Examining the Implications of an Inference of Remorse or Lack Thereof Drawn From a Convicted Offender's Plea of Guilty or Not Guilty

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SUMMARY

The concept of remorse is often referred to as a sentencing factor carrying enough weight to mitigate the sentence imposed on a convicted offender, and the lack thereof is seen as an aggravating factor. Numerous cases have referred to an offender's plea of guilty (in terms of section 112 of the Criminal Procedure Act) as an indication of remorse, and to a plea of not guilty (in terms of section 115 of the same Act) as a lack thereof. In drawing such inferences, our courts seem to negate the right to a fair trial, particularly the right to adduce and challenge evidence as envisaged in section 35(3)(*i*) of the Constitution of the Republic of South Africa, 1996. This article seeks to analyse the implications of drawing an inference of remorse (or lack thereof) from a convicted offender's plea of guilty or not guilty. This article seeks to answer the question of whether the inference of remorse or lack thereof, drawn by sentencing courts from a plea of guilty or not guilty, is a blind one; and if it is not a blind inference, then how do sentencing officers ensure that a balance between the aggravating and mitigating factors is maintained to ensure that the punishment fits the crime.

KEYWORDS: Remorse, fair trial, plea of guilty and plea of not guilty

1 INTRODUCTION

South African criminal proceedings consist of three stages – namely, the pre-trial stage where the accused enters a plea of guilty in terms of section 112 of the Criminal Procedure Act (CPA)[1] or a plea of not guilty in terms of

[1] 51 of 1977.

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section 115 of the same Act; a trial stage, which encompasses conviction and sentencing; and a post-trial stage, which includes appeals and reviews. Although separate, these stages are greatly influenced by what has transpired in the preceding stage. The issue of a convicted offender's plea made at the beginning of proceedings thus has a bearing on the question of remorse as a mitigating or aggravating factor during sentencing.

It is trite that before a sentencing court may impose a sentence on a convicted offender, it has to consider the aggravating factors put before it by the State, as well as the mitigating factors put before it by the legal representative appearing on behalf of the offender or by the offender representing themselves. It is at this stage that the concept of remorse emerges as either an aggravating factor or a mitigating factor.

Mitigating factors refer to any factor that has the effect of reducing the sentence imposed on a convicted offender,[2] and it is only logical to deduce that aggravating factors are any factor that has the effect of increasing the sentence imposed on a convicted offender. According to *S v Ramba,*[3] mitigating and aggravating factors are all the factors that a court can properly take into account in aggravation or mitigation of a sentence.[4]

It is important to note that there is no generally applicable list of what constitutes mitigating or aggravating factors, and even where a factor is ordinarily considered to be mitigating, in other matters, the very same factor may have the implication of aggravating the sentence.[5] Incidentally, the weight attached to any of these factors depends on the facts of each case and is at the discretion of the presiding judicial officer.[6] However, although a hierarchy does not exist, it has become noticeable that remorse seems to enjoy a higher status than other factors, because of the weight sentencing officers attach to this factor.[7] On the one hand, the status given to the remorse factor can have a detrimental effect on the case of a convicted offender who is deemed to lack remorse simply because they had entered a plea of not guilty.[8] On the other hand, it could mean a grave miscarriage of justice when a convicted offender is rewarded handsomely with a reduced sentence for a plea of guilty that is perceived as an act of remorse.[9]

The concept of remorse is plainly defined as a distressing emotion resulting from accepting responsibility for harmful conduct towards another person.[10] The court in *S v Martin*[11] accepted remorse to mean "repentance, an inner sorrow inspired by plight or by a feeling of guilt e.g because of

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2 Terblanche *A Guide to Sentencing in South Africa* 3ed (2016) 210; *Mlambo v S* ZAGPPHC (unreported) 2023-07-11 Case no A272/2022 par 42.

3 1990 (2) SACR 334 (A).

4 *S v Ramba supra* par 341i–342a.

5 Terblanche *A Guide to Sentencing in South Africa* 209–239.

6 *Ibid*.

7 Lippke "Remorse, Dialogue, and Sentencing" 2022 16 *Criminal Law and Philosophy* 611 613.

8 *Mbatha v S* 2009 (2) SACR 623 (KZP) par 31.

