THE CHALLENGES POSED BY MANDATORY MINIMUM SENTENCE LEGISLATION IN SOUTH AFRICA AND RECOMMENDATIONS FOR IMPROVED IMPLEMENTATION

[A research paper submitted in partial fulfilment of the requirements for the degree of LLM Constitutional Litigation in the Department of Law, University of the Western Cape]

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Date: November 2004

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KEYWORDS

- **Fair Trial**
- **Independence of Judiciary**
- **Jurisdiction**
- **Discretion**
- **Two-stage procedure**
- **Juvenile offenders**
- **Minimum sentence**
- **Substantial and compelling circumstances**
- **Authoritative guidelines**
- **Case Law**

ABSTRACT

The challenges posed by mandatory minimum sentence legislation and recommendations for improved implementation.

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ABSTRACT

Generally the Courts have a discretion to impose sentence. Violent crime was rampant in South Africa. The response of the legislature in dealing with crime was to enact legislation in 1997 like sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997 which prescribe severe mandatory sentences for a large number of serious offences like murder, rape and armed robbery. This legislation came into effect on 1 May 1998 and was to have effect for two years. The President could with the concurrence of Parliament by proclamation extend its operation for one year that was in fact done. The latest extension of the Criminal Law Amendment Act 105 of 1997 was for a further two years making the minimum sentence provisions valid until 30 April 2005 that means it has not lapsed yet. The Courts did not like these mandatory sentences because of the limitation it places on

judicial discretion and dealt with this legislation that limited their judicial discretion restrictively in order to defend their sentencing discretion. Although the Criminal Law Amendment Act 105 of 1997 was held not to be unconstitutional the Courts still sought to give it a narrow interpretation. This paper commences with an outline of the Criminal Law Amendment Act. This paper will further reveal the Constitutional challenges that were brought against the Criminal Law Amendment Act. The attention of the reader will also be drawn with regard to judicial interpretation of the Criminal Law Amendment Act as well as the applicability of the Criminal Law Amendment Act to District Courts and juvenile offenders. Thereafter the procedural requirements that must be complied with in the Criminal Law Amendment Act and its consequences if not complied with will follow. This paper will examine how the Courts defined substantial and compelling circumstances, the approaches adopted by the Courts and when deviation from the Criminal Law Amendment Act can take place. In conclusion a summary of the challenges posed by mandatory minimum sentence legislation as well as recommendations for the improved implementation of the Criminal Law Amendment Act will follow.

DECLARATION

I declare that "The challenges posed by mandatory minimum sentence legislation and recommendations for improved implementation" is my own work, that it has not been submitted for any degree or examination in another university and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

ALFRED EUGENE ISAACS

NOVEMBER 2004

SIGNED:_____

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CHAPTER 1: INTRODUCTION

Violent crime is rampant in South Africa. During recent years there had been a tremendous increase in the prevalence in murders, rapes, hi-jacking, robberies and related crimes of violence. The public felt that crime was not seriously being dealt with by the legislature and judiciary because of lenient sentences imposed by the Courts for serious crimes and the legislature not doing anything about it. This was reflected in the following television and newspaper reports[1]:

- "People are being murdered, raped, abused and hacked, either through political recreational or gangster violence. Chaos reigns without control."[2]
- "We will never be in a position to bring the epidemic of serious economic crime and corruption in South Africa to an end if we do not bring in new structures to deal with it."[3]
- "Tough jail sentences should be imposed on child abusers and this could be the only deterrent against child abuse. We have told Mr Omar that the sentences meted out for offenders were too lenient and that new laws with stiffer sentences had to be introduced."[4]
- "A minimum sentence and tougher sentences could be introduced for child molesters, since existing sentences do not appear to be sufficient deterrent for the community."[5]
- "Die straf wat opgelê word vir kindermolestering en kindermishandeling is absoluut onbevredigend. Daarom neem dit so drasties toe."[6]

The response of the legislature to the public outcry for heavier penalties and for offenders to serve a more realistic term of imprisonment was by implementing mandatory minimum sentences on 1 May 1998[7]. It had the effect of penalties being increased from 5 years to life imprisonment for certain serious offences set out in Part I, II, III and IV of the Criminal Law Amendment Act.

1 Neser JJ. *"Mandatory minimum sentences in the South African Context".* Department of Criminology. (University of South Africa) found in http://www.crisa.org.za/volume3/vvs.htm1

2 The Citizen, 26 October 1995, Neser JJ. *"Mandatory minimum sentences in the South African Context".* Department of Criminology. (University of South Africa) found in http://www.crisa.org.za/volume3/vvs.htm1

[3] Pretoria News, 26 October 1995, Neser JJ. *"Mandatory minimum sentences in the South African Context"*. Department of Criminology. (University of South Africa) found in http://www.crisa.org.za/volume3/vvs.htm1

[4] Sowetan, 10 November 1995, Neser JJ. *"Mandatory minimum sentences in the South African Context"*. Department of Criminology. (University of South Africa) found in http://www.crisa.org.za/volume3/vvs.htm1

The Courts didn't like the implementation of mandatory minimum sentences because it set out a prescribed penalty that they should impose for certain types of offences thereby limiting their sentencing discretion.

The Courts have over the years frowned on mandatory sentences that placed a limitation on judicial discretion. In *S v Toms*[8] Corbett CJ held that:

> "the infliction of punishment is a matter for the discretion of the trial Court. Mandatory sentences reduce the Court's normal sentencing function to the level of a rubber stamp. The imposition of mandatory sentences by the Legislature has always been considered as an undesirable intrusion upon the sentencing function of the Courts[9]. A provision, which reduces a Court to a mere rubberstamp, is wholly repugnant[10]. "

The Appellate Division observed that without such discretion, harsh and inequitable results inevitably follow.

This view was confirmed in *S v Mofokeng*[11] where Stegmann J, at the very outset of his judgment, quotes from the adventures of Alice in Wonderland where the following was said on the trial of the knave of hearts for the alleged theft of a tray of tarts:

> "'Let the jury consider their verdict', the King said,
> 'No, No!' said the Queen. 'Sentence first - verdict afterwards'.
> 'Stuff and nonsense!' said Alice loudly.
> 'The idea of having the sentence first!'
> 'Off with the head!' said the Queen, shouted at the top of her voice."

[5] Beeld, 22 November 1995, Neser JJ. *"Mandatory minimum sentences in the South African Context"*. Department of Criminology. (University of South Africa) found in http://www.crisa.org.za/volume3/vvs.htm1

[6] Beeld, 26 October 1996, Neser JJ. *"Mandatory minimum sentences in the South African Context".* Department of Criminology. (University of South Africa) found in http://www.crisa.org.za/volume3/vvs.htm1

[7] The Criminal Law Amendment Act 105 of 1997.

[8] 1990 (2) SA 802 (A) at 806(h)-807(b).

[9] 1990 (2) SA 802 (A) At 822 (c)-(d).

[10] 1990 (2) SA 802 (A) At 830(j) – 831(b).

[11] 1999(1) SACR 502 (W) at 506 (d).

The Judge also refers to the Report of the Truth and Reconciliation Commission where the judiciary is, inter alia, reminded to speak out against unjust legislation. In this regard Stegmann J found the provisions of sections 51, 52 and 53 of the Act to have challenged his conscience and sense of justice. Stegmann J describes his unhappiness with the Criminal Law Amendment Act as follows:

> "For the Legislature to have imposed minimum sentences severely curtailing the discretion of the Courts, offends against the fundamental constitutional principles of the separation of the powers of the Legislature and the judiciary. It tends to undermine the independence of the Courts and to make them mere cat's paws for the implementation by the legislature of its own inflexible penal policy that is capable of operating with serious injustice in particular cases."

Stegmann J made the following order with reluctance that in terms of section 52(3)(b) of the Act, the sentence imposed by section 51(1), the prisoner is sentenced to imprisonment for life.

An Eastern Cape High Court Judge, Mr Justice Leach, said the Criminal Law Amendment Act had:

> "driven a coach and four through the Courts' civilised principles of sentencing.[12] The approach is one that precludes a balanced approach and sacrifices the individual offender on the altar of deterrence. It undermines the independence of the Courts."

Leach J described the Criminal Law Amendment Act as "a sop to politicians that rendered powerless the discretionary powers of the Court"[13].

Leach J was responding to Jones J, who spoke out against the minimum sentences and the now limited discretionary powers of the Courts. In terms of the Criminal Law Amendment Act Jones J said that he had been obliged to jail a 21-year-old man for life for

the rape of a three-year-old King William's Town girl. Jones J said he "would have considered imposing a sentence of between 20 and 25 years had he not been fettered by the legislation".

[12] Dispatch Outline. Saturday, September 4, 1999 found in www.dispatch.co.za/1999/09/04/easterncape/court.HTM page 1-3.

[13] Dispatch Outline. Saturday, September 4, 1999 found in www.dispatch.co.za/1999/09/04/easterncape/court.HTM page 1-3.

In *S v Montgomery*[14] the High Court held that "most judges regard section 51 as disconcerting". Also, in *S v Jansen*[15] Davis J held that:

> "mandatory minimum sentences disregard all individual characteristics and each case is treated in a factual vacuum, leaving no room for an examination of the prospect of rehabilitation and of the incarceration method to be adopted. Such a system can result in a gross disregard of the right to dignity of the accused."

The problem was the crime situation in South Africa that became a concern for society and the legislature. The public felt that the judiciary imposed too lenient sentences for serious violent crimes and the legislature was not doing anything about it. The response of the legislature to address the problem with crime and lenient sentences being imposed was by introducing the Criminal Law Amendment Act[16] which provides for mandatory sentences to be imposed for certain serious offences. The Courts do not like mandatory sentences because such legislation limits their sentencing discretion. The Courts interpreted this legislation restrictively in order to defend their sentencing discretion. Although the Criminal Law Amendment Act was held not unconstitutional the Courts still sought to give it a narrow interpretation.

