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THE SOUTH AFRICAN DRUGS AND DRUG TRAFFICKING ACT 140 OF 1992 READ WITH THE SOUTH AFRICAN CRIMINAL LAW AMENDMENT ACT 105 OF 1997: AN EXAMPLE OF A *ONE SIZE FITS ALL* PUNISHMENT?

ABSTRACT. Trafficking in drugs is a global problem. The legal response to the challenge of trafficking in drugs is found in harsh penalties usually founded in direct imprisonment for extended periods of time. The worldwide trend towards imprisoning drug traffickers, and indeed drug users, is mimicked in South Africa. This submission examines the sentencing or penal effects of the drug Nyaope, which was included in Schedule I and II of the South African Drugs and Drug Trafficking Act 140 of 1992 (Hereinafter the Drugs and Drug Trafficking Act.), in 2014. The effect of the inclusion is that *Nyaope users and traffickers* are now punished in the same manner as any other traffickers namely, through direct imprisonment. This submission argues that the inclusion of Nyaope and the resultant effect on sentencing is an example of net widening and results all too often in a *one size fits all* (The phrase 'One size fits all' literally describes commercial products tailored for suitability in all instances. It has since extended to describing effects of methods and measures upon applications, hence its adoption in several fields interpretations including law. As a legal term it differentiates general understanding of the application of particular principles to specific practical application. For example, in multilateral trade, it is used to analyse a perspective inscribing commonness in an uncommon or uncompetitive circumstance such as in the rationale behind the imposition of limitations on special and differential treatment principles for developing and least developed countries against developed countries. This article uses this phrase to argue that although the traditionally harsh sentences fit drug traffickers this is not always the case, especially where perpetrators are victims of drug abuse. For literal interpretation, see <http://dictionary.cambridge.org/CambridgeDictionaries> and <http://dictionary.cambridge.org/dictionary/british/one-size-fits-all>. For multilateral trade legal perspective, refer to M.M.M. Monyakane, Special and Differential Treatment under the World Trade Organisation (WTO) with Specific Reference to the Application of the WTO Agreement on Agriculture, Dissertation in partial fulfillment of the LLM

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degree in Mercantile Law, University of the Free State South Africa <http://etd.uovs.ac.za/ETD-db/theses/available/etd-09132006-92208/unrestricted/MonyakaneMMME.pdf> 2005,75; as well as S. Michael, 'One Size Fits All' An Idea Whose Time Has Come and Gone Proceedings of the 21st International Conference on Data Engineering (ICDE 2005) 1084-4627, who explains this concept from a different professional perspective.) approach to the sentencing of drug users and traffickers. This submission uses the previous American practice of using a grid system of sentencing to demonstrate that the inclusion of Nyaope in the Schedules of the Drugs and Drug Trafficking Act has reduced sentencing discretion in a manner not conducive with the limitation clause. The paper argues that the South African approach at present faces the same challenges faced by American courts under the previous grid system of sentencing. The submission argues that the South African approach to sentencing Nyaope users should reflect the principle of fairness and not use an approach which treats all drug traffickers as one and the same for purposes of sentencing.

I INTRODUCTION

Worldwide, effective punishment for drug traffickers is normally sought from legislation prescribing long term imprisonment sentences.¹ South Africa mimics this trend by punishing trafficking in drugs falling under Schedule I and II of the Drugs and Drug Trafficking Act² to a sentence of direct imprisonment of between 5 and 25 years. Sentencing for trafficking in drugs is affected by Section 51 of the so called Minimum Sentences Act³ and in the event that a perpetrator of trafficking cannot show substantial and compelling circumstances to justify the imposition of a lesser sentence, the sentencing court is obliged to sentence a trafficker to 15 years imprisonment. In essence drug traffickers are sentenced in terms of legislatively imposed sentencing guidelines to anything between 15 and 25 years imprisonment unless they can show substantial and compelling circumstances justifying a sentence reduced to 5 years imprisonment. Although the researcher does not dispute the social evil of drug use/abuse and trafficking she questions the logic of sentencing specifically Nyaope users under such a strict and heavily

¹ Sentences for trafficking in drugs range from long term imprisonment to death penalties in some of the forefront states. See <http://drugabuse.com/the-20-countries-with-the-harshes-t-drug-laws-in-the-world/The> 20 Countries with the Harshest Drug Laws in the World [accessed 03/02/2015].

² South African *Drugs and Drug Trafficking Act* 140 of 1992 Sections 3, 4, 5, and 17.

³ Criminal Law Amendment Act 51 of 1997. Hereinafter referred to for the sake of convenience as the Minimum Sentences Act.

consequent regime in light of the characteristics of Nyaope as a drug and the profile of a typical user.

II THE CRIMINALISATION OF NYAOPE: A CONTEXTUAL SYNOPSIS

In 2013 the South African Department of Justice and Constitutional Development⁴ announced its intention to formally criminalise Nyaope. Nyaope is an inexpensive concoction,⁵ of substances which has become particularly attractive to young, unemployed youths⁶ from disadvantaged backgrounds. There are also some indications that Nyaope is used as a method of *stress-relief* amongst the youth.⁷ The use of Nyaope has risen steadily of late and this, in part, informed the DOJ&CD's intention to take formal measures to curb its use through legislative intervention.

⁴ Hereinafter DOJ&CD.

⁵ While reporting on concerns advocating for the criminalisation of exchanges in Nyaope, the British broadcaster Channel 4, indicated that, 'a deadly cocktail nicknamed nyaope or whoonga' is 'one drug that seems to be causing most concern' and mentioned that Nyaope is '... a mixture of third grade heroin, rat poison, cleaning detergents, and sometimes HIV antiretroviral medication [ARVs]—'crack with a sickening twist,' which is 'sold as bags of white powder and is usually added to dagga and smoked as a joint.' In South Africa a deadly new drug is made out of ARV'S [http://www.theatlantic.com/international/archive/2013/08/\[accessed April, 2014\]](http://www.theatlantic.com/international/archive/2013/08/[accessed April, 2014].). Regarding the inferred criminalisation of 'nyaope' in South Africa, Health 24 in its report on the 06/01/2014 entitled, More young people using heroin, A worrying trend is the use of heroin by younger people—in combination with other drugs, such as cocaine and dagga, mentioned that the main ingredients of Nyaope, heroin and dagga, are listed [under chemical names/structures/formula] as undesirable dependence-producing substances in the Drugs and Drug Trafficking Act, Act 140 of 1992(Drug Act) even though 'nyaope' is not listed as such in Schedules I and II. [http://www.health24.com/Lifestyle/Street-drugs/News/More-young-people-using-heroin-20140106. \[accessed 28/May/2015\]](http://www.health24.com/Lifestyle/Street-drugs/News/More-young-people-using-heroin-20140106. [accessed 28/May/2015].).

⁶ The statistics in 2008 which has not significantly changed is that about 26 percent of the labour force in South Africa is unemployed. See Banerjee, A etal, Why has unemployment risen in the New South Africa? *Economics of Transition Volume 16(4) 2008, 716 and see* a news report of the 26 January 2015 by John Kane-Berman There's no disguising SA's youth unemployment problem [http://www.bdive.co.za/opinion/columnists/2015/01/26/theres-no-disguising-sas-youth-unemployment-problem \[accessed 27/05/2015\]](http://www.bdive.co.za/opinion/columnists/2015/01/26/theres-no-disguising-sas-youth-unemployment-problem [accessed 27/05/2015].).