9 Lippke 2022 *Criminal Law and Philosophy* 613.

10 Morse "Commentary: Reflections on Remorse" 2014 42 *J Am Acad Psychiatry Law* 49 49.

11 1996 (2) SACR 378 (W).

breaking the commands of a higher authority".[12] Tudor suggests that the feeling of remorse implies the need to make things right, to apologise, and to repair the ruin and an undertaking not to repeat the wrongdoing.[13]

This article seeks to answer the question of whether inferences of remorse or lack thereof drawn by sentencing courts from pleas of guilty or not guilty are blind, and if they are not, then how do sentencing officers ensure that a balance between the aggravating and mitigating factors is maintained at all times to ensure that the punishment fits the crime.

This article is divided into six parts. Part 1 is the introduction. Part 2 begins an examination of the legislative framework. Part 3 examines the sincerity of the remorse as it relates to the offender taking the court into their confidence. Part 4 examines in depth the implications of remorse during sentencing. Part 5 examines whether the court is equipped to assess the presence of remorse or lack thereof. Part 6 offers a conclusion.

2 LEGISLATIVE ANALYSIS

2 1 Constitution

As the basis, we ought to acknowledge that the Constitution of the Republic of South Africa, 1996 (the Constitution) is the supreme law of the Republic; any law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.[14] The basic rights afforded to South African citizens are contained in Chapter 2 of the Constitution.[15] The rights contained in Chapter 2 are afforded to everyone and, as such, are to an extent supposed to be claimed by everyone.[16] Among these rights is the right to a fair trial and, more particularly, the right to challenge and adduce evidence in terms of section 35(3)(*i*) of the Constitution. As a prerequisite for a fair trial, a litigant has a right to cross-examine any witness who has been called by the other party and has been duly sworn in.[17]

Apart from the Constitution, this right is affirmed by section 166 of the CPA.[18] This right can also be deduced from the *audi alteram partem* rule, which encapsulates the criminal-law concept that "no person should be condemned unheard". It is against this backdrop that the submission that an alleged offender's plea of not guilty indicates a lack of remorse appears to be in contravention of the rights afforded in terms of section 35(3)(*i*) of the Constitution.

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12 *S v Martin supra* par 383h.

13 Tudor "Why Should Remorse Be a Mitigating Factor?" 2008 2 *Crim Law and Philos* 241 243.

14 S 2 of the Constitution.

15 Ch 2 of the Constitution is the Bill of Rights, consisting of ss 7–39.

16 Freedman "Constitutional Aspects" 2013 *SACJ* 418.

17 Miller "Completed Cross Examination. A Prerequisite for a Fair Trial" 2013 536 *De Rebus* 28.

18 S 166 of the CPA provides for the cross-examination and re-examination of witnesses.

2 2 Criminal Procedure Act

A plea in terms of section 112 of the CPA is commonly referred to as a plea of guilty. In terms of the CPA, the accused person may, at a summary trial, make a plea of guilty to the offence on which they are charged and may be convicted.[19] For the plea to be accepted, the accused person has to admit to all the elements of the crime; if satisfied with the plea, the court will convict the accused as charged and move on to sentencing.[20] A plea in terms of this section means that the offender abandons the right to challenge and adduce evidence and deprives the State of the opportunity to prove guilt beyond a reasonable doubt at trial.[21]

It is clear from the aforesaid how quickly the case before the court reaches finalisation when the accused pleads guilty at the onset. This is one of the reasons for why it is said that the plea of guilty may mitigate the sentence, as an inference of remorse is more often than not drawn from the accused's actions – be it because the accused's plea does not waste the court's time by going to trial, or merely that it brings some sort of closure to the complainant or those affected by the offender's actions.[22] Furthermore, the plea may be considered as a way for the offender to take responsibility for their criminal actions, which is normally acknowledged as a sign of remorse and the first step towards rehabilitation.[23]

However, it is not always that a plea of guilty is an indication of remorse; as such, our courts bear the responsibility to differentiate between remorse and pure guilt after being backed into a corner.[24] Van der Merwe submits that in some instances, the offender's plea of guilty is not indicative of remorse but rather a mechanism to deprive the court of the opportunity to hear the gruesome details of the offence.[25]

The court in *S v Matyityi*[26] stated:

> "Remorse was said to be manifested in him pleading guilty and apologising, through his counsel (who did so on his behalf from the bar) to Ms KD and Mr Cannon. It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor. The evidence linking the respondent to the crimes was overwhelming. In addition to the stolen items found at the home of his girlfriend, there was DNA evidence linking him to the crime scene, pointings-out made by him and his positive identification at an identification parade. There is, moreover, a chasm between regret and remorse. 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

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19 S 112(1) of the CPA.