This paper commences with an outline of the Criminal Law Amendment Act. This paper will further reveal the Constitutional challenges that were brought against the Criminal Law Amendment Act. The attention of the reader will also be drawn with regard to judicial interpretation of the Criminal Law Amendment Act as well as the applicability of the Criminal Law Amendment Act to District Courts and juvenile offenders. Thereafter the procedural requirements that must be complied within the Criminal Law Amendment Act and its consequences if not complied with will follow. This paper will examine how the Courts defined substantial and compelling circumstances, the approaches adopted by the Courts and when deviation from the Criminal Law Amendment Act can take place. In

conclusion a summary of the challenges posed by mandatory minimum sentence legislation as well as recommendations for the improved implementation of the Criminal Law Amendment Act will follow.

[14] 2000 2 SACR 318 (N) at 322(f)-(h).

[15] 1999 (2) SACR 368 (C) at 373 (g)-(h).

[16] Act 105 of 1997.

CHAPTER 2: AN OUTLINE OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

2.1 INTRODUCTORY COMMENT

Of the Criminal Law Amendment Act sections 51 to 53 deals with mandatory sentences and are divided into four categories namely Part I to Part IV of Schedule 2, each containing certain types of offences with certain penalties. Part I to Part IV of Schedule 2 shall now be looked at individually in order to get a clear understanding of the meaning of its provisions. In doing so it shall become clearer how the Criminal Law Amendment Act placed a limitation on judicial discretion.

2.2 THE PRESCRIBED MINIMUM SENTENCES PROVISIONS IN PART I OF SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Part I of Schedule 2 of the Criminal Law Amendment Act applies to two crimes only, namely murder and rape committed in certain circumstances. If an accused was convicted of a crime falling under Part I of Schedule 2 a sentence of life imprisonment follows[17].

Life imprisonment must be imposed in a case of murder where:

- it was planned or premeditated[18];
- the victim was a law enforcement officer performing his or her functions as such whether on duty or not[19];
- the victim was a person who has given or was likely to give material evidence with reference to any offence referred to in Schedule 1 to the Criminal Procedure Act[20], at criminal proceedings in any court[21];

- the death of the victim was caused by the accused in committing or attempting to commit rape[22];
- the death of the victim was caused by the accused in committing or attempting to commit robbery with aggravating circumstances[23];
- the offence was committed by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy[24];

17 Section 51(1)(a).

18 Refer to murder in Part I, (a).

19 Refer to murder in Part I, (b) (i).

20 Act 51 of 1977.

21 Refer to murder in Part I, (b) (ii).

22 Refer to murder in Part I, (c) (i).

23 Refer to murder in Part I, (c) (ii).

24 Refer to murder in Part I, (d).

Life imprisonment must be imposed in a case of rape where:

- the victim was raped more than once whether by the accused or any co-perpetrator or accomplice[25];
- the victim was raped by more than one person acting in the execution or furtherance of a common purpose or conspiracy[26];
- the victim was raped by a person convicted of two offences of rape but not yet sentenced[27];
- the victim was raped by a person, knowing that he has acquired immune deficiency syndrome or the human immunodeficiency virus[28];
- the victim is a girl under the age of 16 years[29];
- the victim is a physically disabled woman who, due to her physical disability, is rendered particularly vulnerable[30];
- the victim is a mentally ill woman as contemplated in specified legislation relating to mental health[31];
- the rape when committed involved the infliction of grievous bodily harm on the victim[32];

After scrutinising the prescribed minimum sentence provisions in Part I of Schedule 2 of the Criminal Law Amendment Act it becomes clear that the legislature by prescribing a penalty of life imprisonment[33] for the aforementioned offences placed a limitation on the discretion of the judiciary when imposing sentence because if no substantial and compelling circumstances are present in a particular case the

presiding officer is obliged to impose the prescribed penalty of the legislature for offences like murder and rape in the aforementioned circumstances. Part I of Schedule 2 of the Criminal Law Amendment Act clearly deals with the most serious and violent type of offences and that is most probably the reason why such a severe penalty like life imprisonment is prescribed by the legislature.

25 Refer to rape in Part I, (a) (i).
26 Refer to rape in Part I, (a) (ii).
27 Refer to rape in Part I, (a) (iii).
28 Refer to rape in Part I, (a) (iv).
29 Refer to rape in Part I, (b) (i).
30 Refer to rape in Part I, (b) (ii).
31 Refer to rape in Part I, (b) (iii).
32 Refer to rape in Part I, (c).
33 Section 51(1).

2.3 THE PRESCRIBED MINIMUM SENTENCES PROVISIONS IN PART II OF SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Imprisonment of 15 years for a first offender, 20 years for a second offender and 25 years for a third or subsequent offender must be imposed on offences as listed in Part II of Schedule 2.

A first offender would be someone who is convicted for the first time of murder and the words second, third or subsequent offender clearly means someone convicted for the second, third or fourth time of murder. These respective penalties for the aforementioned offenders must only take place after the state, who would be the public prosecutor, had proven previous convictions. This takes place where the state hands up the convicted person's criminal record of previous convictions, which reflects the same offences as the convicted. After reading it to the accused, the accused confirms his record of previous convictions with his signature. This then becomes part of the courts' record of proceedings.

Such offences would be:

- murder in circumstances other than those referred to in Part I of Schedule 2[34];
- robbery where there are aggravating circumstances[35];

- robbery involving the taking of a motor vehicle[36];
- any offence referred to in Section 13(f) of the Drugs and Drug Trafficking Act[37], if it is proved that:

  the value of the dependence-producing substance in question is more than R50 000[38];

  the value of the dependence-producing substance in question is more than R10 000 and the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy[39];
- the offence was committed by any law enforcement officer[40];

34 Refer to murder in Part II.

35 Refer to robbery in Part II, (a).

36 Refer to robbery in Part II, (b).

37 Act 140 of 1992.

38 Refer to undesirable or dangerous dependence-producing substances in Part II, (a).

39 Refer to undesirable or dangerous dependence-producing substances in Part II, (b).

40 Refer to undesirable or dangerous dependence-producing substances in Part II, (c).

- any offence relating to the dealing in or smuggling of ammunition, fire-arms, explosives or armament[41];
- any offence relating to the possession of an automatic or semi-automatic fire-arm, explosives or armament[42];
- any offence relating to exchange control, corruption, extortion, fraud, forgery, uttering or theft involving amounts of more than R500 000;
- if it is proved the offence was committed by a person, group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy;
- if it is proved that the offence was committed by any law enforcement officer involving amounts of more than R10 000 or as a member of a group of persons, syndicate or any enterprise acting in the execution or furtherance of a common purpose or conspiracy;

These provisions of Part II of Schedule 2 is also not applicable to juvenile offenders under the age of 16 years at the time of the commission of the offence and if substantial and compelling circumstances exist the Court can impose a lesser sentence.

2.4 THE PRESCRIBED MINIMUM SENTENCES PROVISIONS IN PART III OF SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Imprisonment of 10 years, 15 years and 20 years must be imposed for a first, second, third or subsequent offender in a case of:

- rape in circumstances other than those referred to in Part I of Schedule 2[43];
- indecent assault on a child under the age of 16 years, involving the infliction of bodily harm[44];
- assault with intent to do grievous bodily harm on a child under the age of 16 years[45].

41 Refer to dealing or smuggling of ammunition, firearms, explosives or armament in Part II, (a).

42 Refer to possession of an automatic or semi-automatic firearm, explosives or armament in Part II, (b).

43 Refer to rape in Part III.

44 Refer to indecent assault in Part III.

45 Refer to assault with intent to do grievous bodily harm on a child under the age of 16 years in Part III.

2.5 THE PRESCRIBED MINIMUM SENTENCES PROVISIONS IN PART IV OF SCHEDULE 2 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Imprisonment of 5 years, 7 years and 10 years can be imposed for a first, second, third or subsequent offender where a fire-arm was used to commit one of the following types of offences:

treason; sedition; public violence; murder; culpable homicide; rape; indecent assault; sodomy; bestiality; robbery; kidnapping; child stealing; assault when a dangerous wound is inflicted; arson; malicious injury to property; housebreaking; theft; receiving stolen property; fraud; escaping from lawful custody; negligent discharge of a fire-arm which are all Schedule 1 offences in the Criminal Procedure Act but overlap with some of the other categories of offences in Schedule 2.

After perusing Part I to Part IV of Schedule 2 in the Criminal Law Amendment Act, the substantive provisions and procedural issues still needs to be explained in order to have a complete understanding of the Criminal Law Amendment Act.

2.6 THE PROCEDURAL PROVISIONS IN THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

If a Regional or High Court decides to impose the prescribed minimum sentence[46] on 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 offence, it shall enter the reasons for its decision on the record of the proceedings. This means the Court must say why youthfulness was disregarded as a substantial and compelling circumstance to impose a lesser sentence most probably for the purposes of the review or appeal procedure.

Any sentence contemplated in the Criminal Law Amendment Act, shall be calculated from the date of sentence[47]. This means that a convicted accused shall only start serving his sentence from the date it was imposed by the Court and his sentence does not have retroactive effect from the date of conviction.

[46] Section 51(3)(b).

[47] Section 51(4).

The operation of a sentence imposed in terms of the Criminal Law Amendment Act cannot be suspended[48] as contemplated in the Criminal Procedure Act[49]. The provisions of the Criminal Law Amendment Act shall not be applicable to a juvenile who was at the time of the commission of the offence under the age of 16 years[50]. If the age of the child is placed in issue, the State bears[51] the onus to prove the age of the child beyond reasonable doubt.

This means the State will have to refer the child either to a district surgeon to establish his or her age or call relatives of the child to give oral evidence in respect of his or her age or obtain a certified copy of the birth certificate of the child if it is available.

The Criminal Law Amendment Act shall cease to have effect after the expiry of two years from its commencement[52]. The President might extend this period, with the concurrence of Parliament by proclamation in the Gazette for two years at a time[53].

This means that if after a period of two years, the President with the consent of Parliament does not by proclamation in the Gazette extend the period the Criminal Law Amendment Act shall then lapse and be of no force and effect. An extension was in fact done because the Criminal Law Amendment Act shall only lapse in April 2005 if not extended again.

