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## **SENTENCING IN SOUTH AFRICA**

### **Public perception and judicial process**

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#### **INTRODUCTION**

On average, fewer than one in ten crimes reported to the South African Police Service (SAPS) result in the conviction of the perpetrator. There is a feeling that crime pays in South Africa. For this reason, and because most law abiding citizens want the country's criminals to be punished, considerable interest is expressed in the sentencing stage of the criminal justice process — both by the public and judicial officers (i.e. judges and magistrates) who make sentencing decisions.

To understand public perception better, and to assess the extent to which sentencing laws satisfy public demands for the tough punishments of criminals, the Institute for Security Studies (ISS) and the Institute for Human Rights and Criminal Justice Studies at Technikon South Africa (TSA) conducted a survey among Eastern Cape residents to ascertain their attitudes to sentencing in South Africa. Some of the survey results are discussed in this paper.

The paper also summarises the decision-making process that judicial officers follow in deciding on a proper sentence. The various sentencing theories, and the most important factors affecting the severity or leniency of a sentence are examined, as are the options available to judicial officers in the type of sentence they can impose.

#### **ATTITUDES TO PUNISHMENT SURVEY**

In mid-1999, the ISS and TSA conducted a survey among Eastern Cape residents to ascertain their attitudes to sentencing in South Africa.<sup>1</sup>

Just over three-quarters of respondents thought that sentences handed down by the courts have an effect on criminals' propensity to commit crime. Most also thought that the courts are too lenient in sentencing, with almost 60 per cent stating that the courts are 'much too lenient'. Only 10 per cent felt that sentences are 'about right' with a small minority (4 per cent) stating that sentences are too tough.

Four-fifths of respondents said that, compared to 1994, there was much more crime in South Africa. A similar number thought that lenient sentences have played a 'major role' in the increase in crime since 1994. Not surprisingly, 80 per cent thought that the introduction of harsher sentences would bring down the crime rate.

Not much statistical information is available on sentencing trends in South Africa. The available information indicates that, over the last decade, courts have been sending fewer offenders to prison.<sup>2</sup> Courts are making greater use of correctional supervision as a sentencing option, for example, and as an alternative to imprisonment.

However, it would seem that prison sentences are getting longer.<sup>3</sup> This could reflect a harsher sentencing regime by the courts, or it could mean that criminals are committing crimes of a more serious nature than what was the case in the past. It is likely that the reason for longer

prison sentences is a combination of both these factors. Moreover, minimum sentencing legislation (applicable to certain serious crimes committed after April 1998) has resulted in the imposition of longer prison sentences.

Three-quarters of the survey respondents thought that the death penalty should be reintroduced for persons convicted of the most serious crimes. Of the respondents who favoured a return of capital punishment, most (68 per cent) believed this would help to reduce serious crimes and serve as a deterrent to criminals.

It appears that support for capital punishment is not based on a belief that the death penalty is a good preventive measure in that it permanently removes dangerous criminals from society. When asked whether they would continue to support the death sentence if offenders who committed serious crimes would be given a true life sentence without the possibility of parole, most (57 per cent) answered in the affirmative.

The survey provided respondents with brief descriptions of a number of crimes. They were asked to place themselves in the position of a sentencing officer and determine what sentence the offenders should receive in the given examples. The crime descriptions and a summary of the respondents' answers follow below.

Where crimes are covered by the Criminal Law Amendment Act of 1997 (see 'imprisonment' below), the minimum sentence as prescribed for these crimes is given. Judicial officers are not compelled to impose the minimum sentence as prescribed by the Act. However, they may impose a lesser sentence (than the prescribed minimum) only if they are 'satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence'.

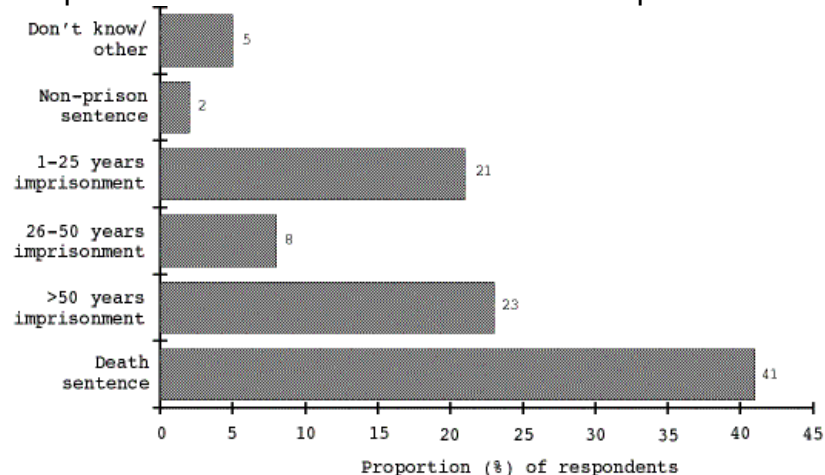
## Murder

*An adult man shoots and kills a police officer who tries to stop him at a roadblock. (The man had some dagga or cannabis in his car and did not want his vehicle to be searched by the police officer.)*

Some 41 per cent of respondents stated that the perpetrator deserved the death penalty. A further 23 per cent would have imposed life imprisonment or a prison sentence in excess of 50 years. Eight per cent opted for imprisonment ranging from 26 to 50 years, and 21 per cent for imprisonment of 25 years or less (graph 1). Many respondents also favoured a prison sentence with forced labour.

Criminal Law Amendment Act: The Act prescribes life imprisonment for any adult convicted of murdering a police officer. (In practice, this would entail a period of imprisonment in excess of 25 years, but probably less than 50 years depending on the age of the convicted prisoner.<sup>4</sup>)

Graph 1: Sentences chosen for murderer of police officer



## Rape

*A 30-year old man rapes a 15-year old girl whom he does not know.*

Just over a quarter of respondents (27 per cent) would have imposed the death sentence, and 24 per cent imprisonment in excess of 50 years. Fourteen per cent opted for imprisonment ranging from 26 to 50 years, and 20 per cent for imprisonment of 25 years or less. The remainder (16 per cent) chose non-prison sentences or did not know which sentence to impose (graph 2).