20 *Ibid*.

21 Msaule "What Must a Guilty Plea Entail?" 2023 642 *Re Debus* 44.

22 Du Toit "The Role of Remorse in Sentencing" 2013 34 *Obiter* 558 563.

23 Cowin "Defendant Remorse, Need for Affect, and Juror Sentencing Decisions" 2012 40 *J Am Acad Psychiatry Law* 41 42.

24 Lippke 2022 *Criminal Law and Philosophy* 613.

25 Van der Merwe "Sentencing" 2012 1 *SACJ* 151 154.

26 [2010] ZASCA 127.

> genuine contrition can only come from an appreciation and acknowledgement of the extent of one's error."[27]

Murphy argues that people who are remorseful for their actions and who are repentant are said to pose less danger and are less likely to commit another wrong as opposed to those who are unremorseful and unrepentant.[28] He, however, acknowledges the possibility of the wrongdoer not being honest about their remorse, whether in the form of self-deception or just mistaking the sincerity of their own repentance.[29] He further acknowledges that even at times, despite being sincere, "backsliding"[30] is always a possibility.[31] Van der Merwe avers that the question of sincere remorse is a factual question, and that an inference of the presence of sincere remorse may be deduced from the offender's actions after commission of the offence.[32] Her views suggest that an inference being drawn purely from a section 112 plea or from an apology made after conviction would be a gross miscarriage of justice. The reasons for such a conclusion are supported by Murphy, who opines:

> "[A] practical problem with giving credit for remorse and repentance, at least at the level of sentencing, is that they are so easy to fake; and our grounds for suspecting fakery only increase when a reward (e.g reduction in sentence) is known to be granted to those who can persuade a sentencing authority that they manifest these attributes of character. To the degree we give rewards for goodness of character, then to that same degree do we give wrong doers incentives to fake goodness of character."[33]

The question of whether remorse should even be considered as a mitigating factor carrying much weight in a particular case was answered by Makgoba J in *Piater v S*,[34] where the court held that the fact that the offender had pleaded guilty was not in itself an indication of her remorse; and that to be taken into account as a mitigating factor, the remorse had to be sincere, and that it was the duty of the offender to take the court into their confidence.[35] In this case, the court was convinced that the offender had no other option but to plead guilty owing to the strong case the State had against her, and alluded to the offender's decision not to enter the witness box during mitigation of her sentence as a failure to take the court into her confidence, denying the court an opportunity to cross-examine her on the mitigating factors she had placed before the sentencing court.[36]

In *S v IS*,[37] Steyn J held that whether an accused person cries remorse is not the test for establishing the presence of the same, and that what is

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27 *S v Matyityi supra* par 13.

28 Murphy "Well Excuse Me! Remorse, Apology, and Criminal Sentencing" 2006 38(2) *Ariz St LJ* 378 378.

29 *Ibid*.

30 Backsliding in this context refers to the convicted offender re-offending despite being truly remorseful for their conduct.

31 *Ibid*.

32 Van der Merwe 2012 *SACJ* 154.

33 Murphy 2006 *Ariz St LJ* 379.

34 2013 (2) SACR 254 (GNP).

35 *Piater v S supra* par 40.

36 *Ibid*.

37 [2017] ZAKZDHC 13.

important is the sincerity of the claim, which is established when they take the court into their confidence.[38] *In casu*, the court observed that the offender viewed himself as not guilty, and considering his actions after the commission of the crime, all pointed to his lack of remorse.[39]

The plea of not guilty in terms of section 115 of the CPA is born out of the section 35(3)(*i*) constitutional right. In terms of the former, where an accused pleads not guilty at a summary trial, they may elect to make a statement in terms of which they explain the basis of their defence.[40] The plea of not guilty allows the accused an opportunity to challenge the strength of the State's case against them and adduce evidence in support of their version of events, and sets in motion the State's duty to prove guilt beyond a reasonable doubt.[41] When such a plea is entered, irrespective of whether the mentioned statement is made or not, the matter may be remanded for a pre-trial conference and in other instances, remanded for a suitable trial date agreed upon by both prosecution and defence.