2.6 THE JURISDICTIONAL PROVISIONS IN THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

The jurisdictional issues deal with the committal of an accused after conviction in a Regional Court of an offence referred to in Schedule 2 to a High Court for sentence[54].

48 Section 51(5).

49 Section 297(4) of the Criminal Procedure Act 51 of 1977 which provides that where a Court convicts a person of an offence in respect of which any law prescribed a minimum punishment, the Court may in its discretion pass sentence but order the operation of a part thereof to be suspended for a period not exceeding five years on any condition.

50 Section 51(6).

51 Section 51(7).

52 Section 53(1).

53 Section 53(2).

54 Section 52(1).

Only a Regional Court can do such referral. The referral takes place only after a conviction on a plea of guilty[55] or a plea of not guilty[56] for an offence referred to in Part I of Schedule 2 or Part II, III or IV of Schedule 2 if the Regional Court is of the opinion that the offence merits punishment in excess of the Regional Court's jurisdiction[57]. If any of these two aforementioned situations are present the Regional Court must stop the proceedings and commit the accused for sentence by a High Court having jurisdiction[58].

If an accused is committed by the Regional Court to the High Court after a conviction on a plea of guilty in the Regional Court, a certified typed copy of the record of the proceedings in the Regional Court shall be handed up by the State to the judge. If the defence does not dispute the contents, correctness and truthfulness of the certified typed copy of the record of proceedings in the Regional

Court when handed up by the State in the High Court to the judge it shall be received by the High Court and form part of the record of that Court.

If the High Court is satisfied that the accused's plea of guilty was correctly recorded[59] and the accused is guilty of the offence of which he or she has been convicted and committed for sentence[60] the High Court shall make a formal finding of guilty and sentence the accused[61].

If the High Court is satisfied that a plea of guilty by the accused was incorrectly recorded[62] or is not satisfied that the accused is guilty of the offence of which he or she has been convicted and committed for sentence[63] the Court shall enter a plea of not guilty and proceed with the trial and any admission by the accused not in dispute shall stand as proof of the fact thus admitted.

55 Section 52(1)(a).

56 Section 52(1)(b).

57 Section 51(2).

58 Section 51(1) or (2).

59 Section 52(2)(b)(i).

60 Section 52(2)(b)(ii).

61 Section 51(1) or (2) as the case may be.

62 Section 52(2)(c)(i).

63 Section 52(2)(c)(ii).

Where an accused is committed after being convicted on a plea of not guilty for sentence by a High Court, a certified typed copy of the record of proceedings in the Regional Court shall be handed in as exhibit by the state and if the defence attorney admit the truthfulness and correctness of it, it shall be received by the High Court and form part of the record of the High Court[64]. If the High Court found the record of proceedings to be in accordance with justice then the judgment of the Regional Court shall be sufficient for the High Court to pass sentence but if the judge is of the opinion that the proceedings are not in accordance with justice he or she shall without sentencing the accused obtain reasons from the regional magistrate for convicting the accused[65]. If the aforementioned should happen the judge shall inform the accused and postpone the case for judgment and if the accused is in

custody the judge may make an order with regard to the detention or release of the accused[66].

The High Court may at any sitting thereof hear any evidence and for that purpose summon any person to appear to give evidence or produce any document or article[67]. The High Court may then whether or not evidence was heard and after considering the statement obtained from the Regional Court magistrate for convicting the accused either confirm the conviction and impose sentence[68]; alter the conviction to a conviction of another offence referred to in Schedule 2 and impose sentence[69]; alter the conviction to a conviction of an offence other than an offence referred to in Schedule 2 and impose sentence[70]; set aside the conviction[71]; remit the case to the Regional Court with instructions how to deal with the matter[72] or make any such order to promote the ends of justice[73]. This brings us then to the end of an outline of the Criminal Law Amendment Act.

64 Section 52(3)(a).
65 Section 52(3)(b).
66 Section 52(3)(c).
67 Section 52(3)(d).
68 Section 52(3)(e)(i).
69 Section 52(3)(e)(ii).
70 Section 52(3)(e)(iii).
71 Section 52(3)(e)(iv).
72 Section 52(3)(e)(v).
73 Section 52(3)(e)(vi).

2.8 CONCLUDING REMARKS

An outline of the Criminal Law Amendment Act clearly reflects that the four categories of Schedule 2 offences with its prescribed penalties and procedural and jurisdictional provisions was aimed at addressing violent crime and limiting the discretion of the Courts when imposing sentence. The question is now how the Constitutional Court dealt with the constitutional challenges.

CHAPTER 3: THE CONSTITUTIONAL CHALLENGES

3.1 INTRODUCTORY COMMENT

The implementation of mandatory minimum sentences in South Africa that limited judicial discretion was challenged on constitutional grounds. There were three constitutional challenges against the Criminal Law Amendment Act:

- Section 52 of the Criminal Law Amendment Act infringe upon an accused's right to have a fair trial[74].
- Section 51 of the Criminal Law Amendment Act amounts to cruel, inhuman and degrading punishment[75].
- The Criminal Law Amendment Act infringes the principle of the separation of powers between the judiciary and the legislature.

3.2 THE RIGHT OF AN ACCUSED TO A FAIR TRIAL

The Constitution provides that every accused has a right to a fair trial, that includes the right to have their trial begin and conclude without unreasonable delay[76].

Section 52 of the Criminal Law Amendment Act makes provision for a two-stage procedure. The first stage is where the accused is tried and convicted in a Regional Court for an offence like premeditated murder which falls under Part I of Schedule 2 of the Criminal Law Amendment Act and merits a punishment of life imprisonment which is in excess of the jurisdiction of the Regional Court. The second stage is where the Regional Court, after convicting the accused of a Part I Schedule 2 offence, must stop the proceedings and refer it to a High Court having jurisdiction to impose a sentence of life imprisonment. In practice an accused involved in such two-stage procedure sometimes wait for almost one year before he or she appears in the High Court for sentence.

74 Section 35(3) of the Constitution of the Republic of South Africa Act 108 of 1996.

75 Section 12(1)(e) of the Constitution of the Republic of South Africa Act 108 of 1996.

76 Section 35(3)(d) of the Constitution of the Republic of South Africa Act 108 of 1996.
The reason for such delay in practice is that all the tapes on which the proceedings were mechanically recorded are send for transcription that usually take three months before it is returned. In some instances a probation officer's report is required for the victim as well as offender if he or she is a juvenile, which takes up to two months to be compiled and submitted. Lastly, because of the many cases

referred to the High Court for sentence a date for an accused to be sentenced in the High Court is not easily obtainable.

In *S v Dzukada*, *S v Tilly*, *S v Tshilo*[77], Lewis AJ declared section 52 as inconsistent with an accused's right to a fair trial and therefore invalid on the following grounds:

- The two-stage procedure[78] is a fragmented procedure where the High Court must impose the most severe sentence despite the fact that it has not tried the accused, is not placed in the atmosphere of the trial and is faced with little other than the bare record of proceedings.
- In deciding whether substantial and compelling circumstances exists to justify a deviation from the prescribed minimum sentence the High Court is required to exercise a sentencing discretion when it has not conducted the trial. In the opinion of the Court, the unfairness entailed in this provision cannot be remedied by the Court's power to hear evidence in terms of section 52(3)(d)[79].
- The hearing of additional evidence by the High Court may in itself lead to unfairness in that the accused is subjected to examination and cross-examination twice[80].
- The process created by section 52 inevitably leads to unreasonable delay in the conclusion of the trial[81].

77 2000 (3) SACR 229 (W) at 240 d-g.

78 Section 52(1).

79 2000 (3) SACR 229 (W) at 242(1)-243 (b).

80 2000 (3) SACR 229 (W) at 243 (d)-(h).

81 2000 (3) SACR 229 (W) at 249(i)-250(j).

The case was then referred to the Constitutional Court in terms of section 172(2)[82] of the Constitution for confirmation of the order of invalidity. The Constitutional Court[83], per Ackermann J declined to confirm the order of invalidity. In dealing with

the split procedure, Ackermann J held that the test was not whether the procedure was ideal, but whether it was fair. The Court found that the provision in question did not compel a Court to infringe an accused's fair trial right but in fact that a High Court has a duty to ensure that the accused receives a fair trial and judges should construe the wording of section 52 in a manner consistent with the fair trial rights of an accused. The Court held that the procedure in section 52 does not prevent any factor which is relevant to the sentencing process from being considered by the sentencing Court and allows an accused to place any factor relevant to his sentencing before the High Court, thereby giving expression to his fair trial right.

3.3 CRUEL, INHUMAN AND DEGRADING PUNISHMENT

In *S v Jansen*[84] the issue was whether the prescribed minimum sentence of life imprisonment amount to cruel, inhuman or degrading punishment. Section 12(1)(d)-(e) of the Constitution provides:

> Everyone has the right to freedom and security of the person, which includes the right:
>
> - not to be tortured in any way; and
> - not to be treated or punished in a cruel, inhuman or degrading way.

The Court found that the sentencing system created in terms of sections 51 to 53 did not create per se a system of minimum sentencing. If it did, there would be a constitutional difficulty. A life sentence is therefore not a cruel, degrading or inhuman punishment because the Court has discretion to impose a lesser sentence and the accused can be released on parole after a certain period of time.

82 Empowers the Supreme Court of Appeal, a High Court or a Court of similar status to make an order concerning the constitutional validity of an Act of Parliament. However, such order has no force unless the Constitutional Court confirms it.

83 *State vs Dzukuda, State vs Tilly, State vs Tshilo* 2000(2) SACR 443 (CC) at 446 (f), 448 (b)-(f), 449(a)-(c).

84 1999(2) SACR 368 (C) at 369 (a).

Davis J was of the opinion that the community was entitled to demand that the Courts, in punishing convicted persons, should ensure that the sentence adequately reflected its censure as well as the retribution it was entitled to extract. The Court held further that another reason why section 51 is not in conflict with an accused's section 12(1)(e) right of the Constitution is because prison authorities are obliged to pursue the objective of rehabilitation by releasing prisoners on parole even with regard to the category of prisoners who serve life imprisonment[85].

