expert would be the person representing the child victim. Although the term 'survivor' has on occasion been preferred,²⁴ draft legislation as well as the Victims' Charter refer to the term 'victim'. In line with the earlier proposal by the Law Commission,²⁵ the definition provided in the Victims' Charter is broad and can be interpreted to include both the person against whom the crime has been committed as well as a witness to the act or omission:

'A victim of crime is defined as a person who has suffered harm, including physical or mental injury; emotional suffering, economic loss; or substantial impairment of his or her fundamental rights, through acts or omissions that are in violation of our criminal law. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim.'²⁶

The above definition also extends beyond the direct victim to include indirect harm to his or her immediate family members and dependants.²⁷ On occasion the court has received and attached weight to evidence on the impact of the child's abuse (committed by another family member) on his or her parents'

²³ Section 47 of the draft Sentencing Framework Bill 2000.

²⁴ Law Commission *op cit* (n 2) 661.

²⁵ Law Commission *op cit* (n 6) 38: The Project Committee on Sentencing suggested that the term 'victim' should be defined as follows: 'the person against whom the offence was committed or who was a witness to the act of actual or threatened violence and who suffers injury as a result of the offence', thereby following the approach in Canada and New South Wales. The reason for the inclusion of witnesses to child sexual abuse cases seems to lie in the fact that it is highly likely that a child's sibling, friend or neighbour who has witnessed the act of rape or indecent assault on the child will experience trauma equal (if not more severe) to that of the direct victim (See *S v M* 1993 (2) SA 1 (A) in chapter 3 par 3.2 for an example).

²⁶ *Minimum Standards on Services for Victims of Crime* (2004) 1.

²⁷ *Ibid.* It is also explicitly stated that the victim in South Africa may be considered as such, regardless of the familial relationship between the perpetrator and the victim. Compare s 4(a)(1) of the Fla.Stat. Ann. 921.143 (2000) which includes 'next of kin' as indirect victims (as referred to by NN Kittrie, EH Zenoff and VA Eng *Sentencing, Sanctions, and Corrections* 2 ed (2002) 292).

relationship,²⁸ but the attitude of presiding officers will determine the effective participation of family members in sentencing proceedings in the end. The jurisdiction of New South Wales, where both a 'family victim' and a 'primary victim' are included under the definition of victim, serves as an example in this regard.²⁹ In practice the courts in New South Wales have interpreted the provision restrictively and have been reluctant to receive victim impact statements from family victims.³⁰

In further defining the victim for purposes of the victim impact statement, the type of crime committed against him or her may be a criterion for including or excluding a person as a victim.³¹ This criterion does, however, not appear to be

²⁸ Personal communication with regional court magistrate D Minnie, Middelburg, Mpumalanga (5/03/05); *S v De Lange* (7/4/2005) Middelburg SH F23/03.

²⁹ Section 26 of the Crimes (Sentencing Procedure) Act 1999. 'Family victim' is defined as follows: 'in relation to an offence as a direct result of which a primary victim has died, means a person who was, at the time the offence was committed, a member of the primary victim's immediate family, and includes such a person whether or not the person has suffered personal harm as a result of the offence'. A primary victim in relation to an offence is defined as follows:

'(a) a person against whom the offence was committed, or
(b) a person who was a witness to the act of actual or threatened violence, the death or the infliction of the physical bodily harm concerned'.

'Victim impact statement' is defined as a statement containing particulars of: (a) in the case of a primary victim, any personal harm suffered by the victim as a direct result of the offence or (b) in the case of a family victim, the impact of the primary victim's death on the members of the primary victim's immediate family.

³⁰ New South Wales Parliamentary Library Research Service (2002) 'Victims of crime: Plea bargains, compensation, victim impact statements and support services' *Briefing Paper 10* 13-14. The court's argument for not taking victim impact statements of family victims of deceased primary victims into account is that the harm is already known and that, in death, all people are equal. However the counter-argument is that defendants, depending on their wealth and prominence, produce varying degrees of impressive character references which are taken into account. The result is that defendants are not treated as if their lives are of equal importance, and, therefore, it is inconsistent to treat victims in this way.

³¹ I Edwards 'Victim participation in sentencing: The problems of incoherence' (2001) 40:1 *The Howard Journal* 46-47 (see his discussion of some developments in the United States of America, the United Kingdom and Southern Australia in this regard). See also s 27(b) of the New South Wales Crimes (Sentencing Procedure) Act 1999.

applicable to South Africa, since the definition above seems to include all acts or omissions that are in violation of our criminal law. Further, despite no provision being made for representatives of local communities and organisations of victims to participate in sentencing procedures, it is submitted that the local practice of an *amicus curiae* in sentencing procedures makes provision for the participation of similar interested groups with regard to child sexual abuse.³²

6.3 RATIONALE OF VICTIM IMPACT STATEMENTS

An examination of international literature indicates that there is no agreement as to the reasons for formal victim impact statement practice. Edwards³³ distinguishes four different theories regarding the rationale for such statements. The first three are viewed as instrumentalist in nature and comprise the following:

- Improving sentencing outcomes – this includes both retributive-proportionate as well as restorative justice (reparation and compensation) arguments.
- Enhancing system efficiency and service quality – criminal justice may become more sensitive to the need of victims, and, in turn, victims are more satisfied with the system because of their participation.
- Benefiting victims – this will be of therapeutic and cathartic value for the victims themselves.

The fourth rationale focuses on process values, citizenship and victims' rights, based on participatory democracy and respect for individual dignity and humaneness. The essence of Edwards' argument is that jurisdictions do not

³² See, for example, *S v Abrahams* 2002 (1) SACR 116 (SCA) at 127f where the Women's Legal Centre entered as an *amicus curiae* amidst public outcry about the lenient sentence imposed by the trial court in an incestuous rape case (Women's Legal Centre (1/10/2001) *Application for intervention as amicus curiae - S v Abrahams* SCA Ref 88/2000).

³³ Edwards *op cit* (n 31) 41-44.

clearly distinguish between the possible reasons for having victim impact statements and therefore do not realise the significant implication this will have regarding the implementation of such statements as well as regarding definitions of 'victim', 'contents' and 'responsibility for preparation'.³⁴ Finally, he points out that the specific approach taken by states, be it radical or conservative, has further implications for *inter alia* state control of victim impact statements.³⁵

Ashworth³⁶ and Sanders *et al*³⁷ distinguish between procedural and substantive rights for victims, with the latter seeking to provide them with appropriate facilities in court and with information about matters such as dates of court hearings and outcomes. While Ashworth³⁸ rejects the victim impact statement as a procedural right for victims, Sanders *et al*³⁹ support the concept of a victim impact statement on condition that it is initiated by the court and serves to inform the presiding officer by providing him or her with up-to-date information at the sentencing stage.

Notwithstanding the assertion that, internationally, there is no clarity about the precise rationale for a victim impact statement,⁴⁰ Roberts notes nine purposes observed in the international literature.⁴¹ These include the following:

³⁴ *Ibid.*

³⁵ Edwards *op cit* (n 31) at 51.

³⁶ A Ashworth 'Victim impact statements and sentencing' (1993) *Crim LR* 498.

³⁷ A Sanders, C Hoyle, R Morgan and E Cape 'Victim impact statements: Don't work, can't work' (2001) *Crim LR* 448-449.

³⁸ *Op cit* (n 36).

³⁹ Sanders *et al* (n 37) 457. This would then be a departure from victim impact statement schemes in the United Kingdom which produce 'unfocussed, multi-purpose documents'.

⁴⁰ C Hoyle, E Cape, R Morgan and A Sanders *The Use of Victim Statements* Home Office Research Development Statistics Directorate (1999) 25.

- providing the prosecution with information about the offence;
- providing presiding officers with information about the seriousness of the crime and, to a lesser extent, about the culpability of the offender in order to assist the court in imposing a sentence consistent with sentencing principles;
- providing the court with a direct source of information about the victim's needs which may assist in determining more appropriate, reparative sanctions;
- providing the court with information about the appropriate conditions that might be imposed on the offender;
- providing the victim with a public forum in which to make a statement reflecting his or her suffering;
- providing the court with an opportunity to recognise the wrong committed against an individual victim;
- providing the victim with an opportunity to communicate the effects of the crime to the offender;
- allowing victims to participate in sentencing, albeit in a non-determinative way; and
- promoting the idea that, although crimes are committed against the state, and the judicial process involves bipartite proceedings, crimes are also committed against individuals.

As secondary purposes derived from the above, Roberts suggests that victims will not only be more satisfied with the judicial process, but will also be able to reach some form of closure, thus facilitating psychological healing. Further,

⁴¹ JV Roberts 'Victim impact statements and the sentencing process: Recent developments and research findings' (2003) 47 *Criminal Law Quarterly* 371-372. He further supports the criticism of the so-called purposes of victim impact statements contained in international literature as being 'anodyne statements' and a 'sop' to victims. He points out that the victim impact statement is simply a platform that provides ventilation for victims in order for the court to be able to go on with business as usual.

public confidence in sentencing may increase, as well as the awareness by criminal justice professionals regarding the after-effects of crime. Lastly, awareness by offenders of the harm caused may increase, while the possibility of reconciliation between victim and offender is promoted by encouraging offender empathy. Roberts⁴² emphasises that the potential of the victim impact statement as an additional communication between victim and offender should not be overlooked. In the light of the fact that there is often a pre-existing relationship between the victim and the offender, the purpose would be to elicit remorse after a message of sensitisation. Research however indicates that imprisoned offenders generally have a very low capacity for showing empathy, which, in all likelihood, makes offender empathy largely an ideal.⁴³

A multipurpose approach appears to be followed in England, where a slightly different term is used for the document that contains *inter alia* the victim's impact statement, namely 'victim personal statement'.⁴⁴ First, the victim personal statement affords a victim the opportunity to make known his or her legitimate interests relating to information on case progress, bail, protection, support and compensation. Secondly, it gives victims the opportunity to tell criminal justice agents and the related services about the after-effects of the crime, thereby providing such agents and services with a ready source of information. The

⁴² Roberts *op cit* (n 41) 376-377. See, further, his discussion of communicative theories of sentencing and of the court's imposed sentence as a message to both the offender and the victim. The Law Commission also stipulated, as a guiding principle in determining appropriate sanctions for a person who has been found guilty of committing a sexual offence, that the offender must take responsibility for his conduct (The Criminal Law (Sexual Offences) Amendment Bill 2003 Schedule 1 (k)). Within the framework of victim impact statements, taking responsibility might become a possibility.

⁴³ *Carte Blanche* (22/08/04). Research results were presented regarding imprisoned offenders who had been tested for emotional intelligence on the basis of a number of factors, of which empathy was one. Also CSL Delpont and A Vermeulen A 'Convicted male sexual offenders: A social work perspective' (2004) 5:2 *CARSA* 41.

⁴⁴ Home Office (undated) *The Victim Personal Statement Scheme: A Guide for Investigators* <http://www.homeoffice.gov.uk/docs/guideforinvestigators.pdf> (accessed 14/09/04) 3.

overall purpose, then, of the victim personal statement in England is to enable criminal justice agents to take more informed decisions at all levels.⁴⁵ In addition, such statement will also be used by the National Probation Service as a key source for preparing offence analysis in the pre-sentence report.⁴⁶

According to Erez, the purpose of introducing victim impact statements was to provide victims with a voice.⁴⁷ Similarly, the Law Commission initially viewed the victim impact statement as an indirect way of giving the victim a voice during the sentencing stage.⁴⁸ Although the South African Victims' Charter seems to follow the same multipurpose approach as in England, with the focus being on both the rights of, and services provided to, victims of crime, the victim's procedural right to provide information in the form of a victim impact statement is clear. Thus, in addition to providing the victim with a voice, the victim impact statement in South Africa is further addressed to the court for consideration in sentencing decisions and therefore also serves as a source of information for the court.⁴⁹ It informs the court about the impact of the crime on the victim and requires the victim to give particulars of any harm, including physical or mental injury, emotional suffering and economic loss resulting from the offence.⁵⁰ The sentencing discretion can only be exercised properly if all the facts relevant to the matter are presented. As argued above, the necessary information required

⁴⁵ Home Office *op cit* (n 44) 17.

⁴⁶ *Ibid.*

⁴⁷ *Op cit* (n 21) 555. Sanders *et al op cit* (n 37) 448-449 agree, yet add idealistic purposes such as ensuring that victims are treated with respect by criminal justice agencies and that stress on the victims is reduced during criminal proceedings.

⁴⁸ *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000a) 88.

⁴⁹ Par 2 of the Victims' Charter reads: 'you may also, where appropriate, make a statement to the court or give evidence during sentencing proceedings to bring the impact of the crime to the court's attention'.

⁵⁰ Draft Sentencing Framework Bill 2000 clause 47(1)(a).

by the court embraces much more than merely information on the elements of the case and the visible injuries. Thus, if a court is to exercise its sentencing discretion properly in child sexual abuse cases, it is necessary for the presiding officer to have access to the victim's story.

A court does not have the necessary expertise to draw conclusions about the effect of an indecent assault or rape on a child victim. In *S v Gerber*,⁵¹ the court in fact accepted that it did not have such expertise:

'A court does not have the necessary expertise to generalise about the consequences, *if any*, for the victim in a case like the present.' (Unofficial translation and the author's emphasis)

It is extremely difficult for any individual, even a highly trained person such as a magistrate or a judge, to comprehend fully the range of emotions and suffering a particular victim of sexual violence may have experienced.⁵² Each individual will have a different background, a different support system and, therefore, a different manner of dealing with the trauma flowing from the abuse. This was emphasised by the court in *Holtzhausen v Roodt*.⁵³

'Rape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female, privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, of both rapist and rape survivor is extremely limited.'⁵⁴

In the light of South African case law, it is clear that speculation about harm will also not be of any help and that a finding of harm without a factual basis will not

⁵¹ 2001 (1) SACR 621 (W) at 624. The same finding was made by the Appellate Division in *S v R* 1993 (1) SACR 209 (A).

⁵² Law Commission *op cit* (n 2) 646.

⁵³ 1997 (4) SA 766 (W).

⁵⁴ *Supra* (n 53) at 778g-h.

pass muster on appeal. It has been held that the long-term effect of child sexual abuse is a generally known fact of which a court can take judicial notice, but evidence is necessary for an inference of grievous harm to be made in a specific case.⁵⁵

In the absence of evidence on harm, a court will find it difficult to arrive at a balanced decision on sentencing.⁵⁶ Further, the presentation of a victim impact statement, in addition to contributing to fairness and the therapeutic advantages,⁵⁷ 'enhances proportionality rather than harshness'.⁵⁸ Despite some initial scepticism about the right of victims to submit impact statements because

⁵⁵ *S v V* 1994 (1) SACR 598 (A) at 600j (see chapter 3 par 3.3.10 for quotation). A Ashworth *Sentencing and Criminal Justice* 2 ed (1995) 310 supports the view that the court should be allowed to assume psychological impact of a certain kind in the case of crimes against young children and questions why victim impact statement information is even necessary in such cases.

⁵⁶ See chapter 4 par 4.5.11 for positive comments flowing from the empirical study conducted amongst regional court magistrates regarding the use of victim impact statements.

⁵⁷ *Rammoko v Director of Public Prosecutions supra* (n 14). According to the observations of the state advocate, the victim, aged 18, looked visibly relieved after having told the offender that what he did (raping her five years earlier) was wrong. See also R Burr 'Litigating with victim impact testimony: The serendipity that has come from *Payne v Tennessee*' (2003) 88 *Cornell LR* 529 who presents evidence on the healing effect of victim impact statements for a murdered victim's mother and defendant after defence-based outreach to the survivor. See also 527 with regard to the latter process based on the principles of restorative justice. RP Mosteller 'Victim impact evidence: Hard to find the rules' (2003) 88 *Cornell LR* 543 at 554 observes, with disapproval, the beginnings of a shift in the use of victim impact statements from proving information to the sentencing court to seeking catharsis or closure. As a result, states Mosteller, victim impact statements become more visceral and more difficult to constrain using ordinary legal rules of due process such as probative value (as opposed to prejudice), relevance and reasonableness. S Bandes 'When victims seek closure: Forgiveness, vengeance and the role of government' (2000) 27 *Fordham Urb LJ* 1605-06 however emphasises that, despite the fact that victims sometimes obtain closure from the legal system, the legal system in fact has goals and purposes that are necessarily distinct from meeting the needs of the victim. Notwithstanding this, victims and their responses are unique and it would be wrong to assume that all victims will benefit equally from the same kind of post-crime treatment. See RP Mosteller 'Popular justice' (1995) 109 *Harv LR* 494.

⁵⁸ Erez *op cit* (n 21) 555.

such statements were a foreign trend demanding circumspection,⁵⁹ the reaction experienced by the Law Commission,⁶⁰ as well as the findings in the empirical study,⁶¹ have been positive, that is, the usefulness of victim impact statements in the sentencing process is indeed recognised. In order that judicial officers may exercise their sentencing discretion properly, it is therefore necessary for them to have information placed before them, not only regarding the objective gravity of the crime, but also in respect of the present and future impact of the crime on the victim.⁶² It is submitted that South Africa ascribes to the main rationale underlying victim impact statements, that is, they are seen as a means of achieving proportionality in sentencing, thereby taking the degree of harm inflicted into consideration in order to achieve a sense of balance.

6.4 THE PRACTICE OF USING VICTIM IMPACT STATEMENTS

6.4.1 Present position in South Africa

Despite the absence of any statutory obligation with regard to the use of victim impact statements in South Africa and the only recent introduction of a Victims' Charter, presentations on harm have been made in some child sexual abuse cases. Impact evidence has been provided in the following ways:

- Experts have given evidence on the impact of a crime, either after personal assessment of the victim or based on experience of similar cases.⁶³ An expert can be a psychiatrist, psychologist, criminologist, medical doctor or social worker. For example, in *S v Blaauw*⁶⁴ an experienced social worker

⁵⁹ L Meintjes-van der Walt 'Towards victims' empowerment strategies in the criminal justice process' (1998) 11 *SACJ* 157.

⁶⁰ Law Commission *op cit* (n 4) 347-348.

⁶¹ See chapter 4 par 4.5.11 above.

⁶² *Rammoko v Director of Public Prosecutions supra* (n 14) at 205e-f.

⁶³ *Holtzhausen v Roodt supra* (n 53) at 772e-f.

⁶⁴ 2001 (2) SACR 255 (C).

testified about the long-term emotional and psychological harm to the five-year-old victim in the case. In *S v Gqamana*⁶⁵ the court found the evidence of the probation officer particularly helpful, especially as the accused had elected not to testify in mitigation. The probation officer's reports on both the accused and the complainant were considered to be fair, thorough and well balanced.

- Secondly, it has been held that it is possible for a mother or teacher to testify about the symptoms of trauma displayed in the child's daily life, for example as regards sleeping patterns, eating or socialising patterns, standard of schoolwork, ability to concentrate, attitude to discipline and a nervous or fearful state of mind. In fact, where this evidence is unchallenged, it is not necessary to lead psychiatric evidence to prove harm.⁶⁶
- Further, it has been possible for the complainant to give evidence on harm by appearing in person and testifying during the sentencing phase. Such an appearance will however have to be considered carefully and will depend to a large extent on the victim's ability and desire to relive the trauma.⁶⁷
- Where a personal appearance is not possible or desirable, letters or poems written by the victim after the assault have also been used. In *S v Van Wyk*⁶⁸ the court found the following poem, written by the victim, to be very enlightening about the effect of the assault on her:

⁶⁵ 2001 (2) SACR 28 (C) at 34C.

⁶⁶ *S v Abrahams* (n 32) at 124c.

⁶⁷ *Rammoko v Director of Public Prosecutions supra* (n 14). Further, the divided-case procedure introduced by the Criminal Law Amendment Act 105 of 1997 has also given rise to instances where the complainant is called by the High Court so that it may be steeped in the atmosphere of the trial (see chapter 2 par 2.2.1.3; *S v Gqamana supra* (n 65)).

⁶⁸ 2000 (1) SACR 45 (C) at 51. Although this case involved the rape of a young woman in her early twenties, it is included here for the sake of completeness regarding the various forms that victim impact statements have taken in South African courts.

Happy Days

Dis vandag presies 'n week,
vir sewe dae alles het gebreek
Mag ek vra hoekom ek,
Was ek op die verkeerde plek?
Hoekom, waarom, wat doen nou,
Sy oë was nie eens blou maar bruin,
soos sy vel, sy ore aaklig klein.
Hoe moet ek vergeet, ek ruik sy sweet,
Is bang een of ander tyd, gaan die werklikheid my vang.

However, as mentioned earlier, the courts have approached pre-sentence presentation of harm caused to victims in a haphazard way. This has given rise to a situation where, in the absence of any evidence on harm, only half of the story relevant to sentencing is presented to the court.⁶⁹ With the aim of addressing the difficulties arising from the lack of a uniform approach to presentation of evidence on harm,⁷⁰ local and foreign debate with regard to the form and content of a victim impact statement, with regard to the person bearing responsibility for such a statement, and with regard to evidentiary issues pertaining to victim impact statements, are examined below.⁷¹ Child sexual abuse victims will have a formal procedural right to make a victim impact statement in

⁶⁹ Chapter 2 par 4.2 and par 5.

⁷⁰ SS Terblanche 'Sentencing in South Africa: Lacking in principle but delivering in justice? Electronically Published Paper 18th International Conference of the International Society for the Reform of Criminal Law, 8-12 August 2004, *Keeping Justice Systems Just and Accountable: A Principled Approach in Challenging Times* Montreal, also points out that South African courts have not considered the seriousness of the crime in terms of the magnitude of the harm caused (or risked) by the offender *and* the offender's culpability with regard to that harm. Although the victim impact statement refers only to harm caused by the crime, there are indications that the Law Commission is adopting an approach that will take into account the offender's knowledge, use and manipulation of the victim's vulnerability (*op cit* (n 4) 372).

⁷¹ Other common law jurisdictions started to embrace victim impact statements as statutory sentencing considerations as early as the 1980s. By 1988, almost all of the American states had provided for statutory authorisation of victim impact statements in sentencing. In Canada, victim impact statements first received statutory recognition with the introduction of amendments to the Criminal Code in 1985, and, thereafter, by way of subsequent amendments in 1999 (see Roberts *op cit* (n 41) 365). Australia followed this approach in 1995, while, in the United Kingdom and Scotland, victim personal statement schemes in their present format were respectively introduced in 2001 and as recently as 2003.

terms of the new Victims' Charter. The present investigation thus focuses on the formal statement which is used to place the victim's story before the court, thereby extending the forms it can take.

6.4.2 Content of victim impact statements

6.4.2.1 Harm

The content of a victim impact statement will be prescribed by the purpose ascribed to such a statement as well as by the definition of harm. By defining the concept of harm in detail, courts are not only made aware of the potential impact that sexual offences can have, but compilers and victims are also guided as to what factors to include in the statement.⁷² In Australia harm includes:

- physical and mental injury or emotion;
- suffering, including grief;
- pregnancy;
- economic loss; and
- substantial impairment of rights accorded by law.⁷³

In the United Kingdom, the concept of harm is extended to make explicit provision for any reference to a fear of further victimisation,⁷⁴ while the American state of Florida provides for social harm as an element to be added.⁷⁵ Provision can also be made in the definition of harm for an open clause covering any

⁷² See, for example, United Kingdom guidelines included as guidance for investigators in the Home Office document *Making a Victim Personal Statement* (26/07/01) par 2; Home Office *op cit* (n 44) 11.

⁷³ Australian Crimes Act 1994.

⁷⁴ In the United Kingdom, the victim can expect 'the chance to explain how the crime has affected him' and that his interests will be taken into account; 'the police will ask him about his fears about further victimisation and details of loss, damage or injury; the police, Crown Prosecutor, magistrates and judges will take this information into account when making their decisions' (Inns of Court School of Law *Criminal Litigations and Sentencing* (2003/2004) 308).

⁷⁵ Florida per Fla.Stat. Ann. 921.143 (2000) as referred to by Kittrie *et al op cit* (n 26) 288.

matter relevant to the imposition of an appropriate sentence.⁷⁶ Reference to future psychological harm seems to be contentious, and concerns appear to revolve around the expert's own training, knowledge and expertise, and the ongoing life experiences of the victim.⁷⁷ What seems to be clear, though, is that the victim impact statement should be updated prior to sentencing in order to describe the physical and emotional state of the victim at the time of sentencing.⁷⁸ In England and South Africa, the victim has the opportunity to update his or her victim personal statement/victim impact statement by making a second statement describing the medium- and/or long-term effects of the crime.⁷⁹ It would appear that responsibility for updating the statement rests solely with the victim. In the absence of an update, the court will then be left with an incomplete account of harm. It is submitted that, if a considerable amount of time has elapsed between the making of the victim impact statement and the date of sentence, the court should require an update.

The South African definition of harm does not introduce anything new. The definition of harm in the Victims' Charter includes physical or mental injury; emotional suffering; economic loss; or substantial impairment of the victim's fundamental rights. Despite the absence of any reference to future harm, the Supreme Court of Appeal has already interpreted the concept to include the difficult aspect of future harm. However, notwithstanding the contents of the definition of harm, the definition appears to be mainly educational. Any victim

⁷⁶ *Ibid* – '... and any matter relevant to an appropriate disposition and sentence'.

⁷⁷ Law Commission *op cit* (n 2) 672. G Vervaeke, S Bogaerts and A Heylen 'Onderkennen van seksueel misbruik bij kinderen' in PJ Van Koppen, DJ Hessing, HLGJ Merckelbach and HFM Crombag (reds) *Het Recht van Binnen: Psychologie van het Recht* (2002) 182.

⁷⁸ *Erez op cit* (n 21) 547.

⁷⁹ Home Office *Making a Victim Personal Statement* (26/07/01) par 15.

would be allowed to include a unique consequence, relevant to that particular victim, in his or her victim impact statement.

6.4.2.2 *Opinion as to sentence*

A thorny issue relates to whether the victim impact statement should include the victim's opinion regarding sentence, and there appears to be no consensus on this point.⁸⁰ In the United Kingdom, such a practice is prohibited and the following guideline serves to clarify the position for victims:

'The judges and magistrates decide how an offender is punished when they pass sentence. You should not offer any opinion as to how the court should punish the offender. The court will not consider your opinion when they make a decision, but will take account of how the offence has affected you.'⁸¹

There are three arguments against including the victim's opinion about sentence. First, it is argued that sexual offence cases, unlike civil cases, are public cases that are dealt with in the name of the state.⁸² Hoffmann, however, rejects this argument by pointing out that victims now rightfully occupy a special place within the criminal justice system.⁸³ Secondly, it is argued that it may be distressing for a victim to have his or her recommendations ignored by the presiding officer.⁸⁴ Furthermore, recommendations regarding a specific sentence

⁸⁰ Law Commission *op cit* (n 2) 682. In contrast to the draft Sentencing Framework Bill 2000, which opposes the idea, the Project Committee on Sexual Offences supports it.

⁸¹ Home Office *op cit* (n 79) par 7; Inns of Court School of Law *op cit* (n 74).

⁸² Law Commission *op cit* (n 4) 347.

⁸³ JL Hoffmann 'Revenge or mercy? Some thoughts about survivor opinion evidence in death penalty cases' (2003) 88 *Cornell LR* 541.

⁸⁴ DJ Hall 'Victims' voices in criminal court: The need for restraint' in M Wasik *The Sentencing Process* (1997) 266.

may also be seen by the presiding officer to be inappropriate, because the victim has no legal background and might simply be seeking revenge.⁸⁵

In response to the above objections against sentence recommendations from the victim, it should be noted that research has shown that a victim's need may relate mainly to telling the offender that what he did was wrong⁸⁶ or asking for payment for counselling and therapy.⁸⁷ Further, as a result of the sexual assault, victims often experience a severe and ongoing sense of loss of control.⁸⁸ By providing them with 'even a small degree of control over the defendant's fate, it may be possible to help them to regain their sense of agency in general'.⁸⁹ Through the recommendation of a lenient sentence, the victim is also afforded the opportunity of showing mercy to the perpetrator.⁹⁰ The argument in favour of allowing a victim to make recommendations to the presiding officer regarding an appropriate sentence should, however, only be considered if such a practice is indeed qualified by the provision that the presiding officer is under no obligation to follow the recommendation.⁹¹ Apart from providing clarity for the victim that it

⁸⁵ Hoffmann *op cit* (n 83) 530. See also (n 228) below.

⁸⁶ *Rammoko v Director of Public Prosecutions supra* (n 14).

⁸⁷ Personal communication with an adult male survivor in May 2004, Pretoria.

⁸⁸ N Henderson 'The wrongs of victim's rights' (1985) 37 *Stan LR* 937 as referred to by Hoffmann *op cit* (n 83) 538.

⁸⁹ Hoffmann *op cit* (n 83) 538. Although the argument is presented with regard to survivor impact evidence in capital cases in the United States of America, it is also applicable to victims of sexual offences. See also Erez *op cit* (21) 551 who argues that one of the major driving forces behind the victim movement was the aim of helping them overcome their sense of powerlessness and reducing the feeling that the system is uncaring.

⁹⁰ *Ibid.* Compare SP Walker and DA Louw 'The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspective of victims, their families and professionals involved' (2004) 17 *SACJ* 306 for a finding that, even though victims were satisfied with the sentences imposed, they would have imposed heavier sentences if they had been the presiding officer.

⁹¹ Law Commission *op cit* (n 2) 682. See also I Edwards 'The place of victims' preferences in the sentencing of "their" offenders' (2002) *Crim LR* 689. Also Lord Chief Justice (2004) *The*

is the court's responsibility to decide on sentence, this provision also contributes to minimising the perception that there is interference in the presiding officers' sentencing discretion.

The South African Victims' Charter does not make explicit provision for the victim to comment on a specific sentence. However, the phrase referring to the prosecutor's option to submit a victim impact statement or lead further evidence 'in support of an appropriate sentence' may be interpreted as including a suggestion by the victim regarding sentence.⁹² Where a sentence is too lenient, the victim is informed in the Charter of the steps that can be taken, namely consulting the prosecution with regard to the possibility of an appeal. By implication, the victim is thus warned that, if a sentence recommendation is made, the court might not follow it. It is submitted that the position is formulated too vaguely in the Charter and should have been addressed more directly. It is further submitted that a victim impact statement should preferably not include a reference to the victim's sentence recommendation, because this may tarnish or neutralise the value of the victim impact statement if the recommendation is too emotional.

6.4.3 Responsibility for the preparation and submission of victim impact statements

The position with regard to the collection of information for the compilation of victim impact statements appears not to be uniform. Depending on the country concerned, such collection is carried out either by justice agents, such as the

Consolidated Criminal Practice Direction III.28.1 par (c). Of interest is the direction to the English courts as to how to deal with the impact statement. 'The court should consider how far it is appropriate to take into account the consequences to the victim and only if desirable may it be referred to in its sentencing remarks' (par (d)).

⁹² Part 2 par 19 of the *Minimum Standards on Services for Victims of Crime* (2004). The Law Commission earlier recommended that victims should be allowed to give their opinions on the appropriate sentence, provided that it is well understood that the court is under no obligation to follow such opinions (*op cit* (n 4) 372).

police (in England and Wales, Scotland, Canada, Australia) or by probation officers, victim assistance staff or prosecution staff (in the United States of America and New Zealand).⁹³ The Law Commission initially opted to follow the latter course and proposed that the responsibility fall on the prosecution, which would have the ultimate duty of ensuring that such evidence or statement is available for submission in court.⁹⁴ Perhaps note has been taken of Edwards⁹⁵ warning that the placing of the responsibility on the prosecution only 'may conflate or confuse victim advocacy with prosecuting in the name of the State'. The South African Victims' Charter⁹⁶ seems to follow a hybrid approach and refers, in addition to the victim's statement to the police, to the possibility that either the presiding officer or prosecutor, or even the defence, may request that a probation officer or other expert prepare a report that may include an assessment of the effect of the crime on the victim. The involvement of the probation service, in 'liaising with victims and detailing the effects of offences, is possibly at odds with its history and ethos'.⁹⁷

It would appear that, internationally, there is agreement that the preparation of victim impact statements should not be performed by agencies associated with offenders.⁹⁸ In practice in South Africa, however, the same probation officer often compiles a report on both the offender and the impact of the crime on the victim. Nevertheless, the ideal is that prosecutors should, as a matter of

⁹³ Erez *op cit* (21) 546. Probation officers would be involved when pre-sentence reports address the impact of the crime in order to determine its seriousness.

⁹⁴ *Op cit* (n 4) 372.

⁹⁵ *Op cit* (n 31) 49.

⁹⁶ Part 2 par 20 of the *Minimum Standards on Services for Victims of Crime* (2004).

⁹⁷ Edwards *op cit* (n 31) 49.

⁹⁸ Erez *op cit* (21) 546.

principle, be assisted by NGOs which provide specialised services for victims of sexual assault.⁹⁹ In contrast to the above, Erez points out that, in a minority of jurisdictions, victims prepare the statements themselves without the assistance of any agency assigned to the task.¹⁰⁰

With regard to younger children, any of the parties or the court may, and, where possible, should, request the services of a child psychologist or other relevant expert to assist in explaining and describing the impact of the harm and emotional trauma suffered by the child as a result of the offence.¹⁰¹ The reasons seem to be, first, that a crime of a sexual nature perpetrated against a child has a traumatising effect on the parents or family members as well. Secondly, owing to their emotional involvement with the child and also the fact that they do not have any professional training, parents may not be able to explain comprehensively the extent of harm suffered by the child.¹⁰² The practical implication of employing a child psychologist might pose problems as regards implementation because of the financial implications involved. It is reiterated that the treatment of victims should be taken seriously and should be made compulsory once criminal justice agents become aware of the victim's experience. The compilation of the victim impact statement, as suggested earlier, could then be linked to the specific agency responsible for such treatment, thereby enabling the child victim to be provided with essential, one-stop assistance.

⁹⁹ Law Commission *op cit* (n 2) 683.

¹⁰⁰ *Op cit* (n 21) 546. Although the reason for adopting this practice seems to lie in the therapeutic value it has for the victim, research has shown that the same therapeutic benefits can be derived from statements prepared by criminal justice agents. C Hoyle, E Cape, R Morgan and A Sanders *Evaluation of the One Stop Shop and Victim Statement Pilot Projects A Report for the Home Office Research and Development Directorate* (1998).

¹⁰¹ Law Commission *op cit* (n 4) 372.

¹⁰² H Galgut as referred to in Law Commission *op cit* (n 4) 348.

It should be noted that, although prosecution staff in the United States of America bear the responsibility for victim impact statements, there is an additional duty on the presiding officer to exercise some control over the process in sexual abuse cases. When the victim is present during sentencing in the case of sexual abuse in the United States of America, the court is obliged to address the victim personally to determine whether he or she wants to make a statement or present any information in relation to sentence.¹⁰³ It is submitted that this could, by implication, apply equally to a relative or custodian of a child victim of sexual abuse who is present during sentencing. The trend of introducing some form of checks and balances by placing a duty upon the sentencing judge to question the prosecution as to whether the victim has been given an opportunity to prepare and submit a victim impact statement has also been suggested in Canada.¹⁰⁴ In addition to the function of ensuring that the victim has made an informed choice about making a victim impact statement, the judge in some states in the United States of America also performs a screening function. In terms of this function, the judge first reviews the written victim impact statement and only permits witnesses to read previously approved testimony on condition that they are able to control their emotions.¹⁰⁵ The practice of involving the presiding officer in determining the attitude of the victim with regard to the making of a victim impact statement is supported. To leave the responsibility solely to prosecution staff will lead to an arbitrary use of victim impact

¹⁰³ Fed. R. Crim. P. 32(c)(3)(E).

¹⁰⁴ Government of Canada *Response to the Fourteenth Report of the Standing Committee on Justice and Human Rights, Victims' Rights – A Voice, not a Veto* (Ottawa: Government of Canada 1998) 16 as referred to by Roberts *op cit* (n 41) 369.

¹⁰⁵ *State v Muhammed* 678 A.2d 164 (1996). See also A Blum 26/6/1995 'Impact of crimes shakes sentencing' *The National Law Journal* who points out that statements by the murdered victim's family could occasionally get out of hand. He also points out how emotion is allowed on the defendant's side in a plea for mitigation, without the court ever expressing any concern.

statements and to unequal opportunities for the court to obtain the victim's story.

6.4.4 Evidentiary aspects of victim impact statements

Although there seems to be agreement that victim impact statements should always be voluntary, victims can be encouraged, facilitated, entitled or even required to participate in this process.¹⁰⁶ However, it appears that, where the victim objects to making a victim impact statement, nobody should be allowed to make a statement on her or his behalf.¹⁰⁷ In most jurisdictions, the victim impact statement must be made under oath¹⁰⁸ and a copy must be given to the defence.¹⁰⁹ Despite proposals to the effect that the absence of a victim impact statement should not lead to any negative inference being drawn or to the conclusion that no harm, loss or emotional suffering has been caused by the crime,¹¹⁰ the contrary approach was adopted in *S v O*.¹¹¹ Here, a finding of no harm was made by the court in the absence of any evidence on the impact of the indecent assaults on the boys concerned.¹¹² In contrast, the magistrate in *S v*

¹⁰⁶ Edwards *op cit* (n 31) 44.

¹⁰⁷ AE Van der Hoven (2004) *Forensic Criminology (Tutorial Letter 501/2004)* Department of Criminology Unisa 202. Section 29(b) of the New South Wales Crimes (Sentencing Procedure) Act 1999 provides, for example, that a victim impact statement may not be received or considered by a court if the victim, or any of the victims to whom the statement relates, objects to the statement being given to the court.

¹⁰⁸ Law Commission *op cit* (n 4) 348.

¹⁰⁹ *R v Hobstaff* (1993) 14 CR App R (S) 60. In New South Wales, the Crimes (Sentencing) Procedure Act 1999 s 28(5) provides, however, that care must be taken to ensure that the offender does not retain a copy for himself. The prosecution in England and Wales also has the discretion to edit any sensitive information in the victim personal statement before it is served on the defence (Home Office *op cit* (n 44) 10, 13, 16).

¹¹⁰ *R v Hobstaff* *ibid*.

¹¹¹ 2003 (2) SACR 147 (C).

¹¹² *S v O* *supra* (n 111) at 162a-c.

V¹¹³ acknowledged that, in the light of the fact that no evidence had been presented on the impact of the indecent assault, no finding of *grievous* harm as an inevitable consequence of the crime could be made.

Uncontested victim impact statements should be admissible evidence on production thereof. If the contents of a victim impact statement are disputed, the author and/or the victim must unfortunately be called as a witness. It is submitted that the victim should then be given the choice whether or not to withdraw the statement. However, when a victim testifies and requests that certain information not be disclosed, the court must balance the interests of the victim and the reasons given for the request against the interests of justice.¹¹⁴

There are no guidelines as to how victim impact statements should be incorporated by sentencing courts 'into the complex determination of sentence'.¹¹⁵ According to Roberts,¹¹⁶ statutory statements of purpose and principle appear to be of little use, and greater direction is needed without infringing upon the court's discretion. Guidelines from superior courts would be required in this regard in order to provide clarity about the weight that should be accorded to the victim impact statement. In recognising this need, the South African Supreme Court of Appeal in *S v Abrahams*¹¹⁷ set an important precedent by its reinterpretation of the evidence on the symptoms of harm to justify an

¹¹³ 1994 (1) SACR 598 (A) at 600g.

¹¹⁴ Clause 47(6) of the draft Sentencing Framework Bill 2000. Compare the position in England and Wales where, once made, the victim personal statement cannot be withdrawn or altered, though it may be clarified by way of one or more later updates.

¹¹⁵ Roberts *op cit* (n 41) 370.

¹¹⁶ *Ibid.*

¹¹⁷ *Supra* (n 32) at 124d. See chapter 3 par 3.1.1.2 and chapter 5 par 5.3.5 for a discussion of the case. Also A Van der Merwe (2002) 'Guidelines on sentencing in child sexual abuse cases' *CARSA* 3(2) 20-24.

obvious conclusion that the rape had deeply and injuriously affected the incest complainant, as well as by its *ratio decidendi* that such a finding of serious harm should be given more weight in sentencing.

The position in England is that a judicial officer would require supporting evidence before an assumption could be made regarding the effect of the offence on the victim,¹¹⁸ unless the surrounding circumstances warrant an inference being properly drawn.¹¹⁹ The evidence of the victim alone should further be approached with care¹²⁰ and only particularly damaging or distressing effects of the crime upon the victim should be taken into account by the court when passing sentence.¹²¹

Judicial training is further envisaged with regard to the potential impact of sexual crimes on victims generally¹²² as well as with regard to the offender's knowledge, use and manipulation of the child's vulnerability as factors to be considered in sentencing.¹²³

¹¹⁸ *R v Perks* [2000] *Crim L R* 606, proposition 1. Taking notice of the Attorney-General's direction that psychological harm should be regarded as the number one aggravating factor, the court reviewed *R v O* (1993) 14 Cr. App. R. (S.) 632 and *R v H* [1999] Current Law 144, which dealt respectively with incest and the indecent assault of children.

¹¹⁹ Lord Chief Justice (16/10/01) Practice Direction (Victim Impact Statements) par 3(b) <http://www.courtservice.gov.uk/cms/7900.htm> (accessed 14/09/2004).

¹²⁰ *R v Perks supra* (n 118) proposition 4.

¹²¹ *R v Perks supra* (n 118) proposition 2 (Similarly, only substantial emotional harm can be taken into account as an aggravating factor in New South Wales (Section 21A(2) of the Crimes (Sentencing Procedure) Act 1999 No 92)).

¹²² Law Commission *op cit* (n 4) 372. The Institute for Child Witness Research and Training has trained several groups of regional court magistrates with regard to the trauma experienced by child victims and adult survivors of child sexual abuse and appears to have had a significant influence on the practice and understanding of, and weight attached to, victim impact statements in regional courts (The Unit for Child Witness Research and Training *Overview of Activities: 1998 – 2001* 5; see also *op cit* (n 28), where the magistrate had attended this course twice).

¹²³ Law Commission *ibid*.

6.4.5 Forms and guidelines

The victim impact statement may be presented to the court in various formats, depending on the underlying rationale for victim participation in sentencing.¹²⁴

The victim impact statement will normally be made in addition to the witness's statement with regard to the offence, and it must at least be signed. In England, the document is presently called a victim personal statement and the statement on the impact of the crime is made in addition to the witness's normal statement regarding the crime. The statement may also contain a request for information about the progress of the case or about support that is needed.¹²⁵ The victim is allowed to say whatever he or she wants to say, with the emphasis being on the fact that the statement is made in his or her own words. The statement is, however, attached to the police docket as an affidavit and is made available to the court only in its written format before sentencing, or forms part of a pre-sentence report.¹²⁶ On the other hand, both Southern Australia¹²⁷ and Canada¹²⁸ give victims the right to read the previously prepared victim impact statement

¹²⁴ Edwards *op cit* (n 31) 48.

¹²⁵ Home Office *op cit* (n 44) 6. The evidentiary section will be ruled off and a paragraph along the following lines usually precedes the victim impact statement: 'I have been given the victim personal statement (VPS) leaflet and the VPS scheme has been explained to me. What follows is what I wish to say in connection with this matter. I understand that what I say may be used in various ways and that it may be disclosed to the defence' (9).

¹²⁶ Edwards *op cit* (n 31) 48 explains that this attitude of keeping victims out of court, thereby preventing them from speaking about harm, must be understood in 'the context of resistance to emotion and theatrics in sentencing to ensure it remains a dispassionate decision making process aimed at state-defined goals'. See also M Hinton 'Guarding against victim-authored victim impact statements' (1996) 20 *Crim LJ* 310-320.

¹²⁷ Supreme Court Criminal Rules 1992 Amendment 8. The victim impact statement must however be furnished in advance to the Director of Public Prosecutions and the presiding officer may direct that any irrelevant material not be read out. Also note that s 7A(1) of the Criminal Law (Sentencing) (Victim Impact Statements) Amendment Act 1998 precludes victims from reading out their statements in magistrates' courts.

¹²⁸ Section 722(2.1) of the Criminal Code of 1985 provides as follows with regard to the presentation of the victim impact statement: 'The court shall, on request of the victim, permit the victim to read a statement prepared and filed in accordance with subsection (2), or to present the statement in any other manner that the court considers appropriate'.

aloud in court if they want to. The interpretation of the Canadian section has however given rise to conflicting decisions, in that some judges have refused an oral victim impact statement in order to prevent victims departing from the prepared victim impact statement and extemporising about the offender and the offence.¹²⁹ In such a situation, a videotaped victim impact statement might still be allowed.¹³⁰ The position as to whether judicial officers are permitted or obliged to allow the oral presentation of previously prepared victim impact statements has still not been clarified.¹³¹ In addition to the possibility of reading out a written statement, the American option of making an oral statement can be offered to victims, thereby allowing them to speak directly to the court.¹³² It would thus appear that some jurisdictions prefer a previously prepared, written format, either just attached to the record or with a possibility of being read out by the victim. Others allow the victim to make an oral presentation in court, guided by provisions such as that the presentation should relate only to the case and should explain the various forms of harm.¹³³

With regard to children, it would appear that, in England, children's statements can be made by means of a video recording, as this is the accepted manner in

¹²⁹ Roberts *op cit* (n 41) 367-369.

¹³⁰ *Ibid.*

¹³¹ *Ibid.*

¹³² Section 4 (a)(1)(a) Fla.Stat. Ann. 921.143 (2000) as referred to by Kittrie *et al op cit* (n 26) 288. Edwards *op cit* (n 31) 48 points out that the rights discourse in America and the belief in the cathartic value of expression lead courts to allow victims to express to the court anything that they wish.