It is for reasons such as the constant remands that usually follow the first appearance that pleas of not guilty may be categorised as wasting the court's time. This is because, in reality, it often takes years for matters to proceed to trial, which in turn delays what may be referred to as the healing process for the victim or those affected by the actions of the offender. It is because of such delays, which prolong the service of justice, that a convicted offender is seen as lacking remorse when they are convicted as charged after having exercised their constitutional right by entering a plea of not guilty. However, such categorisation seems to negate the fact that in certain instances a remand is at the request of the State and the defence is more than ready to proceed with trial.

It is trite that in some instances an accused makes a plea in terms of section 115 of the CPA, and then, at a certain point during the trial, changes that plea by making admissions in terms of section 220 of the CPA, wherein all the elements of the crime are admitted, and which admissions amount to a plea of guilty; thus, the process moves on to conviction and sentencing of the offender. This begs the question of whether the accused is then seen as remorseful owing to the plea change, or is it that they had no other option after seeing the overwhelming evidence of the State against them. In an attempt to answer this question, the article argues that the question of remorse in this case depends entirely on when the plea change was made. Obviously, a different inference may be drawn if the plea change is made at the beginning of the State's case from one drawn when made at the close of the State's case. At the beginning of the trial stage, the strength of the State's case is not so clear, and the accused's actions may be viewed as remorse, unlike at the close of the State's case after all the State's evidence has been led and its strength is easily determinable.

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38 *S v IS supra* par 16.

39 *Ibid*.

40 S 115(1) of the CPA.

41 Terblanche *A Guide to Sentencing in South Africa* 215.

The drawing of an inference of remorse from a section-112 plea gives the impression that a plea in terms of section 115 signifies a lack of remorse on the part of the offender. The reason is that the former is associated strongly with not wasting the court's time and resources.[42] This suggests that the court may already be against an accused who chooses to exercise their constitutional right. Such an attitude places the accused in a highly disadvantageous position. The inference of a lack of remorse drawn by courts from a section-115 plea poses a threat and is an infringement of the rights of the accused.[43] This has the potential of inducing accused persons to plead guilty even where the State has no case, in order not to experience a court's disfavour. An inference of lack of remorse drawn solely from this plea threatens our democracy and freedoms, in that it has the potential to induce a plea of guilty, thus infringing on the rights afforded by section 35 of the Constitution. In South African criminal law and procedure, a person is deemed innocent until they are proved guilty by a competent court.[44] Deeming an accused to be lacking in remorse solely on the basis of a plea of not guilty prematurely convicts the accused on the charge. This is essentially a conviction before evidence is even led, hence the submission that the drawing of this inference threatens our democracy and freedoms.

3 OFFENDER TAKING THE COURT INTO THEIR CONFIDENCE

The concept of remorse at the sentencing stage is closely linked to the convicted offender's taking the court into their confidence.[45] Taking the court into the offender's confidence refers to leading evidence from the witness box of the mitigating factors claimed, and in return affording the court the opportunity to cross-examine the offender.[46] The cross-examination is undertaken for the court to assess the sincerity of the remorse and repentance claimed.[47] An offender taking the court into their confidence has its foundation in section 274(1) of the CPA, which stipulates that before imposing a sentence, a court may receive any evidence that it views necessary to impose a proper sentence on a convicted offender.

According to Du Toit, taking the court into the offender's confidence simply means the convicted offender must enter the witness box for the court to hear at first hand the driving force behind the offender's commission of the crime, what has prompted their repentance and lastly, whether they truly understand the gravity of their actions and the consequences thereof; this allows the court to ascertain the sincerity of the offender's remorse.[48] Failure on the part of an offender to take the court into their confidence is frowned

42 Du Toit 2013 *Obiter* 563.
43 *Mbatha v S supra* par 31.
44 Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche and Van der Merwe *Criminal Procedure Handbook* 6ed (2003) 10.
45 *Piater v S supra* par 39.
46 *Piater v S supra* par 40.
47 Du Toit 2013 *Obiter* 559.
48 *Ibid*.

upon by the court and may harm their claim of remorse and petition for a lower sentence.[49]