Also in *S v Dodo*[86] the Constitutional Court considered the validity of section 51 in relation to the right against cruel, inhuman or degrading punishment. The Court said that the right against cruel, inhuman or degrading punishment requires that the punishment must be proportionate to the offence, including all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant circumstances relating to the offender which have a bearing on the seriousness of the offence and the offender's culpability. In order to justify the deprivation of an offender's freedom it must be shown that it is reasonably necessary to curb the offence and punish the offender[87]. Thus the length of punishment must be proportionate to the offence. Mere disproportionality between the sentence legislated and the sentence merited by the offence would not lead to a limitation of the section 12(1)(e) right, but only gross disproportionality[88].

Ackermann J held that section 51(1), as interpreted in *S v Malgas*[89], did not compel a Court to act inconsistently with section 12(1)(e) of the Constitution, since it did not require a Court to impose a sentence disproportionate to the offence. The Court accordingly held that section 51(1) of the Act is not inconsistent with the right of an offender under section 12(1)(e) of the Constitution not to be punished in a cruel, inhuman or degrading way[90].

85 Section 2(2)(b) of the Correctional Services Act 8 of 1959.

86 2001 (5) BCLR 423 (CC) at 441(h)

87 2001 (5) BCLR 423 (CC) 442(a)-(h).

[88] 2001 (5) BCLR 423 (CC) 443(a)-(c).

[89] 2002 (1) SACR 469 (SCA) at 481 (h)-(j)

[90] 2001 (5) BCLR 423 (CC) 482 (a)-(f).

3.4 THE PRINCIPLE OF THE SEPARATION OF POWERS BETWEEN THE JUDICIARY AND THE LEGISLATURE

In *S v Dodo*[91] the Eastern Cape Division struck down section 51(1) of the Act and held that the provision was inconsistent with section 35(3)(c) of the Constitution and with the principle of the separation of powers and is therefore invalid. Section 165(2) and (3) of the Constitution provides:

- The Courts are independent and subject only to the Constitution and the Law;
- No person or organ of state may interfere with the functioning of the Courts.

The learned judge held that "sentencing is pre-eminently the prerogative of the Courts that the section of the Act in question constitutes an invasion of the domain of the judiciary not by the Executive, but by the legislature and that a criminal trial before an ordinary Court requires an independent Court which is empowered in the event of a conviction, to weigh and balance all factors relevant to the crime, the accused and the interest of society before the imposition of sentence".

The trial envisaged by section 51(1) of the Act, Smuts AJ held, is that an accused convicted of a serious offence charge before the High Court, unless the Court is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence, faces a life sentence which was decided upon before the commencement of the crime, not by the Court itself, but by the legislature.

In dealing with the separation of powers the High Court's reasoning for coming to the conclusion that the provisions of section 51(1) of the Criminal Law Amendment Act undermine the doctrine of the separation of powers and the independence of the judiciary and are inconsistent therewith, relies on certain passages from the first *Certification judgment*[92], the judgments in *Bernstein*[93] and *Heath*[94]. This order of unconstitutionality was referred to the Constitutional Court for confirmation in terms of section 172(2) of the Constitution.

[91] 2001 (3) BCLR 279 (E).

[92] *In re: Certification of the Constitution of the Republic of South Africa*, 1996 10 BCLR 1253 (CC): 1996 4 SA 744 CL paras 106 to 113 and 123.

[93] *Bernstein and Others vs Bester No and Others* 1996 (4) BCLR 469 CC: 1996 2 SA 751 (CC). para 105.

[94] *SA Association of Personal Injury Lawyers and Heath* and Others 2001 1 BCLR 77 (CC): 2001 1 SA 883 (CC) paras 23-26.

The principle of the separation of powers also received considerable attention in *S v Budaza*[95]. After referring to section 165 of the Constitution[96], Smuts AJ refers to the various sources on the importance of the separation of powers. He concludes that the Criminal Law Amendment Act represents grave tampering with the role and independence of the judiciary. The Court should not be party to any injustice. A little bit of injustice to satisfy the Legislature is simply not an option[97].

In *S v Dodo*[98] the Constitutional Court considered the validity of section 51 in relation to the separation of powers principle. The contention that section 51 was contrary to the separation of powers principle was rejected since it required the Courts to have virtually exclusive and unlimited sentencing discretion, coupled with a strict separation of powers, neither of which was or could be. A Court's sentencing discretion is not unfettered, but must be judicially exercised within the options permitted by law and the legislature and executive have legitimate interests in penal policy, including the nature and severity of sentences and in ensuring consistency. However, Ackermann J warned that the legislation ought not wholly to exclude the Court's function and power to apply and adopt a general principle to the individual case. Accordingly the legislature ought not to oblige the judiciary to impose punishment which is wholly lacking in proportionality to the crime.

3.5 CONCLUDING REMARKS

The Criminal Law Amendment Act survived the constitutional challenges brought against it. The question then arises how the Courts interpreted this valid piece of legislation in the paradigm of judicial discretion. It is argued that a restrictive interpretation was given in order to preserve their sentencing discretion.

[95] 1999 2 SACR 491 (E) at 502 (f).

[96] Constitution of the Republic of South Africa, Act 108 of 1996, which provides that the judicial authority of the Republic is vested in the Courts that they are independent and subject only to the Constitution and the Law.

[97] 1999 (2) SACR 491 (E) at 502 (f).

[98] 2001 (1) SACR 594 CC.

CHAPTER 4: JUDICIAL INTERPRETATION OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

4.1 INTRODUCTORY COMMENT

The Courts dealt with this valid piece of legislation by limiting the scope of mandatory sentences. This shall be seen in the applicability of the Criminal Law Amendment Act to District Courts and juvenile offenders, as well as the procedural requirements. We shall first look at how the Courts interpreted certain parts of Schedule 2 of the Criminal Law Amendment Act in order to limit the scope of mandatory sentences.

4.2 DEFINITION OF OFFENCES

In *S v Sukwazi*[99] the High Court had to interpret whether it was the intention of the legislature that the possession of a pistol, solely because it has a semi-automatic firing mechanism, should attract a minimum sentence of 15 years imprisonment in terms of the provisions of section 51 of the Criminal Law Amendment Act in comparison with possession of a 375 Magnum revolver which are more powerful and only carries a maximum of 3 years imprisonment. The appellant after a plea of guilty of being in unlawful possession of a 9mm Bryco pistol was sentenced in the Regional Court to 15 years imprisonment, in accordance with the provisions of section 51 of the Criminal Law Amendment Act.

The High Court found this piece of legislation to be ill conceived and badly drafted because it refers to automatic and semi-automatic firearms when there is no definition and no reference in the Arms and Ammunition Act[100] to such weapons. One can only conclude that the drafters had no regard to the provisions of the Arms and Ammunition Act when drafting this legislation.

99 2002 (1) SACR 619 (N) at 622(c)-(f), 623 (g).

100 Act 75 of 1969.

In *S v Sukwazi*[101] Combrinck J express himself as follows:

> "that the reference in the Criminal Law Amendment Act to possession of a semi-automatic fire-arm amounts to an absurdity and the provisions of the Criminal Law Amendment Act should not have been applied by the Magistrate in the present case. To give the words their ordinary grammatical meaning, would lead to the absurd result that, unlawful possession of powerful weapons such as high calibre revolvers and shotguns would attract a far lesser sentence than small calibre semi-automatic pistols. When such an absurdity appears, the Court is obliged to seek the true intention of the legislature and give effect to such intention. In my view, particularly having regard to the grouping of the arms and explosives in which semi-automatic fire-arms was included, the intention was to include a 'similar armament' to a machine gun or machine rifle[102] which excludes a pistol. It follows that it is not competent for Courts to apply the provisions of the Criminal Law Amendment Act, where an accused has been convicted of the unlawful possession of a semi-automatic pistol"[103].

The sentence of 15 years imprisonment was for the above reasons reduced to 2 years imprisonment.

In *S v Makhava*[104] McLaren J said

> "that it could not have been the intention of the legislature to prescribe a maximum sentence of 15 years for the unlawful possession of a pistol which he said was more correctly described as a 'self-loading pistol' than a semi-automatic. But that no such sentence was prescribed for the unlawful possession of a heavy calibre revolver. The legislature must have had in

mind the imposition of severe sentences for the possession of firearms such as an AK47 assault rifle, an R1 rifle, R3 rifle or an Uzi rifle. I consider that it will be a grave injustice and entirely contrary to what I perceive to have been the intention of the legislature to impose the alleged prescribed minimum sentence of 15 years on the accused for being in unlawful possession of a Norinco 9mm pistol and therefore I sentence the accused to two years imprisonment for the unlawful possession of an unlicensed pistol".

[101] Act 75 of 1969.

[102] Section 32 of the Arms and Ammunition Act 75 of 1969.

[103] 2002 (1) SACR 619 (N) at 624 (a)-(d).

4.3 CONCLUDING REMARKS

The inference that can be drawn are that the Courts narrowly interpreted Part II of Schedule 2 of the Criminal Law Amendment Act with regard to possession of unlicensed semi-automatic pistols. This was done by the Courts by searching for the intention of the Legislature with regard to possession of unlicensed semi-automatic pistols which merit a punishment of 15 years imprisonment for a first offender in comparison with unlawful possession of a revolver which merit a punishment of a maximum of 3 years imprisonment. This clearly re-enforces the principle of the Courts wanting to defend their sentencing discretion because from the authoritative decisions above none of them were prepared to confirm imposition of the prescribed penalty because of finding it to be absurd and ill conceived which could not have been the intention of the Legislature. The Courts' sentiment is that the provisions of the Criminal law Amendment Act should not be applied for possession of an unlicensed semi-automatic pistol.

4.4 DISTRICT MAGISTRATE'S COURTS

The question arose whether District Courts were bound by the Criminal Law Amendment Act. Section 51(2) only makes reference to a Regional or High Court and not to District Courts. Does this mean that District Courts are excluded from the Criminal Law Amendment Act? In finding an answer one need to look at why Parliament enacted the Criminal Law Amendment Act which is clearly to deal with

more serious offences where the District Court mostly deal with minor offences and that's why it also only has jurisdiction to impose a term of 3 years imprisonment[105].

