S v Matyityi
2011 1 SACR 40 (SCA)

Compliance with mandatory sentencing, and placing the victim at the centre of the criminal justice system

1 Introduction and Judicial History

In the case of *S v Matyityi* 2011 1 SACR 40 (SCA), the SCA emphasised the importance of a victim-centred approach to sentencing. The SCA held that by accommodating the victim during the sentencing phase, the court would be better informed about the impact of the crime on the victim, and thus better able to achieve proportionality and balance between the interests of society and of the accused. In the judgment, the SCA also commented on the need for courts to comply with prescribed sentencing legislation – observing that prescribed sentences are frequently deviated from for the flimsiest of reasons. The SCA found this to have been the case in the court *a quo*, where the accused's age and purported remorse were incorrectly regarded as "substantial and compelling circumstances" justifying a deviation from the prescribed minimum sentence. The SCA considered that the court *a quo* had also erred in failing to take account of the accused's previous conviction, and in finding that the rape victim had sustained no injuries.

2 Judicial History

The respondent was a 27 year old repeat offender, who had acted as the ringleader of a gang of three in committing the crimes of rape, murder and robbery. He was convicted of one count of rape, one count of murder, and two counts of robbery. The respondent chose not to testify, nor was any evidence led in mitigation on his behalf, although some submissions regarding his personal circumstances were made from the bar (par 12). He was duly sentenced in the Eastern Cape High Court. The Director of Public Prosecutions (Eastern Cape) (DPP) was aggrieved by the sentences which were imposed in respect of the rape and murder (but not robbery) convictions, which were regarded as being too lenient. The DPP appealed on this basis in terms of section 316B of the Criminal Procedure Act 51 of 1977 (CPA), with the leave of the High Court (par 8).

3 Facts

The crimes took place in two separate incidents, separated by five days. In the first incident, the respondent was one of a gang of three who attacked and robbed the complainant (Mr AC). Mr AC had been sitting in his car at the beach when his car window was smashed, and he was hit in the face. His cell phone, cash and ATM card were stolen. The

respondent placed a hood over Mr AC's face, and he was driven in the back seat of his car to a secluded spot, where he was bound up and tied to a tree. His attackers demanded his ATM pin number, and he deliberately gave an incorrect one. The attackers left him, but returned when they discovered this. He then gave them the correct number, and they left again. Fortunately, he was able to free himself from the tree and escaped from the area on foot. His car was later recovered, but the CD player had been stolen (parr 1-2).

Five days later, the respondent and his gang struck again. This time they attacked a couple who were parked in a secluded spot at the same beach. The male complainant (Mr MF) was attacked and was placed in the boot of the car, bleeding badly, and the female complainant (Ms KD) was driven in the car to a secluded spot and raped by each of the attackers. Mr MF, who was unconscious at that stage, was removed from the boot. The attackers then drove the vehicle back from where they had come, and abandoned the vehicle. Ms KD drove the vehicle to the hospital, but Mr MF was already dead on arrival (parr 3-5).

The respondent and the other gang members were arrested as a result of a tip-off (par 6).

4 Sentence Imposed by the Court *A Quo*

The nature of the offences brought the case within the ambit of section 51 of the Criminal Law Amendment Act 105 of 1997 (the CLAA), which provided for a minimum sentence of life imprisonment for each of the counts of rape and murder (par 9). This was because the murder took place in the course of a robbery with aggravating circumstances, and the complainant was raped by both the respondent and his accomplices (s 51, read with sch 2 Part 1 CLAA and s 1 CPA). Section 51(3)(a) of the CLAA provides that the prescribed minimum sentence can be departed from where "substantial and compelling circumstances" exist.

The court *a quo* did not impose the prescribed minimum sentence of life imprisonment for either of the counts of robbery or rape. Instead, it sentenced the respondent to 25 years' imprisonment on each of the charges of rape and murder, and 13 years' imprisonment on each of the two counts of robbery. The sentences were ordered to run concurrently – meaning that the respondent would serve a total of 25 years at most (par 7).

The reason the prescribed minimum sentences were not imposed, was the respondent's age (27), and because he had pleaded guilty and had expressed remorse (par 9). In addition, the court *a quo* had found no aggravating factors to be present, as it held that the respondent's previous conviction was irrelevant to the case before it, and that the rape victim "had sustained no injuries" (par 10).