⁷ See N Nkosi 'I Sell Sex for Nyaope: Nyaope Crisis Save Our Nation' *Sowetan* (2015-02-15) 8, where a girl aged 17 and had been smoking Nyaope since the age of 13 explains that she abuses Nyaope to relieve stress. Her report is just a tip of an iceberg to statistics of youth in a similar situation.

The South African legislature amended the Drugs and Drug Trafficking Act by inserting Nyaope “ingredients”⁸ into Schedules I and II of the Act. The intention behind this move was ostensibly to facilitate the prosecution of Nyaope related offences such as possession and abuse. Advocate Mthunzi Mhaga of the Department of Justice and Constitutional Development South Africa, confirmed that the department’s⁹ aim in amending the South African Drugs and Drug Trafficking Act was to expand its applicability. He clarified further that in so doing South Africa would be on par with advanced jurisdictions such as *America* where the designer drug¹⁰ issue is a substantial social challenge. In order to expand the reach of the Drugs and Drug Trafficking Act the legislature saw fit to amend the Act using two different approaches. The first approach saw previously unlisted drugs that contained as an ingredient a previously listed substance or substances included in Schedule II. The second approach saw drugs included which mimic the “pharmacodynamics properties—that is biochemical and physiological effects on a person, similar to the listed substances.”¹¹ This approach practically, meant that “[a]ny substance *similar* to the listed substances in Schedule II would therefore be included in the [amendments on] Schedule[s] I and II, based on [their] similarit[ies] in chemical composition as well as the[ir]effect[s] on the [mental health] of a person.”¹² In addition to these mimicking substances, “specific new substances will also be included in Schedule II to the Drugs and Drug trafficking Act.”¹³ Resultantly, the amendment prohibit possession and dealing in *any mixture* that contains chemical substances that have the same effect as the prohibited and illegal substances.¹⁴

⁸ See above n 5.

⁹ South African Department of Justice The Law to be amended to criminalise ‘Nyaope’ http://www.justice.gov.za/m_statements/2013/20130227_nyaope.html [accessed 28 May 2015].

¹⁰ These are designed concoctions or mixtures of prohibited drugs. See Teale P 2011; 71–88.

¹¹ See above n.09.

¹² See above n.09.

¹³ See above n.09.

¹⁴ See above n.09.

The eventual amendment was not without public backlash. Collins and Skeleton,¹⁵ amongst others, documented concerns,¹⁶ regarding the proposed amendments to the Drugs and Drug trafficking Act, especially, focusing on sentencing of perpetrators. They then raised a concern that the proposed amendments were seeking to address a health issue through legal means—an approach viewed as challenged in this article and therefore seeking a speedy solution.

In reaction to public concerns, the DOJ&CD, concomitant with the view that Nyaope addicts are criminals that unsettle the fabric of society, confirmed their intention of amending the Act and eventually “effected amendments to schedules I and II of the Drugs and Drug Trafficking Act, 1992” in order to “...address the escalating use of new narcotic substances, such as Nyaope, which are increasingly destroying the lives of young people.” The DOJ&CD confirmed that “Contrary to the misperception that Nyaope cannot be prosecuted; the new amendment will ensure that the criminal justice system is enabled to prosecute the use and possession of drugs [-Nyaope amongst others].”¹⁷

From the above discussion, it is evident that Nyaope now forms part of the group of illegal substances listed in the schedules to the Drugs and Drug Trafficking Act. The result of this inclusion is that courts are bound to apply Sections 3–7 and 17 of the said Act when trying a Nyaope addict who sells Nyaope for maintaining addiction. In addition the court will be bound to apply Section 51 of the Minimum Sentences Act when sentencing a Nyaope addict where applicable in each particular case. Where the addict is convicted of trafficking in Nyaope he or she faces between 5 years imprisonment and 25 years imprisonment depending on the satisfaction of the substantial and compelling circumstances requirement of the Minimum Sentences Act.

It is averred that the amendment as synoptically traversed above has cast the net too wide insofar as Nyaope is concerned. The remainder of this submission explores the negative consequences of the amendment insofar as sentencing is concerned. It uses the American experience to expose the challenges of attempting to leg-

¹⁵ F. Collins and D Skeleton Nyaope classification revives drug sentencing debate, <http://www.bdlive.co.za/national/health/2014/04/07/nyaope-classification-revives-drug-sentencing-debate> [accessed 28 May 2015].

¹⁶ South African Department of Justice The *End for Nyaope!* <http://www.justice.gov.za/docs/articles/201405-Nyaope.pdf> [accessed 27/May/2015].

¹⁷ *ibid.*

islate all drugs and drug users in a *one-size-fits* all approach to sentencing. The submission further uses the Canadian experience to suggest an alternative approach to South Africa's blight of high drug use in order to mitigate the current approach in South African courts.

III THE AMERICAN APPROACH TO SENTENCING DRUG ADDICTS AND DRUG TRAFFICKERS: A DEVELOPMENTAL OVERVIEW

The American approach to sentencing has evolved in two phases over time. The first phase was where courts depended on grids as thresholds within which to sentence drug related offenders. Due to challenges with this system courts jurisprudence influenced the move to greater sentencing discretion.

3.1 *The Grid Approach to Sentencing: An Overview of the Previous Position*

Previously American courts relied on a so-called grid system to sentence drug infringements, such as for example, the use and dealing in crack cocaine. As is the case with most standardised practices in a due process system of law, the use of grids to sentence drug offenders was severely criticised on the grounds that it overturned judicial discretion.¹⁸ In addition to the bench, the sentencing guidelines were criticised by almost all cadres of the legal profession, who expressed "extraordinary degree of hostility"¹⁹ Judges went to the extent of complaining that, they found the guidelines excessively ridged and focused on "points" and not people.²⁰

The system at that point was premised on sentencing guidelines and not the use of judicial discretion. According to the then guide-

¹⁸ See V. L. Broderick, 'The Importance of Flexibility in Sentencing' (1995)78 (4) *Journal of American Judicature* 182 and consider M. Miller, 'Rehabilitating the federal sentencing guidelines by drawing on seven years of experience and data, the recommendations of scholars, and the advice of judges, the U.S. Sentencing Commission can create a better and more widely respected system.' (1995)78 (4) *Journal of American Judicature Society* 180. As well read As well read Charles J. Ogletree, Jr. *The Death of Discretion? Reflections on the Federal Sentencing Guidelines* *Harvard Law Review* Vol. 101, No. 8 (Jun., 1988), pp. 1938–1960, who reckons that the guidelines overlook several sentencing problems and instead proposes possible sentencing reforms from a jurisprudence based on judicial discretion.

¹⁹ *Ibid.*

²⁰ *ibid.*

lines, sentencing courts were to impose a sentence sufficient, but not greater than necessary. This meant that courts had to first take account of the nature and circumstances of the offence and secondly, the history and characteristics of the defendant. Thirdly, the sentencing court was required to consider available sentencing ranges within which they were confined.

The nature and circumstances of the offence concept recognised the need for the sentence to reflect the seriousness of the offence; to promote respect for the law, to provide just punishment for the offence; to afford adequate deterrence to criminal conduct; to protect the public from further crimes of the defendant; and to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. The history and characteristics of the defendant concept, on the other hand consisted generally of the previous convictions of the offender, their severity and rate of repetition and the way the offender carried him or herself before court—in other words the entire framework on this point was little more than evaluation of character and demeanor. The third leg of the then approach consisted of a consideration of available sentencing ranges within which the courts were encouraged to sentence—i.e. the courts were to sacrifice their discretionary flexibility,²¹ in favor of sentencing within the legislatively prescribed ranges.