¹³³ Section 4 (a)(2) Fla.Stat. Ann. 921.143 (2000) provides for example: 'The state attorney shall advise all victims or, when appropriate, their next of kin that statements, whether oral or written, shall relate to the facts of the case and the extent of any harm, and the extent of any harm, including social, psychological, or physical harm or financial losses, loss of earnings directly or indirectly resulting from the crime for which the defendant is being sentenced, and any matter relevant to an appropriate disposition and sentence.'

which witness statements are dealt with.¹³⁴ In the Canadian province of Saskatchewan, the victim impact statements of children below the age of 13 are made on a form that differs from that provided for adults. Depending on their developmental age, children over 13 can choose which form they want to complete.¹³⁵ Recent Scottish developments allow children over 14 years to make a victim impact statement, with children below that age having another person make a statement on their behalf.¹³⁶ In contrast, the state of New Jersey in the United States of America prohibits children from testifying about harm.¹³⁷

According to the South African Victims' Charter, the court may be informed about the effect of the crime on the victim either by way of a report prepared by a probation officer or an expert, compiled from the information in the police docket, or by way of an interview with the victim, or the victim himself or herself may testify.¹³⁸

¹³⁴ Home Office *op cit* (n 44) 10, 13, 16. Also Home Office 'Achieving best evidence in criminal proceedings: Guidance for vulnerable or intimidated witnesses, including children' *Speaking up for Justice Programme* (undated).

¹³⁵ Saskatchewan Justice (2002) 'Victim impact statement program guidelines manual' *Victims Services Branch* par B 3-4.

¹³⁶ C Boyd 'Youth justice and the protection of children and youth' Paper Electronic Conference Proceedings 18th International Conference of the International Society for the Reform of Criminal Law, 8-12 August 2004, *Keeping Justice Systems Just and Accountable: A Principled Approach in Challenging Times* Montreal (A victim statement pilot scheme was launched in Scotland in November 2003.).

¹³⁷ *State v Muhammed supra* (n 105).

¹³⁸ Par 20 of the *Minimum Standards on Services for Victims of Crime* (2004).

6.5 APPROACH OF THE SUPREME COURT OF APPEAL

Despite the fact that there is a legacy of instances illustrating the ignorance of our courts regarding the version of the child rape victim,¹³⁹ the Supreme Court of Appeal has, as briefly indicated earlier, revealed a paradigm shift in recent judgments. In *S v Abrahams*¹⁴⁰ the Supreme Court of Appeal was required to decide an appeal against sentence. The state had appealed against a sentence of seven years for rape committed by a father on his fourteen-year-old daughter. The sentencing court's assessment that the complainant was exhibiting normal teenage rebelliousness was criticised by the Supreme Court of Appeal as being a misdirection.¹⁴¹ It was found that an appropriate assessment of the evidence given by the mother and the social worker led to the unsurprising and indeed obvious conclusion that 'the complainant had been deeply and injuriously affected by the rape', and that this should have been given more weight in sentencing.¹⁴²

The appeal court's acceptance of the impact of the crime on the victim displays noteworthy insight and sensitivity. The court accepted the following after-effects as testified to by the mother: reluctance of the victim after the rape to enter her own room; insistence on sleeping in her mother's room; difficulty in communicating with the victim; sudden rejection of the mother and repelling of physical contact; deterioration of schoolwork; rebelliousness and disobedience at school; failure of examinations for the first time; snubbing her mother and brother at home and withdrawal from the neighbourhood children. In addition,

¹³⁹ See chapter 5 par 5.3.2 with regard to the haphazard approach of our courts to harm and par 5.3.3 for difficulties experienced by judicial officers as to when harm is caused by child sexual abuse.

¹⁴⁰ *Supra* (n 32). See chapter 3 par 3.1.1.2 for a more detailed discussion of the case.

¹⁴¹ *S v Abrahams supra* (n 32) at 124c. See chapter 5 par 5.3.5.

¹⁴² *S v Abrahams supra* (n 32) at 124f.

the social worker introduced the following after-effects that she found present a year and five months after the complainant was raped: the victim was unable to work through the rape; she still had nightmares and had developed a phobia about her home; she was unable to concentrate for long periods; she was ill-tempered, aggressive, rebellious and withdrawn; she resisted discussion of the event and needed long-term psychotherapy.

In *S v Mahomotsa*¹⁴³ the accused was convicted on two counts of rape. He had had non-consensual sexual intercourse with two 15-year-old complainants on more than one occasion (two months apart). The accused on separate occasions confronted the complainants as they were walking down a street. He threatened both of them, one with a firearm and the other with a knife, and pulled them to his room. The accused raped the first complainant four times, keeping her a prisoner in his room. The second complainant was raped twice. The probation officer submitted a report indicating that there was no harm. The sentencing court subsequently found that there was no physical injury or psychological harm. The Supreme Court of Appeal strongly doubted this conclusion, however, and stated that 'the finding of the trial judge of no psychological damage whatsoever is in the highest degree unlikely'.¹⁴⁴

The Supreme Court of Appeal recently held in *Rammoko*¹⁴⁵ that, when imposing a life sentence,¹⁴⁶ the fact that a victim is under the age of 16 is not the only criterion necessary for the imposition of such a sentence. It is not only the objective gravity of the crime that plays a role, but also the present and future

¹⁴³ 2002 (2) SACR 435 (SCA).

¹⁴⁴ *S v Mahomotsa supra* (n 143) at 441i.

¹⁴⁵ *Rammoko supra* (n 14) at 205b.

¹⁴⁶ In terms of s 51(1) of the Criminal Law Amendment Act 105 of 1997.

impact of the crime on the victim; hence, as argued in chapter 1, paragraph 1.2, thereby elevating the victim to a new platform of consideration in squaring the traditional triad of sentencing. It would appear that, in the absence of evidence of harm, no fair decision can be taken as to the imposition of a life sentence. The court held that the omission of evidence regarding the after-effects of the rape led to a risk for the accused 'that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present'.¹⁴⁷ The case was referred back to the high court so that it could be informed about the after-effects of the crime on the victim. The court accepted that the victim had to a great extent worked through the emotional trauma caused by the rape incident, and this fact was accorded substantial weight. This finding was based on the fact that the complainant was in a traditional relationship and that the initial problems and anxiety in her sexual relationship with the man had improved.¹⁴⁸

In none of the above judgments on child rape could the victim's story concerning the impact of the crime tip the scale in order to outweigh the cumulative effect of the mitigating circumstances, thereby justifying the imposition of life imprisonment.¹⁴⁹ However, the recognition of the relevance and importance of victim impact statements by the Supreme Court of Appeal has contributed to the ongoing education of the judicial officer and represents a much-needed paradigm shift in all child sexual abuse cases. It is not only essential that a victim impact statement be requested by the court, but it is also clear that matters of

¹⁴⁷ *Rammoko v Director of Public Prosecutions supra* (n 21) at 205e.

¹⁴⁸ See chapter 3 (n 41).

¹⁴⁹ See chapter 3 par 3.1.1.2 for the sentences imposed and for the relevant aggravating and mitigating factors that the court took into account.

interpretation and of the weight to be attached to the evidence of harm suffered by the complainant are of equal importance, and will require training and clearer guidance in practice.

6.6 CRITICAL EVALUATION OF THE USE OF VICTIM IMPACT STATEMENTS

6.6.1 Victim impact statements and lay interpretation

In the international discourse on victim impact statements, there has been a long-standing debate about the use of victim impact statements and the problems surrounding them. Within the American context, the debate has focused, and stills focuses¹⁵⁰ to a large extent, on the question whether victim impact evidence should be allowed in federal death cases.¹⁵¹ It should be emphasised that the death penalty is still a sentencing option in the United States of America and that most capital cases are dealt with by way of jury trials. Because the jury consists of lay people, many arguments against victim impact statements are based on the fear that jury members will be prejudiced by irrelevant and emotional victim impact statements.¹⁵² The initial position taken by the US Supreme Court¹⁵³ was to exclude victim impact evidence because it would be almost impossible for the defendant to rebut such evidence without distracting the focus of the sentencing hearing away from the defendant to the victim's character.¹⁵⁴ In addition, the concern was voiced that the admission of

¹⁵⁰ See JH Blume 'Ten years of Payne: Victim impact evidence in capital cases' (2003) 88 *Cornell LR* 257-281.

¹⁵¹ Kittrie *et al op cit* (n 26) 289-293; Schmallegger *op cit* (n 22).

¹⁵² In some states, for example Nebraska, it is believed that judges can be trusted not to be prejudiced by irrelevant and emotional victim impact statements. Thus in the American states where judges constitute the sentencing authority, victim impact statements are regarded as being less problematic, though not all judges might be immune. See AK Phillips 'Thou shalt not kill any nice people: the problem of capital sentencing' (1997) 35 *American Crim LR* 99.

¹⁵³ *Booth v Maryland* 482 U.S. 496 (1987).

¹⁵⁴ *Booth v Maryland supra* (n 153) at 506-507.

victim impact evidence would permit a jury to find that defendants, whose victims were assets to their community, were more deserving of punishment than those whose victims were perceived to be less worthy.¹⁵⁵ Thus the jury would be unable to ignore evidence on social status and would therefore be prejudiced by irrelevant¹⁵⁶ and emotional evidence. However, in *Payne v Tennessee*¹⁵⁷ the US Supreme Court rejected the previous view and held that victim impact evidence in death cases was constitutional¹⁵⁸ and relevant and 'would not necessarily inject an inappropriate amount of emotion or vengeance into the sentence hearing'.¹⁵⁹ Turning the victim into a 'faceless stranger'¹⁶⁰ during the penalty phase of a capital trial amounted, it was held, to depriving the state of the full moral force of its evidence and might prevent the jury from

¹⁵⁵ *Ibid.* See also SE Sundby 'The capital jury and empathy: The problem of worthy and unworthy victims' (2003) 88 *Cornell LR* 343-381 for an in-depth analysis. Also T Eisenberg, SP Garvey and MT Wells 'Victim characteristics and victim impact evidence in South Carolina capital cases' (2003) 88 *Cornell LR* 306-341.

¹⁵⁶ Edwards *op cit* (n 31) 48 criticises this approach by arguing that it is incompatible with the American values of facilitating participation, of redressing the imbalance of rights and of therapeutic benefit for victims.

¹⁵⁷ 501 U.S. 808 (1991) delivered by Chief Justice Rehnquist in which White, O'Connor, Scalia, Kennedy, and Souter, JJ joined. This decision has been the focus of criticism by numerous authors. See, for example, Mosteller *op cit* (n 57) 543-554 who indicates that some states now place limitations on victim impact statements and that a pessimistic outlook regarding such statements now prevails, namely that they are subject to misuse and that it is impossible to provide guiding rules for victim impact statements. See also Philips *op cit* (n 152) 93-118 for an argument that the admission of victim impact evidence entails a risk that the imposition of the death penalty will be dictated by perceptions of the victim's social worth. See Hoffmann *op cit* (n 83) at 531 (n 13) for an extensive list of commentators criticising *Payne*. Also JM Callihan 'Victim impact statements in capital trials: A selected bibliography' (2003) 88 *Cornell LR* 569-581 for references in general on the topic.

¹⁵⁸ One of the arguments in *Booth's case supra* (n 153) against the victim impact statement was that it is contrary to the Eighth Amendment which provides that the decision in respect of the death penalty must be based on reason and not on caprice or emotion, thereby implying that the victim impact statement would do just that.

¹⁵⁹ Hoffmann *op cit* (n 83) 530.

¹⁶⁰ Chief Justice Rehnquist at 826 referred to *South Carolina v. Gathers*, 490 U.S. 805 (1989) at 821.

having all the information necessary to determine a proper punishment.¹⁶¹ The need to determine the defendant's moral culpability and blameworthiness therefore necessitates evidence on the specific harm caused by him.¹⁶² It was left up to the various states to provide a legal framework addressing the implementation of victim impact statements, with the result that different approaches to victim impact statement practice are followed throughout the United States of America.¹⁶³ In the light of the fact that criticism often focuses on the problems victim impact statements might pose with regard to jury members and regarding their irreversible consequence in the case of the imposition of the death penalty, one may be tempted to brush aside the above arguments. Yet, in the light of the soon-to-be-introduced system of lay assessors, some points of concern may become moot points for South Africa.

6.6.2 Effect on sentence severity, patterns or outcomes

Another concern raised against the use of victim impact statements is that they may cause an increase in sentence severity or may affect sentencing patterns or

¹⁶¹ *Payne v Tennessee supra* (n 157) at 827. The court also reaffirmed the view expressed by Justice Cardozo in *Snyder v Massachusetts*, 291 U.S. 97, 122 (1934): 'Justice, though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament. We are to keep the balance true'.

¹⁶² This, in turn, raises questions with regard to unforeseen harm and whether the accused should have foreseen the impact of the crime, such as heart attacks and divorces experienced by survivors of the deceased as result of stress or the grieving process caused by the victim's death.

¹⁶³ *Kittrie et al op cit* (n 26) 292-293 explain that American states have much latitude in devising new procedures and remedies to meet different needs. Unlike open-ended, federal law, the state of New Jersey allows victim impact evidence only if the defendant first presents evidence on his or her own character. In contrast, Congress, with regard to the Oklahoma City bombing case, passed the Victim's Clarification Act Pub. L.No.105-6 to overrule the court in *United States v McVeigh* 153 F.3d 1166 (10th Cir. 1998) so as to enable victims, notwithstanding arguments that prior attendance of the trial would lead to unfair prejudice and to the confusion of issues, to testify during the penalty phase. The victim impact statement evidence varied and included video presentations, holiday photographs and detailed portrayals of the daily routines of the deceased.

outcomes.¹⁶⁴ However, Erez¹⁶⁵ presents research findings to the contrary. Sanders *et al*¹⁶⁶ support this argument, though for different reasons, and state that the victim impact statement contains mundane, predictable information in the majority of cases and is unable to meet the needs of courts. In the instance where something unexpected is said, verifiable, concrete evidence needs to be provided in order to make a difference.¹⁶⁷ Erez¹⁶⁸ further presents research leading her to conclude that the victim impact statement makes an important contribution to proportionality as opposed to severity in sentencing. This assertion is illustrated by cases where victim impact statements provided information that caused the punishment to be either more severe, or more lenient, than would have been initially thought in the absence of such information.¹⁶⁹ Although Sanders *et al*¹⁷⁰ denounce this argument based on lack of evidence, *Rammoko's* case¹⁷¹ serves as an example of such an instance. Initially, in this case, a life sentence was imposed for the rape of the girl, yet the

¹⁶⁴ E Erez 'Victim participation in sentencing: And the debate goes on' (1994) 3 *International Review of Victimology* 17. Compare also J Nadler and MR Rose 'Victim impact testimony and the psychology of punishment' (2003) 88 *Cornell LR* 442 for a finding that victim impact statements describing severe emotional harm lead to severity in punishment amongst lay persons *inter alia* because people are suggestible as regards outcome bias.

¹⁶⁵ *Op cit* (n 21) at 548.

¹⁶⁶ Sanders *et al op cit* (n 37) 454 in a debate with Erez.

¹⁶⁷ In *R v Perks supra* (n 118) the Court of Appeal in England set out a series of principles for the use of victim impact statements. See the discussion on evidentiary rules above.

¹⁶⁸ *Op cit* (n 21) 548.

¹⁶⁹ E Erez and L Rogers 'The effects of victim impact statements on criminal justice outcomes and processes: The perspectives of legal professionals' (1999) 39 *British Journal of Criminology* 216.

¹⁷⁰ *Op cit* (n 37) 451. They assert that no evidence exists to prove Erez's argument.

¹⁷¹ *Supra* (n 14). See chapter 2 for a detailed discussion of the case. See also Ashworth *op cit* (n 55) 311, citing a further example from *Hind* (1993) 15 CR App Rep (S) 114 indicating that, in the case of rape where the victim does not suffer severe trauma, the offence would be regarded as less serious. The offender had been the victim's former lover.

court imposed a sentence of 21 years after hearing her personal statement five years later, which the court interpreted to indicate that she had recovered to a great extent.

However, it is conceded that, in the absence of any guidelines as to the judicial use of victim impact statements, such statements may lead to arbitrary application. As one presiding officer stated:

'I take it as a point of departure that a sexual crime against a child is of a very serious nature. The offender should not be benefited by reduced harm, only aggravating harm is taken into consideration.'¹⁷²

Roberts,¹⁷³ however, also concedes that is possible that victim impact statements could contain information that might lead to the imposition of a lighter sentence. He cites research where sex offenders escaped imprisonment because of victim input,¹⁷⁴ as well as research from Canadian case law.¹⁷⁵ The latter provides that the victim's approach can mitigate the sentence in exceptional circumstances, namely as a result of a court-authorised request, an aboriginal sentencing circle¹⁷⁶ or a submission by the prosecution. In practice, this might result in an asymmetrical approach, because a more severe sentence at the request of the victim will not be acceded to, yet, in exceptional cases, the court might impose a

¹⁷² Personal communication with Durban regional court magistrate during Training Course on The Judicial Officer and the Child Witnesses (20/03/04).

¹⁷³ *Op cit* (n 41) 383.

¹⁷⁴ A Walsh 'Placebo justice: Victim recommendations and offender sentences in sexual assault cases' in E Fattah (Ed) *Towards a Critical Criminology* (1992) 304 as referred to in Roberts *op cit* (n 39) 383.

¹⁷⁵ Roberts *op cit* (n 41) 384; *R v Gabriel* (1999), 26 C.R. (5th) 363, 137 C.C.C. (3d) 1 (Ont. S.C.J.).

¹⁷⁶ W van Tongeren 'Circle sentencing' Paper, 17th International Conference of the International Society for the Reform of Criminal Law, 24-28 August 2003, *Convergence of Criminal Justice Systems: Building Bridges – Bridging Gaps* (see chapter 1 (n 58)).

shorter period of custody, or an alternative sentence, where the victim might experience hardship through the imposition of the envisaged sentence.¹⁷⁷

6.6.3 Varying harm

A further problem relating to victim impact statements is that the impact of a sexual crime on children with regard to the nature and intensity of the trauma may be affected by a number of factors, including the following:¹⁷⁸

- the circumstances of the crime (the period of abuse, whether duress or violence was used, or whether penetration took place);¹⁷⁹
- the relationship of the offender to the victim;
- the victim's psychosocial adjustment at the time of, and prior to, the commission of the crime;
- the degree of support offered to the victim both immediately and in the long term after the event (the support of the mother appears to be significant);¹⁸⁰
- whether the victim was offered some form of post-trauma counselling and assistance (the level of symptoms and the parent-child relationship will play a role in this regard),¹⁸¹ and the quality thereof;

¹⁷⁷ Roberts *op cit* (n 41) 384-385.

¹⁷⁸ Law Commission *op cit* (n 2) 671-672.

¹⁷⁹ Vervaeke *et al op cit* (n 77) 183.

¹⁸⁰ *Ibid.* See (n 30) of Vervaeke *et al op cit* (n 77) where the authors cite various studies indicating the importance of the mother's support of the child as a factor in the coping mechanisms of victims.

¹⁸¹ K Kopiec, D Finkelhor and J Wolak 'Which juvenile crime victims get mental health treatment?' (2004) 28:1 *Child Abuse and Neglect* 45-59. Two pathways were found to counselling: first, when the child is perceived as depressed or withdrawn, or when the parent-child relationship is negatively affected, and, secondly, via school intervention when victimisation occurs at school, or the victim is perceived to be at fault to some degree. The latter would, for example, be applicable to the sexualised child (as a result of sexual abuse) acting out or making unaccepted advances to other children or teachers.

- the age of the victim (victims younger than 12 years would appear to experience more serious trauma)¹⁸²;
- the victim's ability to understand the meaning of the sexual assault; and
- assistance given to the victim during the criminal justice process (research has indicated that a court preparation programme can serve as a tool in re-empowering the child¹⁸³).

Vervaeke *et al*¹⁸⁴ further assert that not every victim of child sexual abuse displays negative symptoms, and that, in the case where psychological harm is experienced, such harm varies greatly. However, by submitting a victim impact statement that reflects the impact of the above mediating factors on a child's harm, it can lead to the situation where the offender can only benefit from more information. The victim impact statement would thus not be seen as a problem when it communicates the factors influencing a more lenient sentence. Although Burchell and Milton¹⁸⁵ concede that there may well be a considerable difference in the severity with which the abusive act affects the child, they argue that the fundamental reason for punishing the offender is the abuse of power or authority over the child. This abuse of trust or authority is not only the ethical factor that renders the abuse abhorrent, but is also the source of the emotional trauma.¹⁸⁶

¹⁸² Vervaeke *et al op cit* (n 77).

¹⁸³ KD Müller *Preparing Children for Court: A Handbook for Practitioners* (2004).

¹⁸⁴ *Op cit* (n 77) 6.

¹⁸⁵ J Burchell and J Milton *Principles of Criminal Law* 2 ed (1997) 625.

¹⁸⁶ See also PE Mullen and J Fleming 'Long-term effects of child sexual abuse' *National Child Protection Clearing House: Issues in Child Abuse Prevention* Number 9 Autumn (1998) for an explanation that the breach of trust and/or exploitation of vulnerability involved in indecent assault could lead to problems regarding relationships, intimacy and sexual adjustment in adult life.

6.6.4 Future impact of the crime

In addition, the determination of future impact as required by *Rammoko*¹⁸⁷ in *inter alia* child rape cases seems to be problematic. Although there is a growing awareness that child sexual abuse often has long-term effects,¹⁸⁸ it would appear that determining specific future harm is almost impossible,¹⁸⁹ since child sexual abuse often occurs in high-risk families.¹⁹⁰ Vervaeke *et al*¹⁹¹ cite research which indicates that incest is often committed in problem families and that it is not easy to determine whether the sexual abuse or the family dynamic caused the psychological and social dysfunctionality of the victim.¹⁹²

A further study conducted amongst both incest- and non-abused college students found that the psychological functioning of abused victims was only marginally

¹⁸⁷ *Supra* (n 14).

¹⁸⁸ Both the judiciary and public opinion have acknowledged it. Vervaeke *et al op cit* (n 77) 183 refer to a study on public opinion and knowledge of child sexual abuse in which it was found that the belief exists that sexual abuse causes harm, that all victims experience harm, that boys as well as girls suffer equal harm, and that the harm is normally severe. In South Africa, a popular weekly magazine has, since the beginning of 2004, decided to contribute to the destigmatisation of child sexual abuse and, at the same time, educate the public about its harmful consequences. It has featured articles about the long-term effects of child sexual abuse and has featured interviews with adult victims of child sexual abuse which cover a broad spectrum of subcategories of abuse. See, for example, Zabine 'n Kind vir altyd' *Huisgenoot* (19/08/04) 28; E Louw 'Op skrif: My lang donker nagte' (17/06/04) *Huisgenoot* 16. Adult victims of child sexual abuse have also started to publish accounts of their experiences and the effect thereof on their lives. See, for example, L Caine and R Royston *Out of the Dark* (2004); C Slaughter *Before the Knife: Memories of an African Childhood* (2002) and E Lotter *Dis ek Anna* (2004).

¹⁸⁹ Ashworth *op cit* (n 55) 310 asserts that psychological harm and social adjustment (with its implications regarding the victim's standard of living) in incest cases are difficult to gauge.

¹⁹⁰ D E Pelekis, A Mykletun and A A Dahl 'The relative influence of childhood sexual abuse and other family background risk factors on adult adversities in female outpatients treated for anxiety disorders and depression' (2004) 28:1 *Child Abuse and Neglect* 61-76.

¹⁹¹ Vervaeke *et al op cit* (n 77).

¹⁹² H Israels *Heilige Verontwaardiging: Een Onderzoek naar de Feministische Visie op Incest* (2001) referred to by Vervaeke *et al op cit* (n 77) 6.

worse.¹⁹³ There appears to be no agreement about the role of child sexual abuse in future, problematic adult relationships. Some research indicates that, despite the presentation of anxiety, the quality of adult intimate relationships cannot necessarily be linked to child sexual abuse, but is linked rather to risk factors pertaining to family background.¹⁹⁴ In contrast, earlier studies indicated a significant association between child sexual abuse and a decline in socioeconomic status, increased sexual problems, the disruption of intimate relationships, a difficulty in showing trust and a propensity on the part of victims to perceive their partners as uncaring and overcontrolling.¹⁹⁵ However, as pointed out earlier, child sexual abuse appears to be more common among those victims who come from disturbed and disrupted families and who reported physical and emotional abuse. This might, however, only partially explain the apparent association between child sexual abuse and negative outcomes.¹⁹⁶ These findings were later confirmed by further studies which concluded that the breach of trust and/or exploitation of vulnerability involved in indecent assault scenarios could lead to problems regarding relationships, intimacy and sexual adjustment in adult life.¹⁹⁷ It would also appear that the number of offenders involved and the duration of the abuse during childhood are directly associated with high levels of

¹⁹³ B Rind, P Tromovitch and R Bauserman 'A meta-analytic examination of assumed properties of child sexual abuse using college samples' (1998) 124 *Psychological Bulletin* 22-53 referred to by Vervaeke *et al op cit* (n 75) 6.

¹⁹⁴ Pelekis *et al op cit* (n 190).

¹⁹⁵ PE Mullen, J Martin, JC Anderson and SE Romans 'The effect of child sexual abuse on social, interpersonal and sexual function in adult life' (1994) 165:1 *British Journal of Psychiatry* 35-47 conducted research amongst 248 women in New Zealand.

¹⁹⁶ *Ibid.*

¹⁹⁷ Mullen and Flemming *op cit* (n 186).

psychological distress in adulthood amongst those having a history of child sexual abuse.¹⁹⁸

6.6.5 The offender's culpability

From the above it would thus appear that immediate and future responses to child sexual abuse might vary widely from child to child. One victim might also be more vulnerable than another¹⁹⁹ and this is viewed as a chance circumstance influencing sentence.²⁰⁰ It is arguable whether the offender should be more heavily punished, despite his lack of knowledge of pre-existing vulnerability or his lack of control over the availability of expert assistance that could improve the victim's ability to cope.²⁰¹ It is a well-established principle in criminal law that culpability is determined by what was actually foreseen, or what should have been foreseen, by the accused.²⁰² However, the exception to this general principle, referred to as 'thin-skull cases', is based on the principle that 'you take your victim as you find him' and might be of importance here.²⁰³

For purposes of sentencing, the degree of culpability of the offender is relevant. Depending on one's moral justification for punishment, the inclusion of unforeseen harm could form part of the 'crime warranting a proportionate

¹⁹⁸ J Steel, L Sanna, B Hammond, J Whiple and H Cross (2004) 'Psychological sequelae of childhood sexual abuse: Abuse-related characteristics, coping strategies, and attributional style' 28:7 *Child Abuse and Neglect* 785-801.

¹⁹⁹ Law Commission *op cit* (n 2) 672.

²⁰⁰ Ashworth *op cit* (n 55) 311 further argues that victim impact statements are generally not relevant to sentencing, yet concedes that, unlike other offences, in the offence of rape the impact on the victim is relevant.

²⁰¹ *Ibid.*

²⁰² CR Snyman *Criminal Law* (2002) 4 ed 179-220; Burchell and Milton *op cit* (n 181) 297-397.

²⁰³ Burchell and Milton *op cit* (n 185) 124.

penalty'.²⁰⁴ It would appear that, for this purpose, the Law Commission proposed a subjective test to determine the offender's knowledge, use and manipulation of the particular victim's vulnerability for purposes of sentencing.²⁰⁵ However, all children are vulnerable per se²⁰⁶ and some degree of harm in cases of child sexual abuse has been accepted.²⁰⁷ The question that can be raised is whether the 'thin-skull rule' should not be extended to the sentencing phase. Taking the victim as you find him or her certainly also includes his or her physical, religious and emotional characteristics.

In the present South African context, with the focus on sexual offences and the protection of children, the legislature has attempted to create a class of 'most serious offences' through prescribed minimum sentences.²⁰⁸ It was certainly the perceived standard harm, as opposed to actual harm, that was the rationale for including child rape in such category.²⁰⁹ Notwithstanding this, it would appear that evidence of severe psychological trauma caused by sexual abuse is now used by courts to refine and regrade the seriousness of child sexual abuse offences. Harm is construed as contributing to the seriousness of the offence and

²⁰⁴ T Metz 'Legal punishment' in C Roederer and D Moellendorf *Jurisprudence* (2004) 585. Metz indicates that backward-looking theorists would disagree about the answer, while, for forward-looking theorists, the issue revolves around reducing future crime, notwithstanding a presumably stiffer sentence. It is pointed out that South Africa, like *inter alia* the United States of America, follows a hybrid approach.

²⁰⁵ Law Commission *op cit* (n 2) 672; Law Commission *op cit* (n 4) 372.

²⁰⁶ See research presented in chapter 5 par 5.3.4 and par 5.4 (about the harm caused by paedophiles through the grooming process and about possible long-term effects).

²⁰⁷ *S v V supra* (n 113); *S v Mahomotsa supra* (n 143).

²⁰⁸ Criminal Law Amendment Act 105 of 1997.

²⁰⁹ Compare A Von Hirsch and N Jareborg 'Gauging criminal harm: A living standard analysis' (1991) 11:1 *Oxford Journal of Legal Studies* 1-38, who propose that victim harm and characteristics are relevant only to the classification of the offence and its seriousness. It is the standard harm in a category of crime that should be included in establishing the seriousness of the offence, and not the actual harm.

a finding of a higher degree of culpability on the offender's part. However, even in the case of severe psychological trauma, such trauma may be outweighed by the cumulative effect of the mitigating factors, and the prescribed minimum sentence of life imprisonment could then not be imposed, as it would amount to an injustice as such.²¹⁰

The assertion is also made that, unlike physical harm, psychological harm is not a reliable indicator of the defendant's culpability.²¹¹ Regardless of who the victim is, the extent of the bodily injury reveals a great deal about the act that led to the injury. However, Labuschagne indicates how easy it is within the family set-up to abuse the child given the relationship concerned, which comprises a combination of authority, power and intimacy.²¹² With regard to child sexual abuse, it is submitted that the accused's culpability is highlighted by the fact that he is in a position of trust or authority towards a child and chooses to abuse that position, or chooses not to abide by the parental duty to assist a developing teenage child.

6.6.6 Unfounded or exaggerated allegations about impact

The fear that victims (or parents) may possibly make unfounded or exaggerated allegations about the impact of rape or indecent assault²¹³ is countered by the practice that, in most jurisdictions, victims do not prepare their own statements.

²¹⁰ *S v Malgas* 2001 (1) SACR 469 (SCA). See chapter 3 par 3.1.1.2 for a discussion of cases following *Malgas*.

²¹¹ Nadler and Rose *op cit* (n 164) 442.

²¹² 'Intieme menslike verhoudinge, seksuele misbruik van 'n kind en 'n eggenote en die strafregtelike effek van 'n lang tydsverloop tussen misdaadpleging en aanmelding' (2001) 34:1 *De Jure* 140.

²¹³ In chapter 3 par 2.11 one respondent, for example, indicated that the circumstances of the victim impact statement would have to be investigated to determine whether it could be believed, or whether it was not a mere ploy to exaggerate the case against the accused.

Instead, these are prepared by a specific agency, and, in the retelling, the statements become filtered or 'edited',²¹⁴ or even 'sterilised',²¹⁵ leading rather to an understatement of the harm experienced by a victim.²¹⁶ A victim impact statement scheme would normally also not encourage exaggeration, inflammatory input or vindictiveness.²¹⁷ In addition, some sort of verification would have to have been carried out before the agency would present the statement in court, or include it as a court document.

6.6.7 Arbitrariness and disparity

The issue of arbitrariness appears to be a source of further concern with regard to victim impact statements.²¹⁸ Research indicates that a minority of crime victims elects to submit a victim impact statement.²¹⁹ This creates disparity, as there will then be victim impact statements in some cases and not in others.²²⁰ A further problem relates to the wide scope of what is sometimes permissible

²¹⁴ Erez *op cit* (n 21) 548-549.

²¹⁵ R Delgado 'Storytelling for oppositionists and others: A plea for narrative' (1989) 87 *Michigan LR* 2411 as referred to by Erez *ibid*.

²¹⁶ Erez *op cit* (n 21) 549.

²¹⁷ Hoyle *et al op cit* (n 100) 28.

²¹⁸ Nadler and Rose *op cit* (n 164) 453.

²¹⁹ A Young 'Victims of crime research series: The role of the victim in the criminal process: Literature review – 1989-1999' (2001) *Ottawa: Department of Justice Canada* 25; D Mitchell 'Victim impact statements: A brief examination of their implementation in Victoria' (1996) 8 *Current Issues in Criminal Justice* 163.

²²⁰ Ashworth *op cit* (n 55) 312. He refers specifically to the victim impact statement with regard to a sentencing recommendation. This is optional for victims and only some victims show mercy towards their offenders. Thus it is a matter of chance that determines the offender's sentence. See Sanders *et al op cit* (n 37) 450 for a discussion of findings that only about 30 percent of people opted to make a victim impact statement, of which over half did so for an instrumental reason, such as to ensure imprisonment, and nearly half did so for a procedural reasons, such as to improve decision making. Two-thirds made statements for therapeutic purposes.

regarding victim impact statements.²²¹ Different levels of emotional harm expressed in victim impact statements activate the decision maker's 'moral emotions of contempt, anger and disgust', leading to a more severe sentence.²²² Although no research has been conducted on whether judges would be affected in the same way as lay people, there is evidence that judges, despite their training and expertise, rely on the same decision-making process as lay people, 'making them vulnerable to systematic mental shortcuts'.²²³ South African judges have however often prided themselves on, and have reminded themselves of, their ability and duty to decide on sentencing issues without being emotional.²²⁴

6.6.8 Variation in the ability of the victim to articulate

Another concern relevant to victim impact statements that is sometimes raised is the great degree of variation in the ability of victims to articulate the impact that the crime has had on their lives and in the clarity of their descriptions.²²⁵ With regard to children, it would in most cases either be a parent or behavioural expert who would testify about the symptoms of harm, and the concern would thus not be as relevant.

6.6.9 Redundant information

Those opposed to victim impact statements also raise the issue that information provided in the victim impact statement is redundant, as it is already contained

²²¹ Nadler and Rose *op cit* (n 164) 453. They suggest that the scope of what is admissible as a victim impact statement should be limited.

²²² Nadler and Rose *op cit* (n 164) 445.

²²³ C Gutrie, JJ Rachlinski and AJ Wistrich *et al* 'Inside the judicial mind' (2001) 86 *Cornell LR* 777.

²²⁴ *S v O supra* (n 111) at 158f-g and 159a-c; *S v Mhlakaza and Another* 1997 (1) SACR 515 (SCA) at 518i-j.

²²⁵ Law Commission *op cit* (n 2) 672; Nadler and Rose *op cit* (n 164) 442.

in the docket or has emerged during the trial.²²⁶ It was however indicated above that, in the case of a plea of guilty, which is the trend in paedophile cases, the court is often faced with the dilemma of having no information available about the impact of the crime on the victim(s). In this instance, the victim impact statement would serve the purpose of telling the other side of the story.

6.6.10 Opinion evidence on sentence

The problem relating to opinion evidence by victims is threefold. First, it is asserted that the sentence could be 'skewed into an exclusively retributive mode' when the court relies on the victim's opinion of what the appropriate sentence should be.²²⁷ Although it might be true in many cases, it has been indicated in paragraph 6.4.2.2 above that it is not always the case. Secondly, presiding officers might perceive such evidence as a way of dictating to them, thereby infringing on their sentencing discretion.²²⁸ Thirdly, allowing such evidence might raise the expectations of victims, only for them to become more disillusioned with the criminal justice system or feel ignored where the recommendation as regards sentence is not followed.²²⁹ This argument might be applicable in countries such as the United States of America where the practice that the victim has the option of expressing an opinion on sentence is widely accepted.²³⁰ However, both concerns could be addressed by communicating the court's attitude to the victim in advance. For example, as indicated above, in England

²²⁶ Roberts *op cit* (n 41) 389.

²²⁷ GP Fletcher *With Justice for Some - Protecting Victims' Rights in Criminal Trials* (1996) 198 referred to by J Burchell and J Milton (2005) *Principles of Criminal Law* 3 ed 14. Walker and Louw *op cit* (n 90).

²²⁸ See chapter 4 par 4.5.6.

²²⁹ Home Office *The Victim Personal Statement Scheme: Guidance Note for Practitioners or Those Operating the Scheme* (undated) at <http://www.homeoffice.gov.uk/docs/guidenote.pdf> (accessed 14/09/04).

²³⁰ *Op cit* (n 132) and (n 133).

and Wales, guidelines are given to victims that would avoid any incorrect perception or expectation.²³¹

6.6.11 Further trauma to the victim

6.6.11.1 Disputed victim impact statement

Another concern that might arise relates to the extent to which a child may suffer secondary trauma when being cross-examined regarding a disputed victim impact statement. Research has however shown that defence counsel very seldom embark on a cross-examination of the victim. From an advocacy point of view, it would seem that defence counsel are afraid of being perceived as using bad tactics should they cross-examine and as not being prudent.²³² Apart from the danger of creating the perception of bullying the victim, the fear exists amongst legal professionals that observing the victim personally telling the court about the after-effects of the crime might adversely affect the sentence imposed.²³³ This could possibly explain why regional court punishments for indecent assault, for example, are often severe, but are set aside on appeal and are replaced by higher courts with a far more lenient sentence.²³⁴ However, this does not mean that unfounded victim impact statements would simply be admitted. Other than by way of cross-examination, the defence can and probably will challenge the victim impact statement by making contradictory submissions or by providing other evidence.

²³¹ Home Office *op cit* (n 79) 2 par 7. See also par 6.4.2.2 above.

²³² Erez *op cit* (n 21) 549.

²³³ *Ibid.*

²³⁴ See the discussion of indecent assault cases in chapter 3 par 3.3 for the specific sentences.

6.6.11.2 Plea bargaining and denial of a victim impact statement

A final concern about the further trauma for the victim could relate to cases where plea bargaining takes place. Recently, in New South Wales, certain key elements of a victim's statement were not taken into account in the gang-rape of two 16-year-old girls.²³⁵ Although the judge acknowledged the importance of the impact of the offenders' behaviour on the victims for sentencing purposes, she disregarded those aspects that went beyond the agreed facts and sentenced the three accused to a very lenient sentence, contrary to the expectations of the victims and the public.²³⁶ One of the victims afterwards expressed her feelings of being denied and deceived as follows:

'I did expect the sentencing to give me some sense of closure so I could start getting on with my life. But it's been the exact opposite. It's just made things worse because it's like, now my story has been changed by the legal system ... The facts were changed and I want to stop that. My story should be told the way it happened. They could have told us at least that they were going to change it and let us decide what we wanted to do from there. But they didn't. Personally, I would rather go through the process of court because at least my story is getting told and they are actually getting sentenced on what they did and not what they didn't do.'²³⁷

6 7 CONCLUSION

Despite arguments for the replacement of the procedural right to make a victim impact statement with proper substantive rights pertaining to service for victims,²³⁸ or for the incorporation of victims in a genuinely participative

²³⁵ *Regina v AEM(jnr) & AEM(snr) & KEM* (23/8/01) District Court of New South Wales Criminal Jurisdiction Case no 01/11/0096.

²³⁶ *Regina v AEM (jnr) & AEM (snr) & KEM supra* (n 219) at 6. The case became the focus of a public outcry and gave rise to law reform in the area of gang-rapes. See R Jones, G Griffith and R Simpson 'Gang rapists: The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001' *New South Wales Parliamentary Library Research Service: Briefing Paper* (2001) 12 at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/F95E42F6AD02> (accessed 22/10/2004).

²³⁷ New South Wales Parliamentary Library Research Service *op cit* (n 236) 15.

²³⁸ A Ashworth 'Victim's rights, defendant's rights and criminal procedure' in A Crawford and J Goodey (eds) *Integrating Victim Perspectives in Criminal Justice* (2000) 185. Ashworth *op cit*

system²³⁹ where they will be treated with respect, it would appear that the victim impact statement is likely to exist in its present format in most jurisdictions for the time being. The view of Ashworth²⁴⁰ that victim impact statements could, in endeavouring to achieve victim participation, distort criminal processes is not supported by research on the practice of informal victim impact statements in South Africa as discussed in paragraph 6.4.1, and by the approach of the Supreme Court of Appeal as discussed in paragraph 6.5 above. However, lessons might be learnt from criticism about the lack of conceptual clarification of victim impact statements and about the lack of uniformity in its format.²⁴¹

Only a draft, statutory platform for victim impact statements exists in South Africa.²⁴² However, the recent, final Victims' Charter 2004, which consolidated the legislative framework with regard to existing victim rights in South Africa, provides some clarity as to the platform for formal victim impact statements in South Africa. In line with the victim-centred, restorative justice movement that has led to the paradigm shift, victims are now more formally acknowledged as unique and have the right, at least in theory, to offer or present information to professionals involved in the case and to participate in criminal justice proceedings.²⁴³

(n 36) 498 further asserts that, although victim impact statement rights might be high in profile, they do not contribute much in increasing genuine respect for victims.

²³⁹ Sanders *et al op cit* (n 37) 458.

²⁴⁰ *Op cit* (n 238a).

²⁴¹ Roberts *op cit* (n 41) 396.

²⁴² Clause 47 of the draft Sentencing Framework Bill 2000; section 17(b) of the Criminal Law (Sexual Offences) Amendment Bill 2003 (The latest version available as a working document is dated February 2004 and was referred back again for further deliberations.)

²⁴³ B Naude, J Prinsloo and A Ladikos 'Restorative justice: A global overview of its functioning and effectiveness' (2003) 16:5 *Acta Criminologica* 7. M Batley Unpublished Paper 'Restorative justice' (2004) *Symposium on the Child in the Criminal Justice System* (16/06/04). See also

However, responsibility for the presentation of victim impact statements has not been clarified.²⁴⁴ If it is optional and is left in the hands of the prosecutor, as is the position at present, this, as indicated above, would be unsatisfactory. It is submitted that the presiding officer should have the final responsibility in all cases of child sexual abuse for monitoring the presentation of victim impact statements during sentencing.²⁴⁵ This could be seen as an extension of his or her inquisitorial role during sentencing.

The introduction of victim impact statements in all cases of child rape will further contribute to ending the divided-case practice of recalling victims to the high court in order that such court may 'be steeped in the atmosphere of the trial,'²⁴⁶ or to establish the impact of the crime for the first time after finalisation of the case.²⁴⁷

The practice of victim impact statements is not new to South Africa and the aim of such statements has always been to assist the presiding officer in deciding on a proper sentence. The findings of the empirical study in chapter 4 also indicate that there is a need among presiding officers for more information about victims, for example:

Burchell and Milton *op cit* (n 227) 13 who accept that a convincing case could be made for the use of victim impact statements.

²⁴⁴ Draft legislation makes the victim impact statement the prosecutor's responsibility, but the Victims' Charter, in addition to the reference to the prosecutor's option to submit a victim impact statement, also mentions the possibility that the court or defence can ask for an expert report on impact.

²⁴⁵ In terms of s 19(1)(2) of the previous draft Sexual Offences Bill (2000), a court could even order that the complainant be assessed by a suitably qualified person in order to establish the impact of the offence. This has been omitted in the latest 2003 bill.

²⁴⁶ *S v Gquamana supra* (n 65) at 34a. Also *S v Njikelana* 2003 (2) SACR 166 (C).

²⁴⁷ *Rammoko supra* (n 14).

'They (victim impact statements) should be made compulsory – difficult to sentence without.'²⁴⁸

Further, it has been indicated above that most of the concerns raised by those opposed to victim impact statements have proved to be unfounded or are not so serious. The Supreme Court of Appeal has not only endorsed statements on the after-effects of the crime, but has also found them to be essential in arriving, in cases of rape and indecent assault where the minimum-sentence legislation is applicable, at a decision that is fair both to the offender and the public.²⁴⁹ Victim impact statements thus serve a greater purpose than contributing only to determination of the quantum of punishment.²⁵⁰ They provide the judicial officer with the other side of the story in order that a balanced/holistic approach to sentence may be followed. It is however submitted that matters pertaining to victim impact statements should not be overregulated out of fear of some emotion on the part of victims. By doing so, the victim impact statement will simply become too complicated to use efficiently.

²⁴⁸ Chapter 4 par 4.2.11.

²⁴⁹ See chapter 2 par 2.1.

²⁵⁰ Roberts *op cit* (n 41) 396.

CHAPTER 7

THE USE OF EXPERT WITNESSES IN SENTENCING IN CHILD SEXUAL ABUSE CASES

'In response to the question: "Is that your conclusion that this man is a malingerer?" Dr. Unsworth responded: "I wouldn't be testifying if I didn't think so, unless I was on the other side, then it would be a post traumatic condition".¹

- 7.1 INTRODUCTION**
- 7.2 THE NEED FOR PSYCHOLOGICAL EXPERTISE IN THE SENTENCING PHASE**
- 7.3 THE NATURE OF THE SENTENCING PHASE**
- 7.4 THE PRESENTATION OF EXPERT EVIDENCE DURING THE SENTENCING PHASE**
- 7.5 THE RULES RELATING TO EXPERT EVIDENCE DURING THE SENTENCING PHASE**
- 7.6 POSSIBLE SOLUTIONS TO PROBLEMS**
 - 7.6.1 Introduction**
 - 7.6.2 A code of ethics or guidelines for forensic experts**
 - 7.6.3 Court-appointed neutral experts**
 - 7.6.4 Expert assessors**
- 7.7 CONCLUSION**

7.1 INTRODUCTION

In sentencing the offender in child sexual abuse cases, the judicial officer is faced with a particularly difficult task.² The court, as indicated in chapter 1, finds itself in a dilemma when it has to balance its constitutional duty to protect vulnerable children³ (taking into account research indicating the high recidivism

¹ Paul Simon Proof (Warner Brother Records, Inc. 1993).