5 Prescribed Minimum Sentencing

The prescribed minimum sentencing regime has been described as an unsophisticated instrument, covering "the field of serious crime in no more than a handful of blunt paragraphs" (*S v Vilakazi* 2009 1 SACR 552 (SCA) par 11). It has been much criticised (see for example, Terblanche in *Criminal justice in a new society: Essays in honour of Solly Leeman* (eds Burchell & Erasmus) (2003) 194).

The legislative scheme provides that the maximum sentence allowed by law (life imprisonment) must be imposed in certain cases, unless substantial and compelling circumstances require otherwise.

The leading case on what will count as such circumstances, is *S v Malgas* 2001 1 SACR 469 (SCA), in which the SCA held (par 25) that ordinarily the prescribed sentence should be imposed, and that the sentencing court should not deviate from the prescribed sentences for flimsy reasons. However, if the prescribed sentence would be unjust, or disproportionate to the offence, then it must be departed from (par 25).

In determining whether injustice would result from the imposition of the prescribed sentence, all the usual mitigating and aggravating factors have to be considered (Terblanche & Roberts "Sentencing in South Africa: Lacking in principle but delivering justice?" 2005 *SACJ* 187 189). However, there is still uncertainty as to precisely what circumstances will be sufficient to justify a departure from the prescribed minimum sentence. This has led to uncertainty in sentencing (Sloth-Nielson & Ehlers "A phyrric victory? Mandatory and minimum sentencing in South Africa" Institute for Social Studies paper 111 (2005) 12; Terblanche "Sentencing guidelines for South Africa: Lessons from elsewhere" 2002 *SALJ* 858 859).

However, subsequent courts have clarified that it is incorrect to interpret *Malgas* (supra) as meaning that the prescribed sentence must be imposed in "typical" cases, and may be departed from only where the case is atypical (*S v Vilakazi supra* par 19). It is also wrong to view circumstances as substantial and compelling only if they are exceptional in the sense of being seldom encountered or rare (*Malgas supra* par 10; Terblanche & Roberts 2005 *SACJ* 187 192; but see *S v Mofokeng* 1999 1 SACR 502 (W)). Likewise, it is also wrong to view *Malgas* (*supra*) as jettisoning the "substantial and compelling circumstances" requirement, and replacing it with an unfettered discretion for the sentencing court to impose whatever sentence it considers fair.

The SCA in *Matyityi* (*supra*), clarifies that *Malgas* (*supra*) simply establishes that the sentencing court must independently apply its mind to the question of whether the prescribed sentence is proportionate to the crime. If not, substantial and compelling circumstances as contemplated in section 51(3)(a) exist, and the court may not impose the prescribed sentence.

The debate about when the prescribed sentence can be departed from continues to rage, and is especially robust in the context of rape. The SCA has conceptualised rape on a continuum from bad to worst, and has repeatedly held that it is only for rapes of the worst type, that life imprisonment will be justified (*S v Abrahams* 2002 1 SACR 116 (SCA); *S v Mahomotsa* 2002 2 SACR 435 (SCA); *Rammoko v Director of Public Prosecutions* 2003 1 SACR 200 (SCA)). However, in the case of *S v Vilakazi* (*supra* par 30), the SCA held that this did not mean that the sentence of life imprisonment was reserved for extreme cases only, holding that:

> [t]here comes a stage at which the maximum sentence is proportionate to an offence and the fact that the same sentence will be attracted by an even greater horror means only that the law can offer nothing more.

Some legislative guidance in this area has been provided by the Criminal Law (Sentencing) Amendment Act 38 of 2007, which came into effect on 31 December 2007. It amended the CLAA, by introducing section 51(3)(aA), which specifies that when sentencing for rape, there are four factors which will not count as substantial and compelling circumstances to justify the imposition of a lesser sentence. These are: the complainant's previous sexual history; the apparent lack of physical injury to the complainant; the accused person's cultural or religious beliefs about rape; and any relationship between the accused person and the complainant prior to the offence being committed.

The *Matyityi* case (*supra*) provides further guidance on how the minimum sentencing regime should be approached. The SCA held, in *Matyityi* that where minimum sentencing legislation applies, it must be the starting point for the presiding officer (par 11), and that there was no longer a clean slate upon which the presiding officer could inscribe whatever sentence was thought fit (par 18). The SCA held that this had been clearly and authoritatively held in *Malgas* (*supra* par 11). The SCA held that the proper approach was for the presiding officer to take as his point of departure that the minimum sentence was to be applied, and then to assess whether substantial and compelling factors justifying a departure from the norm were present (*Matyityi* par 18). However, the SCA noted (par 23), that sentencing courts are all too frequently willing:

> [t]o deviate from the minimum sentences prescribed by the legislature for the flimsiest of reasons [such as] speculative hypotheses favourable to the offender, maudlin sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy implicit in the amending legislation, and like considerations …

The SCA held that the factors referred to above were obviously not intended to qualify as substantial and compelling circumstances for the purposes of the prescribed minimum sentence legislation. In *S v PB* 2011 1 SACR 1 (SCA) par 21), the SCA reiterated that sentencing courts should not fall into the trap of deviating from the prescribed sentences for flimsy reasons, and on the basis of speculative hypotheses.