Based on the above and in general, unless otherwise provided for, courts imposed sentences of the kind, and within the range, referred to in the regulations.²² The courts were permitted to deviate only if they found a sentencing factor, whether aggravating or mitigating, that was not considered by the United States Sentencing Commission (Commission) when it drafted the sentencing guidelines, which warranted deviation from the prescribed sentencing ranges. In determining whether a particular circumstance was adequately taken into consideration, courts considered only the sentencing guidelines. In the absence of an applicable sentencing guideline, they imposed appropriate sentences, satisfying requirements in the regulations,²³ policy statements, and official commentary of the Commission, together with any amendments thereto by an Act of Congress.²⁴

²¹ The United States Code s 994(a)(1) of title 28.

²² The United States Code s 994(a)(4).

²³ The United States Code s994 (a)(2).

²⁴ *ibid.*

In relation to cases of an offence other than a petty offence, in the absence of an applicable sentencing guideline, courts considered sentencing on the basis of analogous sentences prescribed by guidelines as had applied in similar offences on like offenders, and to applicable policy statements of the Sentencing Commission, together with any amendments of specific regulations such as guidelines or policy statements by an Act of Congress. Specific regulations however, applied when sentencing a defendant convicted of certain offences such as offences involving minor victims.²⁵ In these cases courts imposed a kind of sentence within a specific range,²⁶ except where a particular criterion existed to deviate.²⁷

At the time of sentencing courts were obliged to state in open court the reasons for the imposition of particular sentences. Where the sentence was of the kind, and within the range, described in the regulations²⁸ and that range exceeded 24 months, courts were obliged to give reasons for imposing a particular sentence within that range. If the chosen sentence was not of the kind, or was outside of the range, described in subsection (a)(4), the court was required to give, specific reason for imposing a sentence different from that provided. Such a reason or reasons was to be stated with specificity in the written order of judgment and commitment, except to the extent that the court relied upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32. In the event that the court relied upon statements received in camera in accordance with Federal Rule of Criminal Procedure 32 the court was required to stipulate that such statements were so received and that it relied upon the content of such statements.

Any measure that the court chose to employ ought to have been without prejudice to the sentencing process hence why courts upon motion by the defendant or the Government, or on their own motion, could in their discretion employ any additional procedures that they concluded would not unduly complicate or prolong the sentencing process. Courts however had limited authority to impose a sentence below a statutory minimum.

²⁵ Under section 1201; an offence under section 1591, or an offence under chapter 71, 109A, 110, or 117.

²⁶ The United States Code s 994(a)(4).

²⁷ *ibid.*

²⁸ *ibid.*

Where courts did not order restitution, or order partial restitution, they had to include in their statements reasons for such decision.²⁹ Courts were mandated to provide a transcription or other appropriate public record of the courts statements of reasons, together with orders of judgment and commitment to the probation system and the Commission.³⁰ If a sentence included a term of imprisonment they had to submit their reports to the Bureau of Prisons.³¹ Before taking a decision to impose an order of notice, courts were obliged to follow strict *pre-sentence* procedure for “an order of notice.”³² In accordance with Section 3555 courts were bound to give notice about their intention to the defendant and the Government.

Upon motion of the Government, the sentencing court had the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant’s substantial assistance in the investigation or prosecution of another person who had committed an offence. Such sentence was imposed in accordance with the guidelines and policy statements issued by the Commission pursuant to Section 994 of title 28, United States Code.

The applicability of statutory minimum sentence was limited to certain cases. It did not apply in certain categories of the offences described by the law. Despite any other provision of law, in some cases to certain offences³³ courts had no discretion but to impose a sentence pursuant to guidelines promulgated by the Commission under Section 994 of title 28³⁴ without regard to any statutory minimum sentence.

However, this limitation could be averted in exceptional cases such as where courts found at sentencing, factors relevant to the personal circumstances such as the criminal history³⁵ of the accused and the extent of participation³⁶ of the accused, as was previously discussed.

²⁹ Sentencing guidelines read with the Controlled Substances Act.

³⁰ *Ibid.*

³¹ *Ibid.*

³² *Ibid.*

³³ Under Controlled Substances Act (21 U.S.C. 841, 844, 846) 401, 404, or 406 and Controlled Substances Import and Export Act (21 U.S.C. 960, 963) section 1010 or 1013.

³⁴ The sentencing guidelines section 994 of title 28.

³⁵ As provided in the sentencing guidelines read with the Controlled Substances Act.

³⁶ Controlled Substances Act sec 408.

The American approach to sentencing drug addicts and traffickers, based on the above discussed previous position, caused much consternation at all levels of the justice system. This is discussed below in the context of the introduction of a sentencing discretion for these types of offences in the United States of America.

3.2 *The American Debates on the Introduction of Sentencing Discretion for Drug Trafficking Cases*

Hereunder the researcher using crack-cocaine as an object of debate to demonstrate the difficulty of determining an effective sentence for those addicted to dependence producing substances when sentencing discretion is restricted.

The sentencing jurisprudence on crack cocaine cases in the United States of America was previously characterised by two approaches. While there was an inclination to stick to the guidelines and jury contribution to sentencing (as discussed in 3.1 above) there was also a move towards discretionary sentencing. The case that led the evolution of sentencing in respect of minor “drug trafficking” offences is the decision in *United States v Booker*.³⁷

This case came after five years since the decision in *Apprendi v New Jersey*.³⁸ In *Apprendi*, the defendant was convicted of possession of a firearm for an unlawful purpose. The judge found, in addition, that the crime was committed with the intent of intimidating an African American family based solely on their race, and thus applied the state hate crime sentence enhancement. Whereas the defendant would have faced 5 to 10 years based on the weapons offence, the judge imposed a sentence of 12 years as a result of the sentencing enhancement for the racial motivation of the crime.

The U.S. Supreme Court reversed *Apprendi's* sentence while it held that “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”³⁹ Failing to meet this standard was a violation of the protections of the Sixth Amendment of the United States Constitu-

³⁷ *United States v. Booker*, 543 US 220 (2005) Hereinafter referred to as Booker. See, as well, RS King and M Mauer *Sentencing with Discretion: Crack Cocaine Sentencing After Booker* January 2006. <http://www.sentencingproject.org/Admin/Documents/Publications>. [date accessed 2/February/2014].

³⁸ *Apprendi v New Jersey* 530 U.S. 466(2000).

³⁹ *ibid.*

tion. Whereas the jury had convicted *Apprendi* for the weapons offence, it was the judge, based on testimony heard during a later hearing, who decided to apply the hate crime enhancement. The trial judge's finding of a racial motivation to the crime by a preponderance of the evidence violated the defendant's Sixth Amendment protection to have evidence impacting on sentence proven beyond a reasonable doubt. The outcome of this decision greatly altered the landscape by which criminal sentences were crafted. The requirement that all sentence enhancements be proven beyond a reasonable doubt would reverberate through future sentencing jurisprudence. *Apprendi* continued a thread of case law that had emerged in the cases of *Jones v United States*⁴⁰ and *Almendarez-Torres v United States*.⁴¹ The central question was what factors and circumstances of the offence and the offender could be considered in the determination of a sentence and what was the appropriate burden of proof. Forth flowing from the above inquiries the role of the judge and the jury in sentencing deliberations arose as a central focus for cases that followed.