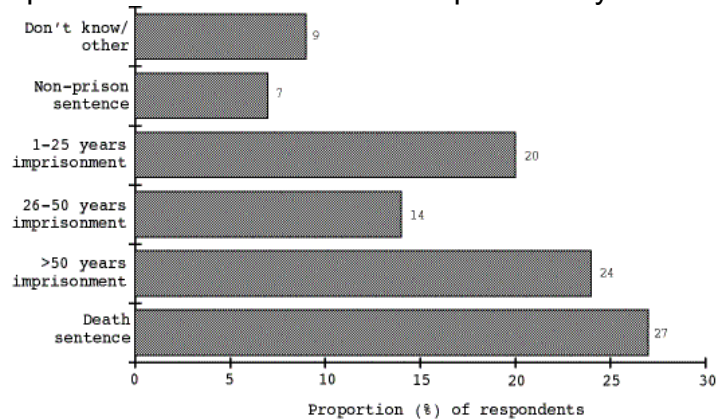
Criminal Law Amendment Act: As the victim is under the age of 16, the Act prescribes a sentence of life imprisonment.

*A 25-year old man rapes his 21-year old girlfriend.*

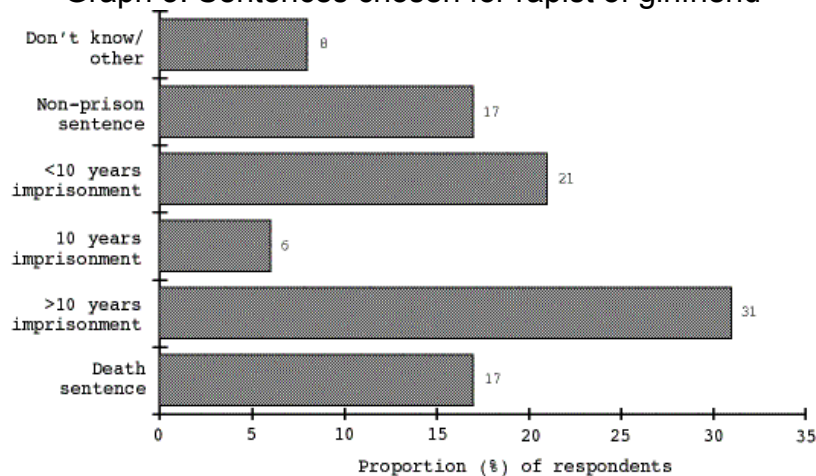
Seventeen per cent chose the death penalty, and 31 per cent imprisonment in excess of 10 years. Six per cent would have imposed imprisonment of 10 years, and a fifth (21 per cent) imprisonment of less than 10 years. A further 17 per cent favoured an alternative to imprisonment such as correctional supervision, public shaming, or the payment of compensation to the victim (graph 3).

Criminal Law Amendment Act: A minimum period of 10 years of imprisonment is prescribed.

Graph 2: Sentences chosen for rapist of 15-year old girl



Graph 3: Sentences chosen for rapist of girlfriend



## Vehicle hijacking

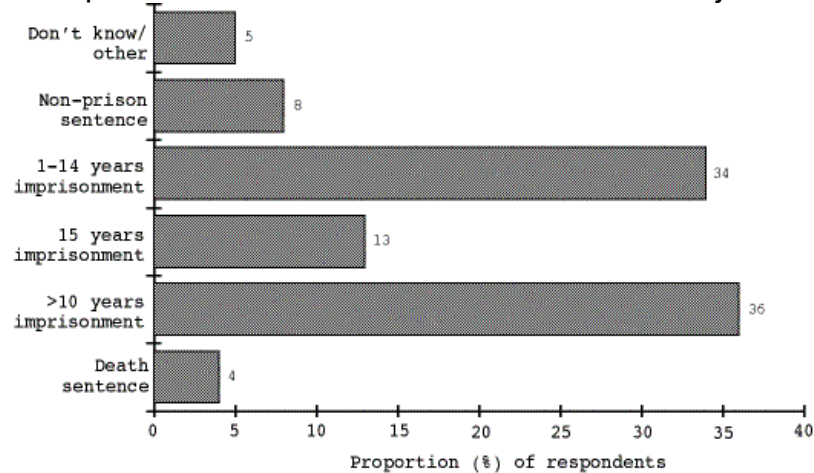
*An adult man hijacks a motor vehicle by threatening the owner of the vehicle with a firearm.*

Four per cent chose the death penalty, and a further 36 per cent imprisonment in excess of

15 years. Thirteen per cent opted for 15 years of imprisonment. A third (34 per cent) chose imprisonment of less than 15 years, and 8 per cent an alternative to imprisonment, such as public shaming and community service (see graph 4).

Criminal Law Amendment Act: A minimum of 15 years imprisonment is prescribed.

Graph 4: Sentences chosen for armed vehicle hijacker



### Housebreaking

*A 32-year old man breaks into a house and steals twelve music tapes/CDs, and an expensive television set.*

Sixteen per cent opted for lengthy prison sentences ranging from 11 to 30 years. A fifth imposed imprisonment ranging from 6 to 10 years, and 36 per cent imprisonment ranging from 2 to 5 years. A further 15 per cent favoured an alternative to imprisonment such as a fine or community service.

*A 16-year old boy breaks into a house and steals twelve music tapes/CDs and an expensive television set.*

Respondents were more lenient when a juvenile (as opposed to an adult) was convicted of housebreaking. Only 5 per cent suggested imprisonment for more than 10 years. Fifteen per cent chose imprisonment ranging from 6 to 10 years in duration, and 23 per cent imprisonment ranging from 2 to 5 years. A further 37 per cent proposed an alternative to imprisonment such as a whipping (13 per cent), correctional supervision or house arrest.

### Shoplifting

*A 17-year old boy steals a loaf of bread and polony from a shop.*

The most common sentence chosen (37 per cent of respondents) was a whipping. Forty per cent elected other alternatives to imprisonment such as compulsory counselling sessions, or correctional services and house arrest. Only 10 per cent suggested some form of imprisonment.

*An adult woman steals a dress and a pair of shoes from a large departmental store.*

Just over half of the respondents (52 per cent) chose imprisonment as a sentencing option, with most favouring a prison sentence between 1 and 5 years (41 per cent of respondents). Other popular sentencing options were a fine (9 per cent), community service (8 per cent), and public shaming (7 per cent).