The SCA in the *Matyityi's* case (*supra*), held further that a failure to apply the will of parliament ultimately subverts the constitutional order. It held (par 23) that:

> … as *Malgas* makes plain, courts have a duty, despite any personal doubts about the efficacy of the policy or personal aversion to it, to implement those sentences. Our courts derive their power from the Constitution and, like other arms of State, owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of State. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them.

Against this background, I will consider the SCA's finding in the *Matyityi* case (supra), that the court *a quo* had erred in finding that substantial and compelling circumstances justifying a departure from the prescribed minimum sentence of life imprisonment for each of the counts of rape and murder, existed. The SCA found that the court *a quo* had erred, both in finding there to be an absence of aggravating factors, and in finding that mitigating circumstances were present.

6 Lack of Aggravating Factors

6 1 Previous Conviction

The SCA held that the court *a quo* had fundamentally misdirected itself, by finding that the previous conviction of the respondent was "not much related" to the offence for which he had been convicted, and that it was therefore irrelevant. In 2005, the respondent had been convicted of being in possession of an unlicensed firearm in contravention of the Arms and Ammunitions Act 75 of 1969, for which he was sentenced to a fine of R1500 or 12 months imprisonment (par 10). His (recent) previous conviction was clearly linked to his capacity for violent crime, and was therefore relevant to his sentencing for the crimes of rape, murder and robbery (*S v J* 1989 1 SA 669 (A) 675). Even if the previous conviction had been remote in nature from the current case, it remained relevant to the respondent's sentencing, because it showed that he had not been deterred by his previous encounter with the law. The SCA commented that the respondent had apparently spurned the mercy shown by the previous court, by continuing with his life of crime (par 10). This was a significant factor in determining the appropriate sentence for him, as it revealed that he had diminished prospects of rehabilitation, and was an indicator that he would not easily be deterred from the future commission of crime.

6 2 Rape Victim's Injuries

The SCA found that the court *a quo* had fundamentally misconstrued the nature of the crime of rape, by remarking that the complainant (Ms KD) had sustained no injuries as a result of it. Indeed, the observation strikes one as shockingly insensitive and callous, even if the magistrate intended only to refer to an absence of permanent physical injuries. The SCA held

that although it was true that Ms KD had sustained no permanent physical injuries, the court *a quo* had ignored the profound psychological, emotional and symbolic significance of the crime of rape for the victim (par 10).

The significance of the absence of physical injuries suffered by a rape complainant, as well as the extent of the emotional trauma suffered by her or him, has received much judicial attention in the context determining the appropriate sentence for the crime of rape.

6 2 1 Physical Injuries

There have been a number of cases in which the absence of (serious) physical injuries suffered by the complainant has been held to be a factor (usually amongst others) indicating that substantial and compelling circumstances which justify a deviation from the statutorily prescribed sentence exist (see for example *S v Mahomatsa* (*supra*); *S v Sikhipha* 2006 2 SACR 439 (SCA)). Legislation now provides that an apparent lack of physical injury to the complainant does not count as a "substantial and compelling" circumstance, justifying the imposition of a lesser sentence (s 51(3)(aA)(ii) CLAA; see also *S v Ntozini* 2009 1 SACR 42 (E); *S v M* 2007 2 SACR 60 (W)). The SCA did not refer to this legislation in the *Matyityi* judgement. Refer also to *S v MN* 2011 1 SACR 286 (ECG); *S v Dayile* 2011 1 SACR 245 (ECG)), where the courts took into account the absence of physical injury, despite the provisions of section 51(3)(aA)(ii) of the CLAA – as did the SCA in *S v Vilakazi* (*supra*).

6 2 2 Emotional Damage

Courts have also held that unless there is evidence as to the emotional impact the rape has had on the complainant, it will not take this into account as a factor indicating that the prescribed minimum sentence should be applied. In other words, the court will not regard the emotional impact of the rape on the complainant as an aggravating factor, without specific evidence of this being presented to the court (see *S v Mahomatsa* (*supra*); *S v Ntozini* 2009 1 SACR 42 (E); *S v Rabako* 2010 1 SACR 310 (O)).