² See chapter 1 par 1.1.1.

³ Section 28 of the Constitution of the Republic of South Africa, 1996.

rate among paedophiles) against the human rights model which requires the courts to treat offenders as worthy human beings.⁴ Paprzycki⁵ points out that, in some uncomplicated cases, the court can, and will, make decisions in terms of its own knowledge of psychology – knowledge which is available to a lawyer and which draws on the experience of life – without the participation of a psychologist. He however warns against the danger of confusing the court's knowledge of psychology with psychological knowledge, which is available only to a psychologist with a specialised degree. Labuschagne argues that the complexity of the human soul in fact necessitates that the courts take notice of scientific knowledge that can assist them in the quest to impose an appropriate sentence:

'If the courts really want to protect vulnerable legal subjects, such as women and children, against sexual violence and abuse, they should also, during sentencing, not only take notice of, but also effectively accommodate, scientific research and knowledge.'⁶ (Own translation)

It would appear from the earlier evaluation of indecent assault cases that the courts are aware of the need to turn to experts in the behavioural sciences for assistance. Once the Criminal Law (Sexual Offences) Amendment Bill 2003⁷ comes into operation, the courts will be obliged to do so in all cases of both indecent assault and child rape.

⁴ *S v Dodo* 2001 (3) SA 382 (CC) at par 38 (see chapter 1 par 1.1.1 for quotation). Also B Mahendra 'The legacy of Roy Meadow' (2004) 154:7117 *New Law Journal (Expert Witness Supplement)* 283.

⁵ 'The status of an expert psychologist in Polish criminal proceedings' in A Czerederecka, T Jaskiewicz-Obydzinska and J Wojcikiewicz (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 8.

⁶ JTM Labuschagne 'Insesverkragting, straftoemeting, die hoogste hof van appel en 'n glimlag van Freud' (2003) *THRHR* 109.

⁷ B50 2003 GG No 25282 of 30 July 2003.

In this chapter, the increased recognition of the need for information from expert witnesses during the sentencing phase will be briefly highlighted. In addition, the impact of the quasi-inquisitorial nature of the sentencing phase on the presentation and rules of expert evidence is examined. The problems relating to valid and reliable expert reports in court and the difficulties experienced by courts in understanding and evaluating expert evidence are also examined. Finally, as possible solutions, this section investigates a professional code of ethics for forensic, behavioural expert witnesses and the appointment of expert assessors during sentencing.

7.2 THE NEED FOR PSYCHOLOGICAL EXPERTISE IN THE SENTENCING PHASE

As indicated above, the sentencing phase is a separate trial during which new issues of a psychological nature become important. Questions posed here relate to the accused's degree of culpability, his dangerousness, the chances of his rehabilitation and the suitability of treatment programmes, and the harm experienced by the victim. In order to obtain the relevant information, the court needs the expertise of behavioural scientists. Thus, both the Criminal Law (Sexual Offences) Amendment Bill 2003⁸ and the Supreme Court of Appeal⁹ have shown increased recognition, in the broader sense, of the importance of psychology to criminal law during the sentencing phase relating to sex offenders.¹⁰

⁸ Schedule 1(l)(v); s 20.

⁹ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA); *S v Abrahams* 2002 (1) SACR 116 (SCA).

¹⁰ See chapter 5 par 5.2 where the necessity for expertise with regard to the accused, as well as with regard to the harm caused to the victim, is highlighted.

7.3 THE NATURE OF THE SENTENCING PHASE

The nature of the sentencing phase differs from that of the trial phase. The emphasis in procedure shifts from being predominantly accusatorial during the trial phase to a more quasi-inquisitorial approach.¹¹ By implication, this means that not only do procedures become more flexible, but the court is also positioned at the centre of the sentencing stage, which requires a more active role from the presiding officer.¹²

The adversarial contest will, however, almost always be continued by the prosecutor and defence in the battle for the desired sentencing outcome, and the credibility of expert witnesses on both sides will be tested through cross-examination. The choice of witnesses will also demonstrate where the party's sympathy lies. What is of particular importance in this chapter is the impact which the quasi-inquisitorial approach has on the presentation and rules of expert evidence for sentencing purposes, as is illustrated below.

7.4 THE PRESENTATION OF EXPERT EVIDENCE DURING THE SENTENCING PHASE

The use of expert testimony relating to the behavioural sciences during the pre-sentence phase is not unknown to judicial officers in South Africa. In cases of indecent assault against children, behavioural sciences such as psychiatry, psychology, forensic social work and criminology are relevant¹³ and can play an

¹¹ South African Law Commission (hereafter 'the Law Commission') *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000) 83. See chapter 1 par 1.1.2 for a more in-depth discussion of the nature of the sentencing phase.

¹² SS Terblanche *The Guide to Sentencing in South Africa* (1999) 99.

¹³ Often it is probation officers employed by the state who are responsible for drawing up the pre-sentence reports. However, private social welfare experts, criminologists, psychiatrists and clinical psychologists can also prepare such reports.

important role in guiding the judicial officer in the exercise of his or her sentencing discretion.

In principle, the court has the discretion, except in a case where correctional supervision is imposed,¹⁴ as to what evidence to receive in order to impose a proper sentence. In some cases, the court itself will obtain expert evidence in addition to the expert evidence presented by the state and/or defence.¹⁵ A situation often arises where expert testimony is not presented and the prosecutor is then blamed for the lack of this evidence.¹⁶ This appears to be indicative of the fact that many judicial officers still find it difficult to move from the accusatorial tradition followed in the course of the trial to the assumption of a more responsible and active role in obtaining expert evidence during the sentencing phase. However, even when such an active role is assumed, the present unsatisfactory fee structure for the payment of state- and court-appointed experts might cause difficulty in securing the appearance of such experts.¹⁷ On the other hand, prosecutors are often satisfied simply with the conviction of the accused and adopt a passive attitude to calling experts, thus leaving everything in the hands of the court.¹⁸ The defence, in contrast,

¹⁴ When the sentencing option of correctional supervision in terms of s 276(h) and (i) of the Criminal Procedure Act 55 of 1977 is imposed on the sex offender, the court has no discretion with regard to a pre-sentence report. It is a statutory requirement that a report by either a probation officer or a correctional officer must be obtained.

¹⁵ *S v O* 2003 (2) SACR 147 (C) at 153g.

¹⁶ *S v Gerber* 2001 (1) SACR 621 (W) at 623j-624a.

¹⁷ Expert witnesses for the state are entitled to claim R50 per day, plus an additional fee for transport when travelling from another city. This is in sharp contrast to the situation of experts for the defence, whose remuneration varies between R400 and R1 000 per day.

¹⁸ *Rammoko v Director of Public Prosecutions* *supra* (n 9). See IA Van der Merwe 'Proving aggravating circumstances: The prosecutor's duty' (2002) 3 *Sexual Offences Bulletin* 20 for a discussion of the role of the prosecutor in child sexual abuse cases.

frequently obtains expert reports and vigorously argues for a sentence in terms of which the accused is not imprisoned.

Evidence by an expert is referred to as a pre-sentence report and is usually requested with regard to the accused as a person, to his risk of further offending and to possible treatment as a sex offender. Terblanche submits that the pre-sentence report should in fact only be used in the assessment of the offender¹⁹ and highlights its main purpose as follows:

'The main purpose is to assist the presiding officer in gaining a better understanding of the offender, and the reasons for his crime. This is one of the triad of factors that the court has to consider in constructing the sentence of the accused. Assistance by experts in the field of human behaviour can, therefore, be of much assistance in determining the effect that this factor should have on the eventual sentence. Thus, it is clear that a pre-sentence report should be obtained whenever the presiding officer feels the need to be better informed as to the character (in the broadest sense of the word) and the possible future of the offender. Of course nothing prevents either the prosecution or the defence from requesting the court to obtain a probation report, or for the defence to obtain a pre-sentence report as part of its evidence in mitigation.'²⁰

The pre-sentence report does not only contain information regarding the offender, but can also, based on social science research, correct incorrect perceptions about 'typical human behaviour' under certain conditions.²¹ In addition, it can also provide the court with advice by making a recommendation as to the appropriate sentence. The court is not bound by these recommendations, but should it decide not to follow the expert's advice, reasons should be given.²²

¹⁹ Terblanche *op cit* (n 12) 114. See *infra* (n 145) for a comparison with the purpose of the pre-sentence report in England and Wales.

²⁰ Terblanche *op cit* (n 12) 111-112.

²¹ J Monahan and L Walker (1987) 'Social frameworks: A new use of social sciences in law' 73 *Virginia LR* 559.

²² Terblanche *op cit* (n 12) 114.

Apart from requesting a pre-sentence report by an expert, the court may also obtain expert assistance by appointing one or two assessors to assist in the determination of a proper, community-based punishment for the accused.²³ In recognising the need for expertise during the sentencing process, the South African Law Commission (hereafter 'the Law Commission') refers specifically to the case of the sex offender and proposes the use of expert assessors having experience or knowledge of the impact of sexual offences on victims and of the characteristics of sex offenders.²⁴ It is important, however, that the assessor's role should be clearly defined as one of providing assistance, since the final responsibility for imposing a proper sentence rests with the judicial officer. However, the recent legislation mandating the appointment of two lay assessors in sexual offence cases might impact on the practical implication, and this will be discussed below.²⁵

7.5 THE RULES RELATING TO EXPERT EVIDENCE DURING THE SENTENCING PHASE

Generally, the court will receive expert evidence on issues that cannot be decided without expert guidance.²⁶ Courts have, however, been cautioned against elevating expert evidence to such heights as to lose sight of their own capabilities and responsibilities.²⁷ Satchwell J has stated that expert opinion would be relevant in instances where it would be 'of assistance to the court' and

²³ Section 93*ter* of the Magistrate's Court Act 32 of 1944.

²⁴ Section 14 of the Schedule to the Criminal Law (Sexual Offences) Amendment Bill 2003. Although this is already an option under the existing law (*ibid*), the aim here would appear to be the need to educate judicial officers in this regard so that they make greater use of it.

²⁵ S Carstens *The Crime Times* 21 June 2004. Section 93*ter* of the Magistrate's Court Act 32 of 1944 as amended by the Magistrate's Court Amendment Act 67 of 1998.

²⁶ PJ Schwikkard and SE van der Merwe *Principles of Evidence* 2 ed (2002) 89.

²⁷ *Holtzhausen v Roodt* 1997 (4) SA 766 (W) at 772e-f.

'helpful', and it is submitted that this would apply equally to matters of sentencing:

'... it would be unwise and it would be irresponsible for myself as a judicial officer, who is lacking in special knowledge and skill, to attempt to draw inferences from facts which have been established by evidence, without welcoming the opportunity to learn and to receive guidance from an expert who is better qualified than myself to draw the inferences which I am required myself to draw.'²⁸

Before a court will accept a witness as an expert, there is a need to establish his or her *credentials*.²⁹

- apart from having specialist training, knowledge, skill or experience, these qualities must indeed enable the witness to assist the court in its decisions;
- the witness is an expert for the purpose for which he or she has been called to state his or her opinion; and
- the facts regarding which the witness expresses an opinion must have a bearing on the case and must be capable of being reconciled with all the other evidence in the case.

Expert witnesses are further required to support and substantiate their opinions with valid reasons, based on proper research, and should remain objective in their conclusions and not ignore matters that are inconvenient to their conclusions.³⁰ However, the court still has to make the final decision after careful analysis of the expert opinion. It should be pointed out at this stage that not all probation officer reports should necessarily be regarded as expert reports, and that, in each case, the individual witnesses' testimony would have to pass the

²⁸ *Holtzhausen v Roodt supra* (n 27) at 778j.

²⁹ Schwikkard and Van der Merwe *op cit* (n 26) 92; C Fortt 'Child sexual abuse and the UK expert witness' (2001) *Solicitors Journal* 3.

³⁰ Fortt *ibid*.

test.³¹ It is submitted that, in this instance, a presiding officer should not hesitate to require proper interviews and in-depth reporting with regard to both the offender and the victim, where applicable.

With regard to evidential aspects, the strict rules of evidence are relaxed during the sentencing phase because of the inclusion of information obtained by *hearsay* in pre-sentence reports. There is no standard approach to hearsay evidence during this phase and this gives rise to contradictory decisions with regard to the evaluation of such evidence.³² An expert witness is further not restricted to relying on his or her own perceptions, or even his or her own reasoning. Experts may, and must, rely on the general body of knowledge that constitutes their field.³³ This is a further area of contention and one in which the courts have indicated their scepticism regarding this type of evidence.³⁴

³¹ The Department of Correctional Services further adopted an unsatisfactory new policy from 2004 in terms of which a *pro forma* form is provided which requires only superficial information.

³² *S v E* 1992 (2) SACR 625 (A) at 629i. In this instance, the evidence of the expert was regarded as unreliable because of hearsay. In all other aspects, her evidence was found to be comprehensive, thorough and founded upon a proper investigation of the appellant as a person. Mrs Raath agreed with the clinical psychologist that the appellant was not a suitable candidate for incarceration and opined that his reformation and punishment were best achieved by imprisonment suspended on condition that he underwent psychotherapy and rendered community service (at 628h). However, in other instances the court is willing to accept hearsay testimony from experts on the impact of the crime, for example in *S v S* 1977 (3) SA 830 (A). See chapter 5 par 5.3.2.

³³ L Meintjes-van der Walt *Expert Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) 70. The cases of *Holtzausen v Roodt supra* (n 27) and the American case, *S v Kinney* 171 Vt 239 (2000) are examples of cases where profile or syndrome evidence was admitted in order to explain, and therefore assist the court in understanding, the behaviour of certain categories of people – even without a personal interview with the person in question.

³⁴ The judge seemed unconvinced by a clinical social worker's testimony regarding the appellant which was presented without having consulted with the appellant. The expert witness stated that, based on the circumstances of the case, '(it) would suggest that the accused is a multiple sex offender with exaggerated risk for recidivism'. He questioned the basis for this, which the social worker had called 'a body of research literature' – *S v O supra* (n 15) at 163j.

Expert witnesses are, subject to certain requirements, also permitted to rely on *textbooks* written by other experts.³⁵ The court will normally receive all reports compiled by experts, but the weight of their evidence will be determined at a later stage.³⁶ Expert evidence in mitigation would be of very little value if it were not related to the accused and the particular crime, and to the facts found to be proven in the judgment.³⁷

Expert witnesses generally testify under oath and thereafter submit their written reports. They read out the report and are then cross-examined on its contents. The cross-examiner might, however, be faced with the same problem the judicial officer faces during evaluation, that is, a lack of knowledge about the particular field of expertise which thus limits his or her ability to conduct an effective cross-examination. Only in cases where the report does not contain any information detrimental to the accused, or where it is not disputed by any of the parties, will it simply be handed in. The danger however still exists that, in such a case, issues that are not fully explained, or matters which are open to interpretation, cannot then be clarified.³⁸ Documentary evidence such as this might thus carry

³⁵ Schwikkard and Van der Merwe *op cit* (n 26) 97. It should be noted that, in *S v Jones* 2004 (1) SACR 420 (C), it was again held that opinions expressed in textbooks are not evidence per se and amount to hearsay. Therefore, a court may make use of them only if an expert confirms their correctness under oath and the court may not take judicial notice of them.

³⁶ The court called a social worker from the Department of Correctional Services who was based at Pollsmoor Prison. However, this witness was, in the end, unable to be of any real assistance to the court regarding the prison programme for sex offenders. He had no specific information about the number of sex offenders participating in the programme, nor any data on the success rate thereof. His evidence was found not to be impressive (*S v O supra* (n 15) at 164f).

³⁷ E Du Toit, FJ de Jager, A Paizes, A StQ Skeen and S van der Merwe *Commentary on the Criminal Procedure Act Service* 7 (1991) 28-3.

³⁸ For example, in *S v S* 1977 (3) SA 830 (A) at 836h, the expert witness was able to explain why the appellant could, despite his acute anxiety and claustrophobia, cope with the film developing room as well as his classroom. Apparently, the appellant did not feel trapped in these environments and therefore did not suffer from his usual anxiety. The issue revolved around the suitability of imprisonment for effective treatment.

less weight in the end. It is submitted that, despite the more inquisitorial nature of this phase, the expert should make an *oral presentation* where possible in order for the court to get the full benefit of available expert evidence. In addition, the right of the accused to a fair trial is also applicable during the sentencing phase³⁹ and will dictate that the opportunity be provided to cross-examine the expert in order to test findings and opinions. The defence could also, as in the pre-trial phase, request that a copy of the expert report be disclosed in advance in order to enable it to prepare for cross-examination. It is submitted that the state should also make expert reports available to the defence in advance, which would amount to a form of *pre-sentence disclosure*.⁴⁰ It would thus appear that the adversarial contest between the parties continues, and, in the case of sentencing, this usually revolves around the question of imprisonment.

In order to decide on the appropriate sentence, the court must first make factual findings, both with regard to aggravating and mitigating factors that will be used either against or in favour of the accused. Despite reference to numerous views in favour of an *onus* being placed on the prosecution with regard to proving and disproving such matters,⁴¹ the Law Commission accepted that no onus in the strict sense of the word exists during the sentencing phase.⁴² The sentencing

³⁹ Section 35(3)(i) of the Constitution of the Republic of South Africa, 1996.

⁴⁰ Meintjes-van der Walt *op cit* (n 33) proposes a similar pre-trial disclosure.

⁴¹ According to Du Toit *et al op cit* (n 37) 28-4, the prosecutor must prove aggravating factors beyond a reasonable doubt (similar to the situation when the death penalty was a sentencing option); also *S v Shepard* 1967 (4) 170 (W) at 180g – the court points out that the sentence is at least as important to the accused as his conviction, and a factor which will make a vast difference to his sentence must therefore be proved beyond reasonable doubt. The Canadian position supports this approach, based on the accused's right to freedom and security of person, though hearsay evidence may be used to prove an aggravating factor beyond reasonable doubt – *R v Gardiner* [1982] 2 SCR 368 (SCC) at 415.

⁴² *Op cit* (n 11) 86.

phase is perceived as being analogous to decisions on bail, where a value judgement is involved with there being no formal onus with regard to a finding relating to the interests of justice.⁴³ Further, despite the fact that the adversarial contest might be continued by the state and defence with regard to a custodial sentence, it can be argued that the procedure is more inquisitorial and therefore not inherently party driven.⁴⁴ The Law Commission thus proposed that the party who alleges, carry the burden of proof, which burden should be met according to a standard satisfactory to the court.⁴⁵

As mentioned above, courts must receive expert evidence in instances where expert guidance is helpful, but without losing sight of their own capabilities.⁴⁶ It would appear that the courts do not always realise when expert evidence is needed and when judicial notice can be taken of a fact to obtain information for sentencing purposes. Courts may, as a standard approach, take judicial notice of 'facts which are generally and locally notorious, facts which can easily be ascertained and the law' and this practice has been accepted.⁴⁷ It has been said that notorious facts include *inter alia* elemental experience in human nature.⁴⁸ With regard to matters of child development, the court has on occasion

⁴³ *Ellish v Prokureur-Generaal* 1994 (2) SACR (W) at 586-593. Compare JJ Joubert (ed) *Criminal Procedure Handbook* 5 ed (2001) 156 for the viewpoint that the state bears the onus in all cases falling outside the ambit of ss 11(1)(a) and 11(1)(b) of the Criminal Procedure Act 51 of 1977 and that the standard is proof on a balance of probabilities.

⁴⁴ Law Commission *op cit* (n 11) 85.

⁴⁵ *Op cit* (n 11) 87. Compare *Ahmed* (1984) 80 Cr.App.R.(S.) 325 (as referred to by M Wasik 'Rethinking information and advice for sentencers' in *Sentencing, Judicial Discretion and Training* (1992) 176: a prosecutor must prove a disputed fact during the sentencing process beyond reasonable doubt).

⁴⁶ *Holtzhausen v Roodt supra* (n 27).

⁴⁷ Terblanche *op cit* (n 12) 108. Schwikkard and Van der Merwe *op cit* (n 26) 450.

⁴⁸ *R v African Canning Co SWA Ltd* 1954 (1) SA 197 (SWA) 199f. See DT Zeffert, AP Paizes and AStQ Skeen *The South African Law of Evidence* (2003) 718-721 for a general discussion on matters of general knowledge for purposes of judicial notice.

seemingly viewed such development as generally notorious and falling within its own general knowledge, and has taken judicial notice of this subject without resorting to any expertise.⁴⁹ The context in which this has been done has usually been with regard to evidence of changed behavioural patterns and other symptoms of trauma that have been displayed by the child victim. It was shown earlier⁵⁰ that behavioural changes in child victims have been equated by some courts with teenage rebelliousness occurring during the normal developmental process. Such courts have therefore ruled that any evidence in that regard would not be of any value for the purpose of proving harm. Although this approach has been corrected by the Supreme Court of Appeal,⁵¹ it should be reiterated that child development, with specific reference to socio-emotional development, is a specialised field of which judicial notice should not be taken.⁵² Allowing matters of child development to fall within the court's elemental experience of human nature can be detrimental to a correct finding of harm.⁵³ Expert evidence and personal examination of the child should be sought where possible, though this is not the only source for establishing harm.⁵⁴ The Appellate Division however held that the court can indeed take judicial notice of the fact that child sexual abuse has long-term effects, but ruled that evidence is necessary for an inference of grievous harm in a specific case.⁵⁵

⁴⁹ *S v V* 1991 (1) SACR 59 (T) at 71h-i; *S v Abrahams supra* (n 9) at 121a; see also chapter 5 par 5.3.5.

⁵⁰ *Ibid.*

⁵¹ *S v Abrahams supra* (n 9) at 124f.

⁵² KD Müller *Preparing Children for Court: A Handbook for Practitioners* (2004) 52.

⁵³ See chapter 5 par 5.3.5 and par 5.8.2.

⁵⁴ *S v Abrahams supra* (n 9) at 124c.

⁵⁵ *S v V supra* 1994 (1) SA 598 (A) at 600j.

7.6 POSSIBLE SOLUTIONS TO PROBLEMS

7.6.1 Introduction

The evidence of the expert witness is simply one piece in the sentencing puzzle and is interrelated to all other evidence.⁵⁶ Yet, in the majority of child sexual abuse cases (including the mini-study on paedophile offenders) analysed earlier,⁵⁷ expert evidence was presented on the offender and this was accorded substantial weight by the court in the determination of an appropriate sentence. It however appears from the aforementioned mini-study that conflicting evidence has been presented over the years with regard to the likelihood of complete and successful rehabilitation, as well as regarding the length of time needed for treatment. In addition, research indicates that clinicians in a therapeutic relationship with their patients make more 'low-risk' judgements and that their feelings towards the patient are associated with risk judgement.⁵⁸ Given the above, the issue of bias, both conscious and unconscious, arises with regard to party-based introduction of expert evidence,⁵⁹ inherent, personal flaws resulting in poor research, or a therapeutic relationship with the accused. This might necessitate the introduction of a forensic code of ethics that can serve as a guideline for ensuring the quality of expert opinions. This option is investigated below, as is the more efficient use of court-appointed experts.

⁵⁶ Meintjes-van der Walt *op cit* (n 33) 218.

⁵⁷ Chapter 5 par 5.5.1.

⁵⁸ V de Vogel and C de Ruiter 'Differences between clinicians and researchers in assessing risk of violence in forensic psychiatric patients' (2004) 15:1 *The Journal of Forensic Psychiatry and Psychology* 145.

⁵⁹ In *S v Ndaba* 1993 (1) SACR 637 (A) at 641a-b. The court *a quo* accorded little weight to the clinical psychologist's testimony on behalf of the accused on the ground that such testimony was 'onaanvaarbare toespitsing op slegs die appellant se belange'. However, the Appellate Division found that it was a properly substantiated report providing a constructive alternative to imprisonment and therefore not 'n poging tot vergoeliking van die appellant se gedrag'.

Further, the underlying paradox where the court relies on expert evidence lies in the fact that the presiding officer receives evidence on issues that go beyond the court's common knowledge, but is then called upon to evaluate that same evidence.⁶⁰ Explanations in the above-mentioned study with regard to the clinical conditions of the accused also illustrate the wide variety of paedophiles and paedophiliac behaviour, which precludes the acceptance of any single theory or cause of development.⁶¹ In order to make sense of evidence on the paedophile's illness, courts have, as mentioned earlier, varied in their perceptions of the paedophile – from seeing him as the typical dirty old man⁶² to comparing him with the better-known alcoholic.⁶³ As far as the comparison with the alcoholic is concerned, a totally different dynamic and motivation underlie the latter's behaviour,⁶⁴ which raises the question of the appropriateness or usefulness of such a comparison.

As indicated earlier, law and psychology differ not only in their construction of norm and pathology, but also in the method of reasoning associated therewith.⁶⁵ In other words, psychology as a science about human beings perceives its task as discovering, describing and explaining the individual. Law, on the other hand,

⁶⁰ Meintjes-van der Walt *op cit* (n 33) 221.

⁶¹ K Howells 'Adult sexual interest in children: Considerations relevant to theories of aetiology' in M Cook and K Howells (eds) *Adult Sexual Interest in Children* (1981) 55-94. Also CR Bartol (1995) *Criminal Behaviour: A Psychological Approach* 4 ed 269.

⁶² *S v S supra* (n 38) at 834i.

⁶³ *S v D* 1989 (4) SA 225 (C) at 230h-231c.

⁶⁴ S van Wyk, psychologist. Personal communication, April 2004. What appears to be applicable though, is that the paedophile's behaviour, like that of the alcoholic, is only in remission following a treatment programme (NN Kittrie, EH Zenoff and VA Eng *Sentencing, Sanctions, and Corrections* 2 ed (2002) 1203).

⁶⁵ W Domachowski 'Guilty or not guilty: Assertions of social psychology *vis-à-vis* the law' in A Czerederecka, T Jaskiewicz-Obydzinska and J Wojcikiewicz (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 305.

reflects a certain value system in legislating 'rules of social life'.⁶⁶ Law functions mainly at the crossroads of the individual's and society's interests and perceives these interests not as existing objectively, but according to value systems accepted by law. Thus, law deals with a situation that cannot exist in psychology.⁶⁷ This explains why the court has to work with the ideal of rehabilitating paedophiles, while the evidence of psychologists suggests otherwise. In cases where the courts have expressed difficulty in understanding evidence that a complete cure for regressive paedophilia is unlikely, the courts' resistance (or perhaps inability) to accepting and accommodating scientific research is illustrated. The approach which is maintained is that, 'if there were no known form of treatment for paedophilia, then incarceration would be the only option to safeguard children from a paedophile's predations'.⁶⁸ This suggests that the courts believe that paedophilia is an illness that can be cured, while the opposite view is held by the majority of experts. Yet, it would appear that no clarity exists as to the practical implications of the poor prognosis in respect of paedophiles with regard to existing treatment programmes, risk assessment and risk management. A paramount consideration,⁶⁹ therefore, is what the impact on the safety of children will be. As an option in addressing the problem of

⁶⁶ *Ibid.*

⁶⁷ *Ibid.* See also J Le Roux and I Mureriwa 'Paedophilia and the South African criminal justice system: A psychological perspective' (2004) 17:1 *SACJ* 50 for an argument in favour of a finding of diminished responsibility in terms of s 78(7) of the Criminal Procedure Act 51 of 1977 with regard to the fixated paedophile, therefore justifying a lighter sentence. See also Anonymous 'Developments in the law: Confronting the new challenges of evidence' (1995) 108 *Harvard LR* 1481 which explains that science is a descriptive pursuit which does not define how the universe should be, but rather describes how it actually is. Therefore, law should constantly reinvent its responses to novel scientific evidence. Compare also KWF Fiske 'Sentencing powers and principles' in JE Pink and D Perrier *From Crime to Punishment* 2 ed (1992) 238.

⁶⁸ *S v D supra* (n 63) at 231c, cited in *S v O supra* (n 15) at 165c.

⁶⁹ Law Commission *Sexual Offences against Children* Issue Paper 10 Project 108 (1997) 73.

understanding, evaluating and accommodating behavioural science, the use of expert assessors in the sentencing phase is examined below.

7.6.2 A code of ethics or guidelines for forensic experts

The increased recognition of the importance of psychology to criminal law during the sentencing phase in South Africa was indicated above. Courts do, and will in future to an even greater extent, make use of the 'soft' sciences,⁷⁰ namely behavioural experts, to obtain explanations, clarification and recommendations in child sexual abuse cases. The aim of using these experts is to address the compelling and urgent issues facing the criminal justice system, such as matters of risk assessment, the management of offenders and the recognition of victims.⁷¹ Forensic psychology is therefore one of the fastest-growing areas,⁷² although there is yet no system of accreditation for experts.⁷³ Parties and courts are therefore often left in a wilderness of ineffective, contradictory and low-quality reports⁷⁴ which are of no use or practical application.⁷⁵

⁷⁰ Meintjes-van der Walt *op cit* (n 33) 222.

⁷¹ Domachowski *op cit* (n 65) 304; IA van der Merwe 'Expert evidence on sentencing in child sexual abuse cases' Unpublished paper 14th European Conference on Psychology and Law (2004) 7-10 July *Facing the Challenges of a Changing World* Krakow. Compare Fortt *op cit* (n 29) 5 for the viewpoint that psychologists are not always necessary, since many sexual offenders do not suffer from psychological illnesses.

⁷² EK Englander 'Book review: BA Arrigo Introduction to forensic psychology: Issues and controversies in crime and justice (2000)' (2004) 41:3 *Crime, Law and Social Change* 289.

⁷³ Fortt *op cit* (n 29) 5. The Law Commission *Report on Sexual Offences* Project 107 (2002) 373 recognised this need by recommending that required treatment programmes forming part of the original sentence for sex offenders should be accredited. As part of the non-legislative recommendations, it is further required that all persons who work in the field of serving victims of sexual offences and NGOs wishing to assist sexual offence victims or offenders should undergo an accredited training course. Of importance is the fact that training and guidance on the preparation and compilation of reports for submission to court must be included in the above-mentioned accredited training course (376).

⁷⁴ Fortt *ibid*; Kittrie *et al op cit* (n 64) 314 argue in favour of the requirement of competent and reliable evidence as a standard for sentencing information. See chapter 4 par 4.2.12 for findings of regional courts indicating problems with experts' reports. Also *S v V* 1996 (2) SACR 133 (T).

Despite the fact that forensic experts are bound by rules of conduct in their specific fields, these appear to be insufficient to fully address the problem of bias and unreliable reports. Internationally, courts have demanded quality standards and criteria in respect of psychological expertise,⁷⁶ and, in some jurisdictions, have developed codes of ethics or guidelines for forensic experts.

The Federal Court of Australia has issued a practice directive⁷⁷ that should be given by practitioners to any expert witness for purposes of preparing a report or giving opinion evidence in legal proceedings. As a point of departure, a general duty to the court was formulated by the Federal Court:⁷⁸

- 'an expert witness has an overriding duty to assist the court on matters relevant to the expert's area of expertise;
- an expert witness is not an advocate for the party; and
- an expert witness's paramount duty is to the court and not to the person retaining the expert.'

Although a literal interpretation will sometimes be unworkable, lawyers and experts should work together in a practical and sensible way and adhere to the

⁷⁵ A Kuhne 'The psychological view of the best interest of the child – new perspectives and recommendations for psychological expertises' in A Czerederecka, T Jaskiewicz-Obydzinska and J Wojcikiewicz (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 144; Skelton (2004) *Alternative Sentencing Review* CSPRI (Civil Society Prison Reform Initiative) Research Paper Series No 6.

⁷⁶ Kuhne *op cit* (n 75) 143-144 refers to various German studies indicating serious mistakes in forensic reports and recommends *inter alia* more research, better education and advanced studies, and evaluation of therapy for improved psychological research.

⁷⁷ *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* (19/03/04) at http://www.federalcourt.gov.au/how/prac_direction.html (accessed 12/10/04). The aim is *inter alia* to avoid the criticism that is sometimes made (whether rightly or wrongly) that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them. In order to avoid allegations of partiality, the report should be clear and not argumentative in tone, and a pre-existing relationship between the author of the report and any party should be identified.

⁷⁸ With reference to rule 35.3 Civil Procedure Rules (UK) and Practice Direction 35 – Experts and Assessors (UK).

suggested form. This should contribute to an understanding by experts as to what the court expects of them, and should assist them to avoid allegations of partiality. The Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia read as follows:

- 'An expert's written report must give details of the expert's qualifications, and of the literature or other material used in making the report.
- All assumptions of fact made by the expert should be clearly and fully stated.
- The report should identify who carried out any tests or experiments upon which the expert relied in compiling the report, and state the qualifications of the person who carried out any such test or experiment.
- Where several opinions are contained in the report, the expert should summarise them.
- The expert should give reasons for each opinion.
- At the end of the report the expert should declare that "[the expert] has made all the inquiries which [the expert] believes are desirable and appropriate and that no matters of significance which [the expert] regards as relevant have, to [the expert's] knowledge, been withheld from the Court".
- There should be included in or attached to the report (i) a statement of the questions or issues that the expert was asked to address; (ii) the factual premises on which the report proceeds; and (iii) the documents and other materials which the expert has been instructed to consider.
- If, after exchange of reports or at any other stage, an expert witness changes a material opinion, having read another expert's report or for any other reason, the change should be communicated in a timely manner (through legal representatives) to each party to whom the expert witness's report has been provided and, when appropriate, to the Court.⁷⁹
- If an expert's opinion is not fully researched because the expert considers that insufficient data is available, or for any other reason, this must be stated with an indication that the opinion is no more than a provisional one. Where an expert witness who has prepared a report believes that it may be incomplete or inaccurate with some qualification, the qualification must be stated in the report.⁸⁰
- The expert should make it clear when a particular question or issue falls outside the relevant field of expertise.
- Where the expert's report refers to photographs, plans, calculations, analyses, measurements, survey reports or other extrinsic matter, these must be provided to the opposite party at the same time as the exchange of reports.'

The above guidelines pertain to the trial and pre-trial context in both criminal and civil litigation, yet they can serve as valuable principles for the sentencing

⁷⁹ Referring to *Ikarian Reefer* [1993] 20 FSR 563 at 565.

⁸⁰ *Ibid.*

phase. In addition to the guidelines, Meintjes-van der Walt⁸¹ proposes that the following declaration be inserted between the expert's report and such expert's signature:

'I.....DECLARE THAT:

- (i) I understand that my overriding duty in written reports and giving evidence is to assist the Court on matters relevant to my area of expertise.
- (ii) I have endeavoured in my reports and in my opinions to be accurate and to have covered all relevant issues concerning the matters stated which I have been asked to address.
- (iii) I have endeavoured to include in my report those matters which I have knowledge of or of which I had been made aware of which adversely affect the validity of my opinion.⁸²
- (iv) I have indicated the sources of all information I have used and all tests and experiments I have performed.
- (v) I have not without forming an independent view included or excluded anything which has been suggested to me by others.
- (vi) I will notify those instructing me immediately and confirm in writing if for any reason my existing report requires any correction, qualification or amplification.
- (vii) I understand that:
 - (a) my report, subject to any corrections before swearing as to its correctness, will form the evidence to be given under oath or affirmation;
 - (b) I may be cross-examined on my report by a cross-examiner assisted by an expert;
 - (c) I am likely to be the subject of public adverse criticism by the judge if the Court concludes that I have not taken reasonable care in trying to meet the standards set out above.

I confirm that I have not entered into any arrangement where reimbursement is in any way dependent on the outcome of the case.'

Compliance with a forensic code of conduct containing ethical guidelines for experts involved in litigation can certainly add weight to an expert's report.⁸³ While it is not possible to guarantee that the expert is in fact an expert, a code of

⁸¹ *Op cit* (n 33) 231-232.

⁸² A tendency in the United Kingdom was for probation officers to omit details when these might be contrary to the recommendation the writer wished to make. See J Thorpe *Social Inquiry Reports: A Survey* Home Office Research Study no 48 HMSO 16, 33-34 as referred to by A Ashworth *Sentencing and Criminal Justice* 2 ed (1995) 305.

⁸³ L Meintjes-van der Walt 'Ethics and the expert: Some suggestions for South Africa' (2003) 4:2 *CARSA* 50-54.

ethics reduces the risk that the person concerned is not an expert.⁸⁴ As part of a comprehensive, model report referring to the rules of expert evidence and containing a checklist and a review form, Meintjes-van der Walt further proposes the following ethical guidelines:

- 'Guideline 1: It is the duty of the expert to help the court on the matters within his/her expertise. This duty overrides any obligation to the person from whom he/she has received instructions or by whom he/she is paid.
- Guideline 2: The expert owes a duty to the body of knowledge and the understanding and interpretation thereof.
- Guideline 3: The expert witness also has a duty to the party who has sought his or her advice. That duty is to provide advice in the context of the first and second duties above, which implies that the expert should not be an advocate for a party. This can be called a tertiary duty.
- Guideline 4: The opinion is only useful if it is based on the expert's area of competence, includes all relevant matters and is impartial and dispassionate. An expert is subject to the normal duty in respect of evidence of fact, namely to be complete, accurate and truthful.
- Guideline 5: The expert report should reflect not only the expert's statements of fact and opinion, but also the norms and duties expected from an expert witness.⁸⁵

The above guidelines are applicable to all sciences. It should, however, be kept in mind that, during the sentencing phase in child sexual abuse cases, it is primarily the human behavioural sciences that will be involved. Important questions would be those related to the risk of reoffending, to dangerousness and to the suitability of the offender for rehabilitation programmes, as well as to the impact of the crime upon the victims. In an effort to assist defence expert witnesses in child sexual abuse cases in the United Kingdom to ascertain the required level of expertise, Fortt⁸⁶ suggests some guidelines aimed at the

⁸⁴ M Cohen 'Get the facts straight: A new standard for experts' (2004) 154: 7117 *New Law Journal* 296. He also argues that matters should be kept simple, that is, that there should be one code, with additional requirements for different courts.

⁸⁵ *Op cit* (n 83) 45-49. However, in a different format, they in essence appear to be similar to the Australian guidelines.

⁸⁶ *Op cit* (n 29) 3-5. Although the guidelines are intended for family-court proceedings, they deal mainly with experts testifying on the possibility of reoffending by an intra-familial offender and are therefore extremely relevant. Compare also Kittrie *et al op cit* (n 74) 1196 with regard to more general guidelines for the clinical assessment of sexual offenders.

behavioural science discipline. These guidelines are particularly instructive with regard to guideline 4 set out above. In summary, the guidelines entail the following:

- Experts should include matters that are inconsistent with their own conclusions in order to demonstrate their impartiality.⁸⁷
- Whilst addressing the crucial issues, without simply restating incidental trivia, the report should also demonstrate knowledge of the process and dynamics of child sexual abuse, for example by explaining the abused child and the non-offending partner's experiences and perceptions. A case in point, in this regard, would be that the phenomenon that victims and non-abusing partners of offenders often display irrational behaviour and may appear to be colluding with the offender results from the control the offender exercises over them.
- With regard to the use of language, it is important to all role-players that the expert is able to provide a context in layperson's terms for understanding the basis of the expert's opinion, without being bound by professional jargon.⁸⁸
- Experts should include corroborated facts. Simply restating what the perpetrator has told the expert could indicate that the expert is not sufficiently familiar with the issues to be able to distinguish fact from fiction. Without implying that everything is a lie, experts should be aware that it is a characteristic of sexual offenders to present a much-distorted version of events.⁸⁹

⁸⁷ Also Thorpe *op cit* (n 82).

⁸⁸ If technical terms are used, explanations should be provided in the report (Meintjes-van der Walt *op cit* (n 83) 51).

⁸⁹ Fortt *op cit* (n 29) 3 warns that if the expert presents the family as being composed of Father Christmas, the Wicked Witch and Lolita, then the expert has accepted the perpetrator's story completely.

- The expert's report should refer to both quoted research and clinical experience.
- Objectives stated at the beginning of the report – for example, to provide an answer regarding the risk of reoffending – should be answered or an explanation for the omission should be given.
- Conclusions must flow logically from the issues discussed.

The above summary of guidelines could serve as more detailed guidance in an attempt to ensure the production of proper reports, since it would appear that experts often do not know what the court expects of them. In recognising this, s 20(4) of the Criminal Law (Sexual Offences) Amendment Bill 2003 sets out a slightly more detailed requirement. The section refers to the report needed by the court for the newly introduced long-term supervision order of at least five years for dangerous sexual offenders. In terms of the section, the report must contain an exposition of

- the suitability of the offender to undergo a long-term supervision order;
- the possible benefits of the imposition of a long-term supervision order on the offender;
- a proposed rehabilitative programme for the offender;
- information on the family and social background of the offender;
- recommendations regarding any conditions to be imposed upon the granting of a long-term supervision order; and
- any other matter directed by the court.

It is submitted that the court should take an active approach and be specific about its need for information. It should therefore consider issuing official guidelines for experts in child sexual abuse cases.⁹⁰ It should be noted that, in

⁹⁰ It appears that Australian courts are particularly aware of this. Consequently, they have formulated guidelines for child representatives which are used for purposes of providing information and training. Para 6.7 is particularly instructive with regard to the supervising and

some jurisdictions, such as the United Kingdom, professionals who deal with abused children are separated by training and employment agencies from those who deal with the offender.⁹¹ South Africa follows the same approach as Australia, where the same behavioural scientist can perform both these functions. This system thus produces experts who have experience of dealing with both the aftermath of sexual crimes against children as well as with the perpetrators of such crimes.

Pre-sentence reports will normally be obtained from the state's probation service. The working relationship between the court and the probation officer appears to be of significance in that, where there is a close working relationship, probation officers will be trusted and will be treated as appropriate experts for guiding the court.⁹² In South Africa they are, however, not always perceived as experts owing to the low standard of reports produced. In the United Kingdom, similar criticism has been levelled at pre-sentence reports. As a result, there have been significant developments over the past years as regards their compilation according to national standards on the format and content thereof.⁹³ In addition

writing of reports. See Family Court of Australia *Guidelines for Child Representatives* at http://www.familycourt.gov.au/presence/connect/www/home/directions/guidelines_for_child_representatives/ (accessed 30/09/04).

⁹¹ Fortt *op cit* (n 29) 2.

⁹² M Davies 'Social inquiry for the courts' (1974) 14 *British Journal of Criminology* 18-33 in M Wasik *The Sentencing Process* (1997).

⁹³ Earlier guidelines were contained in Home Office *National Standards for the Supervision of Offenders in the Community* (1995, updated 2000). These standards prescribed five main sections for each report: a front sheet with factual information and verified sources, offence analysis, offender assessment, the risk to the public of reoffending, and a conclusion. (Before the development of these guidelines, criticism was levelled at pre-sentence reports because of social-work jargon, the gullibility of probation officers, an unawareness of sentencing principles and practice, and, therefore, the unrealistic nature of some sentence recommendations: A Ashworth *Sentencing and Criminal Justice* 3 ed (2004) 313; also Wasik *op cit* (n 45) 192.)

Section 3(5) of the Criminal Justice Act 2003 defines pre-sentence reports in terms of their function in assisting the court to arrive at the most suitable method of dealing with the offender, and in providing information that may be specified by the Secretary of State. Pre-

to probation officer reports, the accused also has the right to submit a privately commissioned report, which appears to carry more weight in most instances. In private practice, guidance in enhancing privately commissioned pre-sentence reports has been provided in the United States of America for a considerable time. For example, the Psychiatry and Law Center in California has devised a Criminological Case Evaluation and Sentencing Recommendation (CCE-SR) to aid criminal defence attorneys in preparing a sentencing proposal.⁹⁴ The report is prepared by a team of experts in human behaviour and criminal justice administration and addresses the processes of inquiry as well as data collection. It would appear that multidisciplinary involvement in both the compilation and supervision of reports contributes to positive results.⁹⁵ Apart from guidelines set

sentence reports thus no longer amount to a plea in mitigation (Inns of Court School of Law *Criminal Litigations and Sentencing* (1997) 240).

Sections 156-160 of the Criminal Justice Act 2003 further provide requirements for pre-sentence reports prepared by the probation service, based on their analysis of the offender's behaviour, criminal history and needs. The appropriate kind of punishment and rehabilitation in each individual case may be suggested, based on protecting the public and preventing reoffending. Imprisonment for mentally disordered offenders requires a medical report. (Sentence recommendations used to be a sensitive issue for presiding officers in the United Kingdom, since such recommendations were perceived as usurping the function of presiding officers. It is uncertain how presiding officers presently perceive the situation: see A Ashworth *Sentencing and Criminal Justice* 3 ed (2004) 314.)

The National Probation Service in England and Wales recently issued a new format and guidelines for pre-sentence reports which actively aim to improve communication between sentencers and probation officers, for example by making the new offender assessment system available to sentencers (Home Office 'Sex Offender Strategy for the National Probation Service' (2004) at <http://www.probation.homeoffice.gov.uk/files/pdf/PC53.pdf>; <http://www.probation.homeoffice.gov.uk/output/page36.asp> (accessed 3/1/05)). See also the new 'Sex Offender Strategy for the National Probation Service' (September 2004) at <http://www.probation.homeoffice.gov.uk/files/pdf/Sex%20Offender%20Strategy%20Sep%2004.pdf> (accessed 1/11/04).

