SENTENCING THE ELDERLY – AN ACT OF MERCY OR DISCRIMINATION?

S v Phillips (unreported, DCLD), case no CC141/08

1 Introduction

> "(unstrain'd) mercy … seasons' justice" (Shakespeare *The Merchant of Venice* Act IV Scene 1, Portia).

In 2008, the authors' note on advanced age as a mitigating factor in the South African criminal courts set out the Roman-Dutch history and the South African case law with regard to this issue. Brief reference was made to the position of the elderly offender in the Zimbabwean, English and Australian jurisdictions (Carnelley and Hoctor "Advanced Age as a Mitigating Factor" 2008 *Obiter* 268-274). The aim of this note is not to repeat what was said before, but to provide a wider perspective on the pertinent issues relating to sentencing the elderly (a contested term, but for present purposes referring to offenders over the age of 60), especially the concept of mercy. It should be reiterated that old age does not exclude criminal liability, but it can serve as one of many mitigating factors during sentencing although it is not a bar to imprisonment (Carnelley and Hoctor 2008 *Obiter* 270; and see also O'Malley *Sentencing Law and Practice* 2ed (2006) 6.54). The case of *S v Phillips* is no exception.

The structure of this note is the following: it commences with a discussion of the *Phillips* judgment and to place it within a general problematic sentencing framework *vis-a-vis* the elderly. The concept of mercy is then examined in light of recent Commonwealth jurisprudence; whereafter parallels are drawn between the sentencing of a battered wife and the sentencing of a battered geriatric. The note concludes with a brief mention of the post-sentencing options available to an offender in the form of mercy and free pardon as well as parole.

2 *S v Phillips*

In May 2008 the accused, a frail 77-year old man, pleaded guilty to murdering his wife of 40 years (64) in a vicious and prolonged attack in which she suffered severely (1-6). The facts are undisputed and set out in his plea explanation. He stabbed her more than 40 times with two knives (2) and then called the police. There was no history of physical abuse (2). The context of the crime is important. The accused started a successful computerized photographic business about 40 years previously. He taught his personally developed photo-developing technique to his wife. A power struggle developed between the spouses over the control of the business,

resulting in a celibate and unhappy marriage for almost two decades (3). The turmoil escalated when their daughter lost her job and became pregnant (3). The victim taunted her husband that he was too old for her, useless and that she did not need him any more. She had a new family where there was no room for him and that she wished him dead (4). She stole large sums of money from the business for personal use and was clear about her intention to exclude him from the business. In addition, she was preparing to move from the matrimonial home (4). The event was finally triggered by an argument over where the movers should place a TV. His continued pleas for a change of heart were in vain. He was highly upset and in a state of anger, depression and severe stress. He was losing his home, his partner, his family, his business and money of 40 years. The crime was committed in the heat of the moment (5). The judgment indicates that he showed genuine remorse. Furthermore, he suffered from dementia and depression *inter alia* as a result of widespread atrophy of the brain. His life expectancy was 2-5 years (6-7). The court sentenced him to 15 years' imprisonment, suspended *in toto* for five years plus three years correctional supervision that included house arrest; limitation of his movements from Johannesburg (ignoring his request to return to Durban); and 16 hours' community service a month (15-16).

3 Sentencing of the elderly

The sentencing of *Phillips* must be seen within a broader context. Sentencing of the elderly to imprisonment is particularly problematic, both in South Africa and also in Commonwealth countries, for a number of reasons: one, old age is generally accompanied by ill-health or disability which may require ongoing treatment that is especially onerous on the offender as well as costly to the authorities (Fox and Freiberg *Sentencing – State and Federal Law in Victoria* 2ed (1999) 3.711; Wasik *Sentencing* 4ed (1993) 64; Walker and Padfield *Sentencing – Theory, Law and Practice* 2ed (1996) 55; Adams "The Intersection Between Elder Law and Criminal Law: More Traffic than One Might Assume" 2001 *Stetson Law Review* 1331 1348; Leavitt "Proposal for Senior Offender Law" 1999 *Pace Law Review* 293 314; and Ornduff "Releasing the Elderly Inmate: A Solution to Prison Overcrowding" 1996 *Elder Law Journal* 173 174 and 185-186); two, prison is an especially unpleasant experience for the elderly and victimisation is a problem (Walker and Padfield 55; and Adams 2001 *Stetson Law Review* 1348); three, any sentence of imprisonment forms a high proportion or percentage of the life-expectancy of the offender (Fox and Freiberg 3.711; and Hall *Sentencing Law and Practice* (2004) 3.1.2(e)) and death may even be hastened (Easton "Dangerous Waters: Taking Account of Impact in Sentencing" 2008 *Criminal Law Review* 105 110); four, the offences may have been committed decades previously and the offender has since lived a life that was for lengthy periods crime-free and in his current physical state would render re-offending unlikely (Fox and Freiberg 3.711; Ruby, Copeland, Davies, Doucette and Lithowski *Sentencing* 6ed (2004) 214, citing *R(A)* (1994) 88 CCC (3d) 184); five, incarcerating elderly offenders is a more costly exercise than for