In the case of *Rammoko v Director Public Prosecutions* (*supra*), the SCA refused to impose the mandatory sentence of life imprisonment for the rape of a child, because no evidence of serious emotional *sequelae* for the child had been presented. The SCA held (par 13) that:

> Life imprisonment is the heaviest sentence a person can be legally obliged to serve. Accordingly, where s 51(1) applies, an accused must not be subjected to the risk that substantial and compelling circumstances are, on inadequate evidence, held to be absent.

It was argued that the effect of *Rammoko* (*supra*), was that it would be a misdirection for a court to impose the prescribed sentence in the absence of evidence regarding the emotional impact of the rape on the complainant. However, in the case of *S v Ncheche* 2005 2 SACR 386 (W) par 29, the court held that certain cases of rape were so serious, that

regardless of the emotional consequences for the complainant, they justified life imprisonment.

In the *Matyityi* case (*supra*), neither the complainants (Mr AC and Ms KD), nor the survivors of the deceased (Mr MF), testified in aggravation of sentence, nor did they submit victim impact statements. The SCA therefore complained (par 15) that it knew very little about the complainants, and the impact the crime had had on them. However, the SCA, while regretting that there were no victim impact statements, did not regard the lack of specific evidence addressing the emotional consequences of the ordeal for Ms KD, as constituting a substantial and compelling factor justifying a sentence other than life imprisonment for the rape. The SCA was willing to infer the likely impact on the rape complainant from the other evidence (par 20).

7 Victim Impact Statements

The SCA (*Matyityi supra* par 15) stressed that an enlightened and just penal policy needs to be victim-centred, and that in South Africa victim empowerment is based on restorative justice, which seeks to emphasise that a crime is more than the breaking of the law or offending against the state – it is an injury or wrong done to another person.

The SCA (par 16) referred to the United Nations Declaration of the Basic Principles of Justice for Victims of Crime and Abuse of Power (GA Res 40/34 1985-11-29), and The Service Charter for Victims of Crime in South Africa (approved by cabinet on 2/12/04) – both of which seek to accommodate victims more effectively in the criminal justice system, and to place them at the centre of it.

The SCA (par 16) held that the emphasis in South Africa on restorative justice was necessary to give meaningful content to the rights of victims, by reaffirming their constitutionally protected human dignity. Further, restorative justice enabled society to vindicate its collective sense of humanity and humanness.

The SCA held (parr 16-17) that the value of a victim impact statement was that by providing the court with a description of the physical and psychological harm suffered, and the likely future social and economic effect of the crime on the victim and his family, the court would be given an opportunity to truly recognise the wrong done by the accused, and would thus be able to achieve the right degree of balance between the competing interests, and ultimately facilitate the achievement of proportionality in the sentence imposed (see also Muller & Van der Merwe "Recognising the victim in the sentencing state: the use of victim impact statements in court" 2006 *SAJHR* 647 650 (which the court refers to (par 16)); Makiwane "Victim impact statements at the sentencing stage: Giving crime victims a voice" 2010 *Obiter* 606).

The SCA noted (*Matyityi* (supra) par 17) that victim impact statements play a particularly important role in rape cases, because generally courts lack the necessary experience to generalise or draw conclusions about the effects and consequences of a rape, for a rape victim.

It should be noted that the use of victim impact statements in court is not universally accepted as a positive development. Various commentators have considered possible negative consequences flowing from their use, and have found that certain role players in the criminal justice system also find them problematic (see Erez "Neutralising victim reform: Legal professionals' perspectives on victim impact statements" 1999 *Crime and Delinquency* 520; Sanders, Hoyle, Morgan & Cape "Victim impact statements don't work, can't work" 2001 *Criminal LR* 447; Meintjies-van der Walt "Towards victim empowerment strategies in the criminal justice process" 1998 *SACJ* 157 167: *Makiwane supra*).

8 Mitigating Factors

The SCA noted that the respondent had chosen not to testify in mitigation, as was his right (*Matyityi supra* par 12). The SCA held, however, that his silence had negative consequences for him, in the sense that it pointed irresistibly to the conclusion that there was nothing to be said in his favour (par 21).