⁹⁴ TA Rodgers, GT Gitchoff and IO Paur 'The privately commissioned pre-sentence report: A multidisciplinary approach' (1979) 2:2 *Criminal Justice Journal* 171.

⁹⁵ JK Bredar *Justice Informed: The Pre-sentence Report Pilot Trials in the Crown Court* (1992). See also Kuhne *op cit* (n 95) 145 for a recommendation regarding better cooperation between all disciplines involved for the best results.

out by the court, specific guidelines on pre-sentence reports could thus further contribute to quality reports.⁹⁶

In view of South Africa's social context, accredited training programmes on the preparation and compilation of the pre-sentence report should be introduced as a matter of priority. South Africa now has a new democracy where capacity building and redressing the inequalities of the past should also be addressed with regard to role-players and pre-sentence reports. In addition, quality expertise becomes even more imperative in the light of the envisaged introduction of lay assessors in regional courts.⁹⁷ Research indicates that the testimony of experts is more decisive where lay persons have to make judgements.⁹⁸ Biased and unreliable information can therefore lead, far more easily, to perpetrators not receiving appropriate sentences.⁹⁹ Training and accreditation of expert witnesses in general appear to be necessary to professionalise the industry.¹⁰⁰

⁹⁶ AE Van der Hoven *Forensic Criminology (Tutorial Letter 501/2004)* 125-217 has compiled some guidelines for criminology students at honours level with regard to the compilation of pre-sentence reports.

⁹⁷ Magistrates' Courts Amendment Act 67 of 1998. See *infra* par 7.6.4.

⁹⁸ A Ramon, F Francisca and R Santiago 'An assessment of information integration theory and confirmatory bias hypothesis in judicial proceedings: A case of rape and murder' in Czerederecka, T Jaskiewicz-Obydzinska and J Wojcikiewicz (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 301.

⁹⁹ Inns of Court School of Law *op cit* (n 93) 240 refers to 'those preparing reports exercising their discretion in ways which can have serious and lasting consequences for offenders under sentence'.

¹⁰⁰ M Solon 'Experts: amateurs or accredited?' (2004) 154:7117 *New Law Journal* 292. An expert witness certificate has been introduced at Cardiff University which, for example, requires experts to be independently assessed on reports submitted by them. The Academy of Experts in England and Wales also offers an accreditation service: Cohen *op cit* (n 84). It should be noted that the position of assistant probation officer has recently been created in South Africa. Such assistant could *inter alia* help the probation officer in gathering relevant information for pre-sentence reports (s 4A the Probation Services Amendment Act 35 of 2002).

7.6.3 Court-appointed neutral experts

In addition to the need for unbiased and quality expert reports, it was indicated above that there is a need to improve the court's understanding, evaluation and accommodation of behavioural science in the sentencing phase. South African courts are not alone in their struggle to evaluate expert testimony. In the United States of America, statutory guidelines were introduced at the federal level in an endeavour to clarify how courts, as gatekeepers,¹⁰¹ should evaluate the reliability, but not the weight or credibility, of expert evidence for purposes of admissibility.¹⁰² Notwithstanding this, the courts are also authorised to appoint an expert of their own choosing. Such an expert would be a testifying witness who acts in an advisory capacity in complex cases that extend beyond the courts' knowledge.¹⁰³ Despite the fact that such appointments are possible, this option is often underutilised. The failure to use experts in this regard has been said to be

¹⁰¹ *Daubet v Merrel Dow Pharmaceuticals Inc* 113 S Ct 2786 (1993).

¹⁰² Federal Rule of Evidence 702. See DL Mogck 'Are we there yet? Refining the test for expert testimony through Daubert, Kumho Tire and proposed Federal Rule of Evidence 702' (2000) 33 *Connecticut Law Review* 303 who states that rule 702 provides as follows: 'If scientific, technical, or other specialised knowledge, will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise, if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case.' Mogck refers to a remark made by Lord Salisbury in 1877 that '[n]o lesson seems to be so deeply inculcated by the experience of life as that you never should trust experts. If you believe the doctors, nothing is wholesome: if you believe the theologians, nothing is innocent: if you believe the soldiers, nothing is safe'. Believing them to be unreliable, the Marquis concluded that 'experts all require to have their strong wine diluted by a very large admixture of insipid common sense' (Letter to Lord Lytton (June 15, 1877) in Lady Gwendolyn Cecil, 2 *Life of Robert, Marquis of Salisbury* 158 (1921).

It should be reiterated at this stage that admissibility is not the issue during the sentencing phase (which is however precisely the purpose of this rule in the United States of America), but judicial officers could fruitfully implement these guidelines during the evaluation of expert testimony.

¹⁰³ Federal Rule of Evidence 706. The rule specifies a set of procedures governing the process of appointment, the assignment of duties, the reporting of findings, testimony, and compensation for experts. Supplementing the authority of Rule 706 is the broader inherent authority of the court to appoint experts who are necessary to enable the court to carry out its duties. See Federal Judicial Centre 'Use of court-appointed experts and special masters' in *Reference Manual on Scientific Evidence* (1994) 58.

based on 'just (a) plain lack of knowledge about the potential benefits'. Furthermore, it has been stated that such failure 'may be the result of ingrained conceptions about the adjudicatory process and the unease of judges and lawyers who believe that introducing neutral experts will threaten their roles in the process'.¹⁰⁴ There are two main instances in which the use of neutral experts is justified on occasion. In the first instance, neutral experts 'advance(d) the court's understanding of the merits of the litigation and enhance(d) the court's ability to reach a reasoned decision on the merits'.¹⁰⁵ Secondly, this 'need for assistance in decision making often arose when the parties failed to present credible expert testimony, thereby failing to inform the trier of fact on essential issues'.¹⁰⁶ Yet, the appointment of an expert by the court is not perceived as a cure-all.¹⁰⁷

Criticism of court-appointed experts focuses on their questionable neutrality and the significant impact which they can have without being cross-examined in the

¹⁰⁴ E Green 'Court-appointed neutral experts' *The Complete Courthouse, in Dispute Resolution Devices in a Democratic Society*:
(<http://www.law.harvard.edu/publications/evidenceiii/articles/green.htm>)
(accessed 02/08/2004).

According to the author, the judge and lawyer fear that the neutral expert will take their power away from them, since they control the adversary process and the judge is the only neutral person in the courtroom. Bringing a neutral expert into the process destroys the judge's monopoly on neutrality and the parties' control of the expert information and opinion. If, states the author, the latter leads to inaccurate fact-finding, some adjustments would seem appropriate. The traditional roles of judges and lawyers should give way slightly if adjustments would rationalise the adjudicatory process, thereby making it fairer and more efficient (at 61).

¹⁰⁵ JS Cecil and TS Wilging 'Accepting Daubert's invitation: Defining a role for court-appointed experts in assessing scientific validity' (1994) 43 *Emory Law Journal* 995 1009.

¹⁰⁶ Cecil and Wilging *op cit* (n 105) 1010.

¹⁰⁷ DQ Haney 'Judges back use of neutral experts' *Associated Press* February 16 1998. It is also pointed out that the courts in the United States of America have long relied on 'amicus curiae' briefs from professional organisations, thereby allowing written opinions and facts about scientific controversies to be put before the courts.

same way as party-appointed experts.¹⁰⁸ With regard to the latter concern, a project was initiated in the United States of America to ensure *inter alia* that the experts provided by the project were competent, respected members of their discipline and that any conflict of interest was detected beforehand.¹⁰⁹ Although this option is available only during pre-trial proceedings, and during the trial itself, it could be of some assistance during sentencing. It also serves a purpose similar to that of the option mentioned below.

A less formal option in South Africa is the possibility of calling neutral experts as witnesses before sentencing in terms of s 274(1) of the Criminal Procedure Act 51 of 1977. This option was discussed above. Despite the fact that the courts have exercised this option to some extent, it does not always appear to have been of real assistance. This could be attributed to *inter alia* the vague reports tendered regarding matters that are of concern to the court,¹¹⁰ which highlights the lack of expertise among experts. One explanation offered for incompetent performance is the lack of partisan interest.¹¹¹ However, in acknowledging the

¹⁰⁸ Mogck *op cit* (n 102) 333-334. See TM Crowley 'Help me Mr. Wizard! Can we really have "neutral" Rule 706 experts? at <http://www.law.msu.edu/lawrev/98-4/crowley.htm> (accessed 02/08/2004) 18 for a warning not to talk about Rule 706 experts in ways that describe science and expert testimony as neutral – 'the truth that science can never be value free is complex and challenging, but the recognition of that truth is the starting point for moving beyond simplistic rhetoric and assumptions and beginning to deal with the very real technical problems and value choices that confront us in contemporary litigation'.

¹⁰⁹ D Runkle 'Court-appointed scientific experts: A demonstration project of the American Association for the Advancement of Science' (1999) Dec *Fed. Discovery News* 1, 3. Three subcommittees are involved, namely Education, Professional Standards and Evaluation, and Recruitment and Screening Panel. Both experts and judges are also educated.

¹¹⁰ For example, the availability, quality and success rate of sexual offender rehabilitation programmes in prisons.

¹¹¹ P Alldridge 'Scientific evidence and comparative criminal procedure' (1999) 3 *International Journal of Evidence and Proof* 152.

professional integrity of experts, concern must be expressed about such a jaundiced view.¹¹²

A further problem faced by the judicial officer is that of not being able to consult with the expert witness beforehand in order to ascertain the latter's level of expertise. One way to address this is to put certain questions to the expert so that the expert can prepare a proper report for the court.¹¹³ The concept of the neutral expert might be perceived as being controversial and contrary to the legal culture of distrusting experts during the trial phase,¹¹⁴ but the same objections do not hold before sentencing. Although sentencing officers have vehemently defended their discretion in sentencing,¹¹⁵ neutral, expert advice is particularly relevant in the light of the increased recognition of the use of behavioural scientists in sentencing sexual offenders. The neutral expert should

¹¹² Meintjes-van der Walt *op cit* (n 33) 139.

¹¹³ Compare Federal Judicial Centre *op cit* (n 155) 63. A checklist of matters is provided which, after the parties have been given an opportunity to comment on it, should be addressed in connection with the formal order for a court-appointed expert. The checklist refers *inter alia* to the specific tasks assigned to the expert and the subject on which the expert is to express an opinion. It also covers issues such as whether the parties may have formal access to the expert, whether the expert may have informal communications with the court and whether these must be disclosed to the parties.

See also M Wasik *The Sentencing Process* (1997) xviii for an explanation of the need felt in 1991 in the United Kingdom for the probation officer to address the sentencer's concerns with regard to the seriousness of the offence, instead of merely investigating and detailing the offender's background. See, further, N Stone 'Pre-sentence reports, culpability and the 1991 Act' (1992) *Criminal Law Review* 558-67.

(As far back as the early 1990s, the United Kingdom became disillusioned with the rehabilitative model of sentencing. Accordingly, a shift in sentencing philosophy took place towards 'just deserts' and punishments proportionate to the seriousness of the offence developed (Wasik *ibid*). Two questions arise in this regard. First, should South Africa not take note of the reasons for such disillusionment, and, secondly, is South Africa not trying to work according to two conflicting sentencing philosophies, namely punishment and rehabilitation?)

¹¹⁴ See Meintjes-van der Walt *op cit* (n 33) 137-138 for a discussion of the advantages and disadvantages of court-appointed neutral experts during the trial phase and her viewpoint that such a concept could not be implemented with success in South Africa.

¹¹⁵ In *S v Dodo* 2001 (1) SACR 594 (CC), the prescribed minimum sentences laid down by the Criminal Law Amendment Act 105 of 1997 were challenged as being unconstitutional in that it was argued that they took away the judicial officer's sentencing discretion.

be able to maintain a more objective approach as opposed to party-introduced experts, who unconsciously associate themselves with the party on whose behalf they testify. However, experts will often belong to some kind of non-governmental organisation which, for instance, provides a specific service to the victim. This, however, gives rise to the paradox that, by gaining experience in the very environment necessary to acquire such experience, the expert may be seen by the defence as displaying some form of bias.

It is submitted that, in its search for expertise, the court must not simply rely on the probation officer assigned to the court, but must be willing to look further afield,¹¹⁶ for the final responsibility to make a fair and informed decision rests on the judicial officer. Attention must therefore be given to the compilation of a list of respected experts who are acknowledged experts in their fields, which list can then be made available to the court. Although well-briefed, neutral experts would certainly contribute to more objective and comprehensive evidence, the problem of understanding, evaluating and accommodating behavioural science has still not been fully addressed.

7.6.4 Expert assessors

Another option that needs to be investigated for the purpose of understanding, evaluating and accommodating behavioural science is the appointment of expert assessors. The court has the authority to appoint expert assessors for sentencing purposes.¹¹⁷ In the superior courts,¹¹⁸ a maximum of two¹¹⁹ expert assessors

¹¹⁶ Kittrie *et al op cit* (n 64) 315, in their proposal regarding standards in respect of sentencing information, address the situation where there is a need for further study and observation of the accused after consideration of the pre-sentence report. As a guideline it is provided that the judge may then take the necessary steps to obtain such information, including enlisting psychiatrists or other professionals.

¹¹⁷ Section 145 of the Criminal Procedure Act 51 of 1977 and s 93*ter* of the Magistrates' Courts Act 32 of 1944 as amended by the Magistrates' Courts Amendment Act 67 of 1998. Zeffert *et al op cit* (n 48) 306 argue that the reason for the enactment of these sections is that the evaluation of expert evidence is a matter for experts.

may be appointed on the basis of the opinion of the presiding judge. An assessor must either have experience in the administration of justice or must be skilled in any matter that may fall to be considered during the trial. As indicated above, the court, during the sentencing phase in child sexual abuse cases, relies to a great extent on psychological expertise in its quest for an appropriate sentence, yet law and psychology exist in two separate paradigms.¹²⁰ Matters of risk assessment, risk management and rehabilitation certainly fall within the field of expertise that should be considered during sentencing of the sexual offender. Yet, in none of the cases investigated earlier was there any indication of the use of behavioural experts as assessors to assist the court by using their skills. The appointment of expert assessors is therefore a feasible option for high courts, but is an option that they seldom exercise outside of the trial phase. The present sentencing practice of referring all child rape cases to the high court for sentencing in terms of the Criminal Law Amendment Act 105 of 1997 further necessitates a paradigm shift in this regard.

Unlike the high court, lower courts are not explicitly authorised to make use of expert assessors. However, possible law reforms aim to ensure that the presiding officer in a sexual offence case may be assisted by an assessor who has knowledge or experience of child development, of the impact of sexual offences on victims and of the characteristics of sexual offenders.¹²¹ Notwithstanding this, the system of lay assessors already makes provision for the discretionary appointment of one or two assessors for imposition of sentence when this is

¹¹⁸ Section 145(1)(a) of the Criminal Procedure Act 51 of 1977.

¹¹⁹ Section 145(2) of the Criminal Procedure Act 51 of 1977.

¹²⁰ Domachowski *op cit* (n 65).

¹²¹ Schedule 2 to the Criminal Law (Sexual Offences) Amendment Act 2003 proposes amendments to this effect to s 145 of the Criminal Procedure Act 51 of 1977 and s 93*ter* of the Magistrates' Courts Act 32 of 1944.

considered to be expedient for the administration of justice.¹²² In determining whether such appointments should be made, the presiding judicial officer has to take into account such factors as the nature and seriousness of the offence¹²³ and 'any other matter or circumstance which he or she may deem to be indicative of the desirability of summoning an assessor or assessors'.¹²⁴ The growing notion that sexual offenders constitute a special category of offenders¹²⁵ that demands an interdisciplinary approach¹²⁶ would thus justify the appointment of assessors with expertise in matters relevant to the sexual offender and the potential impact of harm upon victims. Notwithstanding the general aim of incorporating lay people as assessors who are 'preferably involved in community activities',¹²⁷ the above-mentioned factors would thus make it possible, and preferable, to appoint people with special skills relevant to sexual offences against children.¹²⁸ It might also be possible to reconsider the meaning of the word 'lay' and interpret it in a way that means any person who is not a lawyer by training.

Several problems may however be encountered with the assessor system in the magistrates' courts, since such system is still at the pilot stage.¹²⁹ First, only persons who are registered on a roll of assessors in terms of the regulations may

¹²² Section 93*ter* (2)(c).

¹²³ Section 93*ter* 4(a)(iii).

¹²⁴ Section 93*ter* 4(a)(vii).

¹²⁵ P Seago *Concise College Texts: Criminal Law* 3 ed (1989) 250.

¹²⁶ Law Commission Report 12; See also Le Roux and Mureriwa *op cit* (n 67) 47.

¹²⁷ Lay Assessors' Regulations 2004 *Determination of Criteria Pertaining to Assessors* s 6(6)(b).

¹²⁸ See also Du Toit *et al op cit* (n 37) service 27 21-9.

¹²⁹ The magisterial districts of the Cape, Gordonia, Polokwane, Port Elizabeth, Pretoria and Wynbeg are involved.

be summoned to court.¹³⁰ Secondly, interested persons must apply to an area assessors' committee for registration on the role of assessors.¹³¹ This gives rise to questions such as who will apply and what criteria will be used to determine the level of expertise of the applicant. Furthermore, will the committee be empowered to deal with such matters?¹³² A further question is whether, in areas where this legislation is not implemented as part of the pilot project, the regional courts can still appoint an expert assessor for the purpose of a community-based sentence prior to the coming into operation of the amendments.¹³³

The precise role of a specialist assessor will influence arguments for or against this practice. With the envisaged role of the assessor in the sentencing phase being that of an advisor only,¹³⁴ the common concern about untested partisan evidence will not apply. Yet there may be another inherent danger, and that is that the expert assessor may still belong to one school of thought in a particular field and be accorded extreme authority by virtue of his or her position as a court expert.¹³⁵ It has been suggested that the role should be confined to one of putting informed questions to party-introduced experts in order to clarify issues

¹³⁰ Section 93*ter* (1) of the Magistrates' Courts Act 32 of 1944.

¹³¹ Section 6(1) of the Lay Assessors' Regulations, 2004.

¹³² According to s 6(6)(d) of the Lay Assessors' Regulations, 2004, a person must provide a short description of his or her profile and is disqualified from being a lay assessor on the grounds of a criminal record for violent offences.

¹³³ Section 93*ter* of the Magistrates' Courts Act 32 of 1944 before amendment.

¹³⁴ Du Toit *et al op cit* (n 37) service 27 21-5. In *S v Lekaota* 1978 (4) SA 684 (A), it was held that, although in the high court the decision regarding punishment is entirely a matter for the judge and the assessors have no say therein, it is not irregular for the judge to consult with his assessors. The judge must however decide on the sentence himself/herself. Section 93*ter* (7)(a) of the Magistrates' Courts Act 32 of 1944.

¹³⁵ I Freckleton 'Court experts, assessors and the public interest' (1986) 8 *International Journal of Law and Psychiatry* 186, as referred to in Meintjes-van der Walt *op cit* (n 48) 140.

for the judicial officer.¹³⁶ Further concerns that might be valid with regard to the expert assessor pertain to fee arrangements and the question as to who to use as an assessor when the leading experts in the field are testifying.¹³⁷

As opposed to problems encountered during the trial, the advantages of using an expert assessor during sentencing are that the phase is a much shorter judicial proceeding and, in child sexual abuse cases, will normally involve only one discipline, namely behavioural science. A further argument in favour of expert assessors is that the mere absence of cross-examination implies that the expert will not perceive himself or herself as being an advocate for any particular party, but rather as an advisor.¹³⁸ By not being forced to defend a viewpoint, the assessor is able to take a more balanced approach rather than being rigid and 'sticking to his or her guns' when challenged.¹³⁹

7.7 CONCLUSION

Meintjes-van der Walt asserts that 'mistrust permeates adversarial thinking with its approach to experts not introduced by either party'¹⁴⁰ and suggests therefore that the introduction of both neutral, court-appointed experts and expert assessors will not be successful in the pre-trial and trial phases. Despite this viewpoint, it is submitted that, because of the difference in the nature of, and issues dealt with during, the sentencing phase, for example the dangerousness

¹³⁶ *Ibid.* Compare E Siegismund 'The function of honorary judges in criminal proceedings in Germany' 112th *International Training Course: Visiting Experts' Papers* 122 who points out the risk of unfair questions or thoughtless remarks by lay judges, thereby showing bias. The same concern would apply to the expert assessor who is not familiar with legal proceedings.

¹³⁷ I Feckelton, P Reddy and H Selby *Australian Perspectives on Expert Evidence: An Empirical Study* (1999).

¹³⁸ JD Martin 'Historians at the gate: Accommodating expert historical testimony in federal courts' (2003) 78 *New York University Law Review* 1518 at 1527.

¹³⁹ *Ibid.*

¹⁴⁰ Meintjes-van der Walt *op cit* (n 48) 140.

and rehabilitation of the sexual offender, coupled with the determination of the future impact of the crime on the victim, expert assistance is necessary and that neutral experts and expert assessors will be more readily accepted in the sentencing phase of child sexual abuse cases. It is further submitted that the authority to call an expert in terms of the simplified procedure provided for in s 274(1) of the Criminal Procedure Act 51 of 1977 is completely underutilised. Finally, the present, newly introduced system of assessors in the lower courts appears to be too cumbersome. A similar section to the one according the high court the right to expert assessor assistance should therefore be introduced in the lower courts.

CHAPTER 8

REGULATING JUDICIAL SENTENCING DISCRETION IN CHILD SEXUAL ABUSE CASES

*'Sentencing is a complex and difficult exercise. It can never be a rigid, mechanistic or scientific process. Consistency of approach by sentencers is essential to maintain public confidence. But perfect consistency in outcome is impossible to achieve because of the infinite variety of circumstances with which, even in relation to one kind of offence, the courts are presented.'*¹

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¹ Sentencing Guidelines *Council Guideline Judgments Case Compendium* (2005) i at: http://www.sentencing-guidelines.gov.uk/docs/complete_compendium.pdf (accessed 1/04/05).

8.5 CONCLUSION

8.1 INTRODUCTION

The judicial officer's sentencing discretion has been described as a pillar in our law that should be jealously guarded by everyone involved.² It was also the basis of the judiciary's outcry against the Criminal Law Amendment Act 105 of 1997, which introduced the concept of minimum, mandatory sentencing.³ In contrast, Terblanche⁴ points out that too much emphasis is placed on a free discretion and asserts that judicial officers in any case restrict their own discretion in that some reduction in discretion is in fact inevitable in attaining the goal of consistency. However, the traditional guidance given in this regard by courts of appeal, legislative sentencing options and restrictions,⁵ and, since May 1998, the introduction of minimum-sentence legislation,⁶ have been criticised.

First, guidelines laid down by the appeal courts are perceived as vague and unsatisfactory. Secondly, the different approaches to the aims of punishment further complicate the matter of consistent sentences, as was illustrated in the

² E du Toit *Straf in Suid-Afrika* (1980) 127; South African Law Commission (hereafter 'the Law Commission') *Sexual Offences: Process and Procedure* Discussion Paper 102 Project 107 (2001) 695. See also chapter 1 par 1.1.3.

³ See chapter 2 par 2.1.2.

⁴ SS Terblanche *The Guide to Sentencing in South Africa* (1999) 151 (see 121-151 for a discussion of the sentencing discretion of South African judicial officers).

⁵ Section 276 of the Criminal Procedure Act 51 of 1977; Sexual Offences Act 23 of 1957.

⁶ The Criminal Law Amendment Act 105 of 1997 controls sentencing in child sexual abuse cases by prescribing minimum, mandatory sentences. For *inter alia* rape where the victim is under the age of 16 years, or where grievous bodily harm is inflicted, life imprisonment must be imposed, and for indecent assault on a child younger than 16 years involving the infliction of bodily harm, imprisonment for a period of 10, 15 and 20 years must be imposed for first, second and third offenders respectively. In terms of s 51(3)(a), the court has a discretion to impose a lesser sentence than that prescribed where 'substantial and compelling' circumstances are present. See chapter 2 for a detailed discussion.

analysis in chapter 5 of cases involving extra-familial paedophiles.⁷ In addition, although sentences for the offence of rape involving children are now more severe than before the enactment of the Criminal Law Amendment Act 105 of 1997,⁸ it would appear that judicial officers tend to emphasise the merits of each particular case (in order to avoid injustice to the accused)⁹ rather than attempting to develop general rules.¹⁰ The legislator's intention of creating widely applicable, general sentencing rules by way of the Criminal Law Amendment Act 105 of 1997 has not been given effect to by the courts in a standardised and consistent manner.¹¹ Lastly, existing guidelines from higher courts in child sexual abuse cases have not been easily accessible since they are not available in one single referencing resource.

While acknowledging that some disparity is inevitable within the South African context where sentences are designed to suit the circumstances of each particular case, the South African Law Commission (hereafter 'the Law Commission') has, as mentioned above, voiced its concern about unjustified disparity.¹² Such disparity occurs where sentences are not uniform owing to lack of consensus across the judiciary on the relative seriousness of offences (which

⁷ Law Commission *op cit* (n 2) 703.

⁸ Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000a) 24.

⁹ See *S v Malgas* 2001 (1) SACR 469 (SCA) at 485d for the decision that the court may deviate from the prescribed minimum sentence when the existence of 'substantial and compelling circumstances' would lead to 'an easily foreseeable injustice' (see chapter 2 par 2.1.2).

¹⁰ Law Commission *op cit* (n 2) 732.

¹¹ See SS Terblanche 'Aspects of minimum sentence legislation: Judicial comment and the court's discretion' (2001) 14 *SACJ* 18-19 where the Criminal Law Amendment Act 105 of 1997 is criticised as being a failure and of causing more disparity in sentencing. See also chapter 2 par 2.1.2 for a discussion of the initial, striking inconsistency between judges in applying the 'substantial and compelling circumstances' test and of the difficulties such test has caused.

¹² *Op cit* (n 2) 732. Terblanche *op cit* (n 3) 151 points out that consistency is perceived to be less absolute than uniformity.

is determined through an informal grading process), owing to the omission or incorrect inclusion of aggravating and mitigating factors, owing to lack of consensus on the relevant circumstances of the offender and owing to lack of consensus on the weight to be given to the various factors that are relevant.¹³ Other aspects indicated earlier which contribute to unjustified disparity include the inconsistent judicial approach to the matter of hearsay and to judicial notice during the sentencing process. It would appear that the courts are willing to follow a more flexible approach only when this will favour the accused.¹⁴

The aim of this chapter is, first, to investigate sentencing principles and guidelines as proposed by the Law Commission over the past few years. Secondly, sentencing guidelines in other jurisdictions, namely England and Wales and the American state of Virginia, are evaluated to assess international approaches to regulating judicial discretion in child sexual abuse cases. Finally, the internal guidelines provided by the Supreme Court of Appeal and other South African higher courts relating to the sentencing process in cases of child sexual abuse are examined briefly.

8.2 THE SOUTH AFRICAN LAW COMMISSION

8.2.1 Sentencing principles

The lack of consistency in sentencing is perceived as a major problem in South Africa.¹⁵ To facilitate a uniformity of approach that would, in turn, lead to greater consistency in sentencing, the proposed new sentencing framework intends to provide more guidance in the form of legislative sentencing principles and

¹³ Law Commission *op cit* (n 2) 732.

¹⁴ See chapter 5 par 5.8.2.

¹⁵ SS Terblanche 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) 120:4 *SALJ* 859.

sentencing guidelines.¹⁶ In this way, a departure is envisaged from case law's separate sentencing principles, which lack 'a clear relationship or hierarchy'.¹⁷ In addition, the principles provide the basis for the envisaged Sentencing Council's sentencing guidelines.¹⁸ These two methods were chosen rather than judicial self-regulation and mandatory, minimum sentencing schemes.¹⁹ It should however be noted that both the Project Committee dealing with sentencing reform in general, as well the one dealing with sexual offences, each proposed a set of sentencing principles. Both of these sets will be examined below.

The Draft Sentencing Framework Bill 2000 formulated the general purpose in sentencing offenders as one of punishment.²⁰ The sentencing principles are accordingly formulated in line with this retributive point of departure. The emphasis is on proportionality with regard to the seriousness of the offence committed.²¹ Further, the determination of the seriousness of the offence is

¹⁶ Law Commission *op cit* (n 8) 28.

¹⁷ *Ibid.* The ideal system envisaged by the Law Commission should 'promote consistency in sentencing, deal appropriately with concerns that particular offences are not regarded with the appropriate degree of seriousness, allow for victim participation and restorative initiatives and, at the same time, produce sentencing outcomes that are within the capacity of the state to enforce them' (*op cit* (n 5) 21 par 1.43).

¹⁸ Section 5(3) of the Draft Sentencing Framework Bill 2000. Section 7(2) provides that the Council will consist of two judges of the Supreme Court of Appeal or high court, two magistrates, the National Director of Public Prosecutions (or appointee on his/her behalf), a member of the Department of Correctional Services, a person not in the full-time employ of the state with special knowledge of sentencing, and the Director of the Council.

¹⁹ Terblanche *op cit* (n 15) 859.

²⁰ Section 2 of the Draft Sentencing Framework Bill 2000 provides: '... to punish convicted offenders for the offences for which they have been convicted by limiting their rights or imposing obligations on them in the requirements of this Act'. The Project Committee on Sexual Offences is also generally in favour of appropriate and severe sentences for sex offenders (Law Commission *Report on Sexual Offences* Project 107 (2002) 266).

²¹ Section 3(1) of the Draft Sentencing Framework Bill 2000.

approached in relation to other categories, or subcategories, of offences in order to ensure a holistic approach.

Two further factors determine the seriousness of the offence. The first is the degree of harmfulness, or risked harmfulness, to the victim as a result of the offence. No definition of harm is provided, but, in the light of recent legislative proposals, it can be assumed that both physical and psychological harm are included,²² particularly with regard to child sexual abuse cases. The inclusion of harmfulness as a characteristic of the seriousness of the offence is probably also the reason for the later recommendation regarding the general training of judicial officers and regarding information on the potential impact of sexual crimes on victims.²³ The second factor that is relevant in determining the seriousness of the offence is the offender's degree of culpability in relation to the offence committed. This factor is refined within the context of child sexual abuse cases. Accordingly, judicial officers should assess, and take into account, the offender's knowledge, use and manipulation of the particular victim's vulnerability for the purpose of sentencing.²⁴

In addition, the following three aims must, subject to the proportionality principle, be optimally combined and balanced:

- Restoring the rights of victims of offences. (Within the context of child sexual abuse cases, this aim appears to underpin the guiding principles

²² The Criminal Law (Sexual Offences) Amendment Bill 2003 proposes an amendment to the definition of rape in the Criminal Law Amendment Act 105 of 1997, schedule 2, part I, (c) to include grievous harm of any kind, thus including the psychological impact of rape. This is in contrast with the approach in s 18 of the Draft Sentencing Framework Bill requiring only serious physical injury for declaration of a dangerous criminal. Compare s 20(1)(c) of the Criminal Law (Sexual Offence) Amendment Bill 2003 which provides for a person convicted of a sexual offence against a child to be declared a dangerous sexual offender.

²³ Law Commission *op cit* (n 20) 372 (in the form of a non-legislative recommendation).

²⁴ *Ibid.*

relating to sexual offences,²⁵ which refer to the objectives of safety and security of victims,²⁶ the promotion of the recovery of the victim,²⁷ and the making of restitution.²⁸)

- Protecting society against the offender.
- Giving the offender the opportunity to lead a crime-free life in the future.²⁹

The last two aims seem to be combined in the long-term objective of considering the rehabilitation of all sex offenders.³⁰ This raises the question whether the seemingly competing objectives of punishment and rehabilitation should not be combined in a unique sentence for sex offenders, either in a secure or controlled setup with specialised rehabilitation programmes or by way of correctional supervision with an individualised, punitive component in addition to rehabilitation programmes.

The absence or presence of relevant previous convictions can have a moderately modifying effect on the criteria of proportionality to the seriousness of the offence.³¹ The concept 'substantial and compelling circumstances' is once again applicable, thereby justifying a departure from the principle of proportionality of

²⁵ Schedule 1 par I(i)-(vi) of the Criminal Law (Sexual Offences) Amendment Bill 2003 provides guiding principles for determining appropriate sanctions for sex offenders.

²⁶ Schedule 1 par I(i) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

²⁷ Schedule 1 par I(ii) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

²⁸ Schedule 1 par I(iii) of the Criminal Law (Sexual Offences) Amendment Bill 2003. This includes material, medical and therapeutic assistance. This could also possibly be linked to the guiding principle in par (k) that a person who commits a sexual offence should be held accountable for his or her actions and should be encouraged to accept full responsibility for his or her behaviour.

²⁹ Law Commission *op cit* (n 20) 373 provides for offender treatment and long-term rehabilitation in the form of non-legislative recommendations.

³⁰ Schedule 1 par I(v) of the Criminal Law (Sexual Offences) Amendment Bill 2003.

³¹ Section 3(4) of the Draft Sentencing Framework Bill 2000.

the sentence to the seriousness of the offence. Reduction of the sentence is to a reasonable extent permissible on the grounds of factors other than the degree of harmfulness, or risked harmfulness, and the offender's degree of culpability in relation to the offence committed.³²

It is submitted that the overriding principle is contained in the last principle indicated by the Project Committee on Sexual Offences, namely that the interests of the victim of a sexual offence should be considered in any decision regarding sanction.

8.2.2 Sentencing guidelines in child sexual abuse cases

A sentencing guideline is defined as a guideline established or revised by the Sentencing Council and published in the Government Gazette.³³ A sentencing guideline should specify sentencing options, as well as their severity, for a particular category or subcategory of offence.³⁴ Terblanche³⁵ argues that our uncodified system of criminal law necessitates the introduction of offence categories, and that more than one similar type of offence can be included in a particular category. This is of importance when dealing with sex offenders, for such offenders are a particularly non-homogeneous group and require the various levels of criminal sexual behaviour to be taken into account.³⁶

³² Section 4 of the Draft Sentencing Framework Bill 2000.

³³ Section 1 of the Draft Sentencing Framework Bill 2000. Note that, apart from its primary function of setting guidelines, the Sentencing Council will also be responsible for setting the monetary value of unit fines, for making policy recommendations regarding the development of community penalties and other sentencing options, for conducting research, for undertaking consultations, for training judicial officers and for producing various publications (Law Commission *op cit* (n 5) 49-50; s 8 of the Draft Sentencing Framework Bill 2000).

³⁴ Section 5(1) of the Draft Sentencing Framework Bill 2000.

³⁵ *Op cit* (n 15) 860.

³⁶ Law Commission *op cit* (n 8) 265.

Sentencing guidelines are restricted to the various sentencing options, namely imprisonment, fines and community penalties.³⁷ As with the broad trend in judgments,³⁸ provision is made for the more detailed grading and ranking of categories of offences according to their relative seriousness and the relevant sentencing options that are prescribed.³⁹

Against the background of the need to protect victims and the community, the Project Committee on Sexual Offences made the following additional recommendations to the proposed Sentencing Council with regard to guidelines for sexual offences:

- Experts in managing sexual offenders should be involved in drafting guidelines.
- Different kinds of sexual offenders require a differential approach.
- Consideration should be given to the possible need for developing guidelines on a community protection model, entailing the need to engage sex offenders in treatment programmes and to provide long-term supervision of dangerous offenders after normal parole.⁴⁰

³⁷ Section 5(2) of the Draft Sentencing Framework Bill 2000. However, this must be understood within the framework of community penalties defined in the Bill. These will consist of correctional supervision and community service, and a wide range of additional conditions will be allowed in terms of ss 30 to 33. The number of months or hours must be specified and a 30 percent deviation is allowed in any direction (s 5(7)(a)), in addition to a suspension option (s 5(7)(b)). See also ss 84 to 84A of the Correctional Services Act 11 of 1998, chapter VI, which regulate community corrections.

³⁸ See chapter 2 par 2.1.2 and chapter 3 par 3.1 1 where the concept 'not the worst category of crime' has emerged in sentencing in child rape cases under the minimum life sentence scheme justifying a deviation, as well as the earlier, similar practice under the death penalty regime.

³⁹ Section 5(3) of the Draft Sentencing Framework Bill 2000. It is of interest to note that s 5(4) allows for different sentencing guidelines for different magisterial districts where the degree of harmfulness differs significantly. In contrast, this trend is not acceptable in Virginia. See *infra* par 4.3.

⁴⁰ Law Commission *op cit* (n 20) 265.

It should be noted that the Draft Sentencing Framework Bill 2000, with its proposals relating to sentencing principles and guidelines, was drafted with the aim of replacing the minimum-sentence scheme regulated by the Criminal Law Amendment Act 105 of 1997. In spite of its initial, intended two-year life span, the operation of this Act has currently been extended to April 2005 and will in all likelihood be further extended. Furthermore, the Draft Sentencing Framework Bill 2000 does not appear to be receiving legislative priority. In the light of this uncertainty, an investigation is conducted below into existing internal guidelines in appeal cases, with the aim of giving them more prominence. However, a brief investigation is first conducted into the approach to sentencing guidelines in foreign jurisdictions.

8.3 FOREIGN DEVELOPMENTS IN REGULATING JUDICIAL SENTENCING DISCRETION

8.3.1 Introduction

Attempts to enhance consistency in sentencing may take various forms, of which sentencing guidelines constitute one method.⁴¹ The contents and format of sentencing guidelines can vary rather widely. Terblanche⁴² indicates four basic foreign approaches, namely the grid-like, mechanical approach found in the federal guidelines of the United States of America and in the state of Minnesota, the narrative style of England and Wales, the Scottish sentencing information system, and the Dutch points system. The jurisdictions of England and Wales, as well as Virginia, have been identified for further exploration, for three reasons. First, academic opinion is that the practice in England and Wales would fit in with

⁴¹ A Ashworth 'Four techniques for reducing sentence disparity' in A von Hirsh and A Ashworth (eds) *Principled Sentencing: Readings on Theory and Policy* 2 ed (1998) 227. The other three methods are statutory sentencing principles, judicial self-regulation and mandatory, minimum-sentencing schemes.

⁴² *Op cit* (15) 861-882. See this article for an in-depth discussion of various systems aimed at educating South African lawyers and academics about the concept of sentencing guidelines as they exist internationally.

the South African legal tradition.⁴³ Secondly, research has indicated that the implementation of guidelines in Virginia has been successful.⁴⁴ Thirdly, there have been recent developments in these jurisdictions with regard to sentencing guidelines in sex offence cases.

The purpose of this investigation is to focus on both the form and content of the guidelines in order to determine the format and kind of guidance, as well as the levels and types of punishment, that are guiding sentencing in child sexual abuse cases internationally. This research is intended as preliminary work in order to further determine what guidelines can best be employed and how judicial officers' cooperation has been achieved.

8.3.2 England and Wales

8.3.2.1 Introduction

Sentencing legislation in England and Wales has been criticised for its complexity and constant change of direction.⁴⁵ In contrast, the development of guideline judgments in England and Wales has, since the 1980s, been described as 'crucial ... and ... a key modern form of guidance' provided by the Court of Appeal.⁴⁶ In

⁴³ Terblanche *op cit* (n 15) 881. He further notes that, in 1998, New South Wales moved away from a sentencing information system towards guideline judgments, similar to the position in England and Wales (880). (See also R Johns 'Sentencing law: A review of developments in 1998-2001' *Briefing Paper* (20/2003) 13 at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/0C05B81C080F963ACA256ECF000715D0> (accessed 19/10/04) for an analysis of recent major developments in sentencing procedure, practice and policy in New South Wales.)

⁴⁴ Sentencing Guidelines Secretariat *Sentencing Guidelines – Experiences from America (Note of Seminars: 28, 29 July 2004)* 10 at <http://www.sentencing-guidelines.gov.uk/> (accessed 08/10/04).

⁴⁵ Wasik 'Going round in circles? Reflections on fifty years of change in sentencing' (2004) *Crim LR* 254.

⁴⁶ Wasik *op cit* (n 45) 260.

1998,⁴⁷ the Sentencing Advisory Panel was established to assist the Court of Appeal in developing new sentencing guidelines and in revising old ones.⁴⁸ Recently, however, the Sentencing Guidelines Council was established to take over the task of issuing guidelines from the Court of Appeal,⁴⁹ although the Sentencing Guidelines Council must still be advised by the Sentencing Advisory Panel. The Sentencing Guidelines Council aims to give authoritative guidance on sentencing and to provide strong leadership regarding the approach to allocation and sentencing issues, based on a principled approach that commands general support.⁵⁰ Thereby, sentencers will be enabled to make decisions on sentencing that are supported by information on the effectiveness of sentences and on the most effective use of resources. It is of importance to note that the context in which the meaning of 'effectiveness' is determined is crucial and that it could vary between the five evenly ranked purposes of punishment as stated in s 142(1) of the Criminal Justice Act 2003, namely protection of the public, punishment, effective reparation, reduction of crime (prevention) or reoffending (rehabilitation).⁵¹ The Sentencing Guidelines Council has a notably more integrated approach, which is reflected in its constitution.⁵² Apart from the Lord Chief Justice as chairperson and seven members representing every tier of the courts dealing with sentencing, there are four non-judicial members with experience of policing, criminal prosecutions, criminal defence and the interests

⁴⁷ In terms of the Crime and Disorder Act 1998.

⁴⁸ Wasik *op cit* (n 45) 260. He points out that the fact that the Court of Appeal accepted 11 out of the 12 sets of advice is indicative of the effective working relationship between such court and the Sentencing Advisory Panel.

⁴⁹ In terms of the Criminal Justice Act 2003.

⁵⁰ At <http://www.sentencing-guidelines.gov.uk/sgchome.html> (accessed 07/10/2004).

⁵¹ *Ibid.*

⁵² At <http://www.sentencing-guidelines.gov.uk/aboutcouncil.html> (accessed 07/10/04). Compare Law Commission *op cit* (n 8) where the main purpose of sentencing is deemed to be punishment.

of victims of crime. In addition, there is representation (not membership) from the National Offender Management Service, covering prisons and probation, and from the Sentencing Advisory Panel, which is represented by its chairperson. Parliament also scrutinises any draft guidelines before they become final.

The Sentencing Guidelines Council further intends to make full use of academic expertise and foreign experience in developing its role.⁵³ According to Ashworth,⁵⁴ the establishment of the Sentencing Guidelines Council is a further step by the legislator in taking back responsibility for sentencing policy after a long period of it being delegated to the judiciary.

The aim of introducing sentencing guidelines in England and Wales is to assist criminal courts in developing a common approach to the sentencing of offenders. Further, by approaching sentencing from a common starting point, both practitioners and the public generally are informed.⁵⁵ In addition, the sentencing guidelines are intended to bridge the gap between government policy and the decisions handed down in individual cases.⁵⁶ Courts are now obliged to take the

⁵³ Sentencing Guidelines Council 1 *The Sentence* (The Sentencing Guidelines Newsletter) Sept 2004 2. The first seminar, attended by sentencing experts from the United States of America, was held in July 2004 *op cit* (n 44).

⁵⁴ A Ashworth *Sentencing & Criminal Justice* 3 ed (2000) 57-58 (see his discussion of the tradition of extended judicial independence in England and Wales and of the Criminal Justice Act 1991 as a measure enabling the legislator to influence sentencing policy in providing a sentencing framework, leaving it to the Court of Appeal to develop more detailed guidelines on practical points). See also C Munro 'Judicial independence and judicial functions' in *Sentencing, Judicial Discretion and Training* (1992) 13.

⁵⁵ Sentencing Guidelines Council *Explanatory Notes to the Criminal Justice Act 2003* (undated) par 56 at <http://www.hms.gov.uk/acts/en2003/2003en44.htm> (accessed 14/09/04).

⁵⁶ Sentencing Guidelines Council *op cit* (n 44).

guidelines into account when deciding on a sentence and must provide reasons when departing from the recommended guidelines.⁵⁷

8.3.2.2 Guideline judgments

The first guideline judgment relevant to the present thesis was given in 1986 in *R v Billam and Others*.⁵⁸ Here, guidance was provided with regard to the appropriate sentences in rape cases. Such guidance was based on a structure comprising four starting points in respect of offences at different levels of seriousness, with specific aggravating factors justifying a substantially more severe sentence.⁵⁹ At the lowest level of seriousness, it appears that a standard category of rape by an adult offender has been created, without the presence of any aggravating or mitigating circumstances. Five years' imprisonment was laid down as the starting point for this offence. Secondly, where the offender is a person in a position of responsibility towards the victim (for example in the case of teacher/pupil), or where two or more offenders are involved, or where the victim's abode was entered, or where the victim was abducted, the starting point is eight years' imprisonment. A third starting point of 15 years is applicable where a number of girls were involved and where the offender embarked on a 'campaign of rape'. Lastly, life imprisonment would be the starting point in the case of the likelihood of ongoing danger to women owing to, amongst others, a gross personality disorder.⁶⁰

⁵⁷ Section 174 of the Criminal Justice Act 2003 places a duty on courts not only to give reasons for sentence, but also to explain the sentence.

⁵⁸ (1986) 8 Cr App R (S) 48; [1986] All ER 985. This case dealt with *Billam* and 16 other accused persons from different cases.

⁵⁹ The Court of Appeal seemingly relied on the Criminal Law Revision Committee's *15th Report on Sexual Offences* (Cmnd 9213 (1984)) for its view of rape (Ashworth *op cit* (n 53) 114).

⁶⁰ See also *R v Offen* [2001] 1 WLR 253 which requires risk to the public for the imposition of life imprisonment.