Two years later, from the time of *Apprendi* decision, the Supreme Court extended the Sixth Amendment protections carved out in *Apprendi* to cases in which the defendants faced capital punishment.⁴² In 2004, the Supreme Court continued to expand the reach of *Apprendi* in the case of *Blakely*.

In *Blakely*, the defendant faced a "standard range" of 49 to 53 months for kidnapping, but the judge added an additional 37 months to the sentence. In *Blakely* the court struck down a provision of the Washington State sentencing guidelines system as unconstitutional because it permitted a judge, when deciding whether to enhance a sentence above the guideline range, to consider factors that had not been proven beyond a reasonable doubt in front of a jury. The ruling in *Booker* confirmed that the holding in *Blakely* was applicable to the Federal Guidelines. In the remedial opinion, the court severed two provisions from the Sentencing Reform Act,⁴³ while keeping intact the rest of the Guidelines system. However, in doing so, the Guidelines, formerly mandatory, were rendered advisory. "This dramatically changed the sentencing landscape and raised

⁴⁰ *Jones v United States* 526 U.S. 227,230 (1999).

⁴¹ *Almendarez-Torres v United States* 523 U.S. 224 (1998).

⁴² For example, *Ring v. Arizona* 536 U.S. 584 (2002).

⁴³ Of the Comprehensive Crime Control Act of 1984.

one of the federal system's most contentious characteristics to centre-stage."⁴⁴

In light of this decision, *Booker* tested the constitutionality of sentencing procedures in the federal court system. Prior to *Booker*, federal sentencing procedures subject to the legislation adopted by Congress in 1986 and 1988, had a penalty structure for crack cocaine which was far harsher than penalty structure for powder cocaine. Under the federal guidelines, a conviction for the sale of 500 grams of powder cocaine resulted in a 5-year mandatory minimum sentence, while the same penalty was triggered for sale or *possession* of only 5 grams of crack cocaine. Thus, the federal sentencing system applied a 100-to-1-quantity disparity when dealing with crack and powder cocaine, which are in essence same drug. This disparity had devastating consequences for various sectors of society, but was particularly evident in the African American community and resulted in severe sentences that many identified as unjust.⁴⁵

In the 20 years since the passage of this legislation, there were numerous calls for reform from advocates, policymakers and the Commission, but the 100-to-1 sentencing disparity between powder and crack cocaine *still remained controlling law*.⁴⁶

In *Booker*, the court's decision permitted judges to exercise greater discretion only in two types of cases. The first were cases where a mandatory sentence did not apply and where courts considered enhancements beyond the baseline sentence. This category encompassed a vast majority of cases where a mandatory sentence does apply. However, Federal judges continued to impose stiff prison sentences despite deviations from the guidelines. While these represented a very modest proportion of crack cocaine sentences, the exact position remains unclear because in the vast majority of sentencing cases in these courts no written decisions are given. What can be discerned from analyses of the work of these courts is that similar dynamics applied to significant numbers of additional crack cocaine

⁴⁴ <http://www.sentencingproject.org/Admin/Documents/Publications>. [date accessed 2/February/2014].

⁴⁵ *ibid.*

⁴⁶ See above n. 44 and read Frank O. Bowman, III *The Failure of the Federal Sentencing Guidelines: A Structural Analysis* *Columbia Law Review* Vol. 105, No. 4 (May, 2005), pp. 1315-1350, who discusses the problems brought to bear by the sentencing guidelines by drawing on examples from a stretched period of time within which the guidelines applied.

cases. As a trend, most of the crack cocaine defendants received substantial prison terms, averaging nearly 11 years.

This implied an obvious indication of resistance and the difficulty courts experienced in moving from inflexible limitations on their discretion. Judicial consideration of sentencing factors then required by the Supreme Court's *Booker* decision resulted in sentences below the Guideline range. Using *Booker* Federal judges employed permitted discretion in assessing individual case characteristics and, in selected cases, they used *Booker* to calibrate sentences that more appropriately met the statutory goals of sentencing, including first the relative weight of guideline, secondly, goals of sentencing and thirdly, individual circumstances.⁴⁷ With the granted court abilities, the *Booker* impact on crack cocaine sentencing proved significant. As a result, a volume of cases that were decided in line with its finding increased, even though there were some challenges in determining exact statistics due to the pervasiveness of mandatory minimum sentences.⁴⁸ The emergence of *Booker* and the cases that followed it marked the change in the rationale of sentencing in the sense that the inflexibilities imposed by legislating judicial discretion were addressed to form a better sentencing system. It was obvious, as King and Mauer⁴⁹ exposed, that *post-Booker* jurisprudence proved that, the adoption of mandatory provisions such as sentencing guidelines was unnecessary. What is clear in this stance is that when "...judges are given flexibility to consider the full merits of each case, they are likely to impose stiff penalties for serious offences but will still have ability to [differentiate] these from cases in which the defendant is less culpable or less of a threat to public safety [, like it has to be in Crack Cocaine Penalty Structure.]"⁵⁰ A few years after *Booker* a change in sentiment occurred and courts turned again to strictly adhering to the sentencing guidelines. In the *United States of America v Mario Claiborne*,⁵¹ a Federal court matter, *Claiborne* pleaded guilty to two counts of possessing and distributing cocaine in violation of 21 U.S.C. §§ 841(a)(1) and 844(a). He was convicted of possession of 5.03 grams of crack cocaine and was subject to a five-year mandatory

⁴⁷ *ibid.*

⁴⁸ In fiscal year 2003, federal courts sentenced 5,462 persons for crack cocaine offences. Three-fourths of this group were sentenced to mandatory prison terms of either five years '(28.9% or ten years (47.5%).' See, above n 46.

⁴⁹ See, above n 44.

⁵⁰ See, above n 44.

⁵¹ *United States of America v Mario Claiborne* 439 F. 3d 479(2006).

minimum sentence for the offence. However, in the light of *Clairborne's* lack of a criminal history and the absence of violence associated with his offence, the district judge applied a safety-valve exception from the Mandatory minimum and imposed a sentence of 15 months. The Government appealed arguing that 15 months is an unreasonable downward variance from the guiding range. The Government challenged the sentence reached on the basis of the reasoning in *Booker*; the plaintiff insisted that the application of the regulations would reach a reasonable decision. Differently to the *Booker* decision, the Government was against the trial court on the basis that it passed a sentence lesser than prescribed in the regulations. The United States Court of Appeal for the Eighth Circuit held in favour of the Government. Similarly, the decision in *Apprendi-Ring-Blakely*, which was challenged by *Booker*,⁵² was followed in January 2007. On 22 January 2007, the United States Supreme Court dealt with *Cunningham v California*⁵³ another example in a line of jurisprudence extending back to the 2000 ruling in *Apprendi*. In this case United States Supreme Court struck down California's Determine Sentencing Law (DSL) system. This court, ruled that a sentence cannot be increased based on aggravating factors that have not been proven beyond reasonable doubt before a jury. California's DSL is couched along *Booker* federal sentencing precedent. California's DSL prescribed upper term sentences to be imposed in cases with aggravating circumstances excluding cases pertaining to crimes with elements requiring jury determination or where accused tendered a plea of guilt. This is due to the fact that procedurally, the judge is tasked to determine the aggravating circumstances. Applying *Blakely*, this circumstance would therefore relate to the middle term prescribed in California's statutes as the relevant statutory maximum, and not the upper term. As *Apprendi's* interpretation relates, statutory maximum is the maximum sentence a court may impose basing itself on the basis of the facts reflected in the jury verdict or admitted by the defendant. Based on the principle laid in *Apprendi's case*, namely that, "unless in the cases where there are previous convictions, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and be proved beyond a reasonable doubt."⁵⁴ the DSL read with *Booker* task the finding of aggravating circumstances to the judge and not to the jury. In this

⁵² *United States v. Booker*, 543 US 220 (2005).