8 1 Personal Circumstances

It was placed on record from the bar that the accused was 27, that he was married with three children, and that his highest level of education was standard seven (par 12). The court *a quo* only considered his age to be significant as a factor impacting on the decision on how to sentence him. The court *a quo* was correct to ignore his personal circumstances in the context of the case. As was observed in *S v Vilakazi* (*supra* par 58):

> ... in cases of serious crime the personal circumstances of the offender, by themselves, will necessarily recede into the background. Once it becomes clear that the crime is deserving of a substantial period of imprisonment the questions whether the accused is married or single, whether he has two children or three, whether or not he is in employment, are in themselves largely immaterial to what that period should be, and those seem to me to be the kind of 'flimsy' grounds that Malgas said should be avoided.

8 2 Age

The SCA was critical of the fact that the court *a quo* made reference to the respondent's "relative youthfulness", without elaborating on what that meant (par 14). The SCA agreed that youth will ordinarily constitute a mitigating factor, but held that ultimately the enquiry should be whether "the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness". Terblanche (*Guide to sentencing in South Africa* (1999) 197) writes that "age tends to be an irrelevant consideration as far as sentencing is concerned if the offender is more than 21 years old" (but compare *S v Nkomo* 2007 2 SACR 198 (SCA) par 13 where the majority found the fact that the appellant was "relatively young at the time" (at age 29) to be a mitigating factor).

In casu, the SCA found that at the age of 27, the respondent's age could not be assumed to be a mitigating factor. The SCA held that anyone over the age of 20 must show by acceptable evidence, that he was

immature to such an extent that his immaturity operated as a mitigating factor (par 14). As the respondent had declined to testify, the SCA could not draw any conclusions about his level of maturity. In any event, the SCA found that his deeds were particularly vicious, having been "breathtakingly brazen", and having been executed with "callous brutality" (par 19). This was inconsistent with immaturity as a mitigating factor. This approach is consistent with that taken in the case of *S v Dlamini* 1991 2 SACR 655 (A) 666, where the AD held that the vicious nature of the accused's deeds could rule out the possibility of immaturity (referred to in *Matyityi's* case *supra* par 13). However, this cannot be a hard and fast rule, as common sense tells us that brazen brutality may in fact be evidence of immaturity, in the sense that it reveals an inability to empathise with others, nor to control impulses nor engage in rational thinking, all of which are hallmarks of immaturity.

More compelling evidence that the respondent was not immature, is to be found in the fact that the respondent supplied the rape complainant, Ms KD, with toilet paper to clean herself after the rapes, and wiped his fingerprints from the steering wheel and door handles. The SCA held (par 19) that this reflected an awareness, presence of mind and sophistication, that was inconsistent with immaturity. It is also noteworthy that the respondent was found to have acted as the ringleader in both incidents, and that the perpetrators had the presence of mind to wipe Mr MF's blood off the exterior of the car, before driving away in the vehicle (par 4).

Accordingly, the SCA found that the respondent's age was a neutral factor, with regard to sentencing (par 14).

8 3 Plea of Guilty

It is a well-known principle of sentencing that a guilty plea in circumstances where the case against the accused is very strong, does not serve as a mitigating factor. It is rather regarded as a neutral one (par 13). In *Matyityi's* case (*supra*), the evidence linking the respondent to the crimes was overwhelming. The incriminating evidence included stolen items found at the home of the respondent's girlfriend, DNA evidence linking him to the crime scene, pointings-out made by him, and the fact that Ms KD, the rape survivor, had identified him at an identification parade (par 13).

The SCA held, that in the circumstances, the plea of guilt was not a relevant factor in determining an appropriate sentence in the case before it, and that the court *a quo* had erred in regarding it as such (par 13).

8 4 Remorse

The respondent's "remorse" was nothing more than an apology expressed by his legal representative from the bar (par 13). The SCA (par 13, quoting *S v Martin* 1996 2 SACR 309 (SCA) par 9) pointed out the "chasm between regret and remorse", explaining the difference as follows:

> Many accused persons might well regret their conduct but that does not without more translate to genuine remorse. Remorse is a gnawing pain of conscience for the plight of another. Thus genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error. Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question.

The SCA concluded that there was no indication that any of this had been explored in the court *a quo*, and thus that remorse could not count as a mitigating factor. The SCA held that information relevant to remorse lies peculiarly within the knowledge of the accused. The implication of this is that (generally) where an accused elects not to testify, a finding of remorse cannot be made by the presiding officer. Sometimes, however, the actions of the accused, rather than what he says in court, can provide more convincing evidence of genuine remorse.