Aggravating factors that should increase the sentence are specifically listed. They include more than the usual violence, the use of a weapon, repeated rape, careful planning of the act, previous convictions, subjection of the victim to further indignities, the very young age of the victim and 'special, serious' after-effects on the victim (physical and mental). In terms of the guideline, the rape of a 'not-so-young child', where no serious harm is proved and the offender was in no position of responsibility towards the child, would thus attract a sentence of five years. *Billam*⁶¹ was criticised for being vague in omitting to suggest the weight that should be given to each factor, either singly or in combination.⁶² Almost a decade later, a calculated application of the aggravating factors in *Billam*⁶³ took the starting point for raping a child up to 13 years.⁶⁴

With regard to incest, a guideline judgment in 1989⁶⁵ divided the offence into three categories according to the age of the girl. Where the girl is under 13, the offence is treated similarly to rape. What is alarming, though, is that when the girl is over 16 and has instigated the offence, the sentence ranges between a nominal penalty and three years. It would appear that a parent's moral duty to resist such a situation is not taken into account in determining the seriousness of the offence. Where the girl's age ranges from 13 to 16, a sentence between five and three years is suggested. The aggravating factors to consider are the girl's physical or psychological suffering as a result of the incest; the fact that the incest continued at frequent intervals over a period of time; the fact that the girl was terrified of the father or was threatened; the fact that the incest was

⁶¹ *Supra* (n 58).

⁶² Ashworth *op cit* (n 64) 114.

⁶³ *Supra* (n 58).

⁶⁴ *Attorney-General's Reference* No. 10 of 1995 (1996) 2 Cr. App. R. (S.) 122.

⁶⁵ *Attorney-General's Reference* No. 1 of 1989 (1989) 11 Cr. App. R. (S.) 409.

accompanied by perversions abhorrent to the girl, for example sodomy or fellatio; the fact that the girl has become pregnant; and the fact that the offender committed similar offences against more than one girl. Possible mitigating factors are a guilty plea; genuine affection on the part of the offender rather than an intention to use the girl simply as an outlet for his sexual desires; the fact that the girl has had previous sexual experiences; the fact that the girl made deliberate attempts at seduction; and the fact that the victim and the family will benefit from a shorter term of imprisonment.

In 2002, the Sentencing Advisory Panel proposed a revision of *Billam*⁶⁶ to reflect new legislation and changes in the attitude to rape.⁶⁷ Secondly, in the absence of any existing guidance, it aimed to address the more lenient sentencing practices reflected with regard to relationship rape as opposed to stranger rape. The structure of *Billam*⁶⁸ was retained, and the key recommendation, based on deliberation and public consultation,⁶⁹ was that, for sentencing purposes,

⁶⁶ *Supra* (n 58).

⁶⁷ See Sentencing Advisory Panel *Rape: Advice to Court of Appeal* (24 May 2002) Introduction par 8 for relevant legislative changes since 1986, including recognition of male rape and marital rape at:
http://www.sentencing-advisory-panel.gov.uk/c_and_a/advice/rape/forward.htm
(accessed 13/04/03).

Sentencing statistics indicated leniency, yet it was impossible to determine from them why 25 percent of sentences below five years departed from *Billam*, or whether individual circumstances justified this (par 7). Further, the number of reported cases of relationship rape largely increased, while the sentencing practices were more lenient than in the case of stranger rape.

⁶⁸ *Supra* (n 58).

⁶⁹ The Panel Chairperson stressed the fact that, when the Court of Appeal issues guidelines based on the Panel's advice, this is neither on the spur of the moment nor a response to media pressure. Surrey Social and Market Research, University of Surrey, was commissioned to carry out research. Not only was insight obtained into the general public's perceptions regarding rape, but also into the experience of victims through individual interviews. Although stranger rape was seen as a more frightening and potentially more dangerous experience, the breach of trust involved in relationship or acquaintance rape was considered as making it equally serious. Therefore, the victim's sense of violation is just as great. For the full report, see Sentencing Advisory Panel *Research Report – 2: Attitudes to Date Rape and*

acquaintance rape and relationship rape should be treated as no less serious than stranger rape. This advice was accepted in the guideline judgment of *R v Millberry and Others*.⁷⁰

For the first time, concern about children as victims of rape started to feature explicitly. The offence of rape of a child was elevated to the second level, attracting eight years as a starting point⁷¹ and the presence of children during the commission of the rape was added as an aggravating factor. Further, in an attempt to clarify the assessment of the seriousness of individual rape charges, the court outlined three issues to be considered, namely the degree of harm to the victim, the level of culpability of the offender, and the level of risk posed by the offender to society.⁷² Soon thereafter, as a result of a submission by the Attorney-General, these guidelines were extended to apply to all other categories of sexual offences, adding the need to deter others from acting in a similar way.⁷³ In addition, direction was also given as to the recognised need for long-term supervision after release from custody in order to prevent the commission of further offences and to further the rehabilitation of the offender.⁷⁴

Relationship Rape; A Qualitative Study (May 2002) at <http://www.sentencing-advisory-panel.gov.uk/research/rape/forward.htm> (accessed 13/04/03).

⁷⁰ [2003] 1 CR App R (S) 396; [2003] 2 All ER 939. The aggravating and mitigating factors identified in this case were later confirmed in *R v Corran and others* [2005] EWCA Crim 192 which forms the basis for guidelines for offences under the Sexual Offences 2003 Act.

⁷¹ *R v Millberry and Others supra* (n 70) at par 20.

⁷² *R v Millberry and Others supra* (n 70) at par 8.

⁷³ *Attorney-General's Reference* (Nos 91,119, 120, of 2002) [2003] 2 Cr App R (S) 338. Except for deterrence, these considerations closely followed the new s 143(1) of the Criminal Justice Act 2003 on determining the seriousness of an offence.

⁷⁴ Guideline judgment in *R v Nelson* [2002] 1 Cr App R (S) 565.

8.3.2.3 Draft sentencing guidelines for implementation of the Sexual Offences Act 2003

The Sexual Offences Act 2003⁷⁵ came into force in May 2004. The Act led to a paradigm shift by recognising trauma to victims and by focusing on protection of the public against the fear of sexual offences. Prior to the commencement of the Act, the Sentencing Advisory Panel embarked on the complex task of structuring sentencing guidelines for the whole new range of sexual offences in a way that links custodial and non-custodial sentences to the seriousness of the offending behaviour.⁷⁶ Sexual offences are classified as non-consensual and as those involving ostensible consent of a child and others.⁷⁷ Consideration is given to the question of the impact of sexual crimes by referring to children within the categories of harm that is acknowledged. Generally, the main forms of harm considered inherent in all, or some, sexual offences are acknowledged as being:

- violation of the victim's sexual autonomy (this is inherent in all non-consensual sexual offences; further, where the victim is coerced or exploited in cases of familial abuse and abuse of trust);
- exploitation of a vulnerable victim (this is perceived as a defining feature of sexual offences involving children);

⁷⁵ This Act was largely based on recommendations contained in the Home Office's review of sexual offences published in the report, *Setting the Boundaries*, July 2000, and on the categorisation adopted in the White Paper HMSO *Protecting the Public*, November 2000 (Cm 5668). New offences were created, old ones were redefined and certain maximum penalties were changed. Of particular interest is the new risk-of-sexual-harm order in Part 2, which is specifically designed to protect children from sexual harm. In terms of this order, anyone can be prevented from engaging in sexually explicit conduct or communication, such as sending a child an indecent sms, pornography or e-mail if such person has engaged in such conduct or communication on at least two occasions in the past. For criticism of this 'stigmatising' measure applicable to persons not having been convicted of an offence, see S Shute 'The Sexual Offences Act 2003 (4) New civil preventative orders: Sexual offences prevention orders; foreign travel orders; risk of sexual harm orders' (2004) *Crim LR* 417. In addition, chapter 5 of the Criminal Justice Act 2003 contains provisions relating to dangerous offenders committing special sexual offences as per part 12, schedule 15.

⁷⁶ Sentencing Advisory Panel *Sentencing Guidelines on Sexual Offences: Consultation Paper* (12 February 2004).

⁷⁷ Sentencing Advisory Panel *op cit* (n 76) 10.

- distress or embarrassment to the victim (all sexual offences are perceived to cause psychological distress or fear to the victim).⁷⁸

However, additional harm may be proved. This can be done by leading evidence of, for example, exceptional psychological trauma, pregnancy arising from the rape, the contraction of sexually transmitted diseases or the suffering of physical injury.

In addition to the previous guidelines' combination of offender culpability and level of harm caused (as mentioned above),⁷⁹ the nature of the sexual activity now contributes to the seriousness of the offence. The broad description of 'sexual touching' is broken down into thirteen levels to indicate decreasing levels of seriousness.⁸⁰ It is not the aim here to fully research the proposals in the Consultation Paper, but only to provide examples of how the matter is approached at this time. It should be noted that the starting points refer only to convictions after contested trials; thus pleas of guilty might attract different sentences.⁸¹ In the case of the rape of a child under 16,⁸² the following

⁷⁸ *Ibid.* There is a fourth form of harm that is referred to as socially unacceptable behaviour. This includes an indecent act with an animal or sexual activities in public lavatories. However, such form is not relevant for the purposes of the present thesis.

⁷⁹ *Ibid.* An intention to cause worse harm is perceived as lying at the highest level of criminal culpability. Little imbalance between culpability and harm caused which can complicate the determination of seriousness is foreseen, except in *inter alia* the excitement offences, the preparatory offences, and the new offence of 'meeting a child following sexual grooming'.

⁸⁰ Sentencing Advisory Panel *op cit* (n 76) par 18. See also the lists of aggravating factors for non-consensual and ostensible consensual cases at par 54-64. When abuse of a position of trust is inherently part of the offence, this would not be taken into account as an aggravating factor.

⁸¹ See *infra* (n 115) for reference to the guidelines on the reduction of sentences attracted by a plea of guilty.

⁸² Sections 1 and 5 of the Sexual Offences Act 2003. In terms of this Act, children are now considered to be those younger than 18 years.

guidelines,⁸³ which appear to accord with the higher starting point in respect of rape set out in the *Millberry* guidelines, are suggested:

- '8 years custody (no aggravating or mitigating features);
- 10 years custody (for cases where certain aggravating features are present, e g abduction, abuse of trust, more than one offender);
- 15 years plus custody (where the offender has carried out a campaign of rape);
- life imprisonment (where defendant is likely to remain a danger to society for an indefinite time).⁸⁴

The above sentencing guidelines from England and Wales with regard to the rape of a child under 16 appear, on the face of it, to result in less severe sentences when compared with the current sentencing practice in South Africa. In contrast, those sentencing guidelines in the subcategory of sexual assault (non-penetrative sexual behaviour) of a child under 13, with a maximum penalty of 14 years,⁸⁵ appear to result in substantially more severe sentences when compared with the findings in the earlier study conducted in chapter 5 with regard to paedophiles.⁸⁶ The suggested starting points in England and Wales that are on the table for consultation regarding sexual assault (non-penetrative sexual behaviour) of a child under 13 are as follows:⁸⁷

⁸³ Sentencing Advisory Panel *op cit* (n 76) Annex B 48-49.

⁸⁴ A recent example of life imprisonment being imposed is to be found in a case in which the accused was described as 'a serial paedophile ... possibly having preyed on more young victims than any other child sex offender in Britain' and 'a voracious, calculating, predatory and violent paedophile for 40 years' (Editorial 'Life for British paedophile' *Pretoria News* (06/10/04) 5).

⁸⁵ Section 7 of the Sexual Offences Act 2003.

⁸⁶ See chapter 5 par 5.8.1.

⁸⁷ Sentencing Advisory Panel *op cit* (n 76) Annex B 51 - 52.

- '3 months custody for a very minor sexual touching involving only slight or brief contact i.e. bottom pinching;⁸⁸
- 6 months custody for the first offence of low level offending such as "frottage" (no aggravating features);⁸⁹
- 9 months custody for minor sexual touching (no aggravating features);
- 12 months custody for minor sexual touching where aggravating factors such as abuse of trust are present or for second or subsequent offence;
- 2 years custody for sustained or frequent non-genital touching over clothes, or for first offence of touching naked body parts excluding genitalia;
- 3 years custody for touching of, or including naked genitalia (no aggravating features);
- 4 years custody where certain aggravating features are present i.e. abduction, assault sustained over many hours).'

8.3.2.4 Magistrates' court sentencing guidelines

It is worth noting that, since the 1980s, and driven by a desire for consistency, the Magistrates' Association has, with the endorsement of the senior judiciary, and in the absence of specific guidance from the legislature or the Court of Appeal, produced guidelines specifically aimed at the lower courts.⁹⁰ Even without having legal authority,⁹¹ these guidelines are 'well respected and widely

⁸⁸ This is a slightly higher starting point than for sexual assault on a child older than 13 (which is a community rehabilitation order (CRO)), to reflect the young age of the victim and the higher level of harm caused or risked.

⁸⁹ The normal starting point of a custodial sentence may be departed from where, for example, a community sentence is more appropriate for a young offender.

⁹⁰ Magistrates' Association (2003) *Magistrates' Court Sentencing Guidelines* 6 ed at www.magistratesorganisation.org.uk (accessed 09/10/04). See Ashworth *op cit* (n 54) 55 for a discussion of the history of these guidelines. The guideline judgments have, over the years, focused on rape and not indecent assault. Only as recently as 2003 did the approach to determining the seriousness of sexual offences become applicable to all categories: *op cit* (n 73).

⁹¹ Ashworth *ibid*.

used'.⁹² Although the development of guidelines relating to the Sexual Offences Act 2003 (as discussed under 8.3.2.3 above) might eventually replace the two relevant ones of the Magistrates' Association in respect of sexual offences against children, namely indecent assault and pornography, the first-mentioned guideline is worth a brief examination. The sentencing guideline for indecent assault is highly accessible in its A4-format, follows legislative guidelines⁹³ and lays down a concise step-by-step procedure:

- a) As a first step, the seriousness of the offence should be considered, explicitly including the impact on the victim. An initial grading of the offence is required. The questions that must be posed are whether the offence is serious enough for a community penalty, or whether it is so serious that only custody is appropriate. In addition, it must be asked whether the court's sentencing powers are sufficient.

A non-exhaustive list of aggravating and mitigating factors is provided which refers to the offence of indecent assault. In terms of this, the court is required to attach a certain weight to each factor. The relevant, listed aggravating factors are 'age differential, breach of trust, injury (may be psychological), prolonged assault, very young victim, victim deliberately targeted, and vulnerable victim'.⁹⁴ 'Slight contact' features as the only explicit mitigating factor. In addition, racial or religious aggravation, commission of the offence while the offender was on bail and previous

⁹² Wasik *op cit* (n 45) 260.

⁹³ The guideline was developed on the basis of the Criminal Justice Act 1991, which has now been re-enacted as the Criminal Justice Act 2003, with the sexual offences largely being grouped under the Sexual Offences Act 2003.

⁹⁴ Magistrates' Association *op cit* (n 90) 41 (another aggravating factor not relevant to this study is that of the victim serving the public).

convictions may increase the seriousness of the offence. This approach should be communicated to the offender when sentence is passed.

- b) A preliminary view should now be taken of the seriousness of the offence, and then offender mitigation is considered as the next step, including the offender's age, health, cooperation with the police, genuine remorse and voluntary compensation.
- c) The next step is to consider the sentence. This must be compared with the guideline of 5 000 pounds and/or 6 months for indecent assault applicable to first offenders pleading not guilty.⁹⁵ A timely guilty plea may be considered for the purpose of reduction and the legal adviser should be consulted regarding entry in the Sex Offender's Register. The reasons should be carefully considered if a sentence at a different level is chosen.
- d) Lastly, the sentence is decided on using a *pro forma* form that guides the judicial officer through the essential points necessary for giving reasons for sentencing, for example for not awarding compensation.

8.3.2.5 Risk assessment

The legislator in England and Wales now regulates the position with regard to dangerous offenders, who may include offenders who have committed various child sexual abuse offences. Offenders who have committed a specified sexual offence,⁹⁶ and who have been assessed as dangerous,⁹⁷ are sentenced according to the category into which they fall, which will, in turn, determine the maximum

⁹⁵ This offence is in terms of ss 14 and 15 of the Sexual Offences Act of 1956.

⁹⁶ See part 12, chapter 5 of the Criminal Justice Act 2003, which refers to specified sexual offences in schedule 15.

⁹⁷ In terms of s 229 of the Criminal Justice Act 2003 after an assessment made by the court.

penalty prescribed for the offence. The effect of these extended sentences is to keep dangerous sex offenders in prison or under supervision for long periods. At the lowest level, an extended sentence in terms of s 227 of the Criminal Justice Act 2003 must have an extended supervision period of up to eight years added to the sentence. The initial practice of extended sentences for sexual offenders after release (with the aim of preventing the commission of further offences and of furthering rehabilitation of the offender) was introduced on the advice of the Sentencing Advisory Panel as a guideline judgment.⁹⁸

For both imprisonment for public protection and a discretionary life sentence,⁹⁹ the court will specify a minimum term that the offender is required to serve in custody. The offender will however remain in prison until the Parole Board is satisfied that the risk posed by him/her to society has sufficiently diminished for him/her to be released and supervised in the community. Following release, those serving a sentence of imprisonment for public protection will be able to apply to the Parole Board to have their licence¹⁰⁰ rescinded after ten years has elapsed. Offenders serving a discretionary life sentence will be on licence for the rest of their lives.

In assessing whether there is a significant risk of serious harm to members of the public by the offender committing further sexual offences,¹⁰¹ the court must consider the nature and circumstances of the offence and may consider the offender's pattern of behaviour, in addition to any other information available

⁹⁸ *R v Nelson supra* (n 74).

⁹⁹ Section 225 of the Criminal Justice Act 2003. See also *R v Offen* [2001] 1 WLR 253.

¹⁰⁰ The term 'licence' means that the person concerned is under supervision.

¹⁰¹ Section 229(1)(b) of the Criminal Justice Act 2003.

about him.¹⁰² The court is authorised to make an assumption about risk in the case of an offender older than 18 who has a relevant previous conviction, unless the previous factors indicate that the conclusion regarding such risk would be unreasonable.¹⁰³

8.3.2.6 Treatment for sex offenders

Although treatment programmes for sex offenders are available in prison, they are not mandatory as in the case of supervision orders where offenders live in secure accommodation and where behaviour and compliance with treatment programmes and other conditions can be monitored.¹⁰⁴ It would appear that the need has also been recognised for the courts to make detailed orders with regard to treatment within the community as an original sentence, or after being released from custody, in order to ensure compliance.¹⁰⁵ The latter is a form of long-term supervision ('extended periods on licence for sexual offenders'), with treatment as a component. Treatment is perceived to be most effective during the 'peak time' for reoffending,¹⁰⁶ that is, the first few years after conviction once the offender has been released into the community, or after being released from prison. Thus, 'booster or relapse-prevention' programmes are recommended for offenders who have completed treatment programmes during incarceration.¹⁰⁷ In order to determine the specific sex offender's period of treatment, a risk

¹⁰² Section 229(2) of the Criminal Justice Act 2003.

¹⁰³ Section 229(3) of the Criminal Justice Act 2003.

¹⁰⁴ Sentencing Advisory Panel *op cit* (n 76) 10.

¹⁰⁵ *Ibid.*

¹⁰⁶ RK Hanson, A Gordon, AJR Harris, JK Marques, W Murphy, V Quinsey and MC Seto 'First report of the collaborative outcome data project on the effectiveness of psychological treatment for sex offenders' (2002) 14:2 *Sexual Abuse: A Journal of Treatment and Research* 169-194, as referred to by the Sentencing Advisory Panel *op cit* (n 75) 10.

¹⁰⁷ *Ibid.*

assessment is made with the aim of determining a low, medium or high level of sexual deviance and whether there is a low, medium or high risk of reoffending. This appears to be done via clinical assessment. Accredited treatment programmes for male offenders are currently available.¹⁰⁸

8.3.2.7 Ancillary orders

In addition to the existing system of automatic registration for sex offenders following on conviction, part 2 of the Sexual Offences Act 2003 introduces notification orders requiring similar registration for offenders living in the United Kingdom with previous convictions for sexual offences overseas. Three further types of civil, preventative orders aimed at protecting the public are sexual offences prevention orders, foreign travel orders and risk-of-sexual-harm orders. Of particular interest is the last order, which may be made irrespective of a previous conviction for a sexual offence. Here, it is sufficient that a person older than 18 engages, on at least two occasions, in sexually explicit conduct or communication (such as sending an sms), with a child or children and there is reasonable cause to believe that the order is necessary to protect a child or children from harm arising out of future similar acts by such person.

8.3.2.8 Evaluation

The draft guidelines appear to afford children under the age of 13 additional protection and employ a very detailed approach in grading offences, with starting points for sentencing, while drawing on previous research, wide consultation and case law.¹⁰⁹ As with the position in Florida (discussed below), the age of 13 would appear to be a watershed age in all child sexual abuse cases, probably

¹⁰⁸ Sentencing Advisory Panel *op cit* (n 76) 9.

¹⁰⁹ Sentencing Advisory Panel *op cit* (n 76) Annex B 48 - 52.

because such age is normally considered to signal the onset of puberty.¹¹⁰ Once finalised and adopted by the Sentencing Guidelines Council, the above guidelines might be worth a proper evaluation with the aim of seeking possible guidance in developing a common approach to sentencing of offenders in South African child sexual abuse cases. Further, in the light of a new and developing bench in both the lower and high courts in South Africa, the format of the guidance provided in the Magistrates' Courts Guidelines would appear to be very valuable, especially given the fact that the approach is similar to that in South Africa.

However, criticism of the heavy-handedness and excessive number of offences forming the basis of the guidelines¹¹¹ should be kept in mind. Furthermore, according to Spencer,¹¹² the failure to research properly what is normal in the sex lives of children could have far-reaching practical consequences if not remedied by the Sentencing Advisory Panel in the preparation of sentencing guidelines. Further, despite the creation of different classes of offences, namely ordinary sex offences, abuse-of-trust sex offences and familial sex offences, the difference in sentencing levels does not appear to be clear cut.¹¹³

In exercising its broader mandate, the Sentencing Advisory Panel has given advice covering core matters affecting sentencing which serves as a basis for all

¹¹⁰ See J Cloud 'Paedophilia' *Time Magazine* (29/04/02) at http://www.ipce.info/library_3files/cloud_ped_time.htm (accessed 2/06/04). Contrast the position in New South Wales where the significant age of the rape victim is 10 years, justifying the maximum imprisonment of 25 years and a non-parole period of 15 years (Johns *op cit* (n 43)).

¹¹¹ JR Spencer 'Sexual Offences Act 2003 (2) Child and family offences' (2004) *Crim LR* 347. See also EB Baker and CMV Clarkson 'Making punishments work? An evaluation of the Halliday Report on Sentencing in England and Wales' (2002) *Crim LR* 81 for criticism of the effectiveness of the new sentencing approach with regard to sexual offences against children, *inter alia* that it is politically driven.

¹¹² Spencer *op cit* (n 111) 360.

¹¹³ Sentencing Advisory Panel *op cit* (n 76) 24-26.

offences rather than for a particular offence.¹¹⁴ The ongoing drive towards sentencing guidelines,¹¹⁵ and the importance attached thereto, seems to be integral to the legal culture of all tiers of courts¹¹⁶ in England and Wales, and there are high political expectations, such as 'putting the sense back into sentencing',¹¹⁷ of the new Sentencing Guidelines Council. However, the number of offences created in the Sexual Offences Act 2003 and the move away from guideline judgments might lead to a less narrative style in sentencing guidelines. Further, responsibility for the implementation of sentencing guideline cases appears to be that of prosecutors as well. As part of their enhanced role, they have a duty to alert the court to any relevant guideline case and to make the

¹¹⁴ Sentencing Guidelines Council *Draft Guidelines: Seriousness and New Sentences in the Criminal Justice Act 2003* at <http://www.sentencing-guidelines.gov.uk/draftguidelines/seriousnessandnewsentencesinthecriminaljusticeact2003.html>

¹¹⁵ The Sentencing Advisory Panel's *Offences Involving Child Pornography: Advice to Court of Appeal* (15 August 2002) at http://www.sentencing-advisory-panel.gov.uk/c_and_a/advice/child_offences/.htm (accessed 13/04/03) was accepted in the guideline judgment of *R v Oliver and others* [2003] 1 Cr App R (S) 463. Further, a separate Consultation Paper on the Sexual Offences Act 2003 (22 April 2004) focuses on the exploitation offences of prostitution, pornography and trafficking. Though related, they are not directly relevant to this thesis.

A sliding-scale, reduction approach in respect of a guilty plea, starting at one-third reduction for an early guilty plea (par 1.28), has also been adopted. This topic is fully covered by the very first draft guideline published by the Sentencing Guidelines Council clarifying the reasons for reductions and the approach to calculating reduction in individual cases, which are generally perceived as constituting an issue separate from aggravation and mitigation: at <http://www.sentencing-guidelines.gov.uk/draftguidelines/guiltypleas/foreword.html> (accessed 07/10/04); Sentencing Guidelines Council par 2.2: <http://www.sentencing-guidelines.gov.uk/guidelines/council/final.html> (accessed 4/02/05). See the full electronic publication based on the statutory provision in s 152 of the Powers of Criminal Courts (Sentencing) Act 2000 being replaced by ss 144 and 174(2)(d) of the Criminal Justice Act 2003, once in force. Reductions for a plea of guilty are justified by the fact that a trial is avoided. In addition, the gap between charge and sentence is shortened, considerable costs are saved and early pleas save witnesses from being concerned about having to give evidence.

¹¹⁶ See the discussion of the sentencing guidelines for Magistrates' Courts in par 8.3.2.4 above.

¹¹⁷ Home Secretary, David Blunkett as referred to by the Sentencing Advisory Panel 'New Body to Improve Sentencing Practice' (5/3/2004) at http://www.sentencing-guidelines.gov.uk/councilpressreleases/press_05_march_04.htm (accessed 17/10/04).

case available to the court.¹¹⁸ The trial court should then consider this in undertaking its task of arriving at the correct sentence¹¹⁹ and should explain any departure from a given guideline. Lastly, the lifelong licence for certain dangerous sexual offenders appears to be indicative of the belief that complete cure is impossible in certain instances.

Finally, the draft guidelines with regard to sexual offences appear to address some of the deficiencies of guideline judgments, namely the fact that these judgments are delivered sporadically and do not form part of an overall strategy to reduce disparities, coupled with the fact that most judges are not particularly expert regarding the intricacies of sentencing theory and policy.¹²⁰

8.3.3 Virginia

8.3.3.1 Introduction

Unlike the tradition that, until recently, pertained in England and Wales, most American state legislators have for the past 30 years or so taken responsibility for sentencing policy.¹²¹ The Virginia Criminal Sentencing Commission's main

¹¹⁸ *Panayioutou* (1989) 11 Cr. App. R. (S.) 535 and other cases as referred to by Wasik *op cit* (16) at 260.

¹¹⁹ *R v Millberry and Others supra* (n 70) at par 34. In addressing the sentencing discretion of the judge, it was said that the guideline judgment was meant to assist the judge to arrive at the current sentence instead of identifying the correct sentence, which is, in fact, what the task of the trial judge entails.

¹²⁰ Terblanche *op cit* (n 15) 870. It should be noted that the Sentencing Guidelines Council further recently published a compendium of summarised guideline judgments to make sentencing guidelines more accessible and to address the offences under the Sexual Offences Act 2003 in the interim until the publication of a draft guideline anticipated during 2005 (Sentencing Guidelines Council *op cit* (n 1).

¹²¹ Sentencing Guidelines Council *op cit* (n 53). See S Nicholson-Crotty 'The impact of sentencing guidelines on state-level sanctions: An analysis over time' (2004) 50:3 *Crime & Delinquency* 395 at 497 for a table setting out eighteen other states with sentencing guidelines, and where it can be seen that Utah commenced with such a practice as early as 1979. The implementation date for Virginia is indicated as 01/01/1991.

purpose for following the trend in other American states during the mid-1980s¹²² in creating sentencing guidelines was to reduce unwarranted sentencing disparities owing to factors such as race, gender and geographical area.¹²³ Convinced by standardised pre-sentence reports indicating sentencing disparity, the courts themselves voted in favour of sentencing guidelines based on previous sentencing practices, to be developed over a period of five years.¹²⁴ Sentencing guidelines were developed for *inter alia* rape as one of 14 chosen offences. After 10 years, during mid-1995, owing to the adoption of the 'truth in sentencing' principle and the resultant abolition of parole, sentencing guidelines were 're-calibrated'.¹²⁵ But, again, because of public and political concern, sentencing guidelines were inflated for serious offences.

¹²² Virginia learnt from both the successes and mistakes of Minnesota and Washington. For example, the federal guidelines failed for the following reasons: the lack of a criminal code; members on the Sentencing Commission had little practical experience and the base of the disciplines from which they came was narrow; the potential impact on correctional resources was not taken into account; the guidelines were 400 pages in length and were complex to apply; the guidelines were mandatory, with very narrow ranges, which in effect removed judicial discretion, making them very unpopular with judges, especially as the discretion was shifted to prosecutors (Sentencing Guidelines Secretariat *op cit* (n 44) 6-7). See also D Young 'Factfinding at federal sentencing; Why the guidelines should meet the rules' (1994) 79 *Cornell LR* 299 for a critical discussion of the federal sentencing guidelines, referring to the importance of reliable fact determination and its impact on the penalties prescribed by the guidelines, and a submission that the federal rules of evidence should be followed. Note that, today, in shying away from an overly punitive approach, the main aims of sentencing in Virginia are viewed as the reduction of both crime and risk to the public.

¹²³ Sentencing Guidelines Secretariat *op cit* (n 44) 1. Contrast the approach of the Law Commission, which appears to hold a different view with regard to geographical differences (*op cit* (8)).

¹²⁴ For example, the custody threshold was based on the historical custody rate. See M Tonry 'Judges and sentencing policy – the American experience' in *Sentencing, Judicial Discretion and Training* (1992) 163 who warns that if judges are not part of crafting a solution or dislike it, sentencing reform will be a continuing problem.

¹²⁵ Sentencing Guidelines Secretariat *op cit* (n 44) 2. Before that, sentences were inflated to accommodate parole practice where, often, only 25 percent of the sentence was served. The Parole Board in Virginia was abolished in 1995. The Sentencing Guidelines are in their seventh edition and were recently updated to commence on 01/07/04 (Virginia Criminal Sentencing Commission at <http://www.vcsc.state.va.us/training.htm> (accessed 12/10/2004)).

8.3.3.2 Sentencing guidelines

The Virginia Criminal Code contains a detailed list of all offences, indicating the respective penalties, and forms the basis for the sentencing guidelines.¹²⁶ For example, for sexual assault, termed 'aggravated sexual battery', where the victim is under 13, the penalty is stated broadly as 1 year to 20 years. The guidelines are accessed only after the risk assessment for sex offenders (as discussed below in par 8.3.3.3) and two additional assessments have been completed by the court.¹²⁷ The latter assessments include factors other than those in the sex offender risk assessment which must be scored, such as -

- the maximum prescribed penalty for the specific offence;
- additional offences;
- the victim's age being less than 13 years at the time of the commission of the crime;
- victim injury (both emotional (also the feeling of intimidation) and physical injuries are included, with the latter scoring higher);
- prior convictions/adjudications;
- prior incarcerations;
- legal restraint at the time of the offence, such as a postponed or suspended sentence, or parole or supervised probation; and
- whether a weapon or threats were used by the offender.

The individual sex offender's final risk score is then converted to a guideline sentence and is presented to the judge in the form of a midpoint recommendation, together with an accompanying range of a low recommendation and a high recommendation. In the case of indecent assault

¹²⁶ Virginia Criminal Sentencing Commission *Virginia Crime Code Listings* at http://www.vcsc.state.va.us/Codes_Alph.cfm?ID=s (accessed 12/10/2004).

¹²⁷ In the case of rape, it is only one additional assessment and the sex offender risk assessment.

where the score is low, such as eight or less, it is possible for the accused to receive a sentence that varies between probation and incarceration from one day up to six months. In all other instances, it appears that sex offenders will attract terms of imprisonment of seven months and longer, based on their individual scores. The most severe sentencing guideline, based on the highest risk score, lays down 240 years' imprisonment. Two separate sets of sentencing guidelines exist for rape and other sexual assault.

As with the present position in England, the court is bound to follow the process, but may deviate from the guidelines with reasons. An official form is used for recording key factors indicating the seriousness of the offence, the sentencing decision and the reasons for a departure from the guideline sentence.¹²⁸ These reasons are coded and are taken into account during the annual revision of the guidelines to reflect current judicial thinking. It would appear, therefore, that the judiciary's ability to make an input regarding the guidelines contributes to its willingness to accept them.¹²⁹

In contrast to other states, which also have voluntary guidelines, Virginia's sentencing guidelines have a compliance rate of 80 percent.¹³⁰ The successful implementation of the guidelines can be attributed to the fact that the rules are not static, that the guideline ranges are relatively broad, and that training is provided with regard not only to the use of the system, but also with regard to its underlying rationale, thereby giving judges the bigger picture.¹³¹

¹²⁸ After completion, the sentencing forms are forwarded to the Sentencing Commission where the detailed reasons for departure are entered in a coded format.

¹²⁹ Sentencing Guidelines Secretariat *op cit* (n 44) 2.

¹³⁰ Sentencing Guidelines Secretariat *op cit* (n 44) 10; see Nicholson-Crotty *op cit* (n 121) 402.

¹³¹ Virginia Criminal Sentencing Commission *op cit* (n 125); Sentencing Guidelines Secretariat *op cit* (n 44) 10.

8.3.3.3 Sex offender risk assessment

Of particular importance is the development of a 'risk assessment' instrument that was initially designed to apply to all offenders who qualified for incarceration, yet posed a minimal risk to public safety, the aim being to curb the rising prison population. The court may use this 'risk assessment' instrument in addition to the assessment of the seriousness of an offence based on the sentencing guidelines.¹³² According to the risk assessment specifically developed for sex offenders in 2001,¹³³ the likelihood of reoffending and of the offender responding to treatment interventions are first assessed. In an attempt to create a profile of various risk groups, the presence or absence of certain combinations of factors determines the risk group of the offender.¹³⁴ Factors that have been proven to be statistically significant in predicting recidivism (those with known levels of success) are assembled on a risk assessment worksheet, with scores being determined by the relative importance of the factors.¹³⁵ The following factors are taken into account for the risk assessment:

- the offender's age at the time of the offence – if there are multiple sex offences for which the offender is being sentenced, the age must be based on the sex offence that occurred first;
- education – this factor will be scored where the offender has not completed the ninth grade by the date of conviction;
- employment – points are assigned if, during the past two years, the offender made more than two changes in employment, or was unemployed

¹³² Sentencing Guidelines Secretariat *ibid*.

¹³³ Virginia Criminal Sentencing Commission *Assessing Risk Among Sex Offenders in Virginia* (2001) at http://www.vcsc.state.va.us/sex_off_report.pdf (accessed 10/10/04)

¹³⁴ Virginia Criminal Sentencing Commission *op cit* (n 133) 8.

¹³⁵ The risk assessment instrument was developed on the basis of criminological studies indicating the characteristics and recidivism patterns of the population of felony sex offenders convicted and sentenced in Virginia. It is also argued that recidivism prediction based on a statistical method is more reliable (without pretending that it is a foolproof method) than clinical interviews (*ibid*).

for six months or more, but excluding someone regularly employed through a 'temp agency';

- relationship with the victim – four categories are distinguished:
 - *relative* is scored if the offender is the victim's parent, sibling, grandparent, sister-in-law/brother-in-law, aunt, uncle or cousin;
 - *known to the victim* is scored on the basis of the victim's reasonable view of his or her knowledge of the offender. Boyfriends, girlfriends, foster parents, teachers, non-related individuals living in the same household, store clerks who are known to the victim, friends and acquaintances are scored;
 - *stranger* is scored when the victim had no prior knowledge of the offender's identity, such as name, home address or place of employment;
 - *step-parent is scored only if the offender is married to the child's parent.*

In this instance, a distinction is made between victims under the age of 10 and those aged 10 and older. In the first group, the step-parent receives the highest score, while in the last group it is the stranger.

- aggravated sexual battery – this factor is only scored when it is the primary offence and focuses on penetration, or attempted penetration, according to official reports such as police reports, victim impact statements and medical reports. It refers *inter alia* to penetration of the victim's oral, anal or sexual cavities (including the vagina) by the offender's tongue, fingers, objects or bodily fluids like semen or urine;
- criminal history, such as prior arrests for person-type offences;
- prior incarceration – this factor is scored if the offender has served, or is currently serving, imprisonment prior to the date of sentencing for the current offence;
- prior mental health treatment – participation in any mental health, sex offender, alcohol or drug treatment programmes is relevant; and

- the location of the offence – several locations are distinguished, namely:
place of employment;
shared victim/offender residence;
outdoors;
motor vehicle;
victim's residence;
offender's residence or other residence; and
location other than listed.¹³⁶

The offender's or other residence is scored the highest while place of employment scores the lowest.

It would appear then that an offender who is, for example, under 35 years of age, who has not completed the ninth grade, who has been unemployed for less than 75 percent of the time, who is a step-parent of a victim under 10 years of age, who has committed aggravated sexual battery of a penetrative nature, and who has had no previous mental health treatment, but who has a history of prior arrest for a crime against the person, will have a high risk assessment score implying a high recidivism risk.

Depending on the risk assessment scores calculated on the worksheet, the upper sentencing range recommended by the guidelines for sex offenders could be modified and inflated by 50 percent, 100 percent or 300 percent based on the respective outcome of the offender's risk assessment score in respect of level 3: 28-33, level 2: 34-43 or level 1: more than 44.¹³⁷ For example, in the case of a

¹³⁶ Virginia Criminal Sentencing Commission *op cit* (n 133) 8-9. In view of the serious limitations in obtaining accurate information with regard to post-conviction treatment programmes, this was not taken into account as a factor (8). However, see 22-28 for the Commission's review of literature on the effectiveness of sex offender treatment. Research outcomes on the topic are not in agreement and the Commission proposes that instead of asking, 'Does treatment work?', the question should rather be, 'What works for whom?'.

¹³⁷ Virginia Criminal Sentencing Commission *op cit* (n 133) 63.

sexual assault attracting a sentencing range (low point to midpoint to high point) of 7 months, 1 year and 18 months, the sentence may be inflated to 2 years and 3 months (level 3), to 3 years (level 2) or, at the highest risk assessment score of 44 or more (level 1), to 6 years.

It would appear that all rape and sexual assault offenders scoring 28 or more on the risk assessment are now recommended for incarceration, including imprisonment.¹³⁸ Where an offender scores below 28, the sentencing range will not be adjusted.¹³⁹

Preliminary findings on the incorporation of the sex offender risk assessment instrument in the Rape and Other Sexual Assault Guidelines indicate that 48 percent and 41 percent of sex offenders respectively received a risk classification.¹⁴⁰ Further, the most extreme adjustment of 300 percent affected only 3 percent and 2 percent respectively. It would appear that the sex offender risk assessment instrument impacted on one group of sex offenders in particular, namely those sexual assault offenders who, historically, had been recommended for probation or a short jail term on the basis of the guidelines and who are now recommended for prison if they fall within risk levels 1, 2 or 3. Judges seemed to agree with the recommendation and imposed an effective prison sentence in 82 percent of the 105 cases.¹⁴¹

¹³⁸ Virginia Criminal Sentencing Commission *Annual Report* (2003) 35 at http://www.vcsc.state.va.us/2003Annualreport_pdf.pdf (accessed 14/10/04). In Virginia, a sentence of 12 months or less is referred to as a jail sentence, while a sentence of 1 year or more is referred to as a prison sentence.

¹³⁹ Sentencing Guidelines Secretariat *op cit* (n 44) 3.

¹⁴⁰ Virginia Criminal Sentencing Commission *op cit* (n 133) 37.

¹⁴¹ *Ibid.*

What is of importance is that the judge must have reliable data for this exercise. Consequently, a thorough pre-sentence report is now required in all sexual offence cases.¹⁴² However, adherence to the risk assessment, like the sentencing guidelines, is completely voluntary.¹⁴³

8.3.3.4 Treatment of sex offenders

Treatment programmes are available in prison for all sex offenders, but it would appear that not all offenders are required to participate. However, those convicted of violating Article 7 of Chapter 2 of Title 18.2 must be included in such programmes.¹⁴⁴ An important provision is that all sex offenders in prison should be clinically evaluated by way of scientifically valid testing in order to determine who poses a high risk of recidivism.¹⁴⁵

8.3.3.5 Civil commitment of sexually violent predators

In addition to increasing the upper ranges of sentences for high-risk sex offenders, a further recent development now allows for the civil confinement of certain imprisoned sex offenders who pose a high risk of recidivism and who would not otherwise be subject to confinement.¹⁴⁶ Two requirements are necessary for this adjudication as a sexually violent predator.¹⁴⁷ The first is that

¹⁴² Virginia Criminal Sentencing Commission *op cit* (n 133) 10.

¹⁴³ Virginia Criminal Sentencing Commission *op cit* (n 138) 37. It was found that, overall, incorporation of the risk assessment and the extension of the guidelines' range increased overall compliance with the rape guidelines from 58 percent to 68 percent.

¹⁴⁴ Supreme Court of Virginia (2004) 'Civil Commitment of Sexually Violent Predators: Memorandum for Virginia Circuit Court Judges' 2 at http://www.courts.state.va.us/ed/updates/2004_civil_commitment_of_sexually_violent_predators.pdf (accessed 18/10/04) 2.

¹⁴⁵ *Ibid.*

¹⁴⁶ 2003 Va. Acts c. 989, as amended by House Bill 1237 (Chapter 764 of the 2004 General Assembly).

¹⁴⁷ Va. Code Ann. § 37.1-7.1.

an offender must be convicted of a 'sexually violent offence'.¹⁴⁸ Secondly, there should be a finding that, 'because of a mental abnormality or personality disorder, [the offender] finds it difficult to control his predatory behaviour which makes him likely to engage in sexually violent acts'.¹⁴⁹ A Commitment Review Committee must screen offenders appearing on a monthly list provided by the Director of the Department of Corrections. This list contains the names of sex offenders who are to be released in the coming months and who are a high recidivism risk. Factors to be considered include the offender's score on a scientifically valid clinical assessment of recidivism risk, the offender's institutional history and treatment record, and the offender's criminal record.¹⁵⁰ Other relevant documents to be considered are pre-sentence reports, post-sentence reports and victim impact statements.¹⁵¹ After being assessed and being found to be a sexually violent predator, the procedure for commitment can be embarked upon¹⁵² or, in the absence of undue risk to public safety, the offender may be placed in a conditional release programme in order to undergo outpatient treatment and monitoring. In the event of the civil trial being successful, the offender is placed in the custody of the Department of Mental

¹⁴⁸ Sexually violent offences include rape, forcible sodomy, object sexual penetration and aggravated sexual battery where the victim is less than 13 years of age as defined in §§ 18.2-61, -67.1, -67.2, -67.3(A)(1) respectively.

¹⁴⁹ § 37.1-70.1. The standard of proof is clear and convincing evidence. § 37.1-70.9 (C).

¹⁵⁰ Supreme Court of Virginia *op cit* (n 144) 4.

¹⁵¹ *Ibid.* Victim impact statements produced at the trial stage do not contain the identities of victims and, together with the other documents, are not viewed by the offender, but only by his counsel.

¹⁵² The decision to seek civil commitment rests ultimately with the Attorney-General. See Supreme Court of Virginia *op cit* (n 144) 3-8 for a detailed discussion of the complex procedure.

Health, Mental Retardation and Substance Abuse Services and is entitled to an annual review hearing.¹⁵³

8.3.3.6 Evaluation

The above discussion indicates that, in Virginia, the emphasis is on longer terms of imprisonment for high-risk sex offenders who participate in treatment programmes in prison,¹⁵⁴ and on extended outside treatment of those classified as sexually violent predators. As in England and Wales, preventative procedures go beyond the sentencing phase and include orders not classified as punitive measures. In contrast to the Virginia Sentencing Commission's findings that statistical research is more reliable for risk prevention, a clinical assessment is required for in-prison recidivism assessment.

The approach of having a formal, reliable sex offender risk assessment instrument integrated into sentencing guidelines extends the informal practice of risk assessment typically undertaken by judicial officers during the sentencing stage.¹⁵⁵ Such instrument would appear to be a valuable tool that empowers the court while still allowing the judicial officer to use his or her discretion, having taken the circumstances of the case into consideration, to raise the upper range of the suggested sentencing range.

¹⁵³ See Supreme Court of Virginia *op cit* (n 144) 8-9. A battle between experts is expected, since the offender is entitled to a court-appointed expert, or one of his own choice. It should be noted that the criteria stipulated in § 37.1-70.5 (B) should be adhered to, namely that 'such an expert must be a licensed psychiatrist or licensed clinical psychologist who is skilled in the diagnosis and treatment of disorders and abnormalities associated with sex offenders'.

¹⁵⁴ Supreme Court of Virginia *op cit* (n 144) 2.

¹⁵⁵ See chapter 4 par 4.5.10 where risk assessment is formulated during the empirical study as a sentencing guideline in child sexual abuse cases.