In *S v Arias*[106] the issue was whether the provisions of the Criminal Law Amendment Act are applicable to the District Courts. The appellant was convicted in a District Court of contravening Section 5(b) of the Drugs and Drug Trafficking Act[107]. The District Magistrate concluded that despite sitting as a District Magistrate and not as a Regional or High Court:

(i) He was under an obligation to impose a minimum sentence of 15 years, unless substantial and compelling circumstances exist to justify a departure[108].

104 Unreported case No CC89/2001 found in *S v Sukwazi* 2002(1) SACR 619(N) at 622(a)-(j), 623 (a)-(e).

105 Section 276 of the Criminal Procedure Act 51 of 1977.

106 2002 (1) SACR 518 (W) at (a)-(f).

107 Act 140 of 1992.

(ii) It is absurd that a Regional Court or High Court would be bound to impose a minimum sentence, whereas the District Court would be free to impose any sentence within its extended jurisdiction, even less than the prescribed sentence[109].

(iii) The lawmakers intended to include the District Courts within the categories listed in Section 51(2) of the Minimum Sentence Legislation and that the District Courts are bound by the Act[110].

On appeal Gautschi A J dismissed the magistrate's arguments and said the magistrate misguided himself by adopting the approach he followed but agreed about the absurdity of the legislation and referred to other absurdities. That the prosecuting authority enjoys the power [which even a High Court Judge does not enjoy] to determine the likely sentence any offender might face by choosing the Court in which he is to be prosecuted. He further said that there is another absurdity which arises out of the Drugs Act[111], and that is that the District Court, which should try the more minor cases could be given jurisdiction up to 25 years imprisonment. The Court decided the issue by stating that these absurdities could not justify the reading of words into section 51(2) of the minimum sentence legislation in order to add District Courts to the categories of Courts listed therein and it was clearly not the intention of the legislature for to do so would be to legislate and not to interpret[112]."

He further referred to *R v Jacobson and Levy*[113] where it was said that the function of the Court of law is to construe the language of the legislature and arrive at its intention in that way, it has no power to redraft or alter the language. Further reference was made to *R v Venter*[114] where the Court held that the rule is that, where the language of a statute is unambiguous and its meaning is clear, the Court may only depart from such meaning if it leads to absurdities so glaring that it could never have been contemplated by the Legislature. Reference was also made to *Inland Revenue Commissioners v Hinchi*[115] where Viscount Kilmair L C said: "I am content to say that to add the necessary words would, in my opinion, be legislation and not construction."

108 2002 (1) SACR 518 (W) at (g)-(h).

109 2002 (1) SACR 518 (W) at 520 (g).

110 2002 (1) SACR 518 (W) at 522 (d).

111 Act 140 of 1992.

112 2002 (1) SACR 518 (w) AT 520 (g)-(j).

The issue was whether the minimum sentence provisions are applicable where the District Court already had jurisdiction to impose 25 years imprisonment in terms of Act 140 of 1992. The Court decided the issue by confirming that the minimum sentence provisions are not applicable to District Courts and refer the matter back to the District Court to impose sentence under Act 140 of 1992.

In *S v Jimenez*[116] the appellant was convicted in the District Court of dealing in cocaine in contravention of section 5(b) of the Drugs and Drug Trafficking Act[117]. The issue was whether the Magistrate was correct by invoking the provisions of section 51(2) of the Criminal Law Amendment Act finding that he was bound to the Act that stipulates a prescribed Sentence of 15 years imprisonment. Gautschi A J decided the issue by stating that a Court could not extend the meaning of section 51(2) of the Criminal Law Amendment Act by adding to the two categories of Courts already stated therein, a third category of Court, namely the District Court.

From the decided cases it becomes clear that the Criminal Law Amendment Act does not refer to District Courts at all. It is submitted that it was indeed the intention of the Legislature not to affect the District Courts at all and that they should disregard the provisions of the Criminal Law Amendment Act.

The anomalies[118] that affect the Regional Court do not apply to the District Courts[119]. This submission is supported by the fact that the Criminal Law Amendment Act does not affect the standard sentence jurisdiction of the various Courts and that it only contains instructions to the High Courts and the Regional Courts with respect to certain crimes, under specific conditions.

113 1931 (AD) 466 at 480.

114 1907 (TS) 915.

115 1960 (A) at 762.

116 2002(2) SACR 190 (WLD) at 194 (e).

117 Act 140 of 1992.

118 Terblanche S (2001) *"Aspects of Minimum Sentence Legislation: Judicial Comment and the Court's Jurisdiction"*. (14:1) South African Journal of Criminal Justice p1.

119 *S v September* unreported review (E) dated 28 April 2000.

The logical restrictive interpretation the Courts have given to section 51(2) of the Criminal Law Amendment Act which makes only reference to Regional and High Courts is that there exists no ambiguity in the wording of this section with regard to the intention of the legislature to exclude District Courts from the Criminal Law Amendment Act and words should not be read into section 51(2) because to do so would be to legislate and not to interpret. After getting clarity about the applicability of the Criminal Law Amendment Act towards District Courts the next question that arises is if the Criminal Law Amendment Act has any impact and affect on juvenile offenders.

4.5 JUVENILE OFFENDERS

When the introduction of the Criminal Law Amendment Act surfaced in proposed legislation in 1997, South Africa contemplated following a worldwide penological trend that has characterised global sentencing policy in the 1990's[120]. The Criminal Law Amendment Act contravene a range of internationally accepted principles, such as the principle of proportionality, the principle of incarceration of a matter of

last resort[121] and the principle that juvenile sentences should be able to be reviewed by a higher, competent, independent and impartial authority or judicial body according to law[122].

The initial draft of the legislation included all offenders under the age of 18 years, but after non-governmental organisations made written and oral submissions on this draft bill to the portfolio Committee on Justice the Bill was changed to exclude children under the age of 16 years from the ambit of the Criminal Law Amendment Act and 16 and 17 year olds are treated differently to shift the onus to the State to show that there are substantial and compelling reasons why the minimum sentences should be imposed[123].

120 Sloth-Nielsen J. [Unpublished article] *"Minimum Sentences for Juveniles cut down to size"* found in http://www.communitylawcentre.org.za/children/links.php.

121 Section 28(1)(g) of the Constitution of Republic of South Africa Act 108 of 1996.

122 Article 40(2)(b)(v) of the United Nations Convention on the Rights of the Child.

123 Skelton A, (1999*). "Juvenile Justice Reform: Children's Rights versus crime Control"* in C J Davel [ed] Children's rights in a transitional society p101-102.

Mandatory sentence provisions do not apply to children under 16 years of age at the time of commission of the offence. Children between 16 and 18 years at the time of the commission of the offence the Court have discretion. If the Court decides to apply it to such juvenile offenders it must say why.

In *S v Mofokeng and Another*[124] the Court interpreted the relevant statute to exclude juvenile offenders under 16 years from the mandatory sentencing regime. Stegmann J was, with respect, correctly of the view that in respect of children aged 16 and 17 years at the time of the Commission of the offence, the Court has a sentencing discretion according to ordinary criteria usually applicable in determining an appropriate sentence[125].

Although the case of *S v Malgas*[126] did not deal with juveniles the Court summarised the proper scope of section 51, confirming the exclusion of juveniles who were under 16 years at the time of the commission of the offence. In *S v N*[127]

where the accused was 16 years old at the time of the commission of the offence that was murder, which falls under Part I of Schedule 2, the issue was whether the youthfulness of the accused was a substantial and compelling circumstance for the Court to depart from the prescribed minimum sentence that was life imprisonment. The Court decided the issue by finding it was a substantial and compelling circumstance for the Court to impose a lesser sentence than life imprisonment.

Even in *S v Daniels*[128] where the majority of accused were youthful offenders being convicted on charges of murder, robbery and kidnapping which falls under Part I of Schedule 2 the issue was whether the Court can depart from imposing the prescribed minimum sentence if the state and defence are in agreement that section 51(3)(b) do not apply to accused between 16 and 18 years of age. The Court decided the issue by not imposing life imprisonment but various terms of imprisonment on the accused and Griesel J also pointed out that the provisions of the Criminal Law Amendment Act does not apply to children below the age of 16 years when the offence was committed.

124 1999(1) SACR 502 (W) at 520.

125 Goliath P, (August 2003). *Examining the imposition of life imprisonment on juveniles in South Africa, the USA, England and Wales*, p2-3.

126 2001(1) SACR 469 (SCA) at 481 (h)-(f).

127 2000(1) SACR 209 (WLD) at 211 (g).

128 Unreported decision of 7 May 2001 [Case EC 75/2001].

In *S v K*[129] the issue was whether the minimum sentence provisions are applicable where the accused was 16 years and 3 months at the time of the commission of the offences of two counts of attempted murder and the possession of unlicensed semi-automatic firearm as well as the possession of ammunition. The Court decided the issue by interpreting section 51(3)(b) as meaning that the Court is not obliged but has a discretion to impose a sentence prescribed in subsections (1) and (2) of section 51 of the Criminal Law Amendment Act and said there appear to be a three months difference in age at time of the commission of the offences which would have exempted accused from minimum sentences and therefore the Court did not impose the prescribed minimum sentences.

In *S v Blaauw*[130] the issue was whether the prescribed minimum sentences should be imposed upon an accused who was 18 years old after being convicted of raping

a 5 year old girl which fall under Part I of Schedule 2 and entails a sentence of life imprisonment. The Court decided the issue by interpreting the wording of section 51(3)(b) to mean that the Court is not obliged to impose the minimum sentence on children falling in this category, unless the State persuades the Court that the circumstances justify such a sentence[131]. The Court elected not to impose life imprisonment after giving due weight to international instruments, the interest of the community and that of the accused but imposed 25 years imprisonment.

In *S v Nkosi*[132] the issue was whether the Court again was correct by imposing upon appellant who was 16 years old at the time of the commission of the offence the prescribed minimum sentence of life imprisonment. The Court decided the issue by laying down the following guiding principles that should be considered when sentencing juvenile offenders:

(i) Wherever possible a sentence of imprisonment should be avoided.