The sentencing court will also have to be convinced of the genuine nature of the accused's alleged remorse, for it to act as a mitigating factor. This will inevitably require that the accused takes the court fully into his confidence regarding what motivated him to commit the crime, and what has since provoked the change of heart; and whether he does indeed have a true appreciation of the consequences of those actions. The respondent *in casu* chose not to do this (par 12). In any event, the respondent's alleged remorse was also inconsistent with the fact that the offences were committed five days apart. The SCA noted (par 19) that the respondent had had "sufficient time for pause and reflection" after the first incident, yet had proceeded to commit the subsequent (more serious) offences.

8 5 Rehabilitation

The lack of remorse is also significant insofar as it has a bearing on the respondent's prospects for rehabilitation, which is another factor relevant to determining the appropriate sentence to impose. In the case of *S v Dyantyi* 2011 1 SACR 540 (ECG) par 26, the court found that an accused will rarely be able to show that he is a suitable candidate for rehabilitation, without proving to the court that he is genuinely remorseful (see also Mujuzi "The prospect of rehabilitation as a substantial and compelling circumstance to avoid imposing life imprisonment in South Africa" 2008 *SACJ* 1).

9 Sentence Increased

The SCA thus found that the magistrate, by sentencing the accused to 25 years imprisonment (instead of life imprisonment) for each of the crimes of rape and murder, had erred. The court had thus imposed a sentence that was disproportionate to the crime and the interests of society. The court *a quo* had inappropriately emphasised the personal interests of the respondent, above the interests of society. It did not take sufficient account of the prevalence of violent crime; the wanton criminality displayed by the respondent; the right of the public to be protected from crime; the public interest in suitably fair, just and balanced punishment;

and the harm suffered by Mr AC, Ms KD and those who survived Mr MF (par 24).

The SCA concluded that there were no substantial and compelling circumstances present, to warrant a departure from the prescribed statutory sentence, and that this was precisely the type of case that the legislature had in mind when it enacted the minimum sentencing legislation. The SCA therefore imposed the prescribed minimum sentence on the respondent – life imprisonment – for each of the offences of rape and murder.

10 Conclusion

The significance of the *Matyityi* case (*supra*), cannot be over-emphasised. The SCA expressed itself forcefully in three fundamentally important areas. Firstly: prescribed sentences. Secondly: the role of the victim of crime in the sentencing process. Thirdly: the importance of placing all relevant information before the sentencing court, to enable it to properly exercise its sentencing function.

In respect of the prescribed minimum sentence regime, the SCA held (par 23) that sentencing courts should not subvert the will of the legislature by resorting to "vague, ill-defined concepts such as 'relative youthfulness' or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness" to justify deviating from the sentences prescribed by the CLAA. The SCA stressed that "predictable outcomes, not outcomes based on the whim of an individual judicial officer, [are] foundational to the rule of law which lies at the heart of our constitutional order" (par 23). The elimination of uncertainty in sentencing was in fact one of the key reasons for introducing the mandatory minimum sentencing regime into South Africa in the first place (Sloth-Nielson & Ehlers 12). Unfortunately, until more structured sentencing guidelines are put in place, it is unlikely that this objective will be achieved (Terblanche 859).

The SCA also emphasised the importance of the participation of the victim of crime, in the sentencing process. The SCA placed the victims of crime at the centre of the criminal justice system, and held that victim impact statements are essential to just sentencing (parr 16-17). In this regard, the judgment supports the argument that the notion of the "triad" as representing the key sentencing considerations, is outdated. The triad represents the accused, the crime, and the interests of society (*S v Zinn* 1969 2 SA 537 (A)). The impact of the crime on the victim is recognised in this judgment as an independent and equally important consideration. Muller and Van der Merwe (2006 *SAJHR* 647) represent this approach elegantly, when referring to the "squaring of the triad".

Finally, with regards the need to equip the sentencing court for its function, the SCA held (par 24) that an appropriate sentence may well have been imposed by the court *a quo*, had more relevant evidence been placed before it. The responsibility for ensuring that the sentencing court has all the necessary information to reach a fair decision on sentence,

rests on all the role players in the process (the legal representative for the accused, the prosecutor and the presiding officer) (see *S v Siebert* 1998 1 SACR 554 (SCA); *S v Olivier* 2010 2 SACR 178 (SCA); *S v Samuels* 2011 1 SACR 9 (SCA); *S v Pillay* 2011 2 SACR 409 (SCA)), and it is time that the perfunctory approach to sentencing, which is too often displayed in the courts, comes to an end.

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