## **Vigilante crimes**

*An adult man sjamboks a 15-year old boy whom he caught stealing his weekly wages. As a result, the boy receives serious injuries to his buttocks, and has to receive medical treatment at the local clinic.*

One-third of respondents favoured some form of imprisonment. Two per cent opted for more than 10 years imprisonment, and another 2 per cent for 10 years exactly. A further 28 per cent chose imprisonment of 9 years or less, and 52 per cent favoured an alternative to imprisonment such as paying compensation to the victim or imposing a prison sentence that is entirely suspended.

Interestingly, 11 per cent of respondents did not know which sentence to impose. This might indicate the possible sympathy of some respondents for vigilante-type behaviour. Almost 5 per cent of respondents said that the accused should receive no punishment at all (graph 5).

Criminal Law Amendment Act: A minimum sentence of 10 years imprisonment as the victim is under the age of 16 and the assault is serious.

*An adult man catches a 19-year old male youth whom he saw robbing a woman of her handbag by threatening her with a knife. The man hits the youth with an open hand, forces him to strip naked against his will, and then forces him to walk naked to the police station that is 2 kilometres away, where he hands the youth over to the police.*

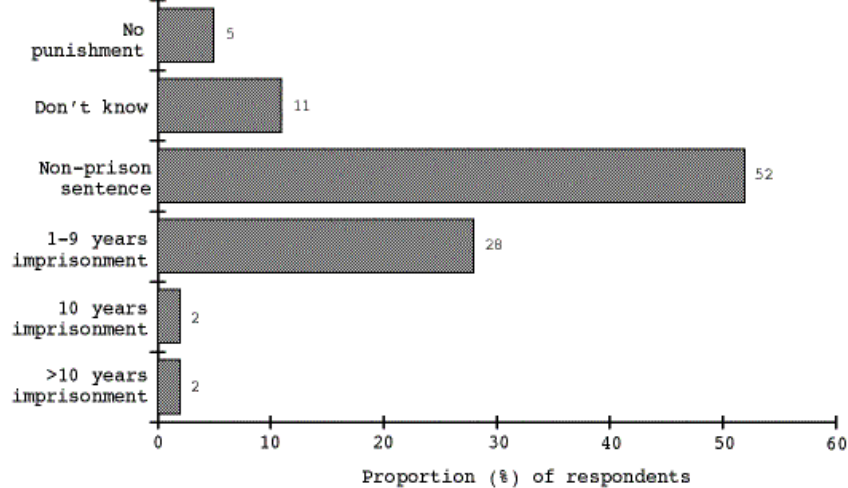
One-quarter of respondents chose imprisonment, mostly falling within the 1 to 5 years range. Most respondents (52 per cent) selected an alternative to imprisonment such as a fine or a completely suspended prison sentence. Fifteen per cent did not know which punishment to impose, and 9 per cent would have imposed no punishment.

*John is told by his teenage daughter that she was raped and stabbed in her leg with a broken bottle by the local gang leader who is 26 years old. John fetches his gun and a canister of petrol and drives to the home of the gang leader some 10 kilometres away. He shoots the gang leader in the stomach, douses him with petrol and sets him alight while he is still alive. The gang leader dies shortly thereafter.*

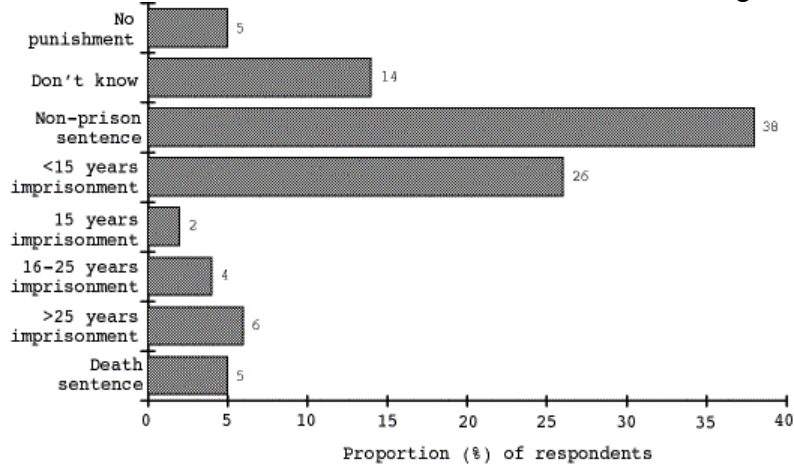
Five per cent of respondents chose the death penalty, and 6 per cent imprisonment in excess of 25 years. Four per cent chose imprisonment of 16 to 25 years, and 2 per cent imprisonment of exactly 15 years. More than a quarter (26 per cent) opted for imprisonment of less than 15 years. A substantial proportion of respondents (38 per cent) favoured an alternative to imprisonment such as a suspended prison sentence (18 per cent of all respondents) and compulsory counselling sessions. Fourteen per cent did not know which punishment to impose, and 5 per cent imposed no punishment (graph 6).

Criminal Law Amendment Act: Life imprisonment if it can be proven that the murder was planned or premeditated, otherwise 15 years imprisonment.

Graph 5: Sentences chosen for man who sjamboks boy



Graph 6 : Sentences chosen for man who murdered his daughter's rapist



### Changing levels of punitiveness

Three-quarters of the survey respondents thought the death penalty should be reintroduced for persons convicted of serious crimes. However, when the same respondents were faced with more detailed scenarios of actual crimes, they were considerably less draconian. Even for the most serious crimes only a minority of respondents opted for the death penalty. For example, only 41 per cent of respondents imposed the death penalty on the murderer of a police officer (graph 7).

The survey revealed that 85 per cent of respondents thought that the courts are either 'too lenient' or 'much too lenient' when it comes to sentencing. However, when provided with some information about actual cases, a sizeable minority (between a third and just under a half) of respondents opted for a more lenient sentence than that provided in minimum sentencing legislation. In respect of vigilante crimes, more than 80 per cent of respondents were more lenient in their sentencing option than the minimum sentencing law (graph 8).

It would seem that the more information available to people about an individual crime, the less punitive they tend to become in their punishment of the offender.<sup>5</sup> While three-quarters of respondents would probably send an offender who had shot and burnt somebody to death to the gallows, very few would do so once they know the offender committed the crime out of revenge for his daughter's violent rape.