(ii) Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate.

129 Unreported decision of 27 January 2000 [Case SS 50/99].

130 2001(2) SACR 255 (C) at 257 (b).

131 Lund J, (2002) "*Sentencing*", (14:1) South African Journal of Criminal Justice at 431.

132 2002(1) SACR 135 (W) at 137 (a)-(e).

(iii) Where imprisonment is considered appropriate it should be for the shortest possible period of time having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interest of the child offender.

(iv) If at all possible, the judicial officer must structure the punishment in such a way as to promote the rehabilitation and re-integration of the child concerned into his/her family or community.

(v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.

The Court a quo erred in its finding and therefore the Court further decided the issue by stating that the sentence of life imprisonment is set aside and replaced by 18 years imprisonment. The Court held that the best interest principle to child offenders was now a crucial element in determination of an appropriate sentence.

In the cases discussed above, the international law and constitutional principles led to an interpretation of the relevant statute, which to all intents and purposes excludes juvenile offenders from the mandatory sentencing regime introduced by the Criminal Law Amendment Act. These cases re-affirm the established principles that even where a child is just over the age of 18 years, youthfulness is an important mitigating factor, particularly where the offender was only slightly older than the cut-off age at the time of the commission of the offence.

It appears that the only time the Court will consider to impose mandatory minimum sentences on juveniles between 16 and 18 will be when the state can prove that such juvenile are a danger to society and not capable of being rehabilitated which are in most cases highly unlikely to happen.

It became apparent that the mandatory minimum sentence provisions are not applicable to juvenile offenders under the age of 16 years. Reasons must be given on record by any judicial officer imposing the mandatory minimum sentence, provisions on any juvenile older than 16 years old, thereby limiting judicial discretion. A further limitation of judicial discretion can be found in the procedural issues of the Criminal Law Amendment Act.

4.6 PROCEDURAL REQUIREMENTS

4.6.1 INFORMING AN ACCUSED OF THE CONSEQUENCES OF THE PROVISIONS OF SECTION 51 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

In *S v Rapoo and Others*[133] the three accused were convicted of armed robbery in the Regional Court and each sentenced to 15 years imprisonment. The issue was whether there was a duty on the Regional Magistrate to explain the provisions of section 51(3) of the Criminal Law Amendment Act to the accused. The Appeal

Court decided the issue by stating that it was the Magistrate's duty to inform the accused of the provisions of section 51 and the implications thereof. The consequences of this failure by the Regional Magistrate were an unfair trial whereupon the sentences were set aside. Also in an unreported case of *Muzi Sukwazi v The State*[134] the appellant was convicted of possession of a firearm after pleading guilty and after the defence addressed the Court the Magistrate raised the issue of whether it was a semi-automatic firearm to the State who then only led evidence to that effect. The accused was sentenced to 15 years in terms of section 51 of the Criminal Law Amendment Act.

The accused appealed against sentence and the appeal Court decided the issue by stating that in terms of section 35(3)(a) of the Constitution the right to a fair trial includes the right for every accused person to be informed with sufficient detail of the charge to answer it. The Appeal Court held because the charge sheet was silent about the minimum sentences provisions the accused was not properly informed of the case against him. The sentence was reduced to one of 2 years imprisonment.

In *S v Dickson*[135] the accused who was undefended appeared in the Regional Court on charges of rape and robbery and there was no specific warning that he was facing a compulsory minimum sentence on the basis that the rape was alleged to have been committed with the infliction of grievous bodily harm to the complainant.

133 1999(2) SACR 217 (T) at 219 (h)-(j).

134 1999 Case No AR 663/99.

135 2000(2) SACR 304 (C) at 309 (d)-(j).

The accused was convicted on both counts and the regional Court referred the matter to the High Court for sentence who decided the issue by stating that the Magistrate's failure to inform the accused of the provisions of the Criminal Law Amendment Act and consequences thereof upon conviction meant that the accused did not have a fair trial and the proceedings were set aside and the matter remitted to the Regional Court for trial de novo.

In *S v Mngumi*[136] the appellant was convicted in the Regional Court of robbery with aggravated circumstances and sentenced to 15 years imprisonment and the Magistrate also failed to inform the appellant of the provisions of the Criminal Law Amendment Act. The Appeal Court decided the issue by stating that the Regional Court was obliged to inform the accused of the applicability of the Criminal Law Amendment Act and because of its failure to comply with its duties the conviction and sentence had to be set aside.

In *S v Ndlovu*[137] the accused had been convicted in a Regional Court of the rape of a 15-year-old girl and the matter was referred to the High Court for sentence in terms of section 52 of the Criminal Law Amendment Act. It appeared that the accused had not been informed on the possibility of life imprisonment. The Court decided the issue by stating there was a duty on the Regional Court to inform the accused of the provisions of the Criminal Law Amendment Act and therefore the conviction was set aside.

In *S v Legoa*[138] the appellant had pleaded guilty to a charge of dealing in dagga but not admitting to its value and was so convicted. The state only then led evidence of the value of the dagga and appellant was sentenced in terms of section 51(2)(a) of the Criminal Law Amendment Act to 15 years imprisonment. The issue was whether the provisions of the Criminal Law Amendment Act became applicable when the Court did not inform the accused before conviction. The Appeal Court decided the issue by stating that the appellant had not been warned that the provisions of the Criminal Law Amendment Act might be invoked and therefore the sentence had to be set aside and replaced with 5 years imprisonment.

136 2002(1) SACR 294 (T) at 295 (e)-(g).

137 2002(2) SACR 204 (SCA) at 204 (d)-(f).

138 2003(1) SACR 13 (SCA) at 15 (e)-(h).

In *S v Ndlovu*[139] the issue of notification to the accused was once again enshrined where the appellant stood trial in a Regional Court and was convicted on a charge of robbery with aggravating circumstances and only after conviction he was advised of the applicability of the provisions of the Criminal Law Amendment Act and

sentenced to 18 years imprisonment and both convictions and sentences was set aside and the matter remitted to the Regional Court to start de novo.

The abovementioned cases clearly reflects that the judicial officers do not have discretion whether or not to inform an accused of the provisions of the Criminal Law Amendment Act and are in fact obliged to do it. A further procedural requirement in the provisions of the Criminal Law Amendment Act that need to be complied with is the split procedure which clearly limits judicial officers' discretion in the Regional Courts to impose sentences for Part 1 of Schedule 2 offences.

4.6.2 THE SPLIT PROCEDURE

Section 52(1) provides that if a Regional Court, after it has convicted an accused of an offence referred to in Part 1 of Schedule 2 following on a plea of guilty or a plea of not guilty, but before sentence, is of the opinion that the offence of which the accused has been convicted merits punishment in excess of the jurisdiction of a Regional Court in terms of section 51, the Court shall stop the proceedings and commit the accused for sentence by a High Court having jurisdiction.

[139] 2004(2) SACR 70 (WLD) at 77 (j) - 78 (c).

This section introduces a two-stage procedure, i.e. stage one where the Regional Court tries a case and stage two where the High Court imposes the sentence. The

issue was whether this procedure affects the accused's right to have a fair trial. In *S v Swartz*[140] Davis J decided the issue by stating:

> "This Court now finds itself in a position of a chained 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. I well understand that in the lower Courts this has occurred previously, but that does not militate against my conclusion. As a result of this chained novel system of criminal justice, which has been chosen by the legislature, much of the evidence led in this Court appeared to go more to conviction than to sentence in order to reduce the impact of the offence on which the accused had been convicted."

The Court further decided that it does not affect an accused's right to have a fair trial because the High Court determines if the proceedings in the Court a quo was in accordance with justice and the accused can still adduce evidence in sentencing.

In *S v Mofokeng*[141] two accused were convicted of rape and kidnapping in the Regional Court which fall under Part 1 of Schedule 2 of the Criminal Law Amendment Act and seeing that the offence merited punishment in excess of the jurisdiction of the Regional Court the two accused was committed to the High Court in terms of section 52(1) for purposes of sentence. The issue was whether the accused was properly transferred to the High Court in terms of section 52(1) for sentence.

The Court decided that for a proper transfer in terms of section 52(1) from the Regional Court to the High Court the following jurisdictional facts must be present:

- A Regional Court must have convicted an accused person of an offence committed on or after 1 May 1998.
- The offence must have been one that is referred to in Schedule 2.
- The Magistrate must not have imposed a sentence.

[140] 1999 (2) SACR 380 (C) at 383 (c) – (e).

[141] 1999(1) SACR 502 (W) at 510 (b)-(e).

- The High Court must be one having jurisdiction and seeing that all of it appears to be present the two prisoners were accordingly sentenced to life imprisonment.

4.7 CONCLUDING REMARKS

The Courts strictly interpreted the Criminal Law Amendment Act to exclude District Courts. With regard to juvenile offenders the Criminal Law Amendment Act was interpreted in such a way to limit its application to juvenile offenders by using the phrase substantial and compelling circumstances incorporated into the Criminal Law Amendment Act to impose lesser sentences than the prescribed mandatory sentences which shall now be looked at and explained.

CHAPTER 5: SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

5.1 INTRODUCTORY COMMENTS

If any Regional or High Court is satisfied that substantial and compelling circumstances exist, which justify the imposition of a lesser sentence than the sentence prescribed, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence[142].

From this provision it becomes apparent that the extent to which the Courts are allowed by the legislation to depart from these prescribed sentences are only when substantial and compelling circumstances exists. The crucial question is what is meant by the term substantial and compelling circumstances. It is not a term found in South African Law but appears to have been borrowed from modern American sentencing practice[143]. In order to understand the meaning of substantial and compelling circumstances one need to look at the different approaches adopted by Courts in determining what substantial and compelling circumstances is because the legislature omitted to describe this phrase with regard to what can be seen as such circumstances.