younger, healthier offenders (Ornduff 1996 *Elder Law Journal* 174 and 182-183). Sentencing the elderly is often also difficult to rationalize in light of the purposes for sentencing as retribution might be pointless and individual deterrence and rehabilitation irrelevant for the elderly (Fox and Freiberg 3.711; Ruby *et al* 214).

In light of these difficulties, and in most cases using the concept of mercy, various courts have been reluctant to sentence the elderly to substantial periods of imprisonment, if at all. The sentence in *Phillips* confirms this tendency. The contents of the concept of mercy are, however, not always easy to demarcate.

4 Mercy

4 1 Introduction

Mercy, which has been described as "a philosophically problematic virtue" (Eisenberg and Garvey "The Merciful Capital Juror" 2004 *Ohio State Journal of Criminal Law* 165), was a primary consideration in the sentence imposed on the accused in *Phillips* (2, where McLaren J acknowledges this in the context of "human frailty" and "genuine remorse"). In most Commonwealth countries old age has been considered in the sentencing of geriatric offenders either as a mitigation factor or as an act of mercy (Wasik 64 (England); and O'Malley 6-54 (Ireland)), especially if it is combination with a blameless record (Walker and Padfield 4.31 (England)); good character (Ruby *et al* 213 (Canada)) or ill-health and disability (Hall (New Zealand) 114; and Ruby *et al* 213).

4 2 South Africa

> "Justice must be done, but mercy, not a sledgehammer is its concomitant" (*S v Harrison* 1970 3 SA 684 (AD) 686A).

In South Africa, mercy is one of the aspects that play a role in the finding of an appropriate sentence (Terblanche *A Guide to Sentencing in South Africa* (2007) 147). Although various judgments note the role of mercy in sentencing, the exact nature of mercy remains elusive.

Mercy or compassion was first mentioned by the South African Supreme Court of Appeal in the decision of *Ex parte Minister of Justice: In re R* v *Berger* (1936 AD 334 341):

> "Tereg word gesê dat na skuldigbevinding die Regter in 'n ander sfeer verkeer waar die oplê van die straf gepaard moet gaan met oordeelkundige genade en menslikheid ooreenkomstig die feite en omstandighede van die geval."

Subsequently, many South African courts have recognized the approach of mercy (*S* v *Sparks* 1972 3 SA 396 (AD) 410G; *S* v *V* 1972 3 SA 611 (AD) 614H; *S* v *Kumalo* 1973 3 SA 697 (AD) 698A; *S* v *De Maura* 1974 4 SA 204 (AD) 208H; *S* v *Narker* 1975 1 SA 583 (AD) 586; *S v Maki* 1994 1 SACR 414 (E) 417e-f; *S v Wayi* 1994 2 SACR 334 (E) 338b-c; *S v Qamata* 1997 1

SACR 479 (E) 480c-d; *S v Opperman* 1997 1 SACR 285 (W) 291g; *S v Rabie* 1975 4 SA 855 (A) 861C-E; *S v Senatsi* 2006 2 SACR 291 (SCA) par 6-7; and *S v Mavinini* 2009 1 SACR 523 (SCA) par 28-31).

In the *locus classicus, S v Rabie,* the court noted that mercy has nothing in common with "maudlin sympathy for the accused" (861C-E). The court recognized that although fair punishment is sometimes robust, mercy is a balanced and humane quality which tempers the court's approach when considering the basic sentence in light of all the circumstances as a whole (*S v Rabie supra* 866A-C; *S v Muggel* 1998 2 SACR 414 (C) 420I-421A; and *S v Du Toit* 1979 3 SA 846 (A) 857H-858B). The proper approach to the determination of sentence, which includes due allowance for the element of mercy or compassion or humanity, seems sometimes to be under-emphasized (*S v Muggel supra* 420H-I). It would, however, be wrong first to arrive at an appropriate sentence by reference to the relevant factors, and then to seek to reduce it for mercy's sake (*S* v *Narker* 1975 1 SA 583 (AD) 586D; *S* v *Roux* 1975 3 SA 190 (AD) 198B-C; and *S v Rabie supra* 861E-F).