Phooko AJ in *Mlambo v S*[50] pointed to the appellant's lack of remorse throughout the trial, as well as his actions after the commission of the offence, as an aggravating factor.[51] The court further referred to the appellant's claim of remorse on appeal as "a belated expression of remorse", as the appellant had an option to testify in mitigation of sentence in the trial court but elected not to do so.[52]

Section 274(1) uses the term "may", which sparks the argument that it is not always the case that such evidence exists, nor that the defence wishes to lead such evidence. However, case law has indicated that failure on the part of a convicted offender to lead such evidence is frowned upon by the courts, and more so when the offender's remorse is to be assessed by the courts.[53] This puts pressure on the defence to present such evidence to gain a court's favour when mitigating factors are considered by the court.

The Supreme Court of Appeal (SCA) in *Piater v S*[54] shed light on the issue of the offender taking the court into their confidence, and the implications of a failure to do so, when it rejected counsel for the appellant's submission that both the trial court and the High Court had "taken issue" with the appellant's failure to testify and viewed this choice as a failure to show genuine remorse.[55] The SCA noted that the court *a quo* had concluded that the trial court did not have sufficient information to assess the offender's remorsefulness, which was the very same issue the court *a quo* faced, and it had nevertheless decided to reduce the sentence. Even in the hearing before the SCA, the appellant had not been forthcoming about what she did with the money.[56] The court held that the appellant should not be criticised for choosing not to testify but rather for failing to place all the necessary information before the court to allow it to award an appropriate sentence. It concluded that the sentence awarded by the court *a quo* was not disproportionate to the seriousness of the offences when levelled against the appellant's personal circumstances and dismissed the appeal.[57]

4 REWARDING "REMORSE" BY AWARDING SHORTER SENTENCES: THE EFFECTS ON UNIFORMITY OF SENTENCES

Remorse appears to enjoy an elevated status compared to other mitigating and aggravating factors – so much so at times that, even where aggravating

49 *Ibid*.
50 *Supra*.
51 *Mlambo v S supra* par 36.
52 *Mlambo v S supra* par 37.
53 *Ibid*. See also *S v IS supra* par 16.
54 [2014] ZASCA 134.
55 *Piater v S* (SCA) *supra* par 10.
56 *Ibid*.
57 *Piater v S* (SCA) *supra* 134 par 11–17.

factors outweigh the mitigating factors, when the issue of remorse comes into play, it tends to weigh more than all the other factors combined.[58]

It is trite that the judicial discretion bestowed on presiding officers is exercised at all stages of criminal matters and not only during the sentencing stage.[59] It is for this reason that Terblanche submits that the exercise of this discretion indicates that a single choice has to be made in the midst of various other "correct" choices.[60] This discretion is influenced by various factors and is guided mostly by the three legs of sentencing set out in the case of *S v Zinn*,[61] in what is now fondly referred to as the "Zinn triad".[62] The latter is an indication that the discretion is not wide and unfettered. Furthermore, legislation on minimum sentences plays a role in ensuring uniformity of sentences by creating a starting point for the imposition of sentences.[63]

The issue of uniformity of sentences arises when a convicted offender is "rewarded" with a reduced sentence for what is perceived as a display of remorse in the face of the charges.[64] The reduction seems to overlook the three legs of the triad, which call for a balance to be struck between the seriousness of the offence, the circumstances of the offender, and the interests of society. It also impacts the imposition of sentences in cases where minimum-sentence legislation applies, as the presiding officer will, on announcing the issue of remorse as a mitigating factor, deviate from the prescribed minimum sentence and cite remorse as a substantial and compelling reason to deviate from the recommended minimum sentence.

In the case of an offender convicted after having entered a plea of not guilty and on the premise that the plea is an indication of a lack of remorse, the courts are more inclined to use the minimum-sentence legislation at sentencing as a starting point. The reason is that in the courts' view, there would be no substantial and compelling circumstances to deviate from the minimum-sentence legislation owing to the assumption of a lack of remorse, which is an aggravating factor. This means that a disparity in sentences is created based on the weight attached to this sentencing factor. It is for this reason that Lippke argues that remorse enjoys an elevated status compared to other sentencing factors.[65] Of course, in awarding a reduced sentence, the court takes numerous other factors into consideration; however, the weight carried by those factors does not supersede that of remorse.[66] According to Lippke, remorse enjoys an elevated status compared to other mitigating and aggravating factors – so much so at times that even where aggravating factors outweigh the mitigating factors, when the issue of