8.4 INTERNAL GUIDANCE FROM SOUTH AFRICAN HIGHER COURTS

8.4.1 Introduction

Despite indications in the past of a 'leave-the-court-alone' approach¹⁵⁶ with regard to sentencing rules, the high court recently demonstrated a need for guidance in child sexual abuse cases. In *S v O*¹⁵⁷ the court held that it was true that there are no two cases where the facts and circumstances are precisely the same and that the sentence in each case has to be decided on its own merits. However, in the case of a gymnastics coach convicted of indecent assault on boys in his class, the court gathered numerous decisions that were viewed by Thring J to represent the collective wisdom of a long series of distinguished judges of different divisions and regions of South Africa who had given their judgments over a period of nearly 50 years. Further, it was stated, many of the cases were also decisions of the Appellate Division or the Supreme Court of Appeal. Accordingly, the court held that these judgments could not merely be wished away or be criticised as a single decision that should not be followed.¹⁵⁸

The court further held that, despite remarks that cases of sexual assault against children had been on the increase over the past few years¹⁵⁹ and that heavier

¹⁵⁶ Terblance *op cit* (n 15) 874. Compare Ashworth *op cit* (n 54) 30 for criticism of the court's view that the varying facts, particularly in sexual abuse cases, do not allow for factual comparisons of precedents.

¹⁵⁷ 2003 (2) SACR 147 (C).

¹⁵⁸ *S v O supra* (n 157) at 156f-h. As a result, the magistrate in the court *a quo* was criticised for being completely out of line with the decisions mentioned and of thereby creating a perception of inconsistency on the part of the courts. It should be noted, however, that the court did not consider *S v V* 1994 (1) SACR 598 (A), which adopted a stricter approach. The question can therefore be posed as to how the judgment in that case would have influenced Thring J's decision in the present case, since the former was a judgment of the Appellate Division and the sentence in effect amounted to three years' imprisonment. See a discussion of the case in chapter 3, par 3.3.1.

¹⁵⁹ *S v L* 1998 (1) SACR 463 (SCA) at 257f.

sentences were required,¹⁶⁰ it was not necessary to determine whether such cases were really on the increase or merely a matter of increased reporting. The court simply held that the nature, character and elements of indecent assault had not changed in the past 50 years, though the terminology might have been changed slightly by legislation.¹⁶¹ Notwithstanding the desire for guidance and consistency, it is submitted that the court overlooked the essential element of the guidance sought by, and authority of, the Supreme Court of Appeal¹⁶² with regard to a more severe approach to sentencing in cases of child sexual abuse. It is of interest to note that this was a decision of the Supreme Court of Appeal and that the judge in the high court in the present case did not take such remark seriously, particularly in the light of his awareness of the hierarchy of our courts. Yet, he chose to endorse consistency. However, despite criticism of the court's final, selective interpretation of precedents, a willingness and need for guidance are clearly illustrated. In *S v McMillan*¹⁶³ it was also emphasised that, despite the fact that precedents are only guidelines, the principle of consistency is simultaneously a basic requirement of justice:

'... dit is tog 'n onmiskenbare vereiste van geregtigheid dat vonnisse konsekwent waargeneem moet word. Hierdie oorweging laat nie toe vir die oplegging wat geheel en al uit pas is met vonnisse in vergelykbare sake nie.'¹⁶⁴

¹⁶⁰ *S v McMillan* 2003 (1) SACR 27 (SCA) at 134f. In *S v Blaauw* 2001 (2) SACR 255 (C) at 260, rape of a child was referred to as a cancer in society, while in *S v Jansen* 1999 (2) SACR 368 (C) at 379b it was held that 'courts in punishing ... should ensure that sentences adequately reflect the censure which society should and does demand, as well as the retribution which it is entitled to extract'. It is of interest to note that, in England and Wales, public opinion is canvassed in researching new guidelines, albeit for aggravating factors (*op cit* (n 69)).

¹⁶¹ It seems as if the judge did not take cognisance of the fact that both the community and the legislator are viewing this type of offence in a more serious light. This is a typical illustration of a judicial officer adopting the positivist approach as opposed to a more contextual approach. See I Olckers 'The model of bias' *Curriculum Development Workshop* (1999) 88.

¹⁶² *S v McMillan supra* (n 160) at 134f.

¹⁶³ *Supra* (n 160).

¹⁶⁴ *S v McMillan supra* (n 160) at par 10.

The question that could be posed is: What cases are comparable? In the case of child sexual abuse it has been reiterated that offenders are not homogenous.¹⁶⁵ In *S v O*¹⁶⁶ above, a case of an extra-familial, diagnosed paedophile, guidance was sought from indecent assault cases varying from non-paedophile, extra-familial to all intra-familial categories. It would appear that, for sentencing purposes, the courts have not distinguished between the types of offenders in the broader category of indecent assault.

Despite the generally limited scope of appellate decisions,¹⁶⁷ the Supreme Court of Appeal has in recent years dealt with quite a few cases of child sexual abuse by way of appellate sentence review. In the light of the hierarchy of the courts and the precedent system, it is necessary to highlight briefly the principles outlined in these cases in order to assess current guidelines emanating from practice,¹⁶⁸ in addition to the proposed statutory guidelines mentioned above.¹⁶⁹ Some high court judgments appear to contain valuable dicta and are therefore included.

¹⁶⁵ Law Commission *op cit* (n 2) 690.

¹⁶⁶ *Supra* (n 157).

¹⁶⁷ Ashworth *op cit* (n 54) 29.

¹⁶⁸ In the light of the difficulties inherent in the sentencing task, honest differences of opinion do often exist. However, in *S v Sadler* 2000 (1) SACR 331 (A) par 10, it was held that the hierarchical structure of our courts is such that, where differences do exist, it is the view of the appellate court that must prevail.

¹⁶⁹ Par 8.3.

8.4.2 Summary of guidelines from case law for sentencing in child sexual abuse cases

8.4.2.1 Aggravating factors with regard to the victim

- Apart from the *physical injuries*, the *psychological effects* of the incident on the complainant in a child sexual abuse case are of vital importance where minimum sentences are prescribed.¹⁷⁰
- The following *symptoms* justify an interpretation and conclusion that a complainant has been *deeply and injuriously affected* by rape: reluctance of the victim to enter her own room after the rape; insistence on sleeping in the mother's room; impossibility of sometimes communicating with the victim; sudden rejection of the mother and repelling physical contact; deterioration of schoolwork; rebelliousness and disobedience at school; failing examinations for the first time; snubbing the mother and brother at home and withdrawing from the neighbourhood children; not being able to work through the rape; having nightmares and developing a phobia about her home; inability to concentrate for long; being ill-tempered, aggressive,

¹⁷⁰ *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205e: the fact that a victim is under the age of 16 years is not the only criterion necessary for the imposition of a life sentence. Not only does the objective gravity of the crime play an important role, but also the present and future impact of the crime on the victim. It would further appear that the psychological effect of the crime is now viewed as an essential element in determining the absence of substantial and compelling circumstances in order to impose the most severe sentence. It was further held that an omission regarding the after-effects of rape led to a risk for the accused where s 51(1) of Act 105 of 1997 applies, namely 'that substantial and compelling circumstances are, on inadequate evidence, held to be absent. At the same time the community is entitled to expect that an offender will not escape life imprisonment – which has been prescribed for a very specific reason – simply because such circumstances are, unwarrantedly, held to be present.' See also *S v G supra* (n 47) at 301a; *S v Blaauw supra* (n 160) at 257: apart from the traditional factors in the *Zinn* triad (*S v Zinn* 1969 (2) SA 537 (A)) and the general aims of sentencing, the interests of the five-year old victim constituted a critical factor that had to be taken into account in determining the appropriate sentence (this case also involved the Criminal Law Amendment Act 105 of 1997 Part III, with 10 years' imprisonment as the prescribed minimum sentence for indecent assault of a child under 16 with the infliction of bodily harm).

rebellious and withdrawn; resisting discussion of the event and needing long-term psychotherapy.¹⁷¹

- Where the *evidence* of the *mother, teacher* or *social worker* on symptoms of trauma is not challenged, such evidence may be accepted without psychiatric evidence on the effects of rape.¹⁷²
- The after-effects of *incest* are more lingering and stigmatising.¹⁷³
- Children are vulnerable and therefore defenceless.¹⁷⁴
- The court can take judicial notice of the fact that all sexual offences committed against children are inherently harmful. However, serious harm should be proved by way of reliable evidence.¹⁷⁵

8.4.2.2 Aggravating factors with regard to the offender

- *Abuse of trust or position of responsibility* by the accused in a position of trust, such as a father, teacher or pastor, is an important aggravating factor.¹⁷⁶

¹⁷¹ *S v Abrahams* 2002 (1) SACR 116 (SCA).

¹⁷² *S v Abrahams supra* (n 171) at 124.

¹⁷³ *S v Abrahams supra* (n 171) at 125: 'What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture. Love thus expressed becomes the negation of love, and the violation of the trust that should sustain it extreme. Its effects may linger for longer than with extra-familial rape.' Of further importance is the fact that the damaging effect of incest has been held to require particular attention with regard to deterrence and retribution in sentencing.

¹⁷⁴ *S v D* 1995 (1) SACR 295 (A) at 260g-h. Terblance *op cit* (n 4) 218.

¹⁷⁵ *S v V* 1994 (1) SA 598 (A) at 600j; *S v Mahomotsa* 2002 (2) SACR 435 (SCA).

¹⁷⁶ *S v R* 1995 (2) SACR 259 (A) (teacher). For a father to abuse his position to obtain forced sexual access to his daughter's body constitutes a deflowering in a grievous and most brutal sense (*Abrahams supra* (n 170) at 123). In *S v Fatyi* 2001 (1) SACR 485 (SCA) the accused indecently assaulted a six-year-old girl. He was a taxi driver engaged in after-care transport and was in a position of trust ('A's conduct was appalling ... for own sexual gratification he took advantage of a little girl entrusted to his care.'). Abusing positions of trust as well as the repetition of the offence itself over a period of time can be used in establishing the fear of repeated abuse (reoffending).

- If the accused is *HIV-positive*, life-threatening diseases may be transmitted to the victim.¹⁷⁷ Where the accused is aware of his condition, this will play an even more important role.
- The *attitude* of the accused can be taken into account as an aggravating factor, for example: the father who views his daughter as a chattel, not merely to be used at will, but, once the first entitlement has been exercised, to be discarded for further similar use by others;¹⁷⁸ and a sexual thug who considers young girls (15 years old) as objects to be used to satisfy his lust, threatens them and removes them from the streets, locks them up and rapes them.¹⁷⁹
- *Repeated* acts of rape of a victim who is locked up are indicative of exploitation of an accused's position of power to the full.¹⁸⁰
- When a degree of *planning* is involved in the accused's commission of the offence, such a factor is considered to be aggravating.¹⁸¹

8.4.2.3 Life imprisonment

The statutory, prescribed minimum sentence of life imprisonment should be reserved for the 'worst' cases¹⁸² – thus the offence of rape should be graded.¹⁸³

¹⁷⁷ *Blaauw supra* (n 160) at 260.

¹⁷⁸ In *Abrahams supra* (n 171) at 122 the sentencing court was criticised for omitting to consider as an aggravating factor the fact that the accused was possessively jealous and was determined to precede other young males in any possible carnal access to his daughter.

¹⁷⁹ *S v Mahomotsa supra* (n 175).

¹⁸⁰ *Ibid.* It was also found that the virility of a young man and the fact that a complainant had had sexual intercourse two days before the rape were not relevant as mitigating factors.

¹⁸¹ *S v Blaauw supra* (n 160). The courts are not educated about the after-effects of grooming and do not realise the potential impact thereof (*S v O supra* (n 157)).

¹⁸² *S v Abrahams supra* (n 171); *S v Mahomotsa supra* (n 175). See chapter 2 for a discussion of the facts in these cases. These cases echo what was stated in *S v Swartz and another* 1999 (2) SACR 380 (C) at 386b-c about not all rapes receiving equal punishment, namely: 'That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness.'

8.4.2.4 General

- Sentences for crimes set out in the Criminal Law Amendment Act 105 of 1997 are consistently higher than before the coming into the operation of such Act, even though deviations are justified by a finding of substantial and compelling circumstances. Thus previous precedents are no longer relevant as far as length of the sentence is concerned.
- In addition to the aims of sentencing and the *Zinn* triad of factors, the interests of the child victim are important¹⁸⁴ – thus the triad of sentencing is squared.

8.4.2.5 Comments on internal guidelines

The above guidelines from case law indicate a growing sensitivity to the importance of the after-effects of the crime on the victim. However, when compared with the findings of international research, there are many shortcomings, one of which is the failure to understand the subtlety and planning inherent in the grooming process, as well as the impact of such process on the child. Further, no recognition is given to the fact that stranger rape and acquaintance rape are experienced as being equally harmful. As with cases falling within the ambit of minimum-sentencing legislation, psychological harm should, in all cases of child sexual abuse, be considered in the determination of a proper sentence. Lastly, despite remarks by the Supreme Court of Appeal indicating that the grading of cases of rape and indecent assault against children should guide the sentencing discretion of judicial officers, there is no clarity on

¹⁸³ In *S v Sauls en 'n Ander* 1982 PH H131 Van den Heever J stated: 'Even rape can vary from "n betreklike nietigheid" to a capital crime'. Olivier AJA referred to this statement in *S v A* 1994 (1) SACR 602 (A) and added that, notwithstanding rape being a serious crime, it can be surrounded by circumstances which, on a scale of abhorrence ('weersinwekkendheid'), makes it more or less serious. This once again illustrates the complexity inherent in the value judgement that must be made as well as the role that sensitivity, or the lack of it, can play, or even the lack of insight into psychological violence with regard to the unguided grading of rape cases left to the judicial officer's sense of abhorrence.

¹⁸⁴ *S v Blaauw supra* (n 160).

the matter. It is submitted that a more detailed approach be developed in order that it may be of greater assistance to the courts.

8.5 CONCLUSION

It seems clear from the above discussion that the drafting of proper sentencing guidelines for child sexual abuse cases should fall within the domain of a body with proper resources and should be based on interdisciplinary research.¹⁸⁵ South Africa should also take note of the multidisciplinary manner in which the membership of such a body is approached in England and Wales in order to broaden the present suggested membership of the envisaged Sentencing Council in s 7 of the Draft Sentencing Framework Bill 2000.¹⁸⁶

Although sentencing guidelines limit judicial independence to a greater or lesser extent, the manner in which they are implemented will determine the degree of cooperation and the attitude of judicial officers. It is submitted that, within the South African legal culture, sentencing guidelines will be successful only where an approach similar to that of the above-mentioned countries is adopted, namely a mandatory process with the discretion to deviate with reasons, cognisance of which will be taken during a revision stage. In addition, such a process allows for

¹⁸⁵ Courts of appeal often do not have sufficient experience of cases involving sexual offences against children and are not equipped to issue guidelines on their own. Recently, in Western Australia, the Criminal Court of Appeal refused to issue a guideline on the issue of suspended sentences for sexual relationships involving children under 16 in terms of the Sentencing Act 1995 (WA) because of a lack of experience of such cases. See R Jones, G Griffith and R Simpson (New South Wales Parliamentary Library Research Service) 'Gang rapists: The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001' *Briefing Paper 12* (2001) 25 at <http://www.parliament.nsw.gov.au/prod/parlment/publications.nsf/0/F95E42F6AD02> (accessed 22/10/2004).

¹⁸⁶ *Op cit* (n 8).

the accommodation of the principle of individualisation of sentences within a guideline framework.¹⁸⁷

Further, the assertion that the practice of sentencing guidelines is in conflict with victim impact statements¹⁸⁸ applies only to a victim impact statement containing a suggestion as to sentence that carries weight, as in some American states.¹⁸⁹ It is further submitted that the proposal by the Sexual Offences Committee to allow the victim's proposal as to sentence, with the knowledge that the court will not adhere to it, will not jeopardise consistent and fair treatment of sex offenders in South Africa. Reliable fact-finding in order to make effective use of sentencing guidelines remains of importance and the arguments with regard to improving the quality of pre-sentence reports in chapter 7 above are relevant. In the sentencing guidelines of the foreign jurisdictions discussed above, the version of the victim with regard to the serious after-effects of the crime plays an important role in the grading of sexual offences for the purpose of determining ranges or starting points. It is submitted that, in all cases of child sexual abuse evidence, the impact of the crime on the victim should be considered in determining the seriousness of the offence, thereby squaring the triad.

With the strong constitutional criminal justice culture in South Africa, a risk assessment instrument that can lead to a more severe sentence for the accused based on prediction testimony may be challenged on the basis that it is vague. This potential problem has been dealt with in other jurisdictions and was found

¹⁸⁷ J Kriegler and A Kruger *Hiemstra: Suid-Afrikaanse Strafproses* 6 ed (2002) 684 list individualisation as the first amongst the main criteria in sentencing. The other criteria are society's view, deterrence, consistency and the interests of society. Also Terblanche *op cit* (n 4).

¹⁸⁸ DJ Hall 'Victims' voices in criminal court: The need for restraint' in M Wasik *The Sentencing Process* (1997) 265.

¹⁸⁹ *Ibid.*

to pass constitutional muster.¹⁹⁰ The assessment of dangerousness would appear to be implicit in the sentencing task, and is therefore not unconstitutional.¹⁹¹ The present concern expressed by the legislator, society and the judiciary about the high risk of sex offenders reoffending against children also makes it unlikely that such instrument will be the subject of a successful constitutional challenge.

As elsewhere, the restorative justice concepts of recognition of harm and victim impact statements are embraced, yet, in sexual offences against children, typical practices during sentencing, such as victim-offender mediation, conferencing and circle sentencing, do not appear to be relevant.¹⁹² Further, it would appear that restorative justice concerns about stigmatising, which is perceived to perpetuate deviant behaviour, have not played any role in the creation of the categories of 'sexually violent predators' or 'dangerous sexual offenders' in both comparator countries.¹⁹³

The above investigation indicates an international trend of regulating, or structuring, judicial discretion in the quest for less disparity in sentencing. Both comparator countries allow the judicial officer to deviate from the broad sentencing guidelines with reasons, thereby accommodating the principle of individualisation. In South Africa, neither the Criminal Law Amendment Act 105 of 1997 nor case law provides any clear guidance on the grading of sexual offences against children, nor do they provide starting points and sentence ranges. In the light of the fact that the Draft Sentencing Framework Bill, which provides for a Sentencing Commission, has not been given any priority, it is

¹⁹⁰ Virginia Criminal Sentencing Commission *op cit* (n 133) 14.

¹⁹¹ *Ibid.*

¹⁹² *Ibid.*

¹⁹³ G Mousourakis 'Restorative justice: Some reflections on contemporary theory and practice' (2004) 29:1 *Journal for Juridical Science* 9.

submitted that a specialised, multidisciplinary task group be constituted in order to commence work on the above topics. Further, a statistical model based on criminological research should be developed to assist the judicial officer in risk assessment during the sentencing of the sex offender.

Sentencing guidelines will not only contribute to more consistency in sentencing, but will also ease the task of the judicial officer. In addition, such guidelines might also lead to fewer appeals against sentences.

CHAPTER 9

THE SENTENCING PROCESS IN CHILD SEXUAL ABUSE CASES: GUIDELINES AND RECOMMENDATIONS

*'And then, slowly, slowly, for all of the horror and suffering, something else emerged from the hidden story: a diamond had been forming in the darkness, and when it came to light, my whole life made sense to me.'*¹

9.1 INTRODUCTION

9.2 REGULATING JUDICIAL DISCRETION

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9.2.1.1 General

9.2.1.2 Sentencing aims

9.2.1.3 Life imprisonment

9.2.1.4 Aggravating and mitigating factors

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i) The victim

aa) Aggravating factors

bb) Mitigating factors

ii) The offender

aa) Aggravating factors

bb) Mitigating factors

cc) Neutral factors

iii) The crime

aa) Aggravating factors

bb) Neutral factors

iv) The interests of society

aa) Aggravating factors

b) Indecent assault of children

i) The victim

aa) Aggravating factors

¹ C Slaughter *Before the Knife: Memories of an African Childhood* (2002) 250.

- bb) Mitigating factors
- ii) The offender
 - aa) Aggravating factors
 - bb) Mitigating factors
- iii) The crime
 - aa) Aggravating factors
 - bb) Mitigating factors
 - cc) Neutral factors
- iv) The interests of society
 - aa) Aggravating factors
 - bb) Mitigating factors

9.2.2 Recommendations

9.2.2.1 General

9.2.2.2 Formal sentencing guidelines

9.3 VICTIM IMPACT STATEMENTS

9.3.1 Guidelines

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9.4 BEHAVIOURAL SCIENCE

9.4.1 Guidelines

9.4.2 Recommendations

9.5 CONCLUSION

9.1 INTRODUCTION

Chapter 1 highlighted the fact that child sexual abuse is a diverse and emotionally laden phenomenon that courts have to take into account during a complex sentencing process.² In contrast to the situation during the trial, in the sentencing phase, the judicial officer has to function in a quasi-inquisitorial way by taking on a central and active role. In addition, behavioural science – a

² G Vervaeke, S Bogaerts and A Heylen 'Onderkennen van seksueel misbruik bij kinderen' in PJ Van Koppen, DJ Hessing, HLGJ Merckelbach and HFM Crombag (eds) *Het Recht van Binnen: Psychologie van het Recht* (2002) 179.

discipline of which the judicial officer has little understanding – acquires greater importance in this phase. In the sentencing phase, the focus falls not only on issues regarding the accused's motive, dangerousness and degree of culpability, but also on issues relating to the impact of the crime on the victim.

Judicial discretion in the selection of the type and measure of sentence imposed within the legal framework has been hailed as something to be jealously guarded³ and has been described as a crucial aspect of our law of sentencing.⁴ Despite this, judicial discretion has also given rise to unacceptable and unjustified disparity in the sentencing process, as well as in the actual sentences imposed in child sexual abuse cases. This disparity has been caused by the diverse judicial approaches to the seriousness of child sexual abuse offences, to the recognition and interpretation of mitigating and aggravating factors, to the relevant circumstances of the offender and the victim, and to the relative weight given to each of these factors.⁵

The aim in this concluding chapter is to consolidate local judgments (scattered over many years in different law reports) and selected foreign practices and to offer some guidelines that will contribute to greater uniformity in the judicial approach to the use of victim impact statements for sentencing purposes in court, to the presentation and accommodation of expert evidence, as well as to relevant aggravating and mitigating factors. Draft sentencing guidelines are therefore provided. These guidelines embrace general and specific principles and

³ E Du Toit *Straf in Suid-Afrika* (1981) 127.

⁴ SS Terblanche *The Guide to Sentencing in South Africa* (1999) 121.

⁵ Law Commission *Sexual Offences: Process and Procedure* Discussion Paper 102 Project 107 (2001) 732. See also chapter 4 para 4.5.7 and 4.5.16 where it is indicated that judicial officers are either not aware of precedents laid down by higher courts, or are blinded by their own biases.

are intended to guide the judicial officer in the exercise of his or her discretion in the sentencing process relating to the sexual abuse of children.

In addition, recommendations are made regarding the possible reform and further research of the law relating to child sexual abuse. These recommendations relate to victim impact statements, to the effective use of behavioural science in the process of sentencing sex offenders and to the regulation of judicial discretion by way of formal sentencing guidelines pertaining to the category of sexual offences against children. The proposals are based on current South African sentencing practices and, to some extent, on English, Canadian, Australian and American sentencing practices as researched in this study.

9.2 REGULATING JUDICIAL DISCRETION

9.2.1 Guidelines

9.2.1.1 *General*

1. Sentences in respect of sexual offences against children as listed in the relevant schedule to the Criminal Law Amendment Act 105 of 1997⁶ are consistently more severe than prior to the passing of such amending Act.⁷ Thus, where a departure from the prescribed sentence is authorised, previous precedents are no longer relevant as far as the length of the sentence is concerned.

⁶ See chapter 2 para 2.1.1 and 2.1.2 for a discussion of Act 105 of 1997 and the relevant offences.

⁷ *S v Abrahams* 2002 (1) SACR 116 (SCA) at 126b. See *S v G* 2004 (2) SACR 296 (W) at 301e where this guideline of more severe penalties was followed explicitly.

2. Case law serves as a source indicating the type of factors that should be considered as aggravating and mitigating in the grading process relating to child sexual abuse cases.⁸
3. In addition to the aims of sentencing and the factors of the *Zinn* triad, the interests of the child victim are also important.⁹ The sentencing triad is thus squared by focusing on the impact that the crime has had on the victim in a case of child sexual abuse.
4. *Evidence* by the *mother*, a *teacher* or a *social worker* regarding the symptoms of trauma resulting from the crime may, if not challenged, be accepted without psychiatric evidence on the effects of rape or indecent assault.¹⁰
5. The court can take judicial notice of the fact that sexual offences committed against children are inherently harmful. However, serious harm should be proved by way of reliable evidence.¹¹
6. Changes in behavioural and personality patterns following on incident(s) of sexual abuse should not be confused with normal child development.
7. Available evidence with regard to the possible effect of the crime on the victim(s) should be received by the court.
8. A finding of serious harm should be given substantial weight in sentencing.¹²
9. In the case of offences falling under minimum-sentence legislation, only particularly damaging or distressing effects of the crime upon the victim should be taken into account by the court when imposing sentence.¹³

⁸ *S v Abrahams supra* (n 7) at 126c. See the list of aggravating and mitigating factors below.

⁹ *S v Blaauw* 2001 (2) SACR 255 (C). See also chapter 1 par 1.2.

¹⁰ *S v Abrahams supra* (n 7) at 124c.

¹¹ *S v V* 1994 (1) SA 598 (A) at 600j; *S v Mahomotsa* 2002 (2) SACR 435 (SCA) at 441j.

¹² *S v Abrahams supra* (n 7) at 124d.

10. In cases of indecent assault against children falling outside the ambit of the General Law Amendment Act 105 of 1997, any harmful effect experienced by the child should be taken into consideration until such time as more detailed sentencing guidelines are developed in which the harmful effect is an inherent part.
11. The trauma experienced by male and female child victims of sexual assault is equally harmful.¹⁴
12. Conditions regulating the behaviour and activities of the accused must be imposed as part of a non-custodial sentence where there is good reason to believe that the accused may commit a sexual offence against a specific child, or against children in general.¹⁵
13. The sex offender requires some form of motivation to prevent him or her from dropping out of treatment programmes. Such motivation could, for example, include either an initial period of imprisonment¹⁶ or correctional supervision comprising an individualised, punitive element.
14. The following factors in combination are indicative of a high risk of the sex offender reoffending:
 - where the *age* of the offender at the time of the offence was less than 35 years (if there are multiple sex offences for which the offender is being sentenced, the age is that at the time of the sex offence that occurred first);
 - where the offender has not completed the ninth grade of school *education* by the date of conviction;

¹³ *R v Perks* [2000] Crim L. R. 606 proposition 2.

¹⁴ *S v Tshabalala* case no A1955/03, dated 7 February 2005 (unreported)(TPD); 'Judge slams rape discrimination' *Legalbrief Today* (8/2/05).

¹⁵ See the discussion of *S v O* 2003 (2) SACR 147 (C) in chapter 3 par 3.3 for an example. See also guideline 14 directly below for factors indicative of a high risk of reoffending.

¹⁶ *S v O supra* (n 15).

- where the offender is not *regularly employed* (that is, if, in the two years prior to sentencing, the offender changed his or her employment more than twice or was unemployed for six months or more, excluding an offender regularly employed through a 'temp agency');
- where the offender's *relationship* with the victim is that of a:
 - *stranger* (that is, where the victim had no prior knowledge of the offender's identity, such as his or her name, home address or place of employment) and the victim is *older than ten years*;
 - *step-parent* (that is, if the offender is married to the child's parent) and the victim is *under the age of ten*;
- where the indecent assault consisted of *penetration* (in the case of plea bargaining, the true nature of the act is important) *or attempted penetration* according to official reports such as police reports, victim impact statements and medical reports. (Penetration here refers *inter alia* to penetration of the victim's oral, anal or sexual cavities (including the vagina) by the offender's tongue or fingers, by means of objects or by way of bodily fluids like semen or urine;
- where the offender has a *criminal history* of prior arrests for person-type offences (such as murder, rape, kidnapping, assault, indecent assault);
- where the offender has served (or is currently serving) a term of *imprisonment prior* to the date of sentencing in respect of the current offence;
- where the offender has undergone *prior mental health treatment* (participation in any mental health, sex offender, alcohol or drug treatment programmes is relevant);
- where the offence was committed at the offender's residence, or another residence (or at the victim's residence or in a motor vehicle);
- where the offence was committed by a *male against a male victim*;

- where the offender has not had any *relationship with an adult* lasting longer than two years;
- where the offender has *repeated the offence* over a period of time; and
- where the offender has committed sexual offences against *several victims*.¹⁷

15. A plea of guilty and the concomitant reduction in sentence constitute a separate issue from aggravation and mitigation.¹⁸

9.2.1.2 Sentencing aims

1. The main objective of sentencing in child sexual abuse cases is to strike a balance between the offender's punishment and his or her possible rehabilitation. The latter is in the interest not only of the accused himself or herself, but is also in the interest of the young children with whom he or she may come into contact. Where, according to the evidence, the acts concerned have had an impact on the mental state of the children concerned, it would be wrong to allow an offender to escape the consequences of his or her acts simply by submitting to treatment at such a late stage, for this is something that the offender could have done voluntarily at an earlier stage.¹⁹

¹⁷ Virginia Criminal Sentencing Commission (undated) *Virginia Sentencing Guidelines Manual (Rape and Other Sexual Assault)* 2-3; RK Hanson 'Risk assessment with adult sex offenders' Unpublished paper presented at the 7th International Conference of the Association for the Treatment of Sexual Offenders Vienna September 2002 as referred to by J van Niekerk in *S v Jacobs* Middelburg SH 36/01 Appeal no 50-03.

¹⁸ Compare the position in England and Wales (see chapter 5 para 5.7.2.2(b) and 5.9.1). In the majority of indecent assault judgments evaluated in this thesis, the accused have pleaded guilty. It is submitted that this should not carry substantial weight in the case where the conduct took place over a period of time.

¹⁹ *S v D* 1989 (4) SA 225 (C) at 232c-e.

2. To prevent future offences, and with the aim of protecting children, the judicial officer must strive to ensure that the sentence is both appropriate and effective.

9.2.1.3 Life imprisonment

1. Child rape may be classified according to differing degrees of seriousness, with some cases, depending on the relevant aggravating and mitigating circumstances, being considered more serious than others.²⁰
2. The statutory, prescribed minimum sentence of life imprisonment should be reserved for the 'worst' cases.²¹

9.2.1.4 Aggravating and mitigating factors

a) Rape of children

The following aggravating and mitigating factors have been identified in cases of rape against children:

i) The victim

aa) Aggravating factors

1. The Supreme Court of Appeal has accepted that both the *physical injuries* and the *psychological effects* of the incident on the complainant in child sexual abuse cases are essential factors to consider in cases where minimum sentences are prescribed.²²

²⁰ In *S v Sauls en 'n Ander* 1982 PH H131, Van den Heever J held that even rape can vary from a 'trifling matter to a capital crime'. Olivier AJA referred to this dictum in *S v A* 1994 (1) SACR 602 (A) at 608c and added that, notwithstanding rape being a serious crime, it can be surrounded by circumstances which, on a scale of abhorrence ('weersinwekkendheid'), makes it more or less serious.

²¹ *S v Abrahams supra* (n 7) at 127d; *S v Mahomotsa supra* (n 11) at 444b; *S v G supra* (n 7) at 299c. See chapter 3 par 3.1.1.2 for a discussion of the facts in these cases. These cases echoed what was held in *S v Swartz and another* 1999 (2) SACR 380 (C) at 386b-c and reiterated that not all rapes merit the same punishment: 'That is in no way to diminish the horror of rape; it is however to say that there is a difference even in the heart of darkness'.

²² In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205e.

2. The following *symptoms* displayed by the victim justify an interpretation and conclusion that a complainant has been *deeply and injuriously affected* by rape:
 - reluctance to enter her own room after the rape;
 - a fear of sleeping alone;
 - sudden rejection of a parent or caregiver and the repelling of physical contact;
 - deterioration in schoolwork/failure of examinations for the first time;
 - rebelliousness and disobedience at school;
 - an inability to work through the rape;
 - nightmares and the development of phobias;
 - decreased ability to concentrate for long;
 - the victim is ill-tempered, aggressive and rebellious and has withdrawn from family members as well as neighbourhood children; and
 - an inability to discuss the rape and a need for long-term psychotherapy.²³
3. The after-effects of *incest* are more lingering and stigmatising than other forms of sexual assault.²⁴
4. Stranger rape, relationship rape and acquaintance rape are experienced as equally traumatic and harmful by victims.²⁵

²³ *S v Abrahams supra* (n 7) at 124c.

²⁴ *S v Abrahams supra* (n 7) at 125c: 'What is grievous about incestuous rape is that it exploits and perverts the very bonds of love and trust that the family relation is meant to nurture. Love thus expressed becomes the negation of love, and the violation of the trust that should sustain it extreme. Its effects may linger for longer than with extra-familial rape'. Of further importance is that the damaging effect of incest has been held to require particular attention with regard to deterrence and retribution in sentencing.

²⁵ Sentencing Advisory Panel *Research Report – 2: Attitudes to Date Rape and Relationship Rape: A Qualitative Study* (May 2002) at: <http://www.sentencing-advisory-panel.gov.uk/research/rape/forward.htm> (accessed 13/04/03); *R v Milberry and Others* [2003] 1 CR App R (S) 396; [2003] 2 All ER 939. The mitigating factor found in *S v A supra* (n 19), namely that the victim had been raped by

5. The victim does *not complete her schooling* as a result of the rape.²⁶
6. The victim is *ostracised* by some members of the community for sleeping with men and is *intimidated* by the accused's family and friends.²⁷
7. The victim becomes pregnant.²⁸

bb) Mitigating factors

1. The victim has overcome the after-effects of the rape incident, or is making good progress in that regard.²⁹
2. The victim was not a virgin; in other words, the victim has not lost her virginity as a result of the crime of rape.³⁰
3. The fact that a complainant had sexual intercourse with someone else two days before the rape is *not* a mitigating factor.³¹

people from the same social milieu who were known to him or her, should thus no longer be accepted.

²⁶ *Rammoko v Director of Public Prosecutions supra* (n 20). The victim was sent back by her uncle, with whom she lived in town, to her parents who lived on a farm without any schooling facilities (see chapter 3 par 3.1.1.2 d)).

²⁷ *S v Njikelana* 2003 (2) SACR 166 (C) at 174h.

²⁸ *S v B* 1996 (2) SACR 543 (C) at 554a.

²⁹ *Rammoko v Director of Public Prosecutions supra* (n 22); see chapter 3 par 3.1.1.2. Courts should be aware of the danger of a finding that no harm has been caused that is based purely on the victim's appearance in court, such as that made in *S v Gqamana* 2001 (2) SACR 28 (CPC) at 37a and *S v B supra* (n 28) at 554a. Compare *S v G supra* (n 7) at 297j-298a for noteworthy insight from the court.

³⁰ *S v Mahomotsa supra* (n 11) at 441d.

³¹ *S v Mahomotsa supra* (n 11) at 442h.

ii) The offender

aa) Aggravating factors

1. The accused, who was in a position of trust, such as a father, teacher, pastor or caregiver, *abused the trust of the child or his position of responsibility*.³²
2. The accused, at the time of the offence, was *HIV-positive* and was aware of his condition.³³
3. The accused's *attitude* to the victim, for example:
 - a father who is sexually/possessively jealous with regard to his daughter and is determined to precede other young males in any possible carnal access to her. (Such an attitude amounts to one where the daughter is viewed as a chattel, not merely to be used at will, but, once the first entitlement has been exercised, to be discarded for further similar use by others);³⁴
 - a sexual thug who considers young girls as objects to be used to satisfy his lust.³⁵
4. *Repeated* acts of raping a victim, who has been kidnapped, are indicative of the accused's use of his position of power to the full.³⁶

³² In *S v R* 1995 (2) SACR 259 (A), the accused was a teacher. Further, it has been stated that for a father to abuse his position to obtain forced sexual access to his daughter's body constitutes a deflowering in the grievous and most brutal sense: (*S v Abrahams supra* (n 7) at 123d). In *S v G supra* (n 7) the accused (aged 32 and unemployed) lived with the victim's mother and the victim and her mother trusted him completely.

³³ The offence of rape will then fall under prescribed life imprisonment provisions as contained in the Criminal Law Amendment Act 105 of 1997. If the accused is HIV-positive, life-threatening diseases may also be transmitted to the victim (*S v Blaauw supra* (n 9) at 260g).

³⁴ In *S v Abrahams supra* (n 7) at 122g the sentencing court was criticised for not considering as an aggravating factor such an attitude on the part of the accused to his daughter.

³⁵ In *S v Mahomotsa supra* (n 11) at 443d the accused on separate occasions threatened two girls aged 15 years, took them off the street, locked them up and raped them.

³⁶ *Ibid.*

5. The accused uses his superior *physical strength* to, for example, gag or overpower the victim.³⁷
6. A youthful offender consumes *alcohol* together with adults before the rape.³⁸
7. The accused has *previous convictions* for sexual offences against children, or for crimes against the person.³⁹
8. The accused was *awaiting trial* for a similar offence when he committed the rape.⁴⁰
9. The accused shows *no remorse*.⁴¹
10. The accused displays certain *character* traits, for example the accused committed another rape only six weeks before.⁴²
11. A degree of *planning/cunning* was involved in the accused's commission of the offence.⁴³
12. The *grooming process* used by the sexual offender to win the trust of a child in a manipulative way and to obtain access to the child is indicative of planning.⁴⁴

³⁷ *S v Jackson* 1998 (1) SACR 470 (SCA) at 478a.

³⁸ *S v Boer* 2000 (2) SACR 114 (NC) at 120c.

³⁹ *S v Mahomotsa supra* (n 11) at 444d.

⁴⁰ *Ibid.*

⁴¹ *S v R* 1996 (2) SACR 341 (T) at 344j; *S v M* 1994 (2) SACR 24 (A) at 30h. In contrast, in *S v Njikelana supra* (n 27) at 175d the court held that the total lack of remorse on the part of the accused was not in itself an aggravating factor, but simply meant that he could not rely on remorse as a mitigating factor. See chapter 5 (n 252).

⁴² *S v S* 1988 (1) SA 120 (A) at 123g.

⁴³ *S v Blaauw supra* (n 9) at 261a; *S v S supra* (n 42) 122h.

⁴⁴ A Gillespie "'Grooming': definitions and the law" (2004) 7124:154 *New Law Journal* 587. See chapter 5 par 5.4 for an explanation of the grooming process.

bb) Mitigating factors

1. In cases involving familial child abuse or breach of trust, *less emphasis* than usual should be placed on the fact that the offender is of good character or has no prior criminal record.⁴⁵
2. The accused is immature or has deficient and inadequate personality traits that make him less blameworthy.⁴⁶
3. The accused, although not a juvenile any more, is of a young age.⁴⁷
4. The accused was under the influence of an older accused.⁴⁸
5. The accused has an unfavourable personal background.⁴⁹
6. The accused has no previous convictions⁵⁰ (especially where he is already middle-aged or older).
7. Alcohol had an effect on the accused and diminished his sense of judgement.⁵¹
8. The accused has the potential for development or rehabilitation.⁵²

⁴⁵ Canadian Department of Justice 'Sentencing to protect children' *Consultations and Outreach* (24/4/03) 3.

⁴⁶ *S v Blaauw supra* (n 9) at 262a-j.

⁴⁷ *S v Blaauw supra* (n 9) at 263e; *S v Mahomotsa supra* (n 11) at 441d; *S v Gqamana supra* (n 29) at 37c; *S v Boer supra* (n 38) at 119d-f.

⁴⁸ *S v V and Another* 1989 (1) SA 532 (A) at 542d.

⁴⁹ In *S v Blaauw supra* (n 9) at 262a-j it was found that the accused had been negatively influenced by years of rejection and assault by his father, by a lack of a family life, by a low intelligence and by his stay in a reformatory; in *S v Abrahams supra* (n 7) at 126j the accused's son had committed suicide two years prior to the rape of his daughter and it was found that this had adversely influenced his conduct within the family and had led to a diminution in the judgement that he brought to bear as a father; see also *S v Gqamana supra* (n 29) at 35g-i.

⁵⁰ *S v Gqamana supra* (n 29) at 35g.

⁵¹ *S v R supra* (n 41) at 345b; *S v J* 1989 (1) SA 669 (A) at 686h; *S v M supra* (n 41) at 30c; *S v Njikelana supra* (n 27) at 174d-e. In these cases, the slightest possibility of rehabilitation sufficed.

⁵² *S v R supra* (n 41) at 346b; *S v V* 1996 (2) SACR 133 (T) at 138j-139a.

9. The virility of a young man is *not* a mitigating factor.⁵³

cc) Neutral factors⁵⁴

1. The offence was not premeditated.
2. The accused has marital problems that caused sexual frustration.

iii) The crime

aa) Aggravating factors

1. Children are vulnerable and therefore defenceless.⁵⁵
2. The accused used *force*⁵⁶ or *threats*.⁵⁷
3. The victim was *gang-raped*.⁵⁸
4. The victim was *assaulted* during the commission of the crime.⁵⁹
5. The act of rape committed by the accused displayed *callousness* or a *lack of feeling*.⁶⁰
6. The act of rape caused *physical injuries* to the child.⁶¹
7. The physical injuries have caused *permanent damage*.⁶²

⁵³ *S v Mahomotsa supra* (n 11) at 442d-e.

⁵⁴ Previous cases where these factors had been regarded as mitigating should thus no longer be followed.

⁵⁵ *S v D* 1995 (1) SACR 259 (A) at 260g-h; Terblanche *op cit* (n 4) 218.

⁵⁶ *S v Jackson supra* (n 37) at 478b; *S v V and Another supra* (n 48) at 540a; *Attorney-General, Eastern Cape v D* 1997 (1) SACR 473 (E) at 477e; *S v M* 1985 (1) SA 1 (A) at 9c.

⁵⁷ *S v R supra* (n 41) at 343j; *S v M* 1993 (2) SA 1 (A) at 5b.

⁵⁸ *S v Boer supra* (n 38) at 117d; *S v M and Another* 1979 (4) SA 1044 (BH) at 1051e: 'Dit is 'n beesagtigheid ...'; *S v V supra* (n 52) at 540a.

⁵⁹ *S v Boer supra* (n 38) at 117e; *S v M and Another supra* (n 58) at 1051f; *S v Pieters* 1987 (3) SA 717 (AA) at 725a-j.

⁶⁰ *S v Tyatyame* 1991 (2) SACR 1 (A) at 6f; *S v B supra* (n 28) at 553h: '... sy inlywing tot die seksdaad was simpatieloos'.

⁶¹ *S v R supra* (n 41) at 343f-i; *S v Tyatyama supra* (n 60) at 6g.

8. The victim was exposed to *further humiliation*.⁶³
9. The victim was *abducted*.⁶⁴
10. The accused *left the victim behind in a deserted spot*.⁶⁵
11. The accused broke into the *victim's house*,⁶⁶ or forced the complainant into her house,⁶⁷ where the rape was then committed.
12. The victim was a *virgin*.⁶⁸
13. The victim was *pregnant or menstruating* at the time of the commission of the crime.⁶⁹
14. The victim is *very young*.⁷⁰
15. The family had to *move house* because it was not able to live where the crime had taken place.⁷¹

⁶² In *S v M* 2002 (2) SACR 474 (SCA) at 418d and it was found that the trauma caused to the genitals of his daughter, aged six, by a father who raped her over a period of six months, would result in lifelong painful intercourse, with probable problems in enjoying adult relationships. In *S v Tatyama supra* (n 60) at 6g-h it was found that a seven-year-old girl would endure lifelong suffering as a result of a lack of bowel control and would not be able to have children.

⁶³ In *S v Boer supra* (n 38) at 117g the victim was left naked while witnesses arrived. In *S v V en 'n Ander supra* (n 48) at 539j the two accused had posed as policemen, had taken the complainants by force to a dam, and had laughed at and mocked the complainants while they took turns in raping them.

⁶⁴ *S v M supra* (n 56) at 9c; *S v V supra* (n 52) at 540a.

⁶⁵ *S v R supra* (n 41) at 343j; *S v Tyatyama supra* (n 60) at 6f; *S v J supra* (n 51) at 683h.

⁶⁶ *S v M supra* (n 57) at 5a.

⁶⁷ *S v M and Another supra* (n 58) at 1051f.

⁶⁸ *S v Boer supra* (n 38) at 117e; *S v G supra* (n 7) at 300h.

⁶⁹ *S v V and Another supra* (n 48) at 239b.

⁷⁰ *S v Tatyama supra* (n 60) at 6e; *S v Blaauw supra* (n 9) at 261a. See *S v G supra* (n 7) at 300h-i where the court held that the younger the victim the more blameworthy the accused is. (The accused shows greater 'sexual perversity' where he rapes a sexually immature and physically underdeveloped child.)

⁷¹ *S v M supra* (n 57) at 7g.

16. The rape took place in the *presence of other family members*.⁷²

bb) Neutral factors

1. The fact that a victim is refined, civilised or from a good home *should not* play an aggravating role.⁷³
2. The following factors should be regarded as neutral factors, with *no mitigating* weight being attached to them:
 - the absence of a weapon;
 - the absence of any physical threat by the accused;
 - the absence of any cruelty or unnecessary violence; and
 - the rape incident caused no physical harm.⁷⁴

iv) The interests of society

aa) Aggravating factors

1. There is a high incidence of rape in South Africa.⁷⁵
2. There is an escalation of child rape cases and cases where sentences are too lenient cause a public outcry.⁷⁶

⁷² In *S v M supra* (n 57) both the girl and her mother were raped in the presence of the girl's father and brother.

⁷³ Taking this factor into account would amount to discrimination among victims. Cases such as *S v Pieters supra* (n 59) and *S v S supra* (n 42) should thus no longer be followed in this regard.