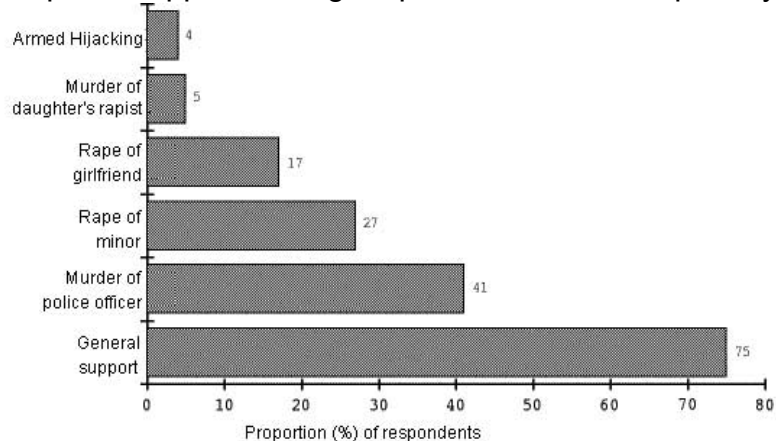
This could explain the discrepancy between the sentences which are handed down by the courts and the public's perception about them. The general public might read one or two newspaper articles about a crime and the circumstances which led to the commission of the

offence. A judicial officer often has hundreds of transcribed pages of testimony and evidence on which to base a proper sentencing decision.

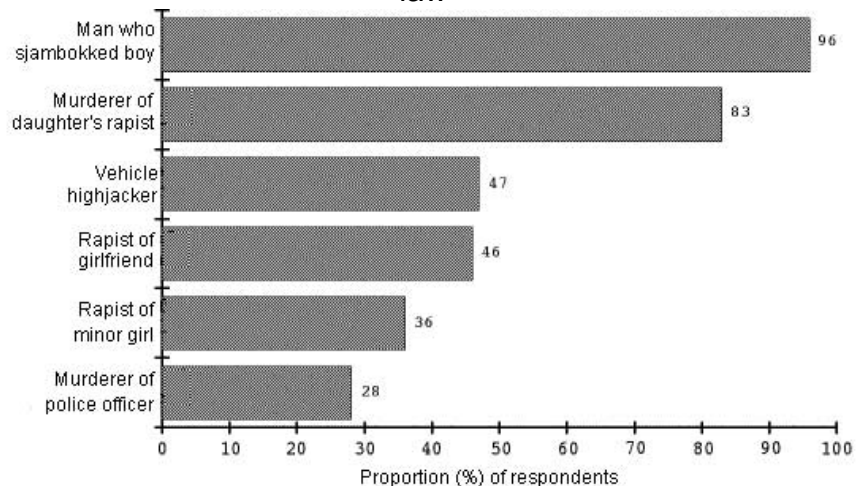
Most magistrates and judges agree that it is relatively easy to convict or acquit an accused on the basis of the evidence presented to the court. For many judicial officers, the most difficult part of a trial is devising an appropriate sentence for a convicted person.

To determine a proper sentence, judicial officers must take a range of mitigating and aggravating factors unique to the trial in question into account. Moreover, previous sentencing decisions by other courts, legislation, and theories of punishment all play a role in the sentence which a court can impose.

Graph 7: Support among respondents for death penalty



Graph 8: Respondents choosing a more lenient sentence than provided by law



## SENTENCING THEORIE

A distinction can be made between absolute and relative theories of punishment.<sup>6</sup> There is only one absolute theory — the retributive theory — where punishment is an end in itself. Absolute theory is retrospective. It looks at the crime which has already been committed and develops an appropriate punishment for that crime.

Relative theory sees punishment as a means to a secondary end or purpose which differs from one theory to the next. Relative theories are progressive as they seek to achieve a future goal such as preventing future crimes, rehabilitating offenders, or deterring offenders and people in general, from committing future crimes.

## Retributive theory

Retributive theory justifies punishment as the morally appropriate response to crime. Retribution thus presupposes moral guilt in that the offender gets what he deserves.

The degree of punishment should be proportionate to the extent of wrongdoing or harm. The theory presupposes that most people agree about the comparative seriousness of crimes, and that crimes can be ranked in order of their seriousness and that punishments can be proportioned to those rankings.

According to the theory, people convicted of comparable offences should receive similar punishments. People convicted of more serious offences should receive harsher penalties than those convicted of less serious offences.<sup>7</sup>

The behavioural premise of the retributive theory is that individuals are responsible and largely rational decision-makers. The political premise is that all offenders are equal before the law and have a right not to be punished disproportionately to the crime committed.<sup>8</sup>

## Deterrence theories

Deterrence theory justifies sentencing based on its consequences, namely the prevention of further or future crimes.

- *Individual deterrence*: Punishment is imposed to deter the individual offender from committing future crimes. A first offender may require little punishment as his conviction should deter him from offending again. A recidivist, however, may require increasingly punitive sentences.
- *General deterrence*: Punishment is imposed with the aim of deterring the community from committing an offence similar to that of the convicted person before court. This is based on the premise that the average person is deterred from committing a crime by the punishment imposed upon others.

The behavioural premise of the general deterrence theory is that of responsible and predominantly rational, calculating individuals. The political premise is that of the greatest good for the greatest number. It is therefore justifiable to punish one person severely in order to deter others more effectively, thereby overriding the aims of proportionality.<sup>9</sup>

## Reformative theory

The reformative theory is also known as rehabilitative sentencing. The purpose of punishment is to *"... reform the offender as a person, so that he may become a normal law-abiding member of the community once again. Here the emphasis is placed not on the crime itself, the harm caused or the deterrence effect which punishment may have, but on the person and the personality of the offender."*<sup>10</sup>

In terms of the theory, offenders largely commit crime because of psychological factors, personality defects, or social pressures. Sentences are consequently tailored to the needs of the individual offender, and typically include aspects of rehabilitation such as community service, compulsory therapy or counselling. The pre-sentencing report by a probation officer or psychologist plays a substantial role in assisting the judicial officer to arrive at an appropriate sentencing decision.

## Preventive theory

The purpose of punishment is the prevention of crime. The purpose of the judicial officer is to identify offenders who are likely to re-offend in future so that special measures can be taken against them. This could be in the form of lengthy periods of imprisonment, capital punishment, or the forfeiture to the state of a firearm or a driver's licence. The castration of sexual offenders would also be an application of the preventive theory.

This approach to sentencing neither looks at the causes of offending, nor is it aimed at changing the behaviour of offenders. It is aimed primarily at protecting potential future victims from the convicted offender.