⁵³ *Cunningham v California*, 549 U.S. 270 (2007).

⁵⁴ *Apprendi v New Jersey* 530 U.S. 466(2000).

way, the finding of aggravating circumstances would be on the balance of probabilities and not beyond a reasonable doubt as it would be if the jury was engaged.⁵⁵ This in effect changed the principle laid in *Apprendi*. The case of *People v Black*⁵⁶ added another change on *Apprendi*'s rules, while appreciating that prima facie there is clash between the California's system and the *Apprendi* rule. It also reinterpreted this rule in that it took it to be excepting only cases with previous convictions. While doing so it exonerated the DSL from examination. In effect, the DSL "simply authorise[s] a sentencing court to engage in the type of fact-finding that traditionally had been incident to the judge's selection of an appropriate sentence within a statutorily prescribed sentencing range,"⁵⁷ as concluded, in *Black*. Hence forth, "the upper term [was] the statutory maximum" and a trial court's imposition of an upper term sentence [did] not violate a defendant's right to a jury trial under the principles set forth in *Apprendi*, *Blakely* and *Booker*. In essence the rationale in the *Black judgement* is to afford the sentencing judge the discretion to decide while considering rules and statutes, whether the facts of the case and the history of the defendant justify the higher sentence, and not to diminish the traditional power of the jury. Having traversed the American sentencing perspective on sentencing the part hereunder considers the South African general approach to sentencing before examining sentencing in terms of drug offences specifically.

IV THE RATIONALE FOR SENTENCING IN SOUTH AFRICA

The rationale of South African law sentencing procedure is to maintain a just and fair punishment. This procedure therefore, prohibits unfair sentencing practices and prefers punishment that deters with a degree of mercy. Ultimately, the goal is to rehabilitate offenders and not condemn them. In order to attain the envisaged fair and balanced sentencing it is important that sentences are metered out with consistency. In particular, the criminal justice system prefers this approach because it maintains the dignity of courts.⁵⁸

⁵⁵ *ibid.*

⁵⁶ *People v Black* 161 P.3d 1130 (2007), hereinafter *Black*.

⁵⁷ *ibid.*

⁵⁸ S.S. Terblanche, *The Guide to Sentencing in South Africa* 2nd edn (Butterworths: Durban, 2007)151.

In line with a due process approach, sentencing courts consider constitutional provisions as paramount.⁵⁹ Homage to constitutional principles demonstrates respect for the supremacy of the law emanating from the basic good or the *grundnorm*. The Constitution of the Republic of South Africa, 1996⁶⁰ regulates the power of state to sentence or punish offenders and defines the extent and limits of the exercise of such power by courts.⁶¹ In South Africa all laws and practices have to abide by the provisions of the written Constitution. In this regard, Section 2 of the Constitution states, the Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.

Most importantly, the Constitution has the Bill of Rights in Chapter 2. Section 12(1)(e) is pertinent to sentencing. It entitles everyone to the right to freedom and security, which includes the right not to be treated or punished in a cruel, inhuman or degrading manner. Relevant to this right are other basic rights including the right to life, to dignity and to equality before the law.⁶² The umbrella provision of the Constitution pertaining to criminal trials is the right to a fair trial. Fairness in this case relates to procedural fairness, which implies that at the minimum there should be compliance with the rules of natural justice. Natural justice encompasses the principles of *audi alteram partem* and *nemo iudex in propria causa sua*. It establishes a general duty to act fairly, in a procedural sense, in accordance with the rule of law in South Africa where individual rights are affected.⁶³ As Terblanche observed, “the exact meaning of ‘a fair trial’ is not fixed, the test of what is fair and what is not depends on all the circumstances of every case, and is determined objectively.”⁶⁴

⁵⁹ This is the means to satisfy fair trial demands in section 35 of the Constitution read with section 12 of the Constitution.

⁶⁰ Hereinafter the Constitution.

⁶¹ *D. Van Zyl* ‘Sentencing and Punishment’ in Chaskalson A, Kentridge J, Klaaren J, Marcus G, Spitz D and Woolman S (eds) *Constitutional Law of South Africa* (Juta: South Africa 1999) vol 2 28-1.

⁶² *State v Makwanyane*, 1995 (6) BCLR 665 (CC) 302. Also see section 35(1) of the Constitution.

⁶³ L.M. Du Plessis and H. Corder, *Understanding South Africa’s Transitional Bill of Rights* (Juta: South Africa, 1994) 169.

⁶⁴ See Terblanche above n.58 at 3. Also see *Shabalala v Attorney General of Transvaal* 1995 (2) SACR 761 (CC) para 51.

4.1 *South African Sentencing Law: A Synoptic Overview*

The South African courts utilise a myriad of principles concerning sentencing and these are found in common law, statutes, case law and academic writings. These principles are interpreted in the context of relevant South African Constitution provisions. In particular, Section 12(1) and Section 35. These sections have to be read with the limitation clause in Section 36. In pursuit of a balanced fair and just sentence presiding officers in South African courts consider standard principles of sentencing. This approach mandates consideration of factors of punishment as stipulated in *Zinn*⁶⁵ and *Rabie*.⁶⁶

Generally, specific sentencing principles emanate from judicial interpretation of relevant provisions. This interpretation is basically the discretion by the judicial officer having considered the evidence tabled before court.⁶⁷ As Terblanche postulates,

Imposing sentence is an action, because it requires the court to purposefully work at finding the most appropriate sentence, and ensure that the sentence is imposed clearly and unambiguously, and will be executed, to the extent which this is legally within the courts powers. Sentencing should also be preceded by an active determination of all facts and factors which may have a bearing on what the most appropriate sentence will be.⁶⁸

In *Sv Toms* and *S v Bruce*⁶⁹ Smalberger JA emphasised the importance of judicial discretion in sentencing. In consonance with Smalberger's view, Terblanche justifies discretion in that it helps the sentencing court to individualise the accused before court.⁷⁰ In this way, "[t]he court has to exercise its sentence discretion to choose the most appropriate sentence from the possible alternatives. The exercise of the sentence discretion does not take place in a vacuum. As a guide to its exercise, South African law on sentencing has developed a number of general principles which should be applied in every case."⁷¹ These guiding principles to this effect mandated that sen-

⁶⁵ *S v Zinn* 1969 2 SA 537.

⁶⁶ *S v Rabie* 1975 (4) SA 855 (A).

⁶⁷ There are two scenarios to this position; through evidence lead during trial (fairness) and through execution of section 112(3) of the CPA.

⁶⁸ See Terblanche above n.58 at 3.

⁶⁹ *S v Toms* and *S v Bruce* 1990 2 SA 802 (A) 806H-I.