58 Lippke 2022 *Criminal Law and Philosophy* 613.
59 S 60 of the CPA.
60 Terblanche *A Guide to Sentencing in South Africa* 127.
61 1969 (2) SA 537 (A).
62 The Zinn triad advocates for a balancing act between the crime, the offender, and the interests of society whenever a court hands down a sentence.
63 Criminal Law Amendment Act 105 of 1997.
64 Lippke 2022 *Criminal Law and Philosophy* 613.
65 Lippke 2022 *Criminal Law and Philosophy* 617.
66 Lippke 2022 *Criminal Law and Philosophy* 613.

remorse comes into play, it has a tendency to weigh more than all the other factors combined.[67]

Norman J in *S v SN*[68] stipulated: "The fact that these are factors that are substantial and compelling circumstances to deviate from the imposition of life imprisonment does not mean that a lighter sentence should be imposed."[69] However, when viewed in context, these factors do in fact lead courts to impose a lighter sentence when they establish the presence of remorse. In so doing, the court uses its discretion to deviate from the prescribed minimum sentence in an effort to reward the offender for their actions. Therefore, if the plea of not guilty prompts the court to award a sentence below the prescribed minimum sentence, one can argue that the presence of these factors leads to the awarding of a lighter sentence.

On a similar note, in *S v Van der Westhuizen*,[70] the High Court held that mercy means

> "that justice must be done, but it must be done with compassion and humility, not by rule of thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weaknesses of human beings and their propensity for succumbing to temptation ... But it must also be borne in mind that consideration of mercy must not be allowed to lead to the condonation or minimization of serious crimes."[71]

Hoctor concurs that upon commission of a crime, full repentance and restoration do not have a bearing on the liability of an offender, and that restoration and full repentance may be taken into account in mitigation of the sentence.[72] He warns of the importance of not forgetting the service of justice by holding the offender liable for their action(s), irrespective of the remorse shown.[73] Inasmuch as remorse is considered a sign of rehabilitation of an offender, it cannot, on its own, be a determinant for leniency.

While commending an offender for their repentance, our courts need to be mindful that the victim or those affected by the conduct of the offender are just as important. In so doing, our courts need to strike a balance as directed by the Zinn triad and not be so impressed by the conduct of the offender as to offer leniency when and where it is not justified. Furthermore, courts must be mindful of the fact that an offender must be punished for unlawful conduct, not only to bring a sense of closure to the victim and those affected by the offender's conduct, but also to deter others from similar behaviour. When courts make a habit of rewarding remorse so handsomely, offenders will not be deterred from committing similar offences because they will find comfort in knowing that a plea of guilty is viewed as a sign of remorse and a compelling and substantial circumstance for a court to deviate from

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67 *Ibid*.

68 [2022] ZAECMKHC 43.

69 *S v SN supra* par 44.

70 1974 (4) SA 61 (C).

71 *S v Van der Westhuizen supra* par 66 E–F.

72 Hoctor "Voluntary Withdrawal in the Context of Attempt – A Defence?" 2021 42 *Obiter* 148 148.

73 *Ibid*.

minimum-sentence legislation, thus creating lawlessness within our democracy.

5 THE COURT'S ABILITY AND SUITABILITY TO IDENTIFY THE PRESENCE OR ABSENCE OF REMORSE

The South African judiciary consists of legal practitioners who have practised in different fields of law. The majority of them do not have a background in psychology or psychiatry; it is thus safe to say that they may lack the expertise necessary to identify and assess an offender's behaviour in order to establish the presence or absence of remorse. As already noted, remorse is described as a feeling of sorrow that may be inferred from the conduct of the convicted offender from the moment the crime took place until mitigation; therefore, it should be differentiated from guilt. The former is normally depicted in the form of an apology, which is accepted by our courts as an indication of the presence of remorse.[74] Though an apology is accepted as a sign of remorse, case law correctly shows that courts do not always accept an apology on its own as a sign of remorse, especially one made from the bar on behalf of the offender.[75] As such, our courts have introduced the need for sincerity of remorse and referred to the question of sincerity as a factual one.[76]