## Weaknesses of individual sentencing theories

Each of the above theories — when applied on their own — has certain weaknesses:

- The retributive theory has difficulty in determining which punishment equals the harm caused by the crime that was committed. This is especially difficult in a culturally diverse and economically unequal society such as South Africa. Moreover, certain crimes are not seen as morally wrong by society at large (e.g. minor traffic offences). The punishment of these crimes must be justified on grounds other than retribution.
- With deterrence theory there is little empirical evidence to support the view that the average criminal is deterred from committing crimes by the punishment imposed upon others or even himself should he be caught and convicted. The idea of general deterrence can only work if there is a strong possibility that criminals are caught and convicted — which is not generally the case in South Africa.<sup>11</sup> Moreover, many crimes are committed impulsively — especially violent crimes — where the offender does not consider the punishment he might receive once convicted.
- It is difficult to apply the reformatory theory in cases where the punishment is in the form of a fine or a short term of imprisonment, therefore having insufficient time to rehabilitate the offender in prison. Moreover, South Africa's prisons are overcrowded to such an extent that rehabilitation has become extremely difficult.
- The preventive theory can lead to the imposition of excessively severe punishments

## Unitary theory

To overcome the weaknesses of the individual sentencing theories, South African courts usually adopt a combination of them. Snyman calls this the unitary theory as all the theories are combined.<sup>12</sup>

In a well-known appellate division judgment, it was held that there are three main considerations to be taken into account when sentence is imposed:<sup>13</sup>

- the 'crime': the degree of harm caused by the offender, or the seriousness of the crime (retributive theory);
- the 'criminal': the personal circumstances of the offender (reformatory theory), such as whether he is a repeat offender or was provoked into committing the crime; and
- the 'interests of society': society must be protected from a dangerous criminal (preventive theory), or the community must be deterred from crime (general deterrence theory), or society's abhorrence of the crime is recognised (retributive theory).

South African courts seek to find a balance between these three factors. "*A court should not emphasize any of them at the expense of the others.*"<sup>14</sup> The courts have also adopted the view that each case and accused is unique. As a result, considerable emphasis is placed on the individualisation of sentences.<sup>15</sup>

## FACTORS AFFECTING SENTENCING

A wide range of factors affect the sentence imposed on a convicted person. The prosecution normally emphasises the aggravating factors of a crime to bolster its case for a tough sentence, while the defence emphasises mitigating factors to persuade the court to pass a lenient sentence.

It is the function of the judicial officer to weigh the aggravating and mitigating factors, and to take into account the above sentencing theories and precedents set by other courts, in the process of arriving at an appropriate sentencing decision. The more prevalent factors which affect courts' sentencing decisions are discussed below.<sup>16</sup>

## Previous convictions

Courts are obliged to take an offender's previous convictions into account when imposing a sentence.<sup>17</sup> Generally, an offender's previous convictions will result in a tougher sentence.

The high court has held that courts should regard the nature, number and extent of similar previous convictions, the passage of time between them, and the offence for which sentence is being handed down. The closer the previous convictions are in time and in nature to the

present offence, the greater the bearing the previous criminal conduct of an accused should have on the sentence handed down.[18](#)

### **Prevalence**

The prevalence of a certain type of crime can be an aggravating factor. Judicial officers have argued that the interests of the community require that sentences imposed for prevalent crimes have a greater deterrent effect — that is, such sentences should be harsher.[19](#)

For example, persons convicted of diamond-smuggling in the diamond rich areas of North-West (where there is a high prevalence of diamond-smuggling), generally receive harsher sentences than convicted diamond smugglers in other parts of South Africa.

### **Breach of trust**

The fact that a crime is committed by a person against someone who has placed the offender in a position of trust is frequently seen as an aggravating factor. For example, a prison warder who, in fundamental breach of his position, assists a prisoner to escape,[20](#) or theft and fraud committed against an employer or business associate constitute aggravating factors.[21](#)

In a reported case of theft from a bank, the court found that the fact that the crime took place over an extended period by a bank employee was an aggravating factor in imposing sentence. The court commented: *"The employer is entitled to expect unswerving honesty from the employee in return for the wages he pays and the benefits he gives to him."*[22](#)

### **Intoxication**

Depending on the type of crime, the fact that an offender was intoxicated at the time of the crime may serve as a mitigating or aggravating factor for the purpose of sentencing. It is likely to be a mitigating factor in the case of a bar brawl where an intoxicated accused is provoked into a fight. However, it will be an aggravating factor in crimes where intoxication is an element of the offence, such as driving under the influence of alcohol. It would also be an aggravating factor where, for example, an accused knows that drinking makes him aggressive, but nevertheless drinks and then, when intoxicated, commits a crime of violence.[23](#)

Legislation enacted in 1988 permits courts to impose the same sentence on an accused who was intoxicated at the time of the offence as it would impose on a sober accused committing the same crime under the identical circumstances.[24](#) Moreover, courts may regard intoxication as a ground for increasing the sentence.[25](#)

### **Maturity, age or illness**

Maturity tends to increase the subjective blameworthiness of an offender. Apart from the insight that comes with age, such an accused should also be able to resist temptation better than a younger, more impulsive person. An offender's maturity may therefore serve as an aggravating factor for the purpose of sentencing.

With increasing age, however, the situation is reversed. Some elderly people may become less responsible, often as a result of physical or mental illness. Their sensitivity to punishment usually also increases, since a fine might rest heavily upon a pensioner, while a sick person might die in prison.[26](#)

### **Intelligence and education**

Low intelligence in an offender might serve as a mitigating factor, as could a lack of formal education. In a case where some uneducated Bushmen had killed an alleged sorcerer after he had refused to hand over his 'black magic apparatus' to them, the court found that imprisonment would not achieve anything in that the accused would weaken in prison and die. The court imposed 360 hours of community service.[27](#)

### **Secondary factors**

Under certain circumstances, the incidental effects of a sentence on an offender is taken into account by the courts when imposing a sentence.

For example, a prison sentence is likely to result in an offender's loss of employment (and if he is an employer, to job losses for his employees). Moreover, if the offender has dependants, they would also suffer from the loss of his support. The courts consequently try to avoid imprisoning people convicted of less serious offences who have dependants to support. Sentences of imprisonment under such circumstances would punish the offender's dependants by depriving them of their breadwinner.[28](#)

Moreover, the courts have emphasised the importance of establishing whether an accused can pay a fine.[29](#) It makes little sense to impose a fine on an indigent accused, which he cannot pay. In such a case, a court is likely to impose a period of imprisonment or impose a non-monetary punishment such as community service.