Terblanche (147 fn 21) is rightly of the opinion that cases where the presiding officer notes that mercy is not available to specific groups or crimes are clearly wrong (*S v S* 1995 1 SACR 267 (A) 273e-f (those who exploit or corrupt the weak); *S v Chapman* 1997 3 SA 341 (SCA) 344I-345B; 345C-D; and *S v Segole* 1999 2 SACR 115 (W) 116) (those who invade the rights of equality, dignity and freedom of all women)).

4 3 Guidelines (proportionality and parity) vs Mercy (discretion)

> "Aquinas and Anselm wondered whether God's mercy to sinners was consistent with his justice" (Walker and Padfield 68).

Although age cannot justify an inappropriate sentence, there seems to be a tension attached to mercy (as a discretionary factor): between honouring the principle of proportionality and parity during the sentencing phase and taking into account humanitarian considerations (O'Malley 6-54; Fox and Freiberg 3.519; Long "The Federal Sentencing Guidelines and Elderly Offenders: Walking a Tightrope between Uniformity and Discretion (and Slipping)" 1994 *Elder Law Journal* 69 73-74; and Markel "Against Mercy" 2004 *Minnesota Law Review* 1421 1478). Harrison suggests that the combination of mercy and justice is seemingly impossible as the state should always act rationally and treat criminals similarly (Harrison "The Equality of Mercy" in Gross and Harrison *Jurisprudence. Cambridge Essays* (1992) 107 109 and 116).

Bottoms distinguishes two forms of mercy ("Fundamentals of sentencing theories" in Ashworth and Wasik *Essays in Honour of Andrew van Hirsch* (1998) 53 67; and see also O'Malley 6-06). The first form of mercy is the view that it is an "autonomous moral virtue … that tempers or 'seasons' justice; and that it is not owed to the individual as a matter of right or desert" (Bottoms 67). It is regarded as an act of grace, compassion and forgiveness that allows a departure from the principle of proportionality (Fox and Freiberg 3.519). Bottoms argues that the application hereof in the criminal justice

system is problematic as it is likely that similar cases could be treated in a dissimilar manner. This cannot be morally defended as the State should act as a fully rational entity (Bottoms 67). Put differently, the giving of offenders their just deserts in a just system is weakened by "arbitrary concessions on merciful grounds" (O'Malley 6-05).

The second form of mercy that Bottoms refers to is that, in Hampton's formulation, "mercy is the suspension or mitigation of a punishment that would otherwise be deserved as retribution, and which is granted out of pity and compassion for the wrongdoer" (Bottoms 67-68). He argues that this principle amounts to a rational exercise of mercy which cannot be regarded as unfair (Bottoms 68). Fairness, including proportionality and parity, is a key component of sentencing (Bottoms 68). In practice there is often a demand for mercy within the legal system, where the application of an established rule or principle would lead to an inappropriate or unjust result in a particular case (Bottoms 68). What is required is a need for flexibility and a distinction should be made between the mechanical operation of a rule and the quest for justice (Bottoms 68-69; and Harrison 120-121).

Put differently, mercy could be viewed as a form of discrimination as it involves the making of exceptions in favour of individuals and not classes of persons (Harrison 108; and Walker and Padfield 68). As such, mercy should be outlawed as it is inconsistent with the rule that the courts should be impartial, rational and consistent in the penalization of offenders (Harrison 118). Walker and Padfield, however, disagree with Harrison and argue that such an argument is only the first step and that there are additional merciful rules that could be set and then have to be followed. An act of mercy can then, if it honours precedent, be following the set rules (Walker and Padfield 68).

The question then remains whether it is possible to make a specific and unique decision in one matter whilst still remaining opposed to arbitrary decision-making (Bottoms 69). Can one give sentencing guidelines that can be flexible in operation? Harrison (122) answers this question as follows:

> "What it requires is the trained application of the reasons of law to individual cases … If justice is to be done, the decision should be taken for reasons and be rationally defensible. Such a rational defence will include emphasizing all the special features of the particular case … Judgment is needed, but the best judgment is informed by, and sensitive to, reason. The best judgment is not just about one case in isolation, but is sensitive to the possible implication of that judgment on other cases."