5.2 THE DIFFERENT APPROACHES ADOPTED BY THE COURTS IN INTERPRETING THE PHRASE SUBSTANTIAL AND COMPELLING CIRCUMSTANCES

5.2.1 INTRODUCTORY COMMENT

The Courts adopted three different approaches in interpreting what substantial and compelling circumstances are. The first approach is a very strict approach because some exceptional circumstances are necessary to constitute substantial and compelling circumstances. The second approach was a lenient approach because the ordinary mitigating factors could qualify as substantial and compelling circumstances. The third approach was a balance approach because both exceptional and normal mitigating factors were considered to determine the existence of substantial and compelling circumstances. We shall now look at how the Courts dealt with these three approaches individually and which one are

generally accepted by our Courts to determine substantial and compelling circumstances.

[142] Section 51(3)(a).

5.2.2 THE STRICT APPROACH

Stegmann J in *S v Mofokeng*[144] held that "for substantial and compelling circumstances to be found, the facts of the particular case must present some circumstances that are so exceptional in 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 the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified". He further added that "as I understand this legislation, substantial and compelling circumstances must be factors of an unusual and exceptional kind that Parliament cannot be supposed to have had in contemplation when prescribing standard penalties for certain crimes committed in circumstances described in Schedule 2".

Steenkamp R in *S v Boer*[145] supported this approach and said "Na my mening moet wesenlike en dwingende omstandighede gesoek word in alle tersaaklike omstandighede van die misdryf self en die persoonlike omstandighede van die beskuldigdes. Wesenlike en dwingende omstandighede moet so buitengewoon en uitsonderlik wees dat 'n hof daardeur gedwing word om 'n ligter vonnis op te lê omdat die verpligte vonnis 'n wesenlike onreg teenoor die beskuldigde sal laat geskied."

The approach of Stegmann J was further adopted in a number of cases:

In *S v Zitha and Others*[146], Goldstein J held that "the legislature has laid down heavy minimum sentences in most if not all the cases, it would seem substantially in excess of these imposed by the Courts until now. Clearly, in my view, the legislature envisaged the imposition of extraordinarily heavy sentences which, if they have the desired effect of bringing down crime, may be jettisoned later".

[143] Van Zyl Smit D (1999) "*Mandatory minimum sentences and departures from them in substantial and compelling circumstances*". South African Journal on Human Rights, 15:270.

[144] *1999(1) SACR 502 (W) at 505 (f)-(g).*

[145] *2000(2) SASV 114 (NKA) 121(e)-(f).*

[146] *1999(2) SACR 404 (W) at 409(e)-(g).*

Also in *S v Segole and Another*[147] Jordaan A J held himself to be bound to the provisions of Section 51 of the Act and obligated to give effect to it. The Court fully agreed with the sentiment expressed by Stegman J that the circumstances in the case that it dealt with and also the circumstances of the present cases did not create compelling circumstances as envisaged by Parliament. "I therefore have no discretion left but to sentence each of you to life imprisonment[148]". This view was further supported in *S v Madondo*[149] where Squires J emphasised that a Court would not easily intervene to impose a lesser sentence as compelling reasons, for doing so would not be lightly found and said that a 'compelling' reason was 'clearly more than just a disparity between what the Court feels may be sufficient and the prescribed minimum". He warned against any attitude by a sentencing Court to substitute its own discretion for that of Parliament and displayed the same attitude in his judgment of *S v Ngubane*[150].

For example in *S v Boer*[151] three accused raped a 14-year-old girl which falls under Part I of Schedule 2 of the Act. The court held that the seriousness of the offence pushed the mitigating circumstances into the background and therefore accused 1 and 2 were sentenced to life imprisonment and accused 3 being a juvenile offender to 15 years imprisonment. Also in *S v Kgafela*[152] where the accused planned the murder of her husband who was a senior magistrate by hiring an assassin to shoot him which falls under Part I of Schedule 2 of the Criminal Law Amendment Act the Court held that the offence was serious in that it had been carefully planned and executed and in the circumstances the sentence of life imprisonment was the appropriate one.

In *S v Majola*[153] where the appellant was sentenced to the prescribed minimum sentence of 15 years imprisonment for stabbing his pregnant lover to death which falls under Part II of Schedule 2 the issue was whether the sentence of 15 years was not disproportionate to the offence seeing that the appellant was a first offender, a responsible member of society and because the crime was not pre-

meditated. The court decided the issue by dismissing the appeal against the sentence stating that the attack was a brutal one, perpetrated on a defenceless pregnant woman.

147 1999(2) SACR 115 (W) at 123(j).

148 1999(2) SACR 115 (W) at 126(e).

149 Unreported judgment of the (N), Case CC22/99, delivered on 30 March 1999.

150 Unreported judgment of the (N), Case CC31/00, delivered on 30 March 1999.

151 2000 (2) SASV at 114.

152 2001 (2) BPD at 207.

5.2.3 THE LENIENT APPROACH

In *S v Mthembu and Others*[154] Leveson J was of the opinion that "the legislature did not intend the phrase to signify a stricter criterion than these previously regarded as mitigating factors." Leveson J also displayed the same attitude in his judgment in the case of *S v Majalefa*[155]. This approach found further support in *S v Cimani*[156] where Jones J held that

> "in every case, however, the nature of the circumstances must convince the reasonable mind that a lesser sentence is a proper sentence and that it is justified when regard is had to the aggravating and mitigating features attendant upon the commission of what it already classified by the law-giver as among the most serious of offences and the interest of society weighed against the interests of the offence".

In *S v Blaauw*[157] Borcheds J after a comprehensive analysis of the decisions on the meaning of substantial and compelling circumstances held that

> "the legislature had not seen fit to describe what factors may or may not be considered. Consequently a Court is, in my view, still able to have regard to all the factors that would traditionally have been considered in imposing sentence. Moreover, in my view, a Court should not consider each factor in isolation, but view them cumulatively in order to determine if substantial and compelling circumstances exist for departing from the prescribed sentence of life imprisonment. I do not believe that in such circumstances a Court would be substituting its own discretion for that of the legislature. I do

not believe that the legislature intended that unfair or grossly disproportionate sentences should be imposed."

A full bench of the Witwatersrand Local Division also adopted this approach in *S v Homoreda*[158], *S v Shongwe*[159] and *S v Dithotze*[160].

153 *2001 (1) SACR 337 (N).*

154 *Unreported case, Case No 365/98.*

155 *Unreported Delivered on 22 October 1998 (W).*

156 *Unreported judgment of the ECD, Case CC11/99m delivered on 28 April 1999.*

157 *1999(2) SACR 295 (W) at 296 (c)-(e).*

158 *1999(2) SACR 319 (W) at 320 (a)-(c).*

159 *1999(2) SACR 220 (O) at 221(i)-(j).*

This flexible standard of departure gave rise to some severe emotional outbursts in reaction to certain judgments like *S v Abrahams*[161] where Foxcroft J held that the offender, who had raped his own daughter, was not a threat to society as a whole and that this was a mitigating factor that could be considered along with others in deciding not to impose the prescribed minimum sentence.

In *S v Jansen*[162] Davis J opined "I consider the words substantial and compelling go to weight rather than to exception. The words substantial and compelling would appear to me to compel the Court to consider all the available mitigating factors to see whether they are of substantial weight to enable the Court to exercise discretion and hence provide for a reduced sentence. Davis J displayed the same attitude in his judgment of *S v Swartz*[163].

In *S v Van Wyk*[164] Davis J held that the test could not be one based on significant disparity "between the minimum sentence and that which previously operated under the informal tariff", since this would fail to take account of the new yardstick created by the legislation. He also rejected the approach that if the minimum sentence induces a sense of shock, this would justify a conclusion that there were substantial and compelling circumstances. He concluded that substantial and compelling circumstances included those that were previously referred to as mitigating circumstances and which include all the circumstances that might indicate a diminished moral blameworthiness on the part of the offender.

For example in *S v Shongwe*[165] where the accused raped a nine-year-old girl and seeing the victim was under 16 years old the offence fell under Part I of Schedule 2 of the Act which made the accused liable to be sentenced to life imprisonment in terms of Section 51(1) of the Act unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. The Court held that the accused being a 47-year-old man who did not clash with the law for a period of 20 years, being married with two children, having fixed employment for nine years and the complainant who was his son's stepdaughter suffering minor injuries that the imposition of life imprisonment on the accused would be shocking, excessive and out of all proportion and therefore the Court sentenced the accused to 15 years imprisonment.

160 1999(2) SACR 314 (W) at 315(b)-(d).

161 2001(2) SACR 116 (C) at 121(e).

162 1999(2) SACR 368 (C) at 377 (h)-(i).

5.2.4 THE BALANCED APPROACH

In *S v Malgas*[166] Marais AJ concluded that "the Courts are a good deal freer to depart from the prescribed sentence than has been supposed in some of the previously decided cases, but at the same time, the prescribed sentences are to be taken as ordinarily appropriate for the crimes in question". The principles to interpreting the phrase 'substantial and compelling circumstances which appear to be the correct approach to be followed were laid down in the judgment as follows:

- Section 51 has limited but not eliminated the Courts discretion in imposing sentence in respect of offences referred to in part 1 of Schedule 2.
- Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment [or the particular prescribed period of imprisonment] as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the Courts.
- The specified sentences are not to be departed from lightly and for flimsy reasons.

- The legislature has, however, deliberately left it to the Courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- All factors traditionally taken into account in sentencing [whether or not they diminish moral guilt] thus continue to play a role. None is excluded at the outset from consideration in the sentencing process.
- The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick [substantial and compelling] and must be such as cumulatively justify a departure from the standardised response that the legislature has ordained.

163 1999(2) SACR 380 (C) at 386 (b).

164 *2000(1) SACR 45 (C) at (g)-(h).*

165 1999 (2) SASV 220 (O) at 221(h)-(j); 222(a).

- In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.

If upon consideration of the circumstances of a particular case, the sentencing Court is satisfied that the prescribed sentence is so disproportionate to the crime that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.

In imposing such lesser sentence, account has to be taken of the fact that the particular kind of crime had been singled out for severe punishment and that the sentence imposed in place thereof should be assessed paying due regard to the benchmark set by the legislature.

In *S v Malan and Another*[167] Shakenovsky J adopted the approach in *S v Malgas*[168] to establish whether substantial and compelling circumstances were present to impose a lesser sentence than life imprisonment and accordingly sentence accused 1 to 20 years imprisonment and accused 2 to 12 years imprisonment of which 2 years are suspended for 3 years.