## **Youthfulness**

Generally, the youthfulness of an accused serves as a mitigating circumstance leading to the imposition of a lesser sentence than on an adult accused. Courts have argued that young offenders do not have the same insights and powers of resistance to temptation that more experienced persons might have.

The prospect of rehabilitating a young offender is greater than that of an older person. Moreover, mixing young offenders with hardened criminals in prison could result in the former being introduced to a life of serious crime. Judicial officers therefore seek to keep young offenders out of prison, unless the seriousness of the offence compels them to do otherwise.

Legislation provides that a court that convicts an accused under the age of 21 of any offence, instead of imposing punishment upon the accused, may order that he is placed under the supervision of a probation officer or a correctional official, or order that he is sent to a reform school. Moreover, if the accused is under the age of 18, the court may also order that he is placed in the custody of a suitable person (usually a parent or close relative).[30](#)

## **Reduced criminal capacity**

A court finding that an offender's capacity to appreciate the wrongfulness of his behaviour, or to act with an appreciation of the wrongfulness of his actions, was diminished by reason of mental illness or mental defect, may take such diminished responsibility into account when imposing a sentence.[31](#)

South African courts have found conditions such as psychopathy, claustrophobia, kleptomania, paedophilia and exhibitionism to be extenuating circumstances.

## **Provocation**

Provocation may serve as a ground for the mitigation of punishment as a crime committed impulsively is morally less blameworthy than one committed with premeditation.[32](#) The courts have found mitigating factors in cases where a spouse finds his partner in a compromising position with a lover and then assaults either the offending spouse or the lover.[33](#)

Snyman argues that provocation ought only to operate as a ground for mitigation if there is a reasonable ground for the offender's anger — if the 'reasonable man' would also have become enraged in the circumstances.[34](#) An objective standard should be applied in deciding whether rage or anger resulting from provocation should operate as a mitigating factor.

## **Remorse**

An offender expressing genuine remorse for the crime he has committed, has a greater chance of being rehabilitated. The courts generally take this into account when considering factors in mitigation of sentence.[35](#) Conversely, it can be an aggravating factor where an offender shows no remorse for the crime committed.[36](#)

## **TYPES OF SENTENCES**

Judicial officers must choose from a wide variety of sentencing options (or a combination of these) which are appropriate to the crime, the convicted person, and the interests of the society where the crime occurred.

## Imprisonment

Unless legislation provides otherwise, a district court may impose a maximum period of imprisonment of 3 years, and a regional court up to 15 years.<sup>37</sup> There is no limit for the high court.<sup>38</sup>

Legislation also provides that no person may be sentenced to imprisonment for a period of less than four days, unless the person concerned is detained until the rising of the court (i.e. until the case being dealt with by the court at the time is finished).<sup>39</sup>

A court which is satisfied that a convicted person habitually commits offences, and that the community should be protected against him, may declare such a person to be a habitual criminal.<sup>40</sup> A habitual criminal may be imprisoned for a maximum of 15 years, and may not be released on parole until a period of incarceration of at least 7 years has been served.<sup>41</sup>

A convicted person may be declared a dangerous criminal if the court is satisfied that he is a danger to the physical or mental well-being of other persons, or that the community should be protected against him.<sup>42</sup> Upon doing so, the court must sentence such a person to imprisonment for an indefinite period. The court must direct, however, that such a person will be brought before the court after a period which may not exceed the jurisdiction of the court (e.g. 15 years for a regional court).

After the expiry of this period, the court must reconsider the sentence. The court may subsequently confirm the sentence of imprisonment for an indefinite period, convert the sentence to correctional supervision, or release the person unconditionally or on such conditions as the court may determine.

A court may sentence a convicted person to periodic imprisonment.<sup>43</sup> This is usually served in hours and imposed on employed offenders so that they do not lose their employment because of the sentence. Periodic imprisonment can be imposed only for offences where no prescribed minimum punishment exists.

A court may also impose a sentence of suspended imprisonment. The whole or part of a prison sentence may be suspended (for up to five years) on a variety of conditions (see 'suspension of sentence' below).

The Criminal Law Amendment Act of 1997 provides for minimum sentences to be imposed on persons convicted of certain offences.<sup>44</sup> Judicial officers may only impose less than the prescribed minimum if they are "... *satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.*"<sup>45</sup>

The Act mandates life imprisonment<sup>46</sup> for persons convicted of murder, where:

- it was planned or premeditated;
- the victim was a law enforcement officer, or a person likely to give material evidence in a criminal trial; or
- it involved rape or robbery with aggravating circumstances.

The Act also provides for life imprisonment for rape where the victim is:

- raped more than once, or by more than one person, or by a person who has been convicted of two or more offences of rape, or by a person who knows that he has HIV/Aids;
- a girl under the age of 16 years, or a physically disabled woman and thereby particularly vulnerable, or a mentally ill woman; or
- seriously assaulted.

The Act mandates a prison sentence of 15 years for a first offender convicted of:

- murder in circumstances other than those referred to above;
- robbery with aggravating circumstances (including vehicle hijacking);
- certain drug-related offences;
- the smuggling of firearms;
- the illegal possession of automatic or semi-automatic firearms; and
- commercial crimes where large amounts of money are involved.<sup>47</sup>

On a second conviction for one of these offences, the Act lays down a 20 year prison sentence that increases to 25 years for a third conviction.

Prison sentences of 10 years for a first offender (20 years on a third conviction) are laid down for offences such as rape in circumstances other than those referred to above, and indecent assault of a child under the age of 16 involving the infliction of serious bodily harm.

The Act lays down a 5-year prison sentence (10 years on a third conviction) for persons convicted of a wide range of offences where the offender had the intention of using a firearm in the commission of the offence.