The conclusion seems to be that sentencing is inevitably a discretionary activity and that no set of rules can provide comprehensively for all the circumstances of all cases (Bottoms 68). It does not, however, mean that the discretion is unfettered as that would lead to inconsistency and injustice (Harrison 121-2; Bottoms 69; and O'Malley 6-07).

The challenge remains to find a system to provide the court with sentencing guidelines that are flexible enough to meet the circumstances of all cases whilst seeking to avoid arbitrariness (Harrison 121-2; Bottoms 69; and O'Malley 6-06). The answer is that the sentence requires "the trained

application of reasons of law to individual cases" (Harrison 121; and Edney and Bagaric *Australian Sentencing. Principles & Practice* (2007) 21). Mercy should thus be regarded as a component of justice and not the antithesis of justice (O'Malley 6-07; and *cf* Eisenberg and Garvey 2004 *Ohio State Journal of Criminal Law* 167-171).

It should be noted that there might be some cases that are so different from previous ones, that no guidelines can be formulated, but where there remains a place for merciful discretion (Walker and Padfield 68) and that certain grounds, although exceptional, would be ethically justifiable for example where the offender is aged (Bottoms 66).

5 Domestic violence and the battered-woman (person) syndrome

In reading the *Phillips* judgment, it may be submitted that the accused could be regarded as a victim of abuse. The Domestic Violence Act 116 of 1998 recognizes that victims of domestic violence are among the most vulnerable members of society; that domestic violence takes on many forms; and that acts of domestic violence may be committed in a wide range of domestic relationships (preamble). Domestic violence is defined to include emotional, verbal and psychological abuse; economic abuse or any other controlling or abusive behaviour where such conduct harms, or may cause imminent harm to, the safety, health or well-being of the complainant (s 1). More specifically, emotional, verbal and psychological abuse means a pattern of degrading or humiliating conduct towards a complainant, including repeated insults, ridicule or name-calling; repeated threats to cause emotional pain (s 1). Economic abuse includes the unreasonable deprivation of economic or financial resources which are required out of necessity, including household necessities (s 1).

In light of the facts of the *Phillips* case, the question may well be asked whether an analogy could be drawn between the accused's case and that of a battered woman who kills, since he was the victim of domestic violence in that his wife threatened to destroy all aspects of his life deliberately and was actually implementing these threats. It is submitted that the suffering of *Phillips* more than meets the requirements of domestic violence. The emphasis is on the effect of the particular conduct on the victim as opposed to the form that the conduct took (Pieterse-Spies "A South African Perspective on Battered Women who Kill their Abusive Partners" 2006 *THRHR* 309 311). To argue that the problems are exclusively the domain of one gender, it is submitted, would be unconstitutional in light of the equality clause.

Two cases of battered women who killed their abusers are relevant: *S v Ferreira* (2004 2 SACR 454 (SCA)) and *S v Engelbrecht* (2005 2 SACR 163 (W)). In *Ferreira* the SCA noted that in each case where an abused woman kills her partner in circumstances that do not qualify as self-defence, the question is not whether she is an abused woman, but whether the killing was "objectively justifiable in self-defence or subjectively seen as justifiable in

mitigation of sentence" (par 38). As the test is subjective, the focus is on what the accused believed and intended when deciding whether, for purposes of the sentencing, moral blameworthiness had been reduced; and whether the threat she sought to escape from was still perceived to be a real and present danger (par 44-45). The court, in effect, sentenced her to six years imprisonment of which she served half as a trial-awaiting prisoner, the remainder was suspended (par 46). The question is whether one cannot argue that Phillips was in a similar situation as he, subjectively, believed that all aspects of his life were falling apart and that he was powerless. It is submitted that it is indeed possible.