⁷⁴ In *S v Jansen* 1999 (2) SACR 368 (C), the crime was classified as a borderline case because of the fact that there was no physical harm. This case should however not be followed in this regard.

⁷⁵ This remark was made as far back as 1979 in *S v M and Another supra* (n 58) .

⁷⁶ *Attorney-General, Eastern Cape v D supra* (n 56) at 478f; *S v G supra* (n 7) at 300j .

b) Indecent assault of children

i) The victim

aa) Aggravating factors

1. The victim has suffered *harmful psychological effects (of any nature)* as a result of the crime.⁷⁷
2. The victims have started to commit indecent acts with one another.⁷⁸

bb) Mitigating factors

1. A lack of evidence *does not* justify a (mitigating) finding that no harm has been suffered by the victim.⁷⁹
2. The fact that the victim is an older boy does not per se mean that less harm has been suffered.⁸⁰

ii) The offender

aa) Aggravating factors

1. A degree of *planning* was involved in the accused's commission of the offence.⁸¹
2. The *grooming process* used by the sexual offender to win the trust of a child, to manipulate him or her and to get access to the child is indicative of planning.⁸²

⁷⁷ See *S v D supra* (n 19) at 232e; *S v K* 1995 (2) SACR 555 (O) at 557h where severe harm was considered to be an aggravating factor. See *supra* par 9.2.1.4 (a) i) aa) 2 for the interpretation by the Supreme Court of Appeal of rape trauma symptoms. The court's interpretation is, it is submitted, also applicable to indecent assault cases.

⁷⁸ *S v K supra* (n 77) at 557h.

⁷⁹ *S v V supra* (n 11) at 600j; see also chapter 5 par 5.3.4.

⁸⁰ *S v R* 1993 (1) SACR 209 (A) at 222h should thus not be followed in this regard.

⁸¹ Recognition has been given to the fact that the paedophile 'deliberately engineered the climate' for his sexual encounters with children (*S v E* 1992 (2) SACR 625 (A) at 631e; see also *S v V* 1991 (1) SACR 59 (T) at 67f. Contrast *S v O supra* (n 15) where the court failed to recognise the nature of the grooming process or its potential after-effects.)

3. The accused abused his position of trust in respect of the child.⁸³
4. The accused abused the reliance placed on him by the victim to make the victim's ideal come true.⁸⁴
5. The accused never took steps to seek help, despite the fact that the abuse took place over a long period.⁸⁵
6. The accused has previous convictions.⁸⁶
7. The accused shows no remorse.⁸⁷
8. The accused told the victim not to assist the police in the investigation.⁸⁸
9. The accused intentionally caused the victim shame and humiliation.⁸⁹
10. There is a substantial age difference between the offender and the victim.⁹⁰

bb) Mitigating factors

⁸² *Supra* (n 44).

⁸³ In *S v Fatyi* 2001 (1) SACR 485 (SCA) at 488j the accused indecently assaulted a six-year-old girl. He was a taxi driver engaged in after-care transport and was in a position of trust. The court found that '[t]he accused's conduct was appalling ... for own sexual gratification he took advantage of a little girl entrusted to his care'. In *S v Manamela* 2000 (2) SACR 176 (WLD) at 180a, a father abused his position of trust. See also *S v O supra* (n 15); *S v D supra* (n 19); *S v E supra* (n 81); *S v V supra* (n 81) for examples of grooming by teachers and a caregiver.

⁸⁴ For example, to advance the complainant's music career (*S v E supra* (n 81) at 631e).

⁸⁵ *S v O supra* (n 15) at 161d-e; *S v E supra* (n 81) at 631d.

⁸⁶ *S v Manamela supra* (n 83) at 180b; *S v K supra* (n 77) at 558a-d; *S v R supra* (n 41) at 217d-g: despite the fact that the accused had a previous conviction, a sentence of correctional supervision was found to be appropriate in the latter case. It would appear that the older the children, the less weight the previous conviction will carry.

⁸⁷ See *supra* (n 41).

⁸⁸ *S v E supra* (n 81) at 631e.

⁸⁹ *S v Muvhaki* 1985 (4) SA 317 (ZHC). This case differs somewhat from the others in that the accused wished to cause embarrassment to the family and lifted the complainant's leg, thereby exposing her naked private parts to her father-in-law.

⁹⁰ Magistrates' Association (2003) *Magistrates' Court Sentencing Guidelines* 6 ed at www.magistratesorganisation.org.uk (accessed 9/10/04).

1. The accused shows remorse.⁹¹ Pleading guilty is *not* per se indicative of remorse.⁹² Each case should be individually assessed for a correct finding of remorse.
2. The accused shows insight into his condition.⁹³
3. The accused has a chance of rehabilitation.⁹⁴
4. The condition of the accused is a sickness or a compulsion,⁹⁵ or his conduct stems from inadequate personality traits.⁹⁶
5. The accused is a first offender.⁹⁷
6. The accused has personal qualities such as being an outstanding/hardworking/creative employee.⁹⁸

⁹¹ In almost all cases of indecent assault dealt with in this study, the accused pleaded guilty, or changed their plea after the first witness had testified. This has often been interpreted as remorse. However, such a situation should be distinguished from the issue of remorse and should be dealt with separately, for a plea of guilty does not necessarily indicate remorse.

⁹² There might be other reasons for the accused pleading guilty, such as not wanting the court to hear all the details of the case that might emerge during a trial, plea bargaining on a lesser plea, or the hope that a plea of guilty will keep him or her out of prison. As the grooming process indicates, offenders are very adept at manipulating a child into a false relationship of trust. Accordingly, it is submitted, the court should at all times be aware of the fact that the offender has not undergone a transformation and is still inherently manipulative, and may even resort to such manipulation to influence the court.

⁹³ *S v O supra* (n 15) at 162f-g.

⁹⁴ In *S v R supra* (n 80) at 222g-h the cause of the accused's crime was a personality defect and he responded well to therapy. However, courts do not agree as to whether there should be certainty or a mere possibility in this regard before such factor is accepted as playing a role in the imposition of correctional supervision. See chapter 5 par 5.5.1.1c).

⁹⁵ *S v S* 1977 (3) SA 830 (A) at 839a; *S v E supra* (n 81) at 632a; *S v D supra* (n 19) at 232c; *S v Ndaba* 1993 (1) SACR 637 (A) at 640.

⁹⁶ *S v R supra* (n 80) at 222g.

⁹⁷ *S v D supra* (n 55).

⁹⁸ *R v C* 1955 (2) SA 51 (T) at 51i; *S v E supra* (n 81) at 632a. This is one of the aspects that makes it so difficult for courts to sentence paedophiles, since they are in most cases agreeable people.

7. *Less emphasis* than usual should be placed on the offender's *previous good character* or *lack of a prior criminal record* because, in cases involving familial child abuse or breach of trust, these are not unusual factors.⁹⁹
8. The accused has strong family ties.¹⁰⁰
9. The accused was sexually molested as a child.¹⁰¹
10. The accused has lost his job because of the conviction, or has taken a reduction in salary.¹⁰²
11. The accused has a strong work pattern or impressive employment history.¹⁰³
12. The accused is young, or relatively young (is not a juvenile).¹⁰⁴

cc) Neutral factors

1. The accused has sexual problems in his marriage.¹⁰⁵

iii) The crime

aa) Aggravating factors

1. The child is very young/is vulnerable.¹⁰⁶
2. Pornographic material was used in order to sexually arouse victims.¹⁰⁷

⁹⁹ Canadian Department of Justice *supra* (n 45).

¹⁰⁰ *S v N* 1991 (1) SACR 271 (C); *S v R supra* (n 80) at 222g.

¹⁰¹ *S v R supra* (32) at 592f; *S v McMillan* 2003 (1) SACR 27 (SCA) at 32b.

¹⁰² *S v D supra* (n 55) at 266e.

¹⁰³ *S v R supra* (n 80) at 222g; *S v N supra* (n 100) at 275d-e; *S v E supra* (n 81) at 632a.

¹⁰⁴ Even the age of 32 was regarded as falling into this category (*S v R supra* (n 80) at 222g).

¹⁰⁵ In *S v D* 1989 (4) SA 709 (T) the accused stated that he desired stimulation by his daughter because of the absence of a sexual relationship with his wife. It is submitted that this could, at best, provide some explanation, but could never be mitigating, since a father cannot replace his wife with his daughter.

¹⁰⁶ *S v V* 1993 (1) SACR 736 (O) at 737g.

3. The abusive acts were repeated on many occasions.¹⁰⁸
4. The abuse took place over a long period.¹⁰⁹
5. The accused used street children who submitted to indecent acts for payment.¹¹⁰
6. The specific nature of the conduct, for example attempted penetration of a young girl.¹¹¹

bb) Mitigating factors

1. There was an absence of sodomy.¹¹²
2. The fact that the victim 'consented' to the indecent acts after a grooming process is *not* mitigating, as this amounts to ostensible consent.¹¹³

cc) Neutral factors

1. The fact that no physical injuries were caused by the indecent assault should be a neutral factor and *not* mitigating.¹¹⁴

¹⁰⁷ *S v E supra* (n 81) at 631f.

¹⁰⁸ *S v O supra* (n 15) at 161d; *S v V supra* (n 106) at 737f.

¹⁰⁹ *S v V supra* (n 106). The abuse continued over a period of seven years from the time that the victim was five years of age.

¹¹⁰ *S v K supra* (n 77) at 560c; *S v D supra* (n 55) at 261b.

¹¹¹ For example, where the accused attempts penetration with a girl of 11 years, but then stops when he realises that she is still undeveloped (*S v V supra* (n 11) at 599g-h).

¹¹² *S v McMillan supra* (n 101) at 31i. It should be kept in mind that when the Criminal Law (Sexual Offences) Amendment Bill 2003 is adopted, the definition of rape will in all likelihood be changed to include all acts of penetration, including sodomy. Such crime will further fall under the Criminal Law Amendment Act 105 of 1997, the aim of which is to bring about more severe sentences.

¹¹³ See chapter 5 par 5.4.

¹¹⁴ *S v McMillan supra* (n 101) at 31i. This decision should thus no longer be followed in this regard.

iv) The interests of society

aa) Aggravating circumstances

1. The prevalence of the offence.

bb) Mitigating factors

1. The *preservation of the family unit*, or family life, would appear to be an important consideration in sentencing in intra-familial abuse cases.¹¹⁵ This is accordingly what leads to the preference for correctional supervision as a sentencing option and is indicative of sensitivity as regards the holistic picture and the additional loss that the victim could suffer if the accused were imprisoned. A further reality is that the perpetrator is often the main or sole breadwinner. This then influences the court to focus on the advantages of s 276(h) of the Criminal Procedure Act 55 of 1977 and on the aim of rehabilitation. Research has however indicated that families within which child sexual abuse occurs are often dysfunctional in more than one respect,¹¹⁶ which raises the question as to the extent to which such a family unit can in fact be preserved.

9.2.2 Recommendations

9.2.2.1 General

1. The arguments of the prosecution and defence regarding sentence should be transcribed and should be made available to the court of appeal in order that a true and complete picture of the sentencing phase is provided.
2. The issue of judicial notice during the sentencing stage should be further researched.

¹¹⁵ *S v N supra* (n 100) at 274e-f; *S v D supra* (n 19) at 716g; *S v V supra* (n 106) at 738a.

¹¹⁶ PE Mullen, J Martin, JC Anderson and SE Romans 'The effect of child sexual abuse on social, interpersonal and sexual function in adult life' (1994) 165:1 *British Journal of Psychiatry* 35.

3. The impact that a plea of guilty should have on sentence in child sexual abuse cases must be researched and judicial officers must be provided with greater guidance in this regard.
4. Prosecutors should be trained to play an active role in sentencing.
5. Procedural provisions introduced by s 52(1) of the Criminal Law Amendment Act 105 of 1997 should be re-evaluated and should be amended to avoid the victim having to appear in court once again in the case of an appeal.
6. Presiding officers who preside over child sexual abuse cases should undergo accredited training.
7. Courts must be educated in the after-effects of grooming in order that they realise the potential/likely impact of a careful grooming process on the victim, particularly in indecent assault cases.

9.2.2.2 Formal sentencing guidelines

1. Formal sentencing guidelines should be laid down for child sexual abuse cases as a category of offence.
2. Sentencing guidelines should be broad in range. Compliance with such guidelines should be voluntary, but with reasons being provided for deviations therefrom. In this way, judicial officers can retain their judicial discretion and their input can be obtained.
3. In addition to sentencing guidelines, a risk assessment instrument should be developed in order to protect children and the public against the risk of sex offenders reoffending. What is of importance here is that the presiding officer must have reliable data in order to assess risk. Consequently, a thorough pre-sentence report must be a necessity in all child sexual abuse cases. (A statistical model based on criminological research should be

developed to assist the judicial officer with risk assessment during sentencing of the sex offender.)¹¹⁷

4. Sentencing guidelines should be based on judicial practice and on new research.
5. Sentencing guidelines in child sexual abuse cases should not be static and the guideline ranges that suggest starting points must be relatively broad.
6. Training must be conducted with regard to not only the use of the system of sentencing guidelines, but also with regard to the underlying rationale thereof, thereby providing the judicial officer with a holistic picture.
7. A ready reference source on sentencing law issues, arranged by subject matter, should be developed in South Africa to assist judges, magistrates and practitioners.
8. Cases of paedophiles, intra-familial indecent assault and once-off incidents attributed to low self-esteem must be distinguished. Cognisance should be taken of the various categories in precedents to enhance consistency, thereby contributing to certainty amongst the public.
9. Judicial officers should be trained with regard to risk assessment factors.
10. In the light of the fact that the draft Sentencing Framework Bill 2000, which provides for a Sentencing Commission, has not been given priority, it is submitted that a specialised multidisciplinary task group be constituted in order to commence work on the foregoing recommendations.
11. Since courts cannot on their own, through sentencing, stop child sexual abuse and protect children and society, a holistic approach should be adopted by the Department of Justice and Constitutional Development, the Department of Correctional Services, the Department of Social Welfare and Community Services and society.

¹¹⁷ Virginia Criminal Sentencing Commission (2001) *Assessing Risk among Sex Offenders in Virginia*; AE van der Hoven 'Sentencing the sex offender: A criminological perspective on section 286A of the Criminal Procedure Act 51 of 1977 (as amended)' (2005) 1:6 *Sexual Offences Bulletin* 65 points out that risk assessment, as opposed to determination of dangerousness, should be rational, supportable, unbiased and comprehensive.

12. Child sexual abuse should be destigmatised. An institution similar to Alcoholics Anonymous (AA) must be developed for people with distorted sexual thinking patterns so that they are provided with the opportunity to seek help.

9.3 VICTIM IMPACT STATEMENTS

9.3.1 Guidelines

1. The main *rationale* (purpose) for introducing a victim impact statement (hereafter VIS) should be to achieve proportionality in sentencing, thereby taking the degree of harm inflicted as a result of the commission of the crime into consideration as the fourth element or pillar in sentencing. A VIS will provide the court with the other side of the story and thus enable it to achieve a more balanced and holistic approach.
2. The introduction of a VIS in all cases of child rape will assist in halting the high court practice of recalling victims in order to 'be steeped in the atmosphere of the trial',¹¹⁸ or in order to obtain information on the impact of the crime for the first time,¹¹⁹ or in order to update a much earlier VIS.
3. A VIS is of equal importance to female and male victims of child sexual abuse.
4. A VIS is as important in child rape cases as it is with regard to all types of indecent assault against children.
5. For the purpose of a VIS, a victim should be *defined* to include the person against whom the offence has been committed, his or her immediate family members and his or her dependants, *as well as* a witness to the act of actual or threatened violence who is adversely affected by the offence.

¹¹⁸ *S v Gqamana supra* (n 29) at 34a.

¹¹⁹ *Rammoko v Director of Public Prosecutions supra* (n 22) at 205f, 206b.

6. The presiding officer must have the *final responsibility* for determining the attitude of the victim to the VIS and for ensuring its availability. To leave this responsibility solely to prosecution staff will only lead to the arbitrary use of the VIS and to unequal opportunities for victims to provide the court with their side of the story.
7. When the victim, or the child victim's caregiver or parent, is present during sentencing in the case of sexual abuse, the court must address them personally to determine whether they wish to make a statement on harm or to present any information in relation to sentence.
8. The *contents* of a VIS should focus primarily on the different forms of harm, such as physical or mental injury, emotional suffering, economic loss, or the substantial impairment of the victim's fundamental rights. The victim should be allowed to include any other consequence of the crime that is unique and relevant to that particular victim, in his or her VIS.
9. The *contents* of a VIS should preferably not include a reference to the victim's sentence recommendation because the value of the VIS may be tarnished or neutralised if the recommendation is too emotional. If such a recommendation is made, it should be on condition that the victim is informed beforehand that it is the court's responsibility to decide on the sentence and that the court will take note of the recommendation, but is under no duty to consider or follow it.¹²⁰
10. The *form of participation* employed in producing a VIS should include written and oral presentations by the victim himself or herself, or by someone on his or her behalf.
11. The victim should be permitted to read out a written statement, or address the court in some other way.

¹²⁰ See chapter 6 par 6.4.2.2 for reasons that may justify the victim's sentence recommendation.

12. The *preparation* of a VIS should be undertaken by an agency that provides victims of child sexual abuse with compulsory treatment. In this way, the child victim can be provided with essential, one-stop assistance.
13. However, victims may, if they prefer, prepare the statements themselves without the assistance of any agency assigned to the task.
14. The VIS of a teenage victim could be presented via *video* – this spares the child from having to make a court appearance and she or he need then appear in court only should it become necessary to cross-examine him or her. Research however indicates that the defence seldom exercises the right to cross-examine with regard to a VIS.¹²¹ An objection that may be encountered is that a video could have a greater impact compared with that of a written statement which is simply read out by the prosecutor, or that of an expert testifying as to the harm caused. Although there may be merit in such an objection, it can be argued that the victim should, wherever possible, 'have a face' during sentencing proceedings.
15. Unless the victim or his or her family objects, a *photograph* of the victim taken shortly after the commission of the crime should, as a matter of routine, be attached to a written VIS that is submitted to the court by the prosecution. This is necessary to avoid the situation of the faceless victim and is of particular importance as regards the divided-case practice introduced by the Criminal Law Amendment Act 107 of 1997 in cases of child rape. The photograph should be destroyed on finalisation of the case.
16. A VIS dealing with harm and the counselling of victims should not be linked to service information on bail and on the progress of the case.
17. The *rules of evidence* with regard to a VIS should be clear.
18. A VIS should always be made voluntarily. Victims should however be entitled to make such a statement and should be encouraged and assisted

¹²¹ See chapter 6 par 6.6.11.1.

to participate in this process.¹²² Where the victim objects to making a VIS, nobody should be allowed to make a statement on her or his behalf.¹²³

19. A VIS must be made under oath.¹²⁴
20. A copy of the VIS must be given to the accused/the accused's legal representative.¹²⁵ The accused must however not be allowed to retain a copy for himself or herself.¹²⁶
21. The prosecution must have a discretion to edit out any sensitive information in the VIS before it is served on the defence.¹²⁷
22. The absence of a VIS should not lead to any negative inference being drawn or to the conclusion that no harm, loss or emotional suffering has been caused by the crime.¹²⁸
23. There must be evidence corroborating the victim's VIS before the court can make a finding with regard to the degree of impact of the offence on the

¹²² I Edwards 'Victim participation in sentencing: The problems of incoherence' (2001) 40:1 *The Howard Journal* 44.

¹²³ AE van der Hoven *Forensic Criminology (Tutorial Letter 501/2004)* Department of Criminology Unisa (2004) 202.

¹²⁴ Law Commission *op cit* (n 5) 348.

¹²⁵ *R v Hobstaff* (1993) 14 CR App R (S) 60.

¹²⁶ In New South Wales, the Crimes (Sentencing) Procedure Act 1999 s 28(5) provides that care must be taken to ensure that the offender does not retain a copy for himself.

¹²⁷ Home Office *The Victim Personal Statement Scheme: A Guide for Investigators* (undated) 10,13, 16 at <http://www.homeoffice.gov.uk/docs/guideforinvestigators.pdf> (accessed 14/09/04).

¹²⁸ *R v Hobstaff supra* (n 125); Law Commission *Report on Sexual Offences* Project 107 (2002) 348.

victim,¹²⁹ unless surrounding circumstances warrant such an inference being properly drawn.¹³⁰

24. An uncontested VIS should be admissible evidence on production thereof. If the contents of a VIS are disputed, the author and/or the victim must be called as a witness. The victim should then be given the choice to withdraw the statement. However, when a victim testifies and requests that certain information not be disclosed, the court must balance the interests of the victim and the reasons for the request against the interests of justice.¹³¹
25. The evidential section of a VIS statement should include a paragraph that reads more or less as follows: 'I have been given the victim impact statement (VIS) leaflet and the VIS scheme has been explained to me. What follows is what I wish to say in connection with this matter. I understand that what I say may be used in various ways and that it may be disclosed to the defence.'

9.3.2 Recommendations

1. *Forms and procedures* should be drawn up for the written preparation and submission of the VIS.
2. Guidelines for victims should be developed explaining the purpose of the VIS and the rights of victims in this regard.

¹²⁹ *R v Perks* [2000] Crim L. R 606, proposition 1. Taking note of the Attorney-General's direction that psychological harm should be regarded as the number one aggravating factor, the court reviewed *R v O* (1993) 14 Cr. App. R. (S.) 632 and *R v H* [1999] *Current Law* 144, dealing with incest and the indecent assault of children respectively.

¹³⁰ Lord Chief Justice (16/10/01) *Practice Direction (Victim Impact Statements)* par 3(b) at <http://www.courtservice.gov.uk/cms/7900.htm> (accessed 14/09/2004).

¹³¹ Clause 47(6) Draft Sentencing Bill 2000. Section 29(b) of the NSW Crimes (Sentencing Procedure) Act 1999 provides, for example, that a VIS may not be received or considered by a court if the victim, or any of the victims to whom the statement relates, objects to the statement being submitted to the court.

9.4 BEHAVIOURAL SCIENCE

9.4.1 Guidelines

1. Child victims of sexual abuse must receive counselling in order to:
 - a) break the cycle where they themselves possibly become perpetrators;¹³² and
 - b) intervene in the long-term negative effects of child sexual abuse relating to self-esteem and future relationships.¹³³
2. Expert reports on both the victim and the offender must be prepared as a matter of routine after conviction of the offender on a rape charge in the regional court. The purpose of these reports is to expedite cases and to minimise further trauma that may be caused as a result of an appeal court having to recall the victim to testify.
3. The scope of pre-sentence reports has changed and such reports now extend beyond the offender. Pre-sentence reports by probation officers therefore include a report on the impact of the crime on the victim.
4. Pre-sentence reports should explain the subtle psychological violence, creation of deceptive trust and manipulation inherent in the grooming process (*modus operandi*) used by the paedophile, as well as the effect thereof on the child victim.
5. Normal child development falls outside the area of judicial notice in so far as 'elemental experience in human nature' is concerned and therefore requires behavioural science expertise to distinguish it from the trauma symptoms displayed by victims.¹³⁴

¹³² See chapter 2 (n 77) for findings indicating that a significant percentage of abused children become abusers themselves. Reported cases such as *S v McMillan supra* (n 93); *S v R supra* (n 28) confirm these findings.

¹³³ See chapter 5 para 5.3.4 and 5.4.

¹³⁴ *R v African Canning Co SWA Ltd* 1954 (1) SA 197 (SWA) 199f. See KD Müller *Preparing Children for Court: A Handbook for Practitioners* (2004) 52. See also DT Zeffert, AP Paizes and AStQ Skeen *The South African Law of Evidence* (2003) 718-721 for a general discussion on matters of general knowledge for purposes of judicial notice.

6. There should be greater multidisciplinary interaction between the disciplines of law and psychology.
7. Judicial officers should make use of behavioural science experts as *assessors* to assist the court in understanding behavioural science and in accommodating it in the sentencing process.
8. Behavioural science experts responsible for producing pre-sentence reports should abide by a code of ethics confirming that their overriding duty is to the court and not to the parties in the case.
9. The court should adopt an active approach and call for expert witnesses in terms of s 274(1) of the Criminal Procedure Act 55 of 1977.
10. The court should be specific with regard to its need for expert information and should consider issuing official guidelines for experts employed in child sexual abuse cases.
11. Guidelines for experts:¹³⁵
 - 11.1 Experts should include matters that do not necessarily support their own conclusions in order to demonstrate their impartiality.
 - 11.2 Whilst addressing the crucial issues, without simply restating incidental trivia, the report should also demonstrate a knowledge of the process and dynamics of child sexual abuse, for instance by including an explanation of the experiences and perceptions of the abused child and the non-offending parent, where relevant. Further, the phenomenon that victims and non-abusing partners of offenders often display irrational behaviour and may appear to be in collusion with the offender could be explained as resulting from the control that the offender exercises over them.
 - 11.3 As regards the use of language, experts should, without being bound by professional jargon, provide a context in laymen's terms that makes it possible to understand the basis of their opinions.

¹³⁵ See chapter 7 par 7.6.2 which serves as the basis of these guidelines for experts.

- 11.4 Experts should include corroborated facts. Simply restating what the perpetrator has told them could indicate that the expert is not sufficiently familiar with the issues concerned in order to be able to distinguish fact from fiction. Without implying that everything is a falsehood, experts should be aware that it is a characteristic of sexual offenders to present a distorted version of events.
- 11.5 The expert's report should refer to both quoted research and clinical experience.
- 11.6 Objectives stated at the beginning of the report (for example, 'to provide an answer as regards the risk of reoffending') should be met or an explanation should be given for a failure to do so.
- 11.7 Conclusions must flow logically from the issues discussed.
- 12. *Correctional supervision* should be individualised with the help of experts so that the punishment component is appropriate to each accused.¹³⁶ Correctional supervision is currently not perceived by the legal profession as being true punishment. Instead, it is seen as amounting to a suspension or, even worse, an acquittal.¹³⁷ However, by individualising correctional supervision, punishment can be combined with the aim of rehabilitation, which is ranked as essential in law reform proposals.¹³⁸

9.4.2 Recommendations

1. Existing programmes in South Africa dealing specifically with sex offenders must be researched and evaluated.
2. Research must be conducted regarding the likelihood of rehabilitation of paedophiles in general, and the outcome of such research must be conveyed to the court.

¹³⁶ To address the concern of the court in *S v D supra* (n19).

¹³⁷ Personal communication with practising advocate JH de la Rey, Pretoria (4/05/04).

¹³⁸ See chapter 2 par 2.2.

3. The status quo (availability and effectiveness) with regard to psychotherapeutic treatment programmes within the Department of Correctional Services should be assessed.
4. Effective psychotherapeutic treatment programmes within a secure and controlled facility, other than traditional correctional facilities, should be investigated, developed and implemented.
5. A list of experts acknowledged in their fields must be compiled and made available to the court.
6. The Magistrate's Court Act 32 of 1944 should be amended to provide for the appointment of expert assessors (similar to the position in the high court) when the court believes that it needs to be assisted in sentencing with regard to matters falling outside its field of expertise.
7. Correctional supervision should be researched and developed in order to make proper provision for both the punitive and rehabilitative aims of sentencing.
8. The state must provide therapeutic centres specialising in the counselling of child sexual abuse victims and courts must have some form of control over a complainant's attendance.
9. Research must be conducted into the long-term effects of child abuse.
10. Probation officers should be trained in the preparation and writing of reports.
11. The proposed, minimum five-year period of long-term supervision should be re-evaluated, taking into account international research regarding the recidivism patterns of paedophiles.

9.5 CONCLUSION

This chapter has provided guidelines regarding the sentencing process in child sexual abuse cases. Such guidelines address general matters, the use of victim impact statements, the use of behavioural science in the sentencing phase and relevant aggravating and mitigating factors. These guidelines have been

proposed in the hope that role-payers will be assisted in structuring the current haphazard approach to the introduction of the issue of the victim's harm in court. They are also aimed at contributing to the provision by experts of more effective and reliable pre-sentence reports. Further, this chapter attempted to provide clarity regarding the factors that are considered to be aggravating or mitigating in the offence category, child sexual abuse, as well as regarding the weight that should be attached to them. The formal regulation of judicial discretion as a crucial need in South Africa should be approached correctly and in accordance with the above recommendations in order to ensure compliance by judicial officers with possible suggested starting points and sentencing ranges. The ultimate aim is to ease the task of judicial officers, to treat sex offenders with greater equality and effectiveness, and to provide protection for children so that they are able to grow up in freedom and without fear.

BIBLIOGRAPHY

Adams S 'Young prisoners' rape ordeal' *Pretoria News* (17/09/04).

Allidridge P 'Scientific evidence and comparative criminal procedure' (1999) 3 *International Journal of Evidence and Proof* 141.

Alys L, Wilson CJ, Clarke J and Toman P 'A comparison of developmental and behavioural factors between sexual homicide offenders, sex offenders who do not kill and control' Unpublished paper 14th European Conference on Psychology and Law *Facing the Challenges of a Changing World* 7-10 July 2004 Krakow.

Anstey G 'All I want is justice' *Sunday Times (Insight)* (3/03/02).

Ashworth A 'Disentangling disparity' Pennington DC and Lloyd-Bostock S (eds) *The Psychology of Sentencing* (1987) 24 Short Run Press: Oxford.

Ashworth A 'Criminal justices and deserved sentences' (1989) 36 *Criminal Law Review* 340.

Ashworth A 'Victim impact statements and sentencing' (1993) *Criminal Law Review* 498.

Ashworth A *Sentencing and Criminal Justice* 2ed (1995) Butterworths: London.

Ashworth A 'Four techniques for reducing sentence disparity' in Von Hirsh A & Ashworth A (eds) *Principled Sentencing: Readings on Theory and Policy* 2ed (1998) 227 Hart: Oxford.

Ashworth A *Sentencing and Criminal Justice* 3ed (2000) Butterworths: London.

Ashworth A 'Victim's rights, defendant's rights and criminal procedure' in Crawford A and Goodey J (eds) *Integrating Victim Perspectives in Criminal Justice* (2000) 185 Aldershot: Ashgate.

Baker EB and Clarkson CMV 'Making punishments work? An evaluation of the Halliday Report on sentencing in England and Wales' [2002] *Criminal Law Review* 81.

Bandes S 'When victims seek closure: forgiveness, vengeance and the role of government' (2000) 27 *Fordham Urb Law Journal* 1599.

Banks R *Banks on Sentencing* (2003) Butterworths: London.

Bartol CR *Criminal Behaviour: A Psychological Approach* 4ed (1995) Prentice Hall: New Jersey.

Batley M 'Restorative justice' Unpublished Paper ARMSA and the Centre for Child Law Symposium *The Child in the Criminal Justice System* 16 June 2004 Pretoria.

C Bawden 'What other papers say' *Pretoria News* (11/12/2004) 7.

Bertelsmann E 'Future developments' Unpublished Paper ARMSA and Department of Criminal and Procedural Law UNISA Symposium *The Impact of the Bill of Rights on the Criminal Justice System: 1994-2004* 22 March 2004 Pretoria.

Blanchette K 'Sex offender assessment, treatment and recidivism: A literature review' (1996) at http://www.csc-scc.gc.ca/text/rsrch/reports/r48/r48e_e.shtml (accessed 14/10/04).

Blum A 'Impact of crimes shakes sentencing' (1995) 26:6 *The National Law Journal*.

Blume JH 'Ten years of Payne: Victim impact evidence in capital cases' (2003) 88 *Cornell Law Review* 257.

Boyd C 'Youth justice and the protection of children and youth' Paper Electronic Conference Proceedings 18th International Conference of the International Society for the Reform of Criminal Law *Keeping Justice Systems Just and Accountable: A Principled Approach in Challenging Times* 8-12 August 2004 Montreal.

Bredar JK *Justice Informed: The Pre-sentence Report Pilot Trials in the Crown Court* (1992) Vera Institute of Justice: London.

Buchanan A 'Reviews: Rosner R (ed) "Principles and practice of forensic psychiatry"' (2004) 15:1 *The Journal of Forensic Psychiatry and Psychology*.

Burchell J and Milton J *Principles of Criminal Law* 2ed (1997) Kenwyn: Juta.

Burchell J and Milton J *Principles of Criminal Law* 3ed (2005) Kenwyn: Juta.

Burnside J 'Book review of De Keijser JW (2000) Punishment and purpose: From moral theory to punishment in action' (2000) *Ebscohost*.

Burr R 'Litigating with victim impact testimony: The serendipity that has come from Payne v Tennessee' (2003) 88 *Cornell Law Review* 517.

- Caelers D 'Unwanted touching' is not rape, say teens' *Legalbrief* (22/10/2004).
- Cain PA 'Good and bad bias: A comment on feminist theory and judging' (1988) 61 *S Cal Law Review* 1945.
- Caine L and Royston R *Out of the Dark* (2004) Transworld Publishers: Reading.
- Callihan JM 'Victim impact statements in capital trials: A selected bibliography' (2003) 88 *Cornell Law Review* 569.
- Campbell IG 'The role of the Crown Prosecutor on sentence' (1985) 9 *Criminal Law Journal* 202.
- Canadian Department of Justice 'Sentencing to protect children' *Consultations and Outreach* (24/4/2003).
- Cann L, Falshaw C, Friendship A 'Sexual offenders discharged from prison in England and Wales: A 21-year reconviction study' (2004) 9 *Legal and Criminological Psychology* 1.
- Carney LP *Introduction to Correctional Science* 2ed (1979) McGraw-Hill: New York.
- Carstens PS 'Paraphilia in South African criminal case law' (2002) 119:3 *SALJ* 603.
- Carstens S 'Vonnis-wette lei dalk tot ophoop van hoë-hof sake' *Beeld* (11/06/03) 11.
- Carstens S 'Laymen to rule in court' *The Crime Times* (21/06/04) 2.
- Case Comment 'Sentencing: Victim impact statements – general considerations' (2000) *Criminal Law Review* 606.
- Cecil JS and Wilging TS 'Accepting Daubert's invitation: Defining a role for court-appointed experts in assessing scientific validity (1994) 43 *Emory Law Journal* 995.
- Cloete T 'Sentence: Public expectations and reaction' (2000) 117 *SALJ* 618.
- Cloud J 'Paedophilia' *Time Magazine* (29/04/02) at http://www.ipce.info/library_3files/cloud_ped_time.htm (accessed 2/06/04).

Cohen DA 'Notes on the clinical assessment of dangerousness in offender populations' (1997) *Forensic Psychiatry On-Line* at <http://www.priory.com/psych/assessin.htm> (accessed 10/01/05).

Cohen M 'Get the facts straight: a new standard for experts' (2004) 154: 7117 *New Law Journal* 294.

Convention on the Elimination of All Forms of Discrimination (1979).

Criminal Justice Initiative *Report: Managing and treating young sex offenders: What action for government and civil society* Workshop 17-18 November 2003 Cape Town.

Criminal Law Revision Committee *15th Report on Sexual Offences* (Cmnd 9213) (1984).

Crowly TM 'Help me Mr. Wizard! Can we really have "neutral" Rule 706 experts?' at <http://www.law.msu.edu/lawrev/98-4/crowley.htm> (accessed 02/08/2004).

Daniels H Morris: *Technique in Litigation* 5ed (2003) Juta: Cape Town.

Davies M 'Social inquiry for the courts' (1974) 14 *British Journal of Criminology* 18.

Davis RC and Smith BE 'The effects of victim impact statements on sentencing decisions: A test in an urban setting' (1994) 11:3 *Justice Quarterly* 453.

De Bruin G 'Lollerdrange nou chemies in bedwang: Molesteerder kry berading in huisarres' *Rapport* (13/7/03) 10.

Delgado R 'Storytelling for oppositionists and others: A plea for narrative' (1989) 87 *Michigan Law Review* 2411.

Delport CSL and Vermeulen A 'Convicted male sexual offenders: A social work perspective' (2004) 5:2 *CARSA* 41.

Department of Justice and Constitutional Development *Minimum Standards on Services for Victims of Crime* (2004).

Developments in the Law 'Confronting the new challenges of evidence' (1995) 108 *Harvard Law Review* 1481.

De Vogel V and De Ruiter C 'Differences between clinicians and researchers in assessing risk of violence in forensic psychiatric patients' (2004) 15:1 *The Journal of Forensic Psychiatry and Psychology* 145.

De Waal J, Currie I and Erasmus G *The Bill of Rights Handbook* 4ed (2001) Juta: Lansdowne.

Doek JE 'Sexual abuse of children: An examination of European criminal law' in Mrazek PB and Kempe CH (eds) *Sexually Abused Children and Their Families* (1981) 80 Pergamon Press: Oxford.

Domachowski W 'Guilty or not guilty: Assertions of social psychology *vis à vis* the law' in Czerederecka A, Jaskiewicz-Obydzinska T and Wojcikiewicz J (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 304.

Donner JPH 'Opening remarks by Dutch Attorney General' February (2004) *The Reformer* 4.

Duncan Brown JD 'Developing strategies for collecting and presenting grooming evidence in a high tech world' (2001) 14: Update 11 *American Prosecutors' Research Institute: National Center for Prosecution of Child Abuse*.

Du Rand P Unpublished presentation 'Specialised court services and the promotion of the rights of vulnerable groups' Training Workshop *The Judicial Officer and the Child Witness* 18-21 March 2004 Durban.

Du Toit E *Straf in Suid-Afrika* (1981) Juta: Johannesburg.

Du Toit E, de Jager FJ, Paizes A, Skeen A StQ and van der Merwe S *Commentary on the Criminal Procedure Act* 29ed (1987) Juta: Cape Town (updated to 2003).

Du Toit P and De Lange L 'Seunsverkragter sit nou baie langer' *Beeld* (8/02/05).

Editorial 'Time to act on rape' *Mail and Guardian* (9-15 November 2001).

Edwards I 'Victim participation in sentencing: The problems of incoherence' (2001) 40:1 *The Howard Journal* 39-54.

Edwards I 'The place of victims' preferences in the sentencing of "their" offenders' (2002) *Criminal Law Review* 689.

Egan V *Book Review: Hollon CR Handbook of Offender Assessment and Treatment* (2001) Ebscohost.

Eisenberg T, Garvey SP and Wells MT 'Victim characteristics and victim impact evidence in South Carolina capital cases' (2003) 88 *Cornell Law Review* 306.

Elliot M, Bowne K and Kilkoyn J 'Child sexual abuse and prevention: What offenders tell us' (1995) 19 *Child Abuse and Neglect* 579.

Engelbrecht J 'Kindermolestering en verkragting: Die howe se rol' (1995) 8:1 *Consultus* 20.

Englander EK 'Book review: Arrigo BA Introduction to Forensic Psychology: Issues and Controversies in Crime and Justice (2000)' (2004) 41:3 *Crime, Law and Social Change* 289.

Erez E 'Victim participation in sentencing: And the debate goes on' (1994) 3 *International Review of Victimology* 17.

Erez E 'Who's afraid of the big bad victim? Victim impact statements as victim empowerment and enhancement of justice' (1999) *Criminal Law Review* 545.

Erez E and Rogers L 'Victim impact statements and sentencing outcomes and processes: The perspectives of legal professionals' (1999) 39:2 *British Journal of Criminology* 216.

Falshaw L, Bates A, Patel V, Corbett C and Friendship C 'Assessing reconviction, re-offending and recidivism in a sample of UK sexual offenders' (2003) 8 *Legal and Criminological Psychology* 207-215.

Federal Court of Australia *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia* at http://www.federalcourt.gov.au/how/prac_direction.html (accessed 12/10/04).

Family Court of Australia *Guidelines for child representatives* at http://www.familycourt.gov.au/presence/connect/www/home/directions/guidelines_for_child_representatives/ (accessed 30/09/04).

Federal Judicial Centre 'Use of court-appointed experts and special masters' *Reference Manual on Scientific Evidence* 2ed (1994) 58.

Fedler J and Olckers I *A Draft Model for Social Context Revisioning of Legal Materials* (2000) Law, Race and Gender Unit: Cape Town.

Finkelhor D (ed) (1986) *A Sourcebook on Child Sexual Abuse* Sage: London.

Finkelhor D and Brown A 'The traumatic impact of child sexual abuse: A conceptualisation' (1985) 55:4 *American Journal of Orthopsychiatry*.

Fisher G *Evidence (University Casebook Series)* (2002) Foundation Press: New York.

Fiske KWF 'Sentencing powers and principles' in Pink JE and Perrier D *From Crime to Punishment* 2ed (1992) 233 Thompson Canada Limited: Toronto.

Fletcher GP *With Justice for Some – Protecting Victims' Rights in Criminal Trials* (1996) Perseus: Philadelphia.

Fortt C 'Child sexual abuse and the UK expert witness' (2001) *Solicitors Journal*.

Freckleton I 'Court experts, assessors and the public interest' (1986) 8 *International Journal of Law and Psychiatry* 186.

Feckelton I, Reddy P and Selby H *Australian Perspectives on Expert Evidence: An Empirical Study* (1999).

Garkawe S 'Enhancing the role and rights of crime victims in the South African justice system – an Australian perspective' (2001) 14 *SACJ* 131.

Gillespie A "'Grooming": Definitions and the law' (2004) 7124:154 *New Law Journal* 585.

Giovannoni JM and Becerra RM (1979) *Defining Child Abuse* Collier Macmillan: London.

Glasser M, Kolvin I, Campbell D, Glasser A, Leitch I and Farrelly S 'Cycle of child sexual abuse: Links between being a victim and becoming a perpetrator' (2001) 179 *British Journal of Psychiatry* 482.

Glaser D and Frosh S *Child Sexual Abuse* 2ed (1993) MacMillan: London.

Golab A 'Theoretical and empirical reasons for assumption of the dissociative nature of many sexual and violent crimes' in Czerederecka A, Jaskiewicz-Obydzinska T and Wojcikiewicz J (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 95.

Goodman G 'Children's testimony in historical perspective' (1984) 40:2 *Journal of Social Issues* 9.

Govender S 'Clampdown on abusive teachers' *Sunday Times* (23/11/2003).

Government of Canada *Response to the Fourteenth Report of the Standing Committee on Justice and Human Rights, Victims' Rights – A Voice, not a Veto* (1998) Government of Canada: Ottawa.

Green E 'Court-appointed neutral experts' *The Complete Courthouse, in Dispute Resolution Devices in a Democratic Society* at <http://www.law.harvard.edu/publications/evidenceiii/articles/green.htm> (accessed 2/08/2004).

Gutrie C, Rachlinski JJ and Wistrich AJ 'Inside the judicial mind' (2001) 86 *Cornell Law Review* 777.

Hall DJ 'Victims' voices in criminal court: The need for restraint' in Wasik M *The Sentencing Process* (1997) 233-266 Aldershot: Dartmouth.

Haney DQ 'Judges back use of neutral experts' *Associated Press* (16/02/98).

Hanson RK, Gordon A, Harris AJR, Marques JK, Murphy W, Quinsey V and Seto MC 'First report of the collaborative outcome data project on the effectiveness of psychological treatment for sex offenders' (2002) 14:2 *Sexual Abuse: A Journal of Treatment and Research* 169-194.

Hanson RK 'Risk assessment with adult sex offenders' Unpublished paper presented at the 7th International Conference of the Association for the Treatment of Sexual Offenders Vienna September 2002.

Hansson J 'Interim reflections on the Cape Attorney-General's task group on rape' in Jagwanth *et al Women and the Law* (1994) 403 HSRC Publishers: Pretoria.

Henderson N 'The wrongs of victim's rights' (1985) 37 *Stanford Law Review* 937.

Herald Reporter 'Fury over rape sentence' *The Herald* (6/02/02).

Hinton M 'Valuing the victim: The use of victim impact statements in sentencing' Unpublished paper read at the 8th International Symposium on Victimology 22-26 August 1994 Adelaide: Australia.

Hinton M 'Guarding against victim-authored victim impact statements' (1996) 20 *Criminal Law Journal* 310-320.

Hoffmann JL 'Revenge or mercy? Some thoughts about survivor opinion evidence in death penalty cases' (2003) 88 *Cornell Law Review* 530.

Hollely K 'Examining the impact of childhood trauma' in Müller K *Introducing the Child Witness* (2000) 104 Printrite: Port Elizabeth.

Hollely K 'Examining the impact of childhood trauma: The legacy of child sexual abuse' in Müller K *The Judicial Officer and the Child Witness* (2002) 97 Printrite: Port Elizabeth.

Hollely K 'Child sex offenders: a complicated entity' in Müller K *The Judicial Officer and the Child Witness* (2002) 241 Printrite: Port Elizabeth.

Home Office 'Achieving best evidence in criminal proceedings: Guidance for vulnerable or intimidated witnesses, including children' *Speaking up for Justice Programme* (undated).

Home Office *Making a Victim Personal Statement* (2001) at <http://www.homeoffice.gov.uk/docs/victimstate.pdf> (accessed 14/09/04).

Home Office *The Victim Personal Statement Scheme: Guidance Note for Practitioners or Those Operating the Scheme* (undated) at <http://www.homeoffice.gov.uk/docs/guidenote.pdf> (accessed 14/09/04).

Home Office *The Victim Personal Statement Scheme: A Guide for Investigators* (undated) at <http://www.homeoffice.gov.uk/docs/guideinvestig.pdf> (accessed 14/09/04).

Home Office *National Standards for the Supervision of Offenders in the Community* (2000) at <http://www.homeoffice.gov.uk/cpd/probu/natstds/htm> (accessed 14/09/05).