⁷⁰ See Terblanche above n.58 at 150.

⁷¹ See Terblanche above n.58 at 153.

tencing courts impose appropriate sentences on the basis of all circumstances of each particular case.

The sentence should be neither too light nor too severe. The sentence imposed should be a reflection of the severity of crime while giving consideration to mitigating and aggravating factors surrounding the person who has offended. Put differently "...the sentence should reflect the blameworthiness of the offender, or be in proportion to what is deserved by the offender."⁷² Aware of the mentioned nature of sentence, courts are guided by their observance of two main factors in sentencing, the crime and the offender as per the triad in *Zinn*.⁷³ Following these two main factors is a consideration of society in whose interests the courts have to be seen to be acting by deterring the would be criminals; preventing the repetition of such criminal behaviours in future while mitigating for rehabilitation of the offender as well as avenging the aggrieved through a retributive punishment.

Terblanche⁷⁴ has categorised and therefore prioritised these secondary factors, where he sees deterrence as the "most important of the purposes of punishment,"⁷⁵ because it has a dual effect, namely, to "deter the offender from reoffending, and to deter the other would-be offenders."⁷⁶ He considers rehabilitation an unimportant factor and therefore optional in the sense that courts ought to consider it when dealing with less serious crimes as opposed to cases of *very serious crime*, where long terms of imprisonments are appropriate. This submission argues that these instances include those where legislation prescribes heavy sentences such as in case of the so-called Minimum Sentences Act and the Drugs and Drug Trafficking Act.

By Terblanche's reasoning prevention, although a factor for consideration in sentencing, plays a separate purpose for punishment and is rarely discussed. Regarding retribution, the courts would be led by the sense of society's abhorrence with particular crime and its value in sentencing depends on the facts of the case and "Thus, if the

⁷² *ibid.*

⁷³ In *S v Zinn* 1969 2 SA 537 Rumpff J A held the triad of crime to be consisting of three factors, the offender, the interests of society, and the credibility of the presiding officer.

⁷⁴ See Terblanche above n.58 at 151.

⁷⁵ *ibid.*

⁷⁶ *ibid.*

crime is viewed by society with abhorrence, the sentence should also reflect this abhorrence.”⁷⁷

As inferred above, retribution avenges and therefore it relates to the requirement that the punishment should fit the crime, or that there should be a proportional relationship between the punishment and the crime. In mitigating for rehabilitation, the court would apply mercy which is “contained within a balanced and humane approach when considering the appropriate punishment. This appropriate punishment is not reduced in order to provide for mercy. There is [therefore] no room for a vindictive and vengeful attitude from the sentencing officer.”⁷⁸

As Terblanche underscores only a small number of factors play a major role in sentencing, namely, “the seriousness of the crime, whether the offender is a young or first offender, and (in isolated instances) whether the offender acted with limited criminal responsibility.”⁷⁹ By adhering to these principles, the court is expected to pass a “proper” sentence while giving full reasons for its *conviction*, which forms the basis of the sentence it ultimately passes.⁸⁰ What exactly constitutes a “proper sentence” varies from case to case and probably from jurisdiction to jurisdiction.⁸¹ The court, however, ought to consider the crime, the criminal and the interests of society to find the sentence, which objectively best balances these elements with retribution, deterrence, rehabilitation and incapacitation.

This delicate balance requires flexibility which is ordinarily available through judicial discretion at sentencing. Hence it is trite to argue that, public policy demands be satisfied because they are the basis of the general criminal justice perspective which influences the South African perspective of humane approach in sentencing. This means that in sentencing, constitutional demands are paramount. It is therefore apparent that sentencing within constitutional demands requires flexibility on the side of the sentencing officer and does not survive in compartmentalised and restricted environments. With these well set principles, any attempt by the legislature to thwart or

⁷⁷ *ibid.*

⁷⁸ See Terblanche above n.58 at 153–154.

⁷⁹ See Terblanche above n.58 at 150.

⁸⁰ See section 146 (a) of the Criminal Procedure Act 51 of 1977; *S v Immelm* 1978(3) SA 726(A) 729 B; *R v Van der Walt* 1952 (4) SA 382(A) 383 D; *R v Henbsch* 1953 (2) SA; *S v Masuku*. 1985 (3) SA 908 (A) 912 F.

⁸¹ Jurisdiction of a court determines the extent and nature of the sentences which it may impose.

limit the required flexibility of judicial discretion would limit the courts ability to execute its constitutional mandate to ensure the sentences it delivers are fair and balanced. It is submitted that this position is especially evident in the current statutorily inferred sentencing of drug traffickers who also abuse Nyaope in terms of the anti-trafficking law.

4.2 *Interpreting the South African Anti-drug Trafficking Law: The So-Called Minimum Sentences Act read with the Drugs and Drug Trafficking Act*

Contrary to the long standing sentencing principles canvassed above, it is apparent that judicial discretion has been restricted by the legislature in some instances. For example, in 1997 at the behest of replacing the death sentence, parliament passed the Criminal Law Amendment Act 105 of 1997.⁸² This legislation sought to change the sentencing regime of South Africa with its prescribed minimum sentences for certain crimes which the legislature considered serious enough to warrant imprisonment for certain prescribed periods of time.⁸³ According to the Act, unless the accused satisfies the sentencing court that a minimum sentence should not apply by proving substantial and compelling circumstances, the court cannot justify the imposition of a lesser sentence.⁸⁴ It is however trite to submit that the demand to prove substantial and compelling circumstances is ironical because it is borne of evidentiary burden and not of clear and direct onus on the accused or the prosecution. In these circumstances the determination of substantial and compelling circumstances remains solely the discretion of the court, even though its hands remain tied by the requirement of the Minimum Sentences Act.

The effect of this requirement is that sentences, for some crimes, must be passed under the legislated guidance for certain serious offences unless the court can provide reasons for slight deviation from the prescribed sentence. In this way the Minimum Sentences Act limits the courts discretion in sentencing the perpetrators of serious crimes. This results; it is submitted, in some situations at least, to imbalanced sentences which have no regard for specific circumstances of particular cases before courts. For the purposes of this submission,

⁸² See _____, *Sentencing in South Africa, Conference Report 1* (Open Society Foundation for South Africa, 2006)28.

⁸³ Above n.58.

⁸⁴ *Ibid.*

for example, offences in terms of Schedules I and II of the Drugs and Drug Trafficking Act. The Drugs and Drug Trafficking Act when read with the Act on Minimum Sentences has the effect of imprisoning a Nyaope user and trafficker to a sentence of direct imprisonment between 15 and 25 years. In effect the Acts read together create a sentencing grid for Nyaope users and traffickers which does not provide any scope for the court to consider the impact of addiction on the eventual trafficking. In addition these Acts permit courts to sentence to imprisonment those with serious health concern, as opposed to offering an alternative.

The sentencing grid would be applicable to the possessor and trafficker of dangerous drugs in contravention of Sections 4(b) and 5(b) of the Drugs and Drug Trafficking Act. In this regard the abusers and addicts who are also dealing in drugs will find themselves in dragnet.