The court in *S v Chipape*[77] inferred the presence of remorse from the actions of the offender, particularly his plea of guilty.[78] On announcing remorse as a mitigating factor, the court stated that the actions of the offender in pleading guilty required the court to show mercy, especially because he took the court into his confidence by revealing the circumstances under which the offence was committed during plea questioning.[79]

The court in *S v Matyityi*[80] set guidelines to be followed by courts in assessing the concept of remorse. The court held:

> "Whether the offender is sincerely remorseful and not simply feeling sorry for himself or herself at having been caught is a factual question. It is to the surrounding actions of the accused rather than what he says in court that one should rather look. In order for the remorse to be a valid consideration, the penitence must be sincere and the accused must take the court fully into his or her confidence. Until and unless that happens the genuineness of the contrition alleged to exist cannot be determined. After all, before a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed;

74 Du Toit 2013 *Obiter* 560.
75 *S v Pistorius* [2016] ZAGPPHC 724.
76 *S v Matyityi supra* par 13; *S v IS supra* par 14.
77 2010 (1) SACR 245 (GNP).
78 *S v Chipape supra* par 17.
79 *Ibid*.
80 *Supra*.

> what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions."[81]

Inasmuch as *S v Matyityi*[82] lays down guidelines, it is important to note that these are not exhaustive. Moreover, the list is based solely on lay observations of what is perceived as indicative behaviour, and cannot, on its own, be accepted as a true reflection of behaviour that indicates the presence or absence of remorse.

Masipa J in *S v Pistorius*[83] noted that the defendant's apology at the start of the trial could easily have been interpreted as an attempt to trick the public into sympathising with him, which would not be viewed particularly as remorse.[84] In establishing the presence of remorse, the court viewed the offender's constant efforts to apologise in person to the deceased's family before and even after incarceration as a sign of genuine remorse, irrespective of the conviction following a plea of not guilty, thus rejecting the State's submission of a lack of substantial and compelling reasons to deviate from the minimum prescribed sentence.[85] In analysing the judgment, the weight that remorse carries (as opposed to the other mitigating factors alluded to by the court) is clear.[86]

Again, in *S v SN,*[87] on pronouncing on the issue of remorse, in relation to the offender, Norman J stated:

> "He testified under oath and apologised throughout in his evidence about what he did to the complainant. He apologised to the complainant, to his brother, his family and the community. I observed him and I am satisfied that not only did he verbalise his remorse but he displayed it as he was testifying. He was intent on tendering apologies as aforementioned, and he did. He appeared and demonstrated sincerity as he was apologising to his brother, the victim, his family and the community."[88]

6 CONCLUSION

The concept of remorse has proved to be an essential component of the sentencing criteria and the most valued mitigating factor. Scholars such as Lippke and Van der Merwe have attested to the weight of this sentencing factor as opposed to other factors, which is contrary to the belief that all factors enjoy the same status and carry the same weight. Inasmuch as it is pertinent for courts to take into consideration mitigating factors when awarding a sentence, these factors should not in any way overlook the crime of the offender, and should not award leniency even when it is not favourable to do so.

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81 *S v Matyityi supra* par 13.
82 *Supra*.
83 *Supra*.
84 *S v Pistorius supra* 4172.
85 *S v Pistorius supra* 4173.
86 *Ibid*.
87 2022] ZAECMKHC 43.
88 *S v SN supra* par 33.

Identifying the presence of remorse or lack thereof is a complex exercise that goes far beyond noting a plea of guilty in terms of section 112 of the CPA, or of not guilty in terms of section 115 of the CPA. It is submitted that to be able to positively identify the presence or absence of remorse, one needs to understand human behaviour. Not much attention is paid to this requirement, even though pronouncements on the behaviour of the convicted offender form the basis for drawing an inference of remorse or lack thereof.

It is evident that identifying the presence of remorse cannot be based solely on an offender's plea of guilty, as the plea is at times a result of circumstance rather than an acknowledgement of wrongdoing. In the same breath, a plea of not guilty cannot, on its own, be said to be an indication of a lack of remorse. The need to understand human behaviour in order to draw the correct inference has created the need for assistance from health-science scholars, particularly those in the fields of psychology and psychiatry. Their expertise in studying and dealing with human behaviour could play an important role in determining the presence or absence of remorse in offenders in our criminal courts.