In *Engelbrecht,* a battered wife was convicted of premeditated murder and sentenced to time served as an awaiting-trial prisoner. The court based its sentence on the fact that she was not a danger to society; was not a threat to any person and has no tendency towards violent crime (par 44). (*Phillips* would have met this criterion.) In addition, as far as the purpose of rehabilitation was concerned, there was no suggestion that *Engelbrecht* had an evil nature or that she had to be turned from immoral or inherently wicked activities or that she had to be weaned of violent crimes (par 45). (Again, *Phillips* would have met this standard.) In dealing with general deterrence, the court in *Engelbrecht* noted that there was no indication that the community at large or abused woman as a group had taken sentences in these types of cases as an encouragement to kill their domestic partners with whom they had domestic difficulties (par 46). (The same can be said about the *Phillips* scenario.) Furthermore, the court in *Engelbrecht* noted that "the thought of capture, trial, conviction and punishment had played no part in and had absolutely no influence upon the criminal action which the court had found the accused to have performed. There was no prospect that any sentence of greater or lesser harshness would have constituted deterrence at that particular time" (par 47). (It is submitted that the situation in *Phillips* was no different.) In *Engelbrecht* the court noted that as the evidentiary burden is onerous in proving the existence, extent, nature, duration and impact of the domestic violence, courts would not entertain these circumstances easily or lightly (par 47). (The question may rightly be asked whether the Phillips facts would meet this burden. It is submitted that, although the scenarios are not the same, they are similar in that in both cases – the woman and the elderly man – experienced similar continued trauma.) With regard to the sentencing theories, the court in *Engelbrecht* (and also in *Phillips*) noted that, as direct imprisonment was not an option and as a suspended sentence was considered, retribution and deterrence were not appropriate to try and formulate (*Engelbrecht* par 53). (For purposes of this note the issue of correctional supervision is disregarded as the two cases on this aspect are not comparable.)

In conclusion, it is submitted that there is more than a tenuous connection between the sentencing of a battered wife who kills her abuser and a battered geriatric who does likewise. If the focus is on the effect of the domestic violence, then it may be submitted that the judicial officer has a set of rules with which to work in establishing an appropriate sentence, along with the discretion to be merciful.

6 Mercy, free pardon and parole

Although Walker and Padfield argue that in England illness is usually regarded by the courts as a matter of executive discretion (55; and see also Wasik 382-383), it seems as in South Africa it can be considered by the courts during the sentencing phases as discussed *supra* as well as the executive, in the form of the either one, mercy and free pardon and two, parole. These possibilities are open to the elderly offender once he has been convicted and sentenced to imprisonment.

The President has the right or prerogative to extend to any sentenced prisoner mercy and free pardon, either *meru moto* or after being petitioned (s 325 of the Criminal Procedure Act 51 of 1977; s 84(2)(j) of the Constitution of the Republic of South Africa, 1996; and *Chonco v Minister of Justice and Constitutional Development* 2008 2 SACR 39 (T)).

The prisoner may also be released on parole by the Correctional Supervision and Parole Board (s 75(1) of the Correctional Services Act 111 of 1998, or on medical grounds by the National Commissioner, the Parole Board or the Minister, where the prisoner is certified to be in the final phase of any terminal disease or condition to die a consolatory and dignified death (s 79).

It has been argued in the US context that releasing of prisoners based on old age might contribute towards resolving the problem of overcrowded prisons:

> "Although many people may debate the role of prisons in society, few believe that they are designed to be nursing homes. Correctional staffs are not trained or equipped to handle … elderly prison population. Even if they were, strong bars are not needed to hold the weak bodies of the older inmates. Prison space could be put to better use protecting society from younger and more violent offenders" (Ornduff 1996 *Elder Law Journal* 199).

Ironically the Correctional Services Act has been amended to provide, upon promulgation, for a sick offender whose sentence has expired but whose release is likely to result in his death or impairment of his health or to be a source of infection to others, may be temporarily detained until his release is authorised by the correctional medical practitioner (s 73(1)). For reasons of compassion or mercy he may be detained for a further period.

7 Conclusion

Sentencing elderly offenders remains a difficult task. Whilst the age of an offender (especially in excess of 60 years) is a "serious factor to be considered in mitigation" (Ruby *et al* 213), and indeed has been consistently treated as such in numerous jurisdictions (see, *eg*, Steffensmeier and Motivans "Older Men and Older Women in the Arms of the Criminal Law: Offending Patterns and Sentencing Outcomes" 2000 *Journal of Gerontology* S141), it seems clear that old age in itself does not justify the imposition of what would otherwise be an unacceptably low sentence (Fox and Freiberg 3.711). That McLaren J was alive to these difficulties in *Phillips* is clear from

his repeated admonition to anyone critical of the judgment to take careful account of the factors upon which the decision was based (6-7, 13). It is clear that the full conspectus of personal circumstances must be taken into account, along with the enigmatic notion of mercy, recently described in *S v Nyambosi* (2009 1 SACR 447 (T) 451e-f) as requiring that

> "justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a sentence must be assessed, not callously or arbitrarily or vindictively, but with due regard to the weakness of human beings and their propensity for succumbing to temptation."

In conclusion, it is submitted that the sentence in *Phillips* should be welcomed in that it is in line with the authors' previous recommendation that correctional supervision could be an ideal alternative in the case of an elderly offender, where imprisonment would invariably be ordered in the case of a younger offender.

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