V SENTENCING UNDER THE SOUTH AFRICAN ANTI-DRUG TRAFFICKING LAWS

The sentencing clauses found in Sections 3, 4, 5, and 17 of the Drugs and Drug Trafficking Act⁸⁵ read with Section 51 of the Minimum Sentences Act⁸⁶ prescribe mandatory sentences of imprisonment for all drug traffickers, depending on the gravity of offender's involvement... These periods range from at least a minimum period of 5 years imprisonment to a maximum of 25 years imprisonment. The Minimum Sentences Act prescribes imprisonment sentences for persons convicted of possession of drugs referred to in the Schedules I and II of Drugs and Drug trafficking Act.

As these provisions do not differentiate addicts from pure offenders, they pose a problem for purposes of sentencing addicted drug traffickers. In terms of the Minimum Sentences Act, Schedule II offences are subjected to very harsh qualifications.⁸⁷ For example, Section 51(3)(a) requires that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than any sentence prescribed. In this way the Act maintains the strict application of the requirement of imprisonment for a certain period of time.

⁸⁵ The South African Drugs and Drug Trafficking Act no 140 of 1992.

⁸⁶ The South African Criminal Law Amendment Act 105 of 1997(the Minimum Sentences Act).

⁸⁷ *S v Legoa* 2003 (1) SACR 13 (SCA) para 13.

*S v Dzukuda & Others*⁸⁸ and *S v Malgas*⁸⁹ shed some light on what constitutes substantial and compelling circumstances. In terms of the dictum in these cases Section 51 extends to limiting judicial discretion as far as specific crimes are concerned. Thus for the exercise of limited discretion there should not be “weighty justification” for the imposition of prescribed sentences and, in addition, there ought to be “truly convincing” reasons why the courts would respond differently where a statutorily listed crime which elicits a severe, standardised and consistent response from the courts. Such reasons ought not to be based on light and or flimsy motives.

Regardless of the legislature’s appreciation that court may invoke lesser sentences in certain instances, by making imprisonment the only option for the scheduled offences, Section 51(5)) prohibits a court imposing a sentence in terms of Section 51 from invoking its general powers of suspension of part of a sentence in terms of the Criminal Procedure Act 51 of 1977. Because under these requirements, the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, rather than a considerate reflection on mitigating circumstances, a shift has occurred in which personal circumstances are given lesser consideration. It is submitted that in the light of the fact that there is no legislation specifically concerned with drug traffickers who abuse drugs, the fact that an abuser stands charged in terms of Schedules I and II offence, mitigates against his personal circumstances. Thus the fact that he has health-related issues would not fit the composite yardstick of substantial and compelling circumstances.

The sentencing of Nyaope sellers and abusers in terms of these provisions render absurd the positive attempts concerning the eradication of drug trafficking crimes. The introduction of the Minimum Sentences Act marked a radical change in the South African sentencing regime. It was hailed in some quarters as a milestone towards eradicating inconsistency and unfairness in the sentencing system, where similar crimes were perpetrated. Its introduction however brought up disfavour amongst the judiciary where courts in some cases⁹⁰ considered it a legislative encroachment on discretionary powers.⁹¹ The question whether Section 51 is constitutionally valid

⁸⁸ *S v Dzukuda; S v Thilo* 2000 2 SACR 443(CC).

⁸⁹ *S v Malgas* 2001 (2) SA 1222 (SCA).

⁹⁰ *Prince and another v State* 2003 (4) All SA (SCA) 51.

⁹¹ *S v Dodo* 2001 (3) SA 382 (CC).

was raised in the Constitutional Court in *State v Dodo*, in April 2001. The Constitutional Court declined to confirm an order of invalidity made in the High Court. That court had held, inter alia, that the section constituted an invasion of the domain of the judiciary by the legislature, in breach of the constitutional separation of powers embedded in the Constitution. The Constitutional Court disagreed, holding that the Constitution did not provide for an absolute separation between legislative, executive and judicial powers and that "... it is pre-eminently the function of the Legislature to determine what conduct should be criminalised and punished."⁹²

Coupled with the flexibility the Act on Minimum Sentences offers to the Minister of Justice, to amend the schedules via announcements in the government gazette from time to time, its effect is unpredictable. It is submitted that this marks a legislative failure to contemplate possible challenges that restrictive sentencing regime may pose on courts, while the Minister holds a flexible mandate to fulfil statutory demands. The listing of Nyaope amongst Schedules I and II offences of the Drugs and Drug Trafficking Act is exemplary of the ensued risks on sentencing under a restricted sentencing regime. This new development has brought about unparalleled damage to the addict and community calling for a different sentencing perspective from the one that the two Acts prescribe.⁹³

Unlike the constitutional approach that emphasises judicial discretion the sentencing measures in the South African drug prevention regime do not have proactive effects to specific classes of offenders such as Nyaope abusers who are also drug addicts. To avoid a blanket approach to sentencing, customarily courts are supposed to act proactively when sentencing and consider all aspects of both mitigation and aggravating circumstances and give such an equal bearing. This happens when no sentencing grids are put in place unlike the "one size fits all" approach currently entrenched in the Drugs and Drug Trafficking Act read with the so called Minimum Sentences Act. Perhaps it is time that the South African legislature turned to other jurisdictions to seek possible solutions to the scourge of drug use and abuse in South Africa.

⁹² *ibid.*

⁹³ The problems mounting Nyaope trafficking and addiction in South African township cannot be completely dealt with under the criminal justice system. This is more a health issue problem than a criminal issue. See the implication in N. Nkosi, 'I Sell Sex for Nyaope: Nyaope Crisis Save Our Nation' *Sowetan* (South Africa, 2015-02-15) 8.

VI LEARNING FROM A CONSTRUCTIVE CANADIAN SENTENCING APPROACH TO SENTENCING DRUG ABUSERS WHO ALSO TRAFFIC IN DRUGS

Recently, when deciding a British Columbia⁹⁴ matter, Galati J was faced with a predicament in a matter concerning the sentencing of a “recurrent drug pusher” and “abuser of crack cocaine.” Canadian courts are bound to a mandatory minimum sentence of 1 year imprisonment for a person convicted of drug trafficking under Section 5(1) or possession for purposes of trafficking under Section 5(2) of the CDSA,⁹⁵ where the offender was previously convicted of a designated substance offence, or had served a term of imprisonment for a designated substance offence in the previous 10 years.⁹⁶

Unlike the American approach that South Africa is seeking to emulate, Galati J opted for a constructive approach as the accused who defaulted in criminal behaviour after abusing drugs could not fit within the circumstantially and procedurally demarcated statutory rebates⁹⁷ constituting alternatives to mandatory minimum sentences.⁹⁸

At the behest of the defence’s challenge on the constitutionality⁹⁹ of the minimum sentence clause, the court found against the Public Prosecution Services of Canada (the Crown). The Crown’s argument as far as the sentencing clause is concerned was that, the concurrent sentences implied by the CDSA, in the circumstances of the case before court, were appropriate and not infringing against individual rights and that even if they do, such infringement is justified as a reasonable limit prescribed by law.¹⁰⁰ The Crown sought the accused to be imprisoned for 2 years less 1 day. This was contrary to the sentence of three to 4 months imprisonment proposed by the defence.

⁹⁴ On the 24 January 2014 before the Provincial Court in *R v Lloyd*, 2014 BCPC 8(CanLII).

⁹⁵ In terms of Section 5(3)(a)(i)(D) of the *Controlled Drugs and Substances Act* (CDSA). See as well, *R v Lloyd* 2014 BCPC 8(CanLII) at para 3.

⁹⁶ This mandatory minimum sentence had operated since the 2012 Bill C-10, Safe Streets and Communities Act SC, 2012,c1.