The courts have been critical of mandatory minimum sentencing legislation. In a 1990 decision, the then Chief Justice Corbett commented:

*"... the imposition of a mandatory minimum prison sentence has always been regarded as an undesirable intrusion by the legislature upon the jurisdiction of the courts to determine the punishment to be meted out to persons convicted ... and as a kind of enactment that is calculated in certain instances to produce grave injustice."*<sup>48</sup>

## Fines

Legislation and the minister of justice determine the maximum fine which can be imposed by the lower courts for common law offences:<sup>49</sup> R60 000 by a district court, and R300 000 by a regional court.<sup>50</sup> Most statutory offences carry the maximum fine allowed in respect of a contravention of a statutory provision.<sup>51</sup>

A court may order the seizure and sale of a convicted person's movable property to enforce payment of a fine. In the case of the high court, this may also include fixed property.<sup>52</sup>

Case law has developed a number of principles applicable to the imposition of fines:<sup>53</sup>

- the offence must justify a fine (offences such as murder and rape are generally too serious to permit the imposition of a fine);
- the amount of the fine must suit the offence (even a wealthy person should not be fined a high amount for stealing a chocolate bar); and
- the fine must be commensurate with the means of the offender (i.e. generally an accused should be able to pay the fine imposed, either from his own money, borrowed money, or through the sale of his assets).

## Suspended sentence

Where a court convicts an accused of an offence, other than an offence where a minimum punishment is prescribed by law, the court may pass sentence, but order that the whole or part of the sentence is suspended. A sentence may be suspended for up to five years only.<sup>54</sup>

A sentence may be conditionally suspended. In such a case, the suspension remains in force only if the accused complies with the conditions of the suspension. An infringement of the conditions can bring about a cancellation of the suspension. For example, a person convicted of theft may receive a fine of R800, that is completely suspended, on condition that he is not again convicted of theft over a three-year period. If the accused is again convicted of theft two years later, it is probable that his suspended sentence will come into force. The accused will then be sentenced and punished for the second theft and, in addition, will be liable to pay the fine of R800 for the first offence.

Conditions utilised in the suspension of sentences may include, *inter alia*, that the offender:<sup>55</sup>

- pays compensation to the victim;
- renders to the victim some specific benefit or service for damage or monetary loss;
- performs community service without remuneration;
- submits to treatment as directed by the court;
- submits to the supervision or control (including control over earnings or other income) of a probation officer; or
- attends or takes up residence at a rehabilitation centre.

## **Correctional supervision**

A court may impose periods of correctional supervision for up to three years.<sup>56</sup> A court may also impose imprisonment with the convicted person subsequently placed under correctional supervision at the discretion of the commissioner of correctional services (provided the period of imprisonment imposed by the court was not more than five years).<sup>57</sup>

Correctional supervision is a form of community-based punishment. An offender serves his sentence within the community, in co-operation with and in the interest of the community. Correctional supervision is thus a collective term for the different methods used to manage offenders in the community.<sup>58</sup>

Correctional supervision is a less expensive alternative to imprisonment and is considered to be a punishment option in its own right. As the appellate division held in 1992:

*"What is clear is that correctional supervision is no lenient alternative. It can, depending on the circumstances, involve an exacting regime, even virtual house arrest. Its advantage is that it is geared to punish and rehabilitate the offender within the community, leaving his work and domestic routines intact and without the obvious negative influences of prison. It can also involve specific rehabilitative treatment and community service."*<sup>59</sup>

The conditions attached by a court to a sentence of correctional supervision determines its severity. Conditions can include, *inter alia*, house arrest after working hours, prohibition of the consumption of alcohol, participation in correctional programmes, prohibition of contact with certain persons, reparation to the victim, and community service.

## **Postponement of sentence**

**A court convicting a person of an offence where no prescribed minimum punishment is applicable, may postpone the passing of sentence for up to five years. The court may do this on a range of conditions or unconditionally. After the expiry of this period (and provided the court is satisfied that the accused has not infringed any of the conditions that were set), the accused is discharged without passing of sentence. The discharge has the effect of an acquittal, except that the conviction is recorded as a previous conviction.**<sup>60</sup>

## **Compensation**

Where an accused has been convicted of an offence that has caused damage to or loss of property (including money), the person suffering the loss, or the prosecution may apply to the court for compensation.<sup>61</sup> The amount of compensation that an offender can be ordered to pay, may not exceed R60 000 in respect of a district court and R300 000 in respect of a regional court.<sup>62</sup>

## **Forfeitures**

Illegally obtained or prohibited property, such as unlicensed firearms and drugs, is usually forfeited to the state after the conviction of the accused. The Prevention of Organised Crime Act permits the forfeiture of any property tainted by criminal activity. In terms of the Act, the court merely has to find on a balance of probabilities that the property was "*an instrumentality*" of an offence, or is the "*proceeds of unlawful activities*."<sup>63</sup> The validity of such an order is not affected by the outcome of criminal proceedings.

## **Committal to a treatment centre**

A court convicting a person of any offence may order, in addition to or in lieu of any sentence in respect of such an offence, that the person should be detained at a drug treatment centre.<sup>64</sup> However, such an order may not be made in addition to any sentence of imprisonment.

## **Caution and discharge**

For minor offences (where no minimum punishment is prescribed), a court may "... discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction."<sup>65</sup>

## CONCLUSION

Sentencing is a complicated process for the courts, involving the appraisal of a range of factors, circumstances and theories. For the public, especially in a country ravaged by high levels of violent crime, this process is often confusing and frustrating when people convicted of horrendous crimes receive what appear to be lenient sentences.

Based on the ISS/TSA survey results reported above it would appear, however, that the public is neither more nor less punitive than the country's judicial officers. The misunderstanding between the public and the administrators of justice has to do with a lack of information and communication. Some judges and magistrates seem to be unaware of the public's feelings and anxieties about certain crimes. Likewise, most people are unaware of the information used by the courts to come to fair and justifiable sentencing decisions.