Home Office *Setting the Boundaries* (2000) at <http://www.homeoffice.gov.uk/docs/vol1main.pdf> (accessed 16/09/05).

Home Office *Protecting the Public* White Paper HMSO (Cm 5668) (2000).

Home Office *Sex Offender Strategy for the National Probation Service* (2004) at <http://www.probation.homeoffice.gov.uk/files/pdf/Sex%20Offender%20Strategy%20Sep%2004.pdf> (accessed 1/11/04).

Home Office *Pre-sentence Reports* (2004) at <http://www.probation.homeoffice.gov.uk/files/pdf/PC53.pdf> (accessed 30/11/04).

Hood C, Rothstein H and Baldwin R *The Government of Risk: Understanding Risk Regulation Regimes* (2001) University Press: Oxford.

Hopper J 'Sexual abuse of males: Prevalence, possible lasting effects and resources' (2003) (<http://www.jimhopper.com> – last revised 11/18/2003).

Hosken G 'Violent crimes by young on the rise' *Pretoria News* (4/5/2004).

Howells K (1981) 'Adult sexual interest in children: Considerations relevant to theories of aetiology' in Cook M and Howells K (eds) *Adult Sexual Interest in Children* 55-94 Academic Press: London.

Hoyle C, Cape E, Morgan R and Sanders A *Evaluation of the One Stop Shop and Victim Statement Pilot Projects* A Report for the Home Office Research and Development Directorate (1998).

Hoyle C, Cape E, Morgan R and Sanders A 'The use of victim statements' *Home Office Research Development Statistics Directorate* (1999).

Hungerford-Welch P 'Law digest: Sentencing' (2004) 7111 *New Law Journal* 58.

Hunt PMA *South African Criminal Law and Procedure* Vol 2 (1982) Juta: Cape Town.

Inns of Court School of Law *Criminal Litigations and Sentencing* (1997/1998) Blackstone Press Limited: London.

Inns of Court School of Law *Criminal Litigations and Sentencing* (2003/2004) Blackstone Press Limited: London.

International Centre for Criminal Law Reform and Criminal Justice Policy (2001) 'Model guidelines for the effective prosecution of crimes against children' Presented for Use in a Workshop at the Sixth Annual Meeting of the International Association of Prosecutors *The Prosecutor in the New Millennium* Sydney Australia 2-7 September 2001.

Israels H *Heilige Verontwaardiging: Een Onderzoek naar de Feministische Visie op Incest* (2001) Contact: Amsterdam.

Itzen C 'Child protection and child sexual abuse prevention' in Itzen C (ed) *Home Truths about Child Sexual Abuse (Influencing Policy and Practice: A reader)* (2000) 405 Routledge: London.

Johns R 'Sentencing law: A review of developments in 1998-2001' (2002) *New South Wales Parliament: Briefing Paper 20/2003* (2003) at <http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/0C05B81C080F963ACA256ECF000715D0> (accessed 19/10/04).

Jones R, Griffith G and Simpson R 'Gang rapists: The Crimes Amendment (Aggravated Sexual Assault in Company) Bill 2001' *New South Wales Parliamentary Library Research Service: Briefing Paper* (2001) 12 at <http://www.parliament.nsw.gov.au/prod/parliament/publications.nsf/0/F95E42F6AD029689CA256ECF000867EB> (accessed 22/10/2004).

Joubert JJ (ed) *Criminal Procedure Handbook* 5ed (2001) Juta: Cape Town.

Joubert JJ (ed) *Criminal Procedure Handbook* 6ed (2003) Juta: Cape Town.

King BJ *Sentencing: Commentary on Minimum Sentences* (2003) Justice College: Pretoria.

King BJ *Sentencing: General Principles* (2003) Justice College: Pretoria.

King M 'Against children's rights' in Keightly R (ed) *Children's Rights* (1996) 28.

Kinnear KL *Childhood Sexual Abuse* (1995) Contemporary World Issues: California.

Kittrie NN, Zenoff EH and Eng VA *Sentencing, Sanctions, and Corrections* 2ed (2002) Foundation Press: New York.

Kopiec K, Finkelhor D and Wolak J 'Which juvenile crime victims get mental health treatment?' (2004) 28:1 *Child Abuse and Neglect* 45-59.

Kotze DJL '*S v Malgas* 2001 (1) SACR 469 (SCA)' (2004) 37 *De Jure* 154.

Kriegler J and Kruger A *Hiemstra: Suid-Afrikaanse Strafproses* 6ed (2002) Butterworths: Durban.

Krugel FW and Terblanche SS (2003) *Praktiese Vonnisoplegging* Butterworths: Durban.

Kubista NJ "'Substantial and compelling circumstances": Sentencing of rapists under the mandatory minimum sentencing scheme' (2005) 18:1 *SACJ* 77.

Kuhne A 'The psychological view of the best interest of the child – new perspectives and recommendations for psychological expertises' in Czerederecka A, Jaskiewicz-Obydzinska T and Wojcikiewicz J (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 137.

Labuschagne JMT 'Insesverkragting, straftoemeting, die Hoogste Hof van Appel en 'n glimlag van Sigmund Freud' (2003) 66 *THRHR* 100.

Labuschagne JMT 'Juridiese denkpatriere as oorblyfsels van oerreligieuse rites: 'n Regsantropologiese perspektief op die behoefte aan angswerende meganismes by regsspraak' (2002) 65 *THRHR* 539.

Labuschagne JMT 'Intieme menslike verhoudinge, seksuele misbruik van 'n kind en 'n eggenote en die strafregtelike effek van 'n lang tydsverloop tussen misdaadpleging en aanmelding' (2001) 34 *De Jure* 136.

Labuschagne JMT 'Ouderdomsgrense en die bestraffing van pedofilie' (1990) 3 *SACJ* 10.

Langanparsad M 'Child abuser agrees to chemical treatment' *Pretoria News* (12/7/2003) 1.

Lawrence B 'Dangerous criminals in terms of sections 286A and 286B of the Criminal Procedure Act 51 of 1977' (2005) 6 *Sexual Offences Bulletin* 56.

Legalbrief Today *Prescription ruling in sexual abuse case a 'first' for South Africa. (Van Zijl v Hoogenhout)* (28/09/04).

Legalbrief Today *Law making no inroads in fight against rape* (28/09/04).

Le Roux J and Mureriwa I 'Paedophilia and the South African criminal justice system: A psychological perspective' (2004) 17:1 *SACJ* 41.

Le Roux J 'The impact of the death penalty on criminality' Electronically Published Paper, 17th International Conference of the International Society for the Reform of Criminal Law, *Convergence of Criminal Justice Systems: Building Bridges – Bridging Gaps* The Hague 24-28 August 2003.

Long B and McLachlan B *The Hunt for Britain's Paedophiles* (2002) Hodder & Stoughton: London.

Lord Chief Justice of England and Wales *Practice Direction (Victim Impact Statements)* (16/10/01) at <http://www.courtservice.gov.uk/cms/7900.htm> (accessed 14/09/2004).

Lord Chief Justice England and Wales (2004) *The Consolidated Criminal Practice Direction* at http://www.dca.gov.uk/criminal/procrules_fin/contents/practice_direction/pd_consolidated.htm (accessed 1/10/04).

Losel F 'Developmental prevention and treatment of delinquency: What we know and what we need to know' Unpublished paper 14th European Conference on

Psychology and Law *Facing the Challenges of a Changing World* 7-10 July 2004 Krakow.

Lotter E *Dis ek Anna* (2004) Tafelberg: Cape Town.

Louw E (2004) 'Op skrif: My lang donker nagte' 17 June *Huisgenoot* 16.

Magistrates' Association (2003) *Magistrates' Court Sentencing Guidelines* 6ed at www.magistratesorganisation.org.uk (accessed 9/10/04).

Magnus L 'Kind sny haarself oor lollery (Pa wat molester is gesodomiseer)' *Beeld* (2/11/2004).

Mahendra B 'The legacy of Roy Meadow' (2004) 154:7117 *New Law Journal (Expert Witness Supplement)* 283.

Maisel P and Greenbaum L *Introduction to Law and Legal Skills* (2001) Butterworths: Durban.

Martin JD 'Historians at the gate: Accommodating expert historical testimony in Federal Courts' (2003) 78 *New York University Law Review* 1518.

Meintjes-van der Walt L 'Ethics and the expert: Some suggestions for South Africa' (2003) 4: 2 *CARSA* 42 – 49.

Meintjes-van der Walt L *Expert Evidence in the Criminal Justice Process: A Comparative Perspective* (2001) Series Criminal Sciences Rosenberg Publishers: Amsterdam.

Meintjes-van der Walt L 'Towards victims' empowerment strategies in the criminal justice process' (1998) 11 *SACJ* 157.

Metz T 'Legal punishment' in Roederer C and Moelendorf D *Jurisprudence* (2004) 555 Juta: Lansdowne.

Miller A 'The newly recognized shattering effects of child abuse' in Itzen C (ed) *Home Truths about Child Sexual Abuse (Influencing Policy and Practice: A Reader)* (2000) 163 Routledge: London.

Ministry for Justice and Constitutional Development *Press Statement: Cabinet Approves the South African Service's Charter for Victims of Crime* (2/12/2004).

Mitchell D 'Victim impact statements: A brief examination of their implementation in Victoria' (1996) 8 *Current Issues in Criminal Justice* 163.

Mlangeni B 'I once was a beast' *Sunday Times (Insight)* (23/11/2003).

Mogck DL 'Are we there yet? Refining the test for expert testimony through Daubert, Kumho Tire and proposed Federal Rule of Evidence (2000) 702' 33 *Connecticut Law Review* 303.

Monahan J and Walker L (1987) 'Social frameworks: A new use of social sciences in law' 73 *Virginia Law Review* 559.

Moolman CJ 1997 'Victim rights in Anglo-American and continental European countries: What can South Africa learn?' 10 *SACJ* 273.

Mosteller 'Victim impact evidence: Hard to find the rules' (2003) 88 *Cornell Law Review* 543.

Mosteller RP 'Popular justice' (1995) 109 *Harvard Law Review* 387.

Mousourakis G 'Restorative justice: some reflections on contemporary theory and practice' (2004) 29:1 *Journal for Juridical Science* 1.

Mullen PE and Fleming J 'Long-term effects of child sexual abuse' (1998) 9 *National Child Protection: Issues in Child Abuse Prevention* Clearing House at <http://www.aifs.gov.au/nch/issues9.html> (accessed 10/02/04).

Mullen PE, Martin JL Anderson JC and Romans SE 'The effect of child sexual abuse on social, interpersonal and sexual function in adult life' (1994) 165:1 *British Journal of Psychiatry* 35-47.

Müller KD 'Preparing children for court: a handbook for practitioners' (2004) Printrite: Port Elizabeth.

Müller KD and Van der Merwe A 'Squaring the triad: The story of the victim in sentencing' (2004) 6 *Sexual Offences Bulletin* 17.

Müller KD and Van der Merwe A 'The sexual offences prosecutor: A new specialisation?' (2004) 29:1 *Journal for Juridical Science* 135.

Müller KD and Van der Merwe A 'Judicial bias: towards a contextual approach' in Müller K *The Judicial Officer and the Child Witness* (2002) 191-204 Printrite: Port Elizabeth.

Müller KD and Hollely KA (2000) *Introducing the Child Witness* Printrite: Port Elizabeth.

Müller KD and Tait AM 'The best interests of children: A criminal law concept?' (1999) 32:2 *De Jure* 322.

Müller KD *The Child Witness in the Accusatorial System* Ph D (Rhodes) (1997).

Munro C 'Judicial independence and judicial functions' in *Sentencing, Judicial Discretion and Training* (1992) 13 Sweet and Maxwell: London.

Myers JEB 'A decade of international legal reform regarding child abuse investigation and litigation: Steps toward a Child Witness Code' (1996) 28 *Pacific Law Journal* 169.

Nadler J and Rose MR 'Victim impact testimony and the psychology of punishment' (2003) 88:2 *Cornell Law Review* 419.

Naude B *An international perspective on victim participation in the criminal justice process with specific reference to victim impact statements* Research report, Department of Criminology Pretoria (Unisa 1995).

Naude B, Prinsloo J and Ladikos A 'Restorative justice: A global overview of its functioning and effectiveness' (2003) 16:5 *Acta Criminologica* 1.

New South Wales Parliamentary Library Research Service 'Sentencing law: A review of developments in 1998-2001' (2002) at <http://www.parliament.nsw.gov.au/prod/parlament/publications.nsf/0/0C05B81C080F963ACA256ECF000715D0> (accessed 22/10/2004).

News 24.com *Konings: Put him away for life* (10/02/2005).

Newton CJ 'Child abuse: An overview' (2001) *Mental Health Journal* (<http://www.therapistfinder.net/Child-Abuse/>) (accessed 20/09/04).

Nicholson-Crotty S 'The impact of sentencing guidelines on state-level sanctions: An analysis over time' (2004) 50:3 *Crime & Delinquency* 395.

Office for Criminal Justice Reform 'Victims' Code of Practice' *Consultation Paper* (7/3/2005) http://www.cjsonline.gov.uk/the_cjs/whats_new-3121.html#9 (accessed 10/3/05).

Olckers I 'The model of bias' *Curriculum Development Workshop* (1999) 85 Law, Race and Gender Unit: Cape Town.

Oliver L 'SA becoming a nation of child abusers: Reported cases tip of iceberg, experts reveal' *Weekend Post* (9/11/2002).

Paprzycki LK 'The status of an expert psychologist in Polish criminal proceedings' in Czerederecka A, Jaśkiewicz-Obydzińska T and Wójcikiewicz J (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2000) 3 Institute for Forensic Research Publishers: Krakow.

Parliamentary Task Group on the Sexual Abuse of Children *Report* (2002).

Pelekis DE, Mykletun A and Dahl AA 'The relative influence of childhood sexual abuse and other family background risk factors on adult adversities in female outpatients treated for anxiety disorders and depression' (2004) 28:1 *Child Abuse and Neglect* 61-76.

Personal communication with regional court magistrates from Gauteng at Pretoria (March 2004).

Personal communication (telephonic conversation) with the State Advocate, E le Roux at Bloemfontein (29/09/03).

Personal interview with practising advocate, JH de la Rey, Pretoria (4/05/04).

Personal communication with Regional Court Magistrate, L Wilken, Nelspruit (5/03/05).

Personal communication with Regional Court Magistrate, D Minnie, Middelburg, Mpumalanga (5/03/05).

Personal communication with Durban Regional Court Magistrate during Training Course on The Judicial Officer and the Child Witnesses, Durban (20/03/04).

Personal communication with Psychologist, S van Wyk, Pretoria (5/04/04).

Pfefferli PW 'Forensic education and training of judges and law enforcement magistrates' Paper, 17th International Conference of the International Society for the Reform of Criminal Law *Convergence of Criminal justice Systems: Building Bridges – Bridging Gaps* 24-28 August 2003.

Phillips AK 'Thou shalt not kill any nice people: the problem of capital sentencing' (1997) 35 *American Criminal Law Review* 93-118.

Pinard G and Pagani L (eds) *Clinical Assessment of Dangerousness: Empirical Contributions* (2001) University Press: Cambridge.

Potgieter R 'How safe are our children?' (2003) 5:3 *SAPSAC Newsletter* 1.

National Prosecuting Authority *Policy Document* (undated).

Pretoria News 'Life for British paedophile' (6/10/04) 5.

National Prosecuting Authority *Prosecution Policy South Africa* (undated).

Rabie MA, Strauss SA and Maré MC *Punishment: An Introduction to Principles* (1994) Lex Patria: Johannesburg.

Ramon A, Francisca F and Santiago R 'An assessment of information integration theory and confirmatory bias hypothesis in judicial proceedings: A case of rape and murder' in Czerederecka A, Jaskiewicz-Obydzinska T and Wojcikiewicz J (eds) *Forensic Psychology and Law: Traditional Questions and New Ideas* (2002) 296.

Raulinga TJ 'Expert testimony in cases of child sexual abuse: Does it assist judicial officers to arrive at the truth?' (2002) 3:1 *CARSA* 25.

Reilly G 'Jail not enough any more' *Pretoria News* (23/09/02).

Rickard C 'Brutal attack viewed as "5 out of 10" rape case by senior judge' *Sunday Times (Insight)* (9/11/2003).

Rind B, Tromovitch P and Bauserman R 'A meta-analytic examination of assumed properties of child sexual abuse using college samples' (1998) 124 *Psychological Bulletin* 22.

Roberts JV 'Victim impact statements and the sentencing process: Recent developments and research findings' (2003) 47 *Criminal Law Quarterly* 365.

Rodgers TA, Gitchoff GT and Paur IO 'The privately commissioned pre-sentence report: A multidisciplinary approach' (1979) 2:2 *Criminal Justice Journal* 171 San Diego, California.

Runkle D 'Court appointed scientific experts: A demonstration project of the American Association for the Advancement of Science' (1999) December *Fed. Discovery News* 1.

Sanders A, Hoyle C, Morgan R and Cape E 'Victim impact statements: Don't work, can't work' (2001) *Criminal Law Review* 447.

SAPA 'Tougher sentence for man who raped daughter' *Pretoria News* (24/11/01).

SAPA 'Teen rapist's suspended sentence to be probed' *The Herald* (6/02/02).

SAPA 'Summit looks at men's role in halting abuse' *Pretoria News* (6/5/2004).

Saskatchewan Justice 'Victim impact statement program guidelines manual' (2002) *Victims Services Branch*.

Schmallegger F *Criminal Justice Today: An Introductory Text for the 21st Century* 4ed (1997) Prentice Hall: Upper Saddle River, New Jersey.

Schwikkard PJ and Van der Merwe SE *Principles of Evidence* 2ed (2002) Juta: Cape Town.

Seago P *Concise College Texts: Criminal Law* 3ed (1989) Sweet and Maxwell: London.

Sentencing Advisory Panel *Research Report 2: Attitudes to Date Rape and Relationship Rape; A Qualitative Study* (May 2002) at <http://www.sentencing-advisory-panel.gov.uk/research/rape/forward.htm> (accessed 13/04/03).

Sentencing Advisory Panel *Rape: Advice to Court of Appeal* (24 May 2002) at http://www.sentencing-advisory-panel.gov.uk/c_and_a/advice/rape/forward.htm (accessed 13/04/03).

Sentencing Advisory Panel *Offences Involving Child Pornography: Advice to Court of Appeal* (15 August 2002) at http://www.sentencing-advisory-panel.gov.uk/c_and_a/advice/child_offences.htm (accessed 13/04/03).

Sentencing Advisory Panel *Annual Report 2002/2003: Summary*.

Sentencing Advisory Panel *Annual Report 2002/2003*.

Sentencing Advisory Panel *Sentencing Guidelines on Sexual Offences: Consultation Paper* (12 February 2004) at <http://prodigi.bl.uk/eGovSupp/sentguidsexoff20040416JG.pdf> (accessed 10/04/04).

Sentencing Advisory Panel *Sentencing Guidelines on Sexual Offences: Consultation Paper 2 – The Exploitation Offences* (22 April 2004) at http://www.sentencing-guidelines.gov.uk/docs/press_22_april_2004.html (accessed 15/06/04).

Sentencing Advisory Panel *New Body to Improve Sentencing Practice* (5/3/2004) at http://.sentencing-guidelines.gov.uk/councilpressreleases/press_05_march_04.htm (accessed 17/10/04).

Sentencing Guidelines Council 01 *The Sentence (The Sentencing Guidelines Newsletter)* Sept 2004.

Sentencing Guidelines Council *Explanatory Notes to the Criminal Justice Act 2003* par 56 at <http://www.hms0.gov.uk/acts/en2003/2003en44.htm> (accessed 14/09/04).

Sentencing Guidelines Council Draft *Guidelines Seriousness and New Sentences in the Criminal Justice Act 2003* at <http://www.sentencing-guidelines.gov.uk/draftguidelines/seriousnessandnewsentencesinthecriminaljusticeact2003.html> (accessed 4/02/05).

Sentencing Guidelines Council *Guidelines Reduction in Sentence for a Guilty Plea* at <http://www.sentencing-guidelines.gov.uk/draftguidelines/guiltypleas/foreword.html> (accessed 07/10/04).

Sentencing Guidelines Council par 2.2 at <http://www.sentencing-guidelines.gov.uk/guidelines/council/final.html> (accessed 4/02/05).

Sentencing Guidelines Secretariat *Sentencing Guidelines – Experiences from America: Notes of Seminars – 28-29 August 2004* at <http://www.sentencing-guidelines.gov.uk/docs/seminar.pdf> (accessed 2/11/04).

Sentencing Guidelines Council *Guideline Judgments Case Compendium* (2005) at http://www.sentencing-guidelines.gov.uk/docs/complete_compendium.pdf (accessed 1/04/05).

Shute S 'The Sexual Offences Act 2003 (1); new civil preventative orders; sexual offences prevention orders; foreign travel orders; risk of sexual harm orders' (2004) *Criminal Law Review* 417.

Siegismund E 'The function of honorary judges in criminal proceedings in Germany' *112th International Training Course: Visiting Experts' Papers* 121.

Service Charter for Victims of Crime in South Africa (2004).

Skeen St Q 'Sentencing' 24 *LAWSA* (2000) 281.

Skelton A 'Juvenile justice reform: Children's rights and responsibilities versus crime control' in Davel CJ *Children's Rights in a Transitional Society (Conference Proceedings)* (1998) 88.

Skelton A *Alternative Sentencing Review* CSPRI (Civil Society Prison Reform Initiative) Research Paper Series No 6 (2004).

Slaughter C *Before the Knife: Memories of an African Childhood* (2002) Black Swan: United Kingdom.

Sloth-Nielson J 'Minimum sentences for juveniles cut down to size?' (2001) 118 *SACJ* 427-433.

Snyman CR *Criminal Law* 4ed (2002) Butterworths: Durban.

Snyman CR 'Die herlewing van vergelding as regverdiging vir straf' (2001) 64 *THRHR* 218-235.

Solon M 'Experts: amateurs or accredited?' (2004) 154:7117 *New Law Journal* 292.

Songca R 'The role of behavioural experts in child sexual abuse cases' (2004) 67:1 *THRHR* 76.

Sookha B 'Suffer the little children: abuse doubles in Gauteng' *Pretoria News* (13/3/2004).

Spencer JR 'Sexual Offences Act 2003 (2) Child and family offences' [2004] *Crim LR* 347.

South African Human Rights Commission *Report on the Enquiry into Sexual Violence against Children* (2002).

South African Law Commission Issue Paper 7, Project 82, *Sentencing: Restorative Justice (Compensation for Victims of Crime and Victim Empowerment)* (1997).

South African Law Commission Issue Paper 10, Project 108 *Sexual Offences against Children* (1997).

South African Law Commission Discussion Paper 91, Project 82 *Sentencing (A New Sentencing Framework)* (2000).

South African Law Commission *Report on Sentencing (A New Sentencing Framework)* Project 82 (2000a).

South African Law Commission Discussion Paper, 102 Project 107 *Sexual Offences: Process and Procedure* (2001).

South African Law Commission *Report on Sexual Offences* Project 107 (2002).

Steel J, Sanna L, Hammond B, Whiple J and Cross H 'Psychological sequelae of childhood sexual abuse: Abuse-related characteristics, coping strategies, and attributional style' (2004) 28:7 *Child Abuse and Neglect* 785-801.

Stella P 'The Purpose and Effects of Punishment' (2001) 9:1 *European Journal of Crime, Criminal Law and Criminal Justice* 56.

Steytler N *Constitutional Criminal Procedure: A Commentary on the Constitution of the Republic of South Africa* (1998) Butterworths: Durban.

N Stone 'Pre-sentence reports, culpability and the 1991 Act' *Criminal Law Review* (1992) 558-67.

Sundby SE 'The capital jury and empathy: The problem of worthy and unworthy victims' (2003) 88 *Cornell Law Review* 343-381

Supreme Court of Virginia 'Civil commitment of sexually violent predators: Memorandum for Virginia Circuit Court Judges' (2004) at http://www.courts.state.va.us/ed/updates/2004_civil_commitment_of_sexually_violent_predators.pdf (accessed 18/10/04).

Terblanche SS 'Aspects of minimum sentence legislation: Judicial comment and the court's discretion' (2001) 14 *SACJ* 1.

Terblanche SS *The Guide to Sentencing in South Africa* (1999) Butterworths: Durban.

Terblanche SS 'Die praktyk van vonnisoplegging onder minimumvonnismwetgewing – *S v Malgas* 2001 (1) SASV 469 (HHA)' (2002) 15 *SACJ* 353.

Terblanche SS 'Sentencing guidelines for South Africa: Lessons from elsewhere' (2003) 120 *SALJ* 857.

Terblanche SS 'Mandatory and minimum sentences: Considering s 51 of the Criminal Law Amendment Act 1997' (2003) *Acta Juridica* 194 Juta: Lansdowne.

Terblanche SS 'Sentencing in South Africa: Lacking in principle but delivering in justice?' Electronically Published Paper 18th International Conference of the International Society for the Reform of Criminal Law *Keeping Justice Systems Just and Accountable: A Principled Approach in Challenging Times* Montreal 8-12 August 2004.

Terblanche SS Unpublished Paper 'Correctional supervision' *Law Teacher's Conference* Grahamstown (2002).

Terblanche SS 'Recent cases: Sentencing – minimum and mandatory sentences in terms of Act 105 of 1997' (2003) 16 *SACJ* 98.

The Magistrates' Association (England and Wales) *Sentencing Guidelines* 6ed (2004/5).

Thomas DA 'Establishing a factual basis for sentencing' *Criminal Law Review* (1970) in Wasik M *The Sentencing Process (The International Library of Criminology, Criminal Justice and Penology)* (1997) 80 Aldershot UK: Dartmouth.

Thomas T 'Supervising child sex offenders in the community – some observations on law and practice in England and Wales, the Republic of Ireland and Sweden' (2001) 9:1 *European Journal of Crime, Criminal Law and Criminal Justice* 69-90.

Thompson B 'How to write an expert report' (2004) 154 *New Law Journal: Expert Witness Supplement* 808-810.

Thorpe J *Social Inquiry Reports: A Survey* Home Office Research Study no 48 HMSO.

Tonry MM 'Judges and sentencing policy – the American experience' *Sentencing, Judicial Discretion and Training* (1992) 137 Sweet and Maxwell: London.

The Unit for Child Witness Research and Training *Overview of activities: 1998-2001*.

United Nations Convention on the Rights of the Child (1989).

Van der Hoven AE *Forensic Criminology (Tutorial Letter 501/2004)* Department of Criminology: Unisa.

Van der Hoven AE 'Sentencing the sex offender: A criminological perspective on section 286A of the Criminal Procedure Act 51 of 1977 (as amended)' (2005) 1:6 *Sexual Offences Bulletin* 61.

Van der Merwe DP (1991) *Sentencing* Juta: Cape Town (updated to 1998).

Van der Merwe A 'Sentencing the child sex offender' in Müller K *Prosecuting the Child Sex Offender* (2001) 275 Printridge: Port Elizabeth.

Van der Merwe A 'Aspects of sentencing in child sexual abuse cases' in Müller K *The Judicial Officer and the Child Witness* (2002) 259 Printridge: Port Elizabeth.

Van der Merwe A 'Guidelines on sentencing in child sexual abuse cases' (2002) 3(2) *CARSA* 20.

Van der Merwe IA 'Proving aggravating circumstances: The prosecutor's duty' (2002) 3 *Sexual Offences Bulletin* 20.

Van der Merwe IA 'Minimum sentences in child sexual abuse cases: The after-effects of rape as a factor in imposing life imprisonment' Paper, 17th International Conference of the International Society for the Reform of Criminal Law *Convergence of Criminal justice Systems: Building Bridges – Bridging Gaps* 24-28 August 2003.

Van der Merwe A 'Minimum sentences in child sexual abuse cases: The after-effects of rape as a factor in imposing life imprisonment' (Forthcoming: 2005) XV:3 *Criminal Law Forum* Kluwer Publications: The Hague.

Van Dokkum N 'The statutory obligation to report child abuse and neglect' in Keightly R (ed) *Children's Rights* (1996) 163 Juta: Kenwyn.

Van Niekerk J 'Foreword' *Say stop: South African Young Sex Offenders Programme – A Diversion Programme for Young Sex Offenders* (2001).

Van Tongeren W 'Circle sentencing' Paper, 17th International Conference of the International Society for the Reform of Criminal Law *Convergence of Criminal justice Systems: Building Bridges – Bridging Gaps* 24-28 August 2003.

Van Zyl Smit D 'Mandatory minimum sentences and departures from them in substantial and compelling circumstances' (1999) 15 *SAJHR* 270.

Van Zyl Smit D 'Sentencing and punishment' in Chaskelson M, Kentridge J, Klaaren J, Marcus G, Spitz D, Stein A and Woolman S (eds) *Constitutional Law of South Africa* (2004) Ch 28 Juta: Lansdowne.

Van Zyl Smit D 'Mandatory sentences: A conundrum for the new South Africa?' (1999) 2:2 *Punishment and Society* 197.

Van Zyl Smit D and Dunkel F (eds) *Imprisonment Today and Tomorrow* (2001) Kluwer Law International: The Hague.

Van Zyl Smit D *Taking Life Imprisonment Seriously (in National and International Law)* (2002) Kluwer Law International: The Hague.

Van Zyl Van der Merwe D 'Korrektiewe toesig: 'n Soepel vonnis-opsie' (1991) 4 *Consultus* 90.

Venter Z 'Judge furious over suspended sentence for rapist of 5-year-old' *The Star* (5/02/02).

Venter Z 'Judges slate male rape bias' *Pretoria News* (8/02/05).

Vervaeke G, Bogaerts S and Heylen A 'Onderkennen van seksueel misbruik bij kinderen' in Van Koppen PJ, Hessing DJ, Merckelbach HLGJ and Crombag HFM (eds) *Het recht van binnen: Psychologie van het recht* (2002) 177-200 Kluwer: Deventer.

Virginia Criminal Sentencing Commission at <http://www.vcsc.state.va.us/training.htm> (accessed 12/10/04).

Virginia Criminal Sentencing Commission (2001) *Assessing Risk among Sex Offenders in Virginia* at http://www.vcsc.state.va.us/sex_off_report.pdf.

Virginia Criminal Sentencing Commission *Annual Report* (2003) http://www.vcsc.state.va.us/2003Annualreport_pdf.pdf (accessed 14/10/04).

Virginia Criminal Sentencing Commission *Annual Report* (2004) http://www.vcsc.state.va.us/2004FULLAnnualreport_pdf.pdf (accessed 14/10/04).

Virginia Criminal Sentencing Commission (undated) *Virginia Sentencing Guidelines Manual (Rape and Other Sexual Assault)*.

Virginia Criminal Sentencing Commission *Virginia Crime Code Listings* at http://www.vcsc.state.va.us/Codes_Alph.cfm?ID=s (accessed 12/10/2004).

Von Hirsch A and Ashworth A *Principled Sentencing: Readings on Theory and Policy* (1998) Hart Publications: Oxford.

Von Hirsch A and Ashworth A 'Protective sentencing under section 2 (2) (B): The criteria for dangerousness' (1996) *Crim LR* 175.

Von Hirsch A and Jareborg N 'Gauging criminal harm: a living standard analysis' (1991) 11:1 *Oxford Journal of Legal Studies* 1-38.

Walker SP and Louw DA 'The Bloemfontein Court for Sexual Offences: Perceptions of its functioning from the perspective of victims, their families and the professionals involved' (2004) 17:2 *SACJ* 289.

Walsh A 'Placebo justice: Victim recommendations and offender sentences in sexual assault cases' in Fattah E (ed) *Towards a Critical Criminology* (1992) 304 St Martins Press: New York.

Wasik M 'Rules of evidence in the sentencing process' (1985) 38 *Current Legal Problems* 187.

Wasik M *Emmins on Sentencing* 3ed (1998) Blackstone Press Limited: London.

Wasik M 'Rethinking information and advice for sentencers' in *Sentencing, Judicial Discretion and Training* (1992) 173 Sweet and Maxwell: London.

Wasik M (ed) *The Sentencing Process (The International Library of Criminology, Criminal Justice and Penology)* (1997) Aldershot UK: Dartmouth.

Wasik M 'Going round in circles? Reflections on fifty years of change in sentencing' (2004) *Crim LR* 253.

Wechsler H 'The challenge of a model penal code' (1952) *Harvard Law Review* 1098.

Wieland S 'Therapy – The brain's second chance' (2004) 6:3 *SAPSAC Newsletter* 1.

Women's Legal Centre *Application for intervention as amicus curiae – S v Abrahams* SCA Ref 88/2000 (1/10/2001).

Young A 'The role of the victim in the criminal process: Literature review – 1989-1999' *Victims of crime research series* (2001) Department of Justice: Ottawa, Canada.

Young D 'Factfinding at federal sentencing: Why the guidelines should meet the rules' (1994) 79 *Cornell Law Review* 299.

Zabine 'n Kind vir altyd' *Huisgenoot* (19/08/04) 28.

Zeffert DT, Paizes AP and Skeen AStQ *The South African Law of Evidence* (2003) LexisNexis Butterworths: Durban.

Table of cases

South Africa

Attorney-General, Eastern Cape v D 1997 (1) SACR 473 (E)

Carmichele v Minister of Safety and Security 2001 (4) SA 938 (CC)

Director of Public Prosecutions, Transvaal v Makwetsja 2004 (2) SACR 1 (T)

Director of Public Prosecutions (Kwa-Zulu Natal) v Regional Magistrate, Mtubatuba 2002 (1) SACR 31 (N)

Ellish v Prokureur-generaal 1994 (2) SACR 579 (W)

Holzhausen v Roodt 1997 (4) SA 766 (W)

N v T 1994 (1) SA 862 (C)
National Coalition for Gay and Lesbian Equality v Minister of Justice 1998 (2) SA 557 (CC)
Prokureur-generaal, Noord-Kaap v Hart 1990 (1) 1990 (1) SA 49 (A)
Rammoko v Director of Public Prosecutions 2003 (1) SACR 200 (SCA)
Rex v Khumalo 1947 (1) SA 739 (O)
R v African Canning Co SWA Ltd 1954 (1) SA 197 (SWA)
R v C 1955 (2) SA 51 (T)
R v K (unreported) (T) as referred to in *R v C* 1955 (2) SA 51 (T) at 52d-53a
R v Z 1960 (1) SA 742 (A)
Rex v Conway 1948 NPD 880
Rex v Sharpe 1930 TPD 790
S v A 1994 (1) SACR 602 (A)
S v Abrahams 2002 (1) SACR 116 (SCA)
S v B 1996 (2) SACR 543 (C)
S v B 1990 (1) SACR 541 (C)
S v B 1980 (3) SA 851 (A)
S v Baloyi 2000 (2) SACR 425 (CC)
S v Bapela and Another 1985 (1) SA 236 (A)
S v Blaauw 2001(2) SACR 255 (C)
S v Boer 2000 (2) SACR 114 (NC)
S v Brandt, case no 513/03, dated 30 November 2004, (unreported) (SCA)
S v C 1996 (2) SACR 181 (C)
S v Chapman 1997 (2) SACR 3 (SCA)
S v Croukamp 1993 (1) SACR 439 (T)
S v D 1995 (1) SACR 259 (A)
S v D 1989 (4) SA 225 (C)
S v D 1989 (4) SA 709 (T)
S v D 1972 (3) SA 202 (O)
S v De Lange (7/4/2005) Middelburg SH F23/03
S v Dithotze 1999 (2) SACR 314 (W)
S v Dodo 2001 (1) SACR 594 (CC)
S v Dzukuda 2000 (2) SACR 443 (CC)
S v Dzukudu 2001 (2) SACR 244 (W)
S v E 1992 (2) SACR 625 (A)
S v Fatyi 2001 (1) SACR 485 (SCA)
S v G 2004 (2) SACR 296 (W)
S v Gerber 2001 (1) SACR 621 (W)
S v Gqamana 2001 (2) SACR 28 (C)
S v Holder 1979 (2) SA 70 (A)
S v Homareda 1999 (2) SACR 319 (W)
S v J 1989 (1) SA 669 (A)
S v Jackson 1998 (1) SACR 470 (SCA)
S v Jacobs Middelburg SH 36/01 Appeal no 50-03

S v Jansen 1999 (2) SACR 368 (C)
S v Jones 2004 (1) SACR 420 (C)
S v K 1995 (2) SACR 555 (O)
S v K, dated 13 September 1973, (unreported) (A)
S v Kgafela 2003 (5) SA 339 (SCA)
S v Kwalase 2000 (2) SA 135 (C)
S v L 1998 (1) SACR 463 (SCA)
S v Lekota 1978 (4) SA 684 (A)
S v Lister 1993 (2) SACR 228 (A)
S v M 2002 (2) SACR 411 (SCA); *S v M* 1999 (2) SACR 548 (SCA)
S v M 1994 (2) SACR 24 (A)
S v M 1993 (2) SA 1 (A); *S v M* 1993 (1) SACR 126 (A)
S v M 1991 (1) SACR 91 (T)
S v M 1985 (1) SA 1 (A)
S v M 1982 (1) SA 590 (A)
S v M en Andere 1979 (4) SA 1044 (BH)
S v M 1976 (3) SA 644 (A)
S v M 1975 (1) SA 424 (A)
S v Mahomotsa 2002(2) SACR 435 (SCA)
S v Makwanyane 1995 (2) SACR 1 (CC)
S v Malapela and Others; S v Mokheseng 2003 (2) SACR 604 (T)
S v Malgas 2001 (1) SACR 469 (SCA)
S v Manamela 2000 (2) SACR 176 (W)
S v Martin 1996(1) SACR 172 (W)
S v McMillan 2003 (1) SACR 27 (SCA)
S v Mhlakaza and Another 1997(1) SACR 515 (SCA)
S v Mkhondo 2001 (1) SACR 49 (W)
S v Mofokeng and Another 1999 (1) SACR 502 (W)
S v Mohlakane 2003 (2) SACR 569 (O)
S v Muvhaki 1985 (4) SA 317 (ZHC)
S v N 1991 (1) SACR 271 (C)
S v N 1979 (3) SA 308 (A)
S v Ndaba 1993 (1) SACR 637 (A)
S v Ndlovu 2001 (1) SACR 204 (W)
S v Njikelana 2003 (2) SACR 166 (C)
S v Nkosi 2002 (1) SACR 135 (W)
S v O 2003 (2) SACR 147 (C)
S v Omar 1993 (2) SACR 5 (C)
S v P 1974 (1) SA 581 (RAD)
S v P 1989 (1) SA 760 (C)
S v Pieters 1987 (3) SA 717 (A)
S v Pillay 1977 (4) SA 531 (A)
S v Plaatjies 1997 (2) SACR 280 (O)
S v R 1996 (2) SACR 341 (T)

S v R 1995 (2) SACR 590 (A)
S v R 1993 (1) SACR 209 (A)
S v S 1995 (1) SACR 267 (A)
S v S 1995 (1) SACR 50 (ZS)
S v S 1988 (1) SA 120 (A)
S v S 1977 (3) SA 830 (A)
S v Sadler 2000 (1) SACR 331 (A)
S v Sauls en 'n Ander 1982 PH H131
S v Segole 1999 (2) SACR 115 (W)
S v Shepard 1967 (4) SA 170 (W)
S v Swartz 1999 (2) SACR 380 (C)
S v T 1976 (3) SA 107 (T)
S v T 1997 (1) SACR 496 (SCA)
S v Tshabalala case no A1955/03, dated 7 February 2005 (unreported) (T)
S v Tshomi en 'n Ander 1983 (3) SA 660 (A)
S v Tyatyame 1991 (2) SACR 1 (A)
S v V 1996 (2) SACR 133 (T)
S v V 1994 (1) SACR 598 (A)
S v V 1993 (1) SACR 736 (O)
S v V 1991 (1) SACR 59 (T)
S v V 1991 (1) SACR 68 (E)
S v V 1972 (3) SA 611 (A)
S v V 1971 (2) SA 626 (E)
S v V en 'n Ander 1989 (1) SA 532 (A)
S v W 1994 (1) SACR 610 (A)
S v Williams 1995 (2) SACR 251 (CC)
S v Young 1977 (1) SA 602 (A)
S v Zinn 1969 (2) SA 537 (A)

England and Wales

Attorney-General's Reference No. 1 of 1989 (1989) 11 Cr. App. R. (S.) 409;
Attorney-General's Reference No. 1 of 1989 [1989] 3 All ER 571 (CA)
Attorney-General's Reference No. 10 of 1995 (1996) 2 Cr. App. R. (S.) 122
Attorney General's Reference (No's 91,119, 120, of 2002) [2003] 2 Cr App R (S) 338
Attorney-General's Reference (No 52 of 2003) [2003] EWCA Crim 373
Practice Direction (crime: consolidated) [2002] 3 All ER 904
R v Billam (1986) 8 Cr App R (S) 48; [1986] 1 All ER 985; [1986] 1 WLR 349, CA
R v Corran and others [2005] EWCA Crim 192
R v Hobstaff [1993] 14 Cr App R (S) 605
R v Millberry [2003] 1 Cr App R (S) 396; [2003] 2 All ER 939
R v Nelson [2002] 1 Cr App R (S) 565
R v Offen [2001] 1 WLR 253
R v Oliver and others [2003] 1 Cr App R (S) 463

R v Perks [2000] Crim LR 606
R v O's (1993) 14 Cr.App.R.(S.) 632
R v H [1999] Current Law 144

United States of America

Booth v Maryland 482 U.S. 496 (1987)
Payne v Tennessee 501 U.S. 808 (1991)
Snyder v Massachusetts, 291 U.S. 97, 122 (1934)
S v Catsam 148 Vt. 366 (1987)
S v Gokey 154 Vt. 129 (1990)
S v Kinney Supreme Court of Vermont, 171 Vt. 239 (2000)
South Carolina v. Gathers, 490 U.S. 805 (1989)
State v Muhammed 678 A.2d 164 (1996).
Daubert v Merrel Dow Pharmaceuticals, Inc 113 S Ct 2786 (1993)
United States v Mc Veigh 153 F.3d 1166 (10th Cir. 1998)

Canada

R v Gabriel (1999), 26 C.R. (5th) 363, 137 C.C.C. (3d) 1 (Ont. S.C.J.).
R v Gardiner [1982] 2 SCR 368 (SCC)

Australia

New South Wales

Regina v AEM(jnr) & AEM(snr) & KEM (23/8/01) District Court of New South Wales Criminal Jurisdiction Case no 01/11/0096
Regina v AEM Snr, Regina v KEM, Regina v MM [2002] NSWCCA 58 at
<http://www.lawlink.nsw.gov.au/scjudgments/2002nswcca.nsf/WebView1?OpenView&Start=451&End=481>

Table of legislation

South Africa

Act 22 of 1898

Act 27 of 1914

Adjustment of Fines Act 105 of 1997

Constitution of the Republic of South Africa, 1996

Correctional Services Act 8 of 1959

Correctional Services Act 111 of 1998

Criminal Law Amendment Act 105 of 1997

Criminal Procedure Act 51 of 1977

Government Notice, Department of Justice and Constitutional Development No R.

2004 Magistrates' Court Act 32 of 1944 – *Determination of criteria pertaining to assessors*

Girls' and Mentally Defective Women's Protection Act

Immorality Amendment Act 2 of 1988

Interim Constitution Act 200 of 1993

Judicial Matters Amendment Act 62 of 2000

Judicial Matters Amendment Act 42 of 2001

Law 27 of 1887

Lay Assessors' Regulations, 2004

Magistrates' Courts Act 32 of 1944

Magistrates' Courts Amendment Act 67 of 1998

Probation Services Amendment Act 35 of 2002

Proc R29 in GG 22261 of 30/4/01

Proc R21 in GG 27549 of 29/04/05

Proc R38 in GG 26626 of 30/7/04

Sexual Offences Act 23 of 1957

Australia

Australian Crimes Act 1994.

New South Wales Crimes (Sentencing Procedure) Act 92 of 1999

New South Wales Victims Rights Act 114 of 1996

New South Wales Crimes (Sentencing Procedure) Amendment (Standard Minimum Sentencing) Act 92 of 1999

Criminal Law (Sentencing) (Victim Impact Statements) Amendment Act 1998 (South Australia)

Supreme Court Criminal Rules 1992 Amendment 8 (South Australia)

Criminal Law (Sentencing) Act 1998

Western Australia

Sentencing Act 1995 (WA)

Canada

Criminal Code of 1985

Victims' Bill of Rights S.O. 1995

United Kingdom

Criminal Justice Act 1967

Criminal Justice Act 1991

Criminal Justice Act 2003

Criminal Justice and Court Services Act 2000

Crime (Sentences) Act 1997

Crime and Disorder Act 1998

Explanatory Notes to the Criminal Justice Act 2003 par 56 at <http://www.hms0.gov.uk/acts/en2003/2003en44.htm> (accessed 14/09/04)

Sex Offenders Act 1997

Sexual Offences Act 2003

United States of America

Federal Rules of Criminal Procedure

Federal Rules of Evidence

Florida State Annotations (2000) / Fla.Stat. Ann. 921.143 (2000)

Victim's Clarification Act, Pub. L.No.105-6.

Virginia Criminal Sentencing Commission <http://www.vcsc.state.va.us/index.htm> (accessed 19/10/04)

2003 Va. Acts c. 989, as amended by House Bill 1237 (Chapter 764 of the 2004 General Assembly)

Table of draft legislation

South Africa

Child Justice Bill 2002

Criminal Law (Sexual Offences) Amendment Bill 2003, B50 2003 GG No 25282 of 30 July 2003

Sentencing Framework Bill 2000

Sexual Offences Bill 2002