⁹⁷ *R v Lloyd* 2014 BCPC 8(CanLII) at para 55.

⁹⁸ SC 1996,c19.

⁹⁹ Defence argued, in terms of s.24(1) of the Charter of Rights and Freedoms(the ‘Charter’) Section 5(3)(a)(i)(D) is unconstitutional and of no force because it violates ss 7, 9 and 12 of the Charter.

¹⁰⁰ Referring to Chapter 1 of the Charter.

The Crown had presented cases supporting its argument to the court. The court lamented the approach followed by courts in those decisions in that those courts, in dealing with cases with circumstances similar to the conditions of the case before court focused on “denunciation and deterrence as primary sentencing objectives.”¹⁰¹ These courts, the court observed were focused on three aspects, namely, “the serious adverse health consequences [,] personal misery associated with the ensued offences [and] the resultant social and economic consequences to society.”¹⁰²

The judge saw it necessary that each accused should be considered an individual with unique circumstances and in order to do that, it devised an approach, where the court first, inquired whether it would not be “grossly disproportional” to punish the accused in terms of the restricted sentencing law and secondly, the court objectively measured if in cases of similar circumstances there would be potential for a grossly disproportionate sentence. The court’s decision was informed by the following factors: the gravity of the offence, the circumstances of the offender and case, the actual effect of the punishment on the individual, principles of sentencing, the existence of valid alternatives to the mandatory minimum, and a comparative analysis of punishments for other crimes.¹⁰³

The court then using the test of an addict from the same locality as the accused, considered the position of the accused as an addict in possession of a small amount of a Schedule 1 substance intending to share it with a spouse or a friend who would then be caught under the same mandatory minimum sentence as a drug trafficker. The judge deemed applying a mandatory minimum sentence of 1 year imprisonment in this scenario as grossly disproportionate because such a sentence went well beyond what is justified by the legitimate “penological goals” and “sentencing principles” of the Canadian drugs trafficking laws.

As a Canadian like other Canadians would feel, the sentence was unsettling to the Court and was abhorrent as well as intolerable. Consequently, the court found that the mandatory minimum sentence of imprisonment for 1 year required by s. 5(3)(a)(i)(D) of the CDSA constituted cruel and unusual punishment in the circum-

¹⁰¹ *R v Lloyd* 2014 BCPC 8(CanLII) at para 29.

¹⁰² *ibid.*

¹⁰³ *R v Lloyd* 2014 BCPC 8(CanLII) at para 78.

stances of the accused.¹⁰⁴ Galati was of the same view as argued earlier that in the case the South African anti-drug trafficking laws, seeking to enforce mandatory minimum sentences provisions on addicts who are caught trafficking is to “cast too wide of a net to be constitutional, and [is] inconsistent with the objective of combating drug trafficking and escalation in drug related crime.”¹⁰⁵

VII CONCLUSION

As the mandated imprisonment of drug abuser offenders serves no long term purpose if disproportional to the rationale of punishment, it remains a question as to why punish the already defeated and sickly person as if he is healthy? I would suggest that South Africa resorts to remedial measures. Taking the Canadian case experience, South Africa has to have vigilant and caring legal practitioners. Like the Canadian practitioner who asked the court to appreciate the negative trend in Canadian jurisprudence. In the light of the restriction of the drug trafficking control legislation, I am confident that the depiction in the concerned Canadian jurisprudence is exemplary of the current sentencing trend in South Africa. Such a colossal jurisprudence, although just a tip of an ice berg to what really happens in the sentencing of recalcitrant drug addicts who push drugs, gives a picture that courts are inclined to wrong approaches especially where precautions are lacking like our South African situation.

This jurisprudence shows that once courts encounter minimum sentences clauses, they incline to turn blind eyes on the impact of the sentence. They consider minimum sentences binding and impose them on the recalcitrant standing at the mercy of courts' recognition of their fragile situation. Instead of the courts crafting sentences that would lead to the rehabilitation of the drug addicts and therefore help wean them off drugs to cut off the chain of criminal behaviour, maintained for addiction at the disposal of minimum sentences, courts condemn the sick criminals to imprisonment as implied in the minimum sentences clause. While overlooking the immediate needs of the accused before court, courts turn to focus solely on third unknown potential victims. This approach suffices to be named “courts potential third party victim syndrome approach,” in the light of its nature of producing very unreasonable results leading to the neglect

¹⁰⁴ *R v Lloyd* 2014 BCPC 8(CanLII), at para 54.

¹⁰⁵ *ibid.*

of the actual problem that courts must address. Closely scrutinised, this approach fuels drug addiction and contributes to the high statistics in drug related crimes. This calls for a swift law to address the problem of drug addiction within drug trafficking. This therefore calls for an urgent recognition of the need to reverting to sentencing discretion as another measure of pursuing constitutional justice where drug abusers who push drugs are involved.

Re-introduction of sentencing discretion in sentencing drug abusers who traffic in drugs is essential where supportive measures are in place. Under this approach, at the utmost, presiding officers would have to measure all the five duties against constitutional prescriptions so as to reach reasonable and fair sentences. In passing a fair and reasonable sentence courts would be informed of the objectives of the constitution with regard to sentencing and would consequently need to move away from the strict measures per the *Zinn*¹⁰⁶ standards. Courts will engage in a difficult and complex exercise of discretion in reaching a sentence that is constant, harsh and suitable for the crime of drug trafficking. To some extent this scenario requires a sort of a biased kind of justice as far as *Zinn*¹⁰⁷ standards are concerned. Presiding officers would therefore be forced to put more emphasis on the rehabilitation of individuals as opposed to the rest of the three requirements. As courts have to consider the health status of the accused and the need to rehabilitate the unhealthy convict who never had intention to sell drugs but for addiction, they would refrain from harsh punishments even though suitable for drug traffickers. Courts would be forced to adopt a constitutionally cautious approach which would demand avoidance of a position that calls for a strict application of all the required *Zinn*¹⁰⁸ standards simultaneously.

In situations implicating addicted drug pushers courts have to turn their heads and consider mitigating circumstances more than aggravating circumstances. The main reason for that is their concern to sentences that address the needs for the punishment of individual drug addicts before courts. In most circumstances the courts would have come to a conclusion that the offenders were involved in trafficking due to some significant coercion and inducement such as the influence of their masters on offenders with a significant lack of capacity for judgment due to having consumed drugs. Another factor

¹⁰⁶ *S v Zinn* 1969 2 SA 537.

¹⁰⁷ Above n 99.

¹⁰⁸ *Ibid.*

that might have motivated the commission of the crime would have been the severe need for a consistent supply of drugs.

Further, courts are bound to ask subjective questions pertaining to whether the accused before court could have committed the offence of drug trafficking if he was not under the influence of drugs. Normally, drug pushers of this nature would be found to be victims of human trafficking who are simultaneously forced through the consumption of drugs to act as drug mules. Such cases portray different scenarios which mandate unique and independent decisions rendering any law that intends to classify them as similar, unreasonable and unfair. It would even be worse to compare these cases to purely drug trafficking cases.

At most there is a general need to re-educate the legal profession on aspect of drug abuse and law because there is a thin line between law and health issues in this regard. Drastic changes needs to be made in the criminal justice system for recalcitrant drug abusers who break the law. There is a need for South Africa to consider the creation of drug treatment courts which would be more specialised and effective than the current approach.

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