For example in *S v Mahomotsa*[169] where the accused was charged and convicted of raping the complainants more than once which had fallen under Part I of Schedule 2 and merited a punishment of life imprisonment. The Court said it does not follow that simply because the circumstances attending a particular instance of rape result in it falling within one or other of the categories of rape delineated in the Criminal Law Amendment Act. A uniform sentence of either life imprisonment or any other uniform sentence must or should be imposed. The accused was subsequently sentenced to 6 and 10 years imprisonment for both counts which was ordered to run concurrently and the State appealed against the sentence and the Appeal Court upheld the appeal but also only imposed 8 years and 12 years imprisonment for both counts which should not run concurrently and still did not impose the prescribed minimum sentence of life imprisonment.

166 2002(1) SACR 469 (SCA), 2001(2) 1222 (SCA) at 481(h)-(j), 482(a)-(f) and 1236-1237.

167 2004(1) SASV 264 (T) at 270 (e)-(j) and 271 (a)-(h).

168 2002(1) SACR 469 (SCA), 2001(2) 1222 (SCA) at 481 (h)-(j), 482 (a)-(f) and 1236-1237.

169 2002 (2) SACR 435 SCA.

5.3 CONCLUDING REMARKS

Establishing the true meaning of the phrase substantial and compelling circumstances used in the Act has led to a series of widely divergent constructions in the Courts. On the one hand some Courts interpreted the phrase to mean that any deviation from the prescribed minimum sentence require circumstances that are so exceptional in nature and that so obviously expose the injustice of the statutory prescribed sentence. It can rightly be described as compelling the conclusion that the imposition of a lesser sentence than that prescribed by the legislation is justified.

On the other hand, some Courts are of the view that this piece of legislation has changed little in the traditional approach to sentencing, in that the legislature did not intend the phrase to signify a stricter criterion than those previously regarded as mitigating factors. What has become clear through the divergent interpretations is the fact that there cannot be a uniform interpretation of the phrase “substantial and compelling circumstances’ but that a Court must assess each case on the merits of

that particular case. In my view the guidelines in *S v Malgas*[170] should be followed because there are no over or under emphasising of any of the constituencies that could take place but a proper balance will be striked.

If it was not for this phrase, substantial and compelling circumstances that were incorporated into the Criminal Law Amendment Act, the prescribed mandatory sentence provisions would not have been able to pass the constitutional challenges that was brought against it in Chapter 3.

[170] 2001(1) SACR 469 (SCA) at 481 (h)-(j), 482 (a)-(f).

CHAPTER 6: CONCLUSION AND RECOMMENDATIONS FOR THE IMPROVED IMPLEMENTATION OF THE CRIMINAL LAW AMENDMENT ACT

6.1 CONCLUDING REMARKS

After the Criminal Law Amendment Act came into effect, the public no longer complained so often about crime not being dealt with seriously or too lenient sentences being imposed by the judiciary. Although the Criminal Law Amendment Act placed a limitation on judicial discretion it was not an absolute limitation because the Courts still have discretion to impose a lesser sentence. An outline of the Criminal Law Amendment Act clearly reflects that in response to the public outcry to the problem of violent crime being rampant in South Africa the intention of the Legislature by introducing the Criminal Law Amendment Act was to deal harshly with crime. Judicial interpretation of the Criminal Law Amendment Act revealed the attitude of the Courts towards this piece of valid legislation. Some constitutional

challenges were brought against the Criminal Law Amendment Act in an attempt to do away with this piece of legislation but it was unsuccessful. The phrase substantial and compelling circumstances incorporated into the Criminal Law Amendment Act saved the Criminal Law Amendment Act from being declared unconstitutional.

The Courts then dealt with this valid piece of legislation by giving the provisions of the Criminal Law Amendment Act a restrictive interpretation and thereby limiting the scope of mandatory sentences. This was done when the Court started to interpret the intention of the Legislature with regard to unlawful possession of a semi-automatic firearm which fall under Part II of Schedule 2 of the Criminal Law Amendment Act, and merit a punishment of 15 years imprisonment in comparison with a revolver which merit a punishment of 3 years imprisonment and are sometimes more powerful depending on the fabricate and make of the revolver. The Courts interpret this provision restrictively to mean that it could not have been the intention of the Legislature that an accused convicted for the unlawful possession of a pistol should get 15 years imprisonment and an accused convicted for the unlawful possession of a revolver 3 years imprisonment. So in practice all the Courts dealt with unlawful possession of a semi-automatic pistol for purposes of sentencing as if they would impose sentence for unlawful possession of a revolver.

The Courts further limited the scope of mandatory sentences which limited their sentencing discretion by interpreting the provisions of the Criminal Law Amendment Act to exclude District Courts. The Courts further interpreted the provisions of the Criminal Law Amendment Act narrowly by adopting its own different approaches as to what would qualify as substantial and compelling circumstances.

Although a restrictive, lenient and balanced approach was adopted the Courts decided to follow the balanced approach as guideline where they could use all the mitigating factors that were normally the personal circumstances of an accused weighed against the aggravating circumstances to determine substantial and compelling circumstances.

The inference that can be drawn is that the Courts shall continue to defend their sentencing discretion by interpreting the provisions of the Criminal Law Amendment Act narrowly.

I would submit that the Criminal Law Amendment Act with its provisions would achieve success because the advantages of this type of sentencing are[171]:

(i) It will answer the public's sense of justice being done;

(ii) It creates a culture of just desert which means people will know that specific actions have specific consequences;

(iii) It decreases the chance factor – whereby criminals take a chance, knowing that the possibility exists that they can get away lightly – either with regard to the sentencing process (technical points; having a lenient sentencing official imposing the sentence or on parole; and

In the South African Bill of Rights the prohibition of cruel, inhuman or degrading punishment is recognised as a fundamental right which derives from the right to human dignity, freedom and equality[172]. Mandatory minimum sentences are not per se unconstitutional but in each case the Court must judge if the prescribed sentences are grossly disproportionate[173].

171 Oliver C, (1998). "*Evaluating mandatory minimum sentences: what will be practical, fair and effective*" [11(2)] Acta criminologica p87.

172 See Section 7(1), 36(1), 39(1)(a).

173 *R v Smith* 1987(1) SCR 1045 (a) – *S v Jansen* 1999(2) SACR 368 (C) where Davis J held that because mandatory sentencing does not create a per se system of minimum sentencing there was not any unconstitutionality.

In interpreting the provisions of Section 51 of the Criminal Law Amendment Act, the Constitutional Court acknowledges throughout the functional role of the three branches of government. It recognises the inevitable degree of overlapping responsibility as well as a duty of interdependence and independence of the different branches. If not, the capacity of the nation able to govern itself effectively would be diminished.

I would submit that although the Criminal Law Amendment Act limited judicial discretion it had been declared constitutional and the duty of the judiciary is to

enforce the law made by the Legislature which are not in conflict with any of the provisions of the Constitution of the Republic of South Africa.

6.2 RECOMMENDATIONS FOR THE IMPROVED IMPLEMENTATION OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

Although Section 51 has been held to be valid, it would appear that some of its provisions should once again be scrutinised by Parliament. It could be argued, for instance, that it is an anomaly[174] that the minimum sentence for offences relating to possession of an automatic or semi-automatic firearm, explosives or armament is imprisonment for 15 years for a first offender[175], while the minimum sentence for attempted murder is imprisonment for merely 5 years for a first offender[176].

The mandatory and minimum sentence provisions are hidden away at the back of legislation dealing with a myriad of other matters. The average person probably still does not know about its existence. To encourage compliance with the authoritative guidelines set out in *S v Malgas*[177] and adopted in the case of S v Dodo[178], publicity could play a vital role.

174 A Cilliers (May 2000) *Minimum Sentences in South African Law*, p 4.

175 Section 51(2)(a)(ii) read with Part II of Schedule 2.

176 Section 51(2)(c)(ii) read with Part II of Schedule 2.

177 *S v Malgas* (1) SACR 469 SCA at 481 (h)-(j), 482 (a)-(f).

178 *S v Dodo* 2001 (5) BCLR 423 (CC) AT 430(b)-(g), 431(a)-(c).

It is submitted that the legislature should give more clarity with regard to the position of District Courts in relation to the provisions of the Criminal Law Amendment Act because the prescribed minimum sentences in respect of offences contained in Part IV of Schedule 2 could cause practical problems in terms of jurisdiction taking into account that Part IV of Schedule 2 encompasses all offences contained in Schedule 1 of the Criminal Procedure Act, if the accused had a firearm with him at the time of the commission of the offence which was intended to be used in the commission of

such offence. These types of offences are normally punishable by a fine or imprisonment or both and the term of imprisonment does not exceed a term of 3 years, but should a firearm have been involved with the intention of using it in the commission of the offence, in any of these type of minor offences, the offences would be subject to a minimum sentence of 5 years imprisonment for a first offender in terms of part IV of the Criminal Law Amendment Act like negligent discharge of a firearm, in terms of section 39(1)(n) of the Fire-arms Act[179] and handling a firearm while under the influence of liquor.

Negligent discharge of a firearm and handling a firearm under the influence of liquor definitely fall under this Part IV of Schedule 2 of the Criminal Law Amendment Act and offences like these are normally heard by the District Courts.

Since District Courts are not included in terms of the Criminal Law Amendment Act to make use of the mandatory sentence provisions all these cases will have to be referred to the Regional Court for sentencing which could give rise to overloaded Court rolls at Regional Court level and the process of referral can become cumbersome.

I would therefore recommend that the legislator should revise the wording of Part IV of Schedule 2 of the Criminal Law Amendment Act or increase the jurisdiction of the District Courts to 5 years.

To conclude I therefore submit that the Criminal Law Amendment Act was a welcome addition to our criminal law. Although the Criminal Law Amendment Act limits judicial discretion its not an absolute limitation because the Courts can impose lesser sentences if it finds substantial and compelling circumstances to be present. After the recommendations for its improved implementation have been attended to then there's no reason left why the application of the criminal Law Amendment Act should not be made permanent.

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