## ENDNOTES

1. The survey included 470 respondents in selected urban centres, minor towns and rural areas. Survey areas were selected for their broad representivity of the population of the Eastern Cape. Respondents within each survey area were chosen on the basis of their race (half the total sample were black, and whites and coloured people each made up one quarter of the sample), gender (half the sample were male, and half female), and age (the age groups 18-30, 31-50, and older than 50 each made up one-third of the sample). The survey was preceded by a detailed focus group study in the Eastern Cape.
2. L Muntingh, *A criminal justice crisis: Sentencing trends in South Africa*, Crime and Conflict, 4, Summer 1995, pp 21-24.
3. Ibid; S Oppler, Correcting corrections: Prospects for South Africa's prisons, [ISS Monograph Series, 29](#), Institute for Security Studies, Halfway House, October 1998, pp 23-26.
4. In terms of section 73(6)(b)(v) of the Correctional Services Act No 111 of 1998 (at the time of writing soon to be promulgated), persons sentenced to life imprisonment in terms of the Criminal Law Amendment Act of 1997, may not be placed on parole until they have served at least four-fifths of their term of imprisonment, or 25 years, whichever is shorter. Presumably, therefore, life imprisonment in terms of the Criminal Law Amendment Act entails a minimum period of imprisonment of 25 years.
5. This statement is supported by research conducted in the Northern Province in May 1998. See C E Oliver, *Public punitiveness and opinions on just desserts: An exploratory study*, unpublished MA dissertation, University of South Africa, Pretoria, June 1999.
6. C R Snyman, *Criminal Law*, Butterworths, Durban, 1989, p 17.
7. M Tonry, *Sentencing Matters*, Oxford University Press, New York, 1996, p 14.
8. A Ashworth, *Sentencing*, in M Maguire, R Morgan & R Reiner (eds), *The Oxford Handbook of Criminology*, Clarendon Press, Oxford, 1997, p 1097.
9. Ibid, p 1098.
10. Snyman, op cit, p 22.
11. See M Schönteich, *Assessing the crime fighters. The ability of the criminal justice system to solve and prosecute crime*, [ISS Papers, 40](#), Institute for Security Studies, Pretoria, September 1999.
12. Snyman, op cit, p 23; see also J Nesor, *The Magistrate*, 21(1), January-March 1986, pp 1-5, for the results of a survey of regional court magistrates, most of whom favoured aspects of all sentencing theories.
13. Zinn 1969 (2) SA 537 (A).
14. Snyman, op cit, p 24.
15. Zinn, op cit.
16. For a more comprehensive list of factors relevant to sentencing see D P van der Merwe, *Sentencing*, Kenwyn, 1998, p 5-17 to p 5-45.
17. Criminal Procedure Act No 51 of 1977, section 271(4).

18. Muggel 1998 (2) SACR 414 (C).
19. Davids 1998 (2) SACR 313 (C).
20. Davids 1998 (2) SACR 313 (C).
21. Botha 1998 (2) SACR 206 (SCA).
22. Prinsloo 1998 (2) SACR 669 (W) at 672b-c.
23. This is what happened in Ndhlovu 1972 (3) SA 42 (N).
24. Criminal Law Amendment Act No 1 of 1988.
25. Ibid, section 2.
26. Van der Merwe, op cit, p 5-26.
27. Mathoka & others 1992 (2) SACR 443 (NC).
28. Wegkamp 1960 (2) SA 665 (T).
29. KIKA 1998 (2) SACR 428 (W).
30. Criminal Procedure Act No 51 of 1977, as amended, section 290.
31. Ibid, section 78(7).
32. See Swanepoel 1983 (1) SA 434 (A) 458.
33. See, for example, Mdindela 1977 (3) SA 322 (O).
34. Snyman, op cit, pp 191-192.
35. Erasmus 1998 (2) SACR 466 (SEC).
36. Kundishora 1976 (4) SA 51 (RA).
37. Magistrates' Courts Act No 32 of 1944, as amended, section 92(1)(a).
38. In terms of section 73(7)(c)(iii) of the Correctional Services Act No 111 of 1998, a person sentenced to imprisonment for a definite period must serve at least a quarter of the effective sentence imposed or the non-parole period, if any, whichever is longer, before being considered for placement under correctional supervision, unless the court has directed otherwise. Moreover, in terms of section 73(6)(a) of the Correctional Services Act No 111 of 1998, a prisoner serving a determinate sentence may not be placed on parole until such a prisoner has served either the stipulated non-parole period, or the rest of the sentence. However, people must be considered for parole when they have served 25 years of a sentence or cumulative sentences.
39. Criminal Procedure Act No 51 of 1977, as amended, section 284.
40. Ibid, section 286(1).
41. Correctional Services Act No 111 of 1998, section 73(6)(c).
42. Criminal Procedure Act No 51 of 1977, section 286A(1).
43. Ibid, section 285.
44. Persons sentenced to imprisonment in terms of the Criminal Law Amendment Act No 105 of 1997 may not be placed on parole unless they have served at least four-fifths of the term of imprisonment imposed or 25 years, whichever is the shorter. However, when imposing imprisonment, the court may order that the prisoner be considered for placement on parole after he has served two thirds of such term. See Correctional Services Act No 111 of 1998, section 73(6)(b)(v).
45. Criminal Law Amendment Act No 105 of 1997, section 51(3)(a).
46. See endnote 4.
47. A person given a determinate sentence in terms of the Criminal Law Amendment Act No 105 of 1997 may not be placed on parole unless he has served at least four-fifths of the imposed term of imprisonment or 25 years, whichever is shorter, but when imposing imprisonment, the court may order that the prisoner should be considered for parole after he has served two-thirds of such term. See Correctional Services Act No 111 of 1998, section 73(6)(b)(v).
48. Toms, Bruce 1990 (2) SA 802 (A) at 822C.
49. Common law offences are offences created through custom and judicial decisions. Statutory offences are offences specifically created by statute or legislation, such as an infringement of the Income Tax Act.
50. Magistrates' Courts Act No 32 of 1944, as amended, section 92(1)(b), in conjunction with *Government Notice No R1411 of 30 October 1998*, Government Gazette, 19435, Government Printer, Pretoria.
51. For example, section 3(1) of the Prevention of Organised Crime Act No 121 of 1998 permits a court to impose a fine of up to R1 billion on a person convicted of racketeering activities.
52. Criminal Procedure Act No 51 of 1977, as amended, section 288.
53. J P Nordier, *Sentencing — Fines*, No. 165A, Justice College, Pretoria, 1999.



54. Criminal Procedure Act No 51 of 1977, as amended, section 297(1).
55. Ibid, section 297(1)(a)(i).
56. Ibid, section 276A(1)(b).
57. Ibid, sections 276(1)(i) and 276A(2)(a).
58. J P Nordier, *Sentencing — Correctional Supervision*, No 167A, Justice College, Pretoria, 1998, p 1.
59. E 1992 (2) SACR 625 (A).
60. Criminal Procedure Act No 51 of 1977, as amended, section 297(2).
61. Criminal Procedure Act No 51 of 1977, as amended, section 300(1).
62. Government Notice, op cit.
63. Prevention of Organised Crime Act No 121 of 1998, as amended, section 50.
64. Criminal Procedure Act No 51 of 1977, as amended, section 296(1).
65. Ibid, section 297(1)(c).