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**Psychopathy in South African criminal case law between 1947 and 1999: an exploration of  
the relationship between psychology and law**

**Submitted in partial fulfillment of the requirements for the degree of Masters of Arts in  
Research Psychology  
in the Department of Psychology,  
University of Cape Town,  
Cape Town**

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(February 2012)**

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## **Abstract**

This study drew on South African criminal case reports containing judicial pronouncements on psychopathy between 1947 and 1999 to explore the historical relationship between psychology and the law. In criminal law, where mental illness is alleged, the issue of responsibility arises. During the period of the study, there were important legal developments in the criminal law relating to criminal responsibility, including the formulation of a statutory test for capacity in 1977 that did away with the M’Naghten Rules and irresistible impulse principle, which had been applied until then. Diminished responsibility was also entrenched in the criminal law in the same Act. Psychopathy provided an interesting case study as, in terms of legal thinking, a diagnosis may indicate pathology but is not of a degree that it necessarily follows that it would be unreasonable to assign blame in law.

Increasingly, psychologists provide expert opinion in the court room but this was not always the case. In the study, psychiatrists provided testimony concerning the diagnosis and prognosis of psychopathy. However, a small number of cases were detected, dating from the early to mid-1980s, in which psychologists provided evidence relating to psychopaths. Many of psychologists were working in the hospital prison for psychopaths and were uniquely able to testify concerning the treatment programmes offered. As the cases showed concern at the dangerousness of psychopathic offenders, these psychologists were well-placed to testify on such matters. In the last case detected within the research period, however, the study showed psychologists testifying in trial matters with regard to diagnosis.

The study was limited to reported cases. Further areas for research are discussed.

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## Table of Contents

Abstract.....	ii
Acknowledgements.....	iii
Table of Contents.....	iv
Chapter 1: Introduction.....	1
1.1. Research problem.....	1
1.2. Purpose.....	2
1.3. Research design.....	2
1.4. Scope and limitations.....	3
1.5. Framework.....	3
Chapter 2: Literature Review.....	4
2.1. The relationship of psychology and law.....	5
2.2. Criminal responsibility.....	8
2.3. A legal test for criminal responsibility.....	9
2.3.1. The principle of diminished responsibility.....	12
2.3.2. Legal procedure to establish criminal responsibility.....	14
2.4. The psychologist as expert witness.....	17
2.4.1. Growing recognition of psychological expertise in South Africa.....	18
2.5. Psychopathic offenders.....	22
2.5.1. Historical perspectives on psychopathy.....	22
2.5.2. Psychopathy in South African law.....	28
2.6. Conclusion.....	32
Chapter 3: Method.....	33

3.1. Study design .....	33
3.2. Scope of study .....	33
3.3. Data sources .....	34
3.4. Procedure adopted .....	35
3.5. Limitations .....	36
3.6. Ethical considerations .....	37
Chapter 4: Results .....	38
4.1. Overview of results .....	38
4.2. Appeals against conviction and sentence .....	39
4.3. The nature of the crimes committed .....	41
4.4. Psychopathy and criminal responsibility .....	43
4.5. Psychopathy and diminished responsibility .....	47
4.6. Significance of dangerousness and the ability to treat to sentencing .....	57
4.7. Judicial attitudes to the expert evidence on psychopathy .....	65
4.8. Testimony by clinical psychologists .....	69
4.9. Legal and clinical understandings of psychopathy. ....	72
4.10. Summary of key trends observed: .....	73
Chapter 5: Concluding remarks .....	75
5.1. Areas for future research .....	79
References .....	81
Appendix: Summary of cases .....	89

## **Chapter 1: Introduction**

Despite sharing a common interest in examining human behaviour, the relationship between the disciplines of psychology and law is complicated, although in more recent years there has been growing acceptance of psychological testimony by the courts (Coles & Veiel, 2001; Ogloff, 1990; Weijers, 2004).

In South African criminal trials, an accused or defendant is referred for assessment by mental health professionals, who give evidence to support the case being made by the state, defence or at the request of the court, concerning legal issues such as fitness to stand trial, blameworthiness and factors that should take into account when deciding the appropriate sentence (Kaliski, 2006). From a legal perspective, psychopathic offenders create difficulties for jurists who must decide whether to hold them accountable or not: psychopaths are not insane but from their conduct can appear so.

The thesis explores from an historical perspective the relationship of psychology and the law in South Africa. In particular, it focuses on the manner in which the criminal law has dealt with psychopathy in the second half of the Twentieth-century between 1947 and 1999, to illustrate aspects of this relationship.

### **1.1. Research problem**

The thesis examines criminal cases, reported between 1947 and 2000, in which the courts have pronounced on psychopathy, with a view to detecting trends that expand present knowledge concerning the history of psychology with the law. In so doing, a number of questions are explored:

- Do the identified cases share any common characteristics?

- Did the law recognize psychopathy as a mental illness? If so, what were the consequences attached to being found in criminal law to be a psychopath?
- What legal challenges, if any, did psychopathy create for jurists applying South African criminal law? If so, how were these challenges been resolved?
- Is it possible to detect increasing acceptance by the South African courts of psychological testimony relating to psychopathy over time? If so, are there identifiable reasons for this trend?
- How have the role-players (judges, psychiatrists and psychologists) related to each other? What challenges, if any, may have been experienced regarding the nature of the testimony given?

## **1.2.Purpose**

Psychopathy itself has a long and controversial history. It provides an interesting case study because it requires a court to judge whether someone, who appears sane but whose conduct suggests otherwise, is blameworthy. Specific legal theories relating to criminal responsibility apply but these are grounded in reasoning that present-day psychologists argue is hopelessly outdated (Haney, 2002). There has been some scholarly research that has explored psychopathy in criminal and mental health law in the South African context. These articles, however, were written some time ago (the 1970s and 1980s).

The intention is to contribute to the current state of knowledge concerning the history of psychology and the criminal law in South Africa. Generally, little historical research has been done on this. To date, the research that has been done has largely focused on political trials that revealed concerns closely related to the political context of the time (Louw & O'Brien, 2007; Tredoux & Foster, 2005). Research that explores the relationship of psychology and the criminal law in the context of mental pathology is scarce.

## **1.3.Research design**

The study considers South African criminal cases reported between 1947 and 1999 in which judicial pronouncements on psychopathy were found. The study draws on historical documents in the form of reported criminal case records for its data. Existing databases containing South African law reports were searched to identify criminal cases where expert evidence relating to psychopathy was presented to the Court. In addition, applicable mental health and criminal law legislation was identified. As case law and legislation are not the only sources of law, recourse was had to other relevant documents, such as influential discussion documents and official reports published during the period of the study.

#### **1.4. Scope and limitations**

The study is confined to the years 1947 to 1999. This period spans important legal developments related to the research topic but is, nonetheless, incomplete. Only cases that were reported and, therefore, accessible through electronic databases were included. As the criteria for the selection and reporting of these cases are unknown, this may create a false impression of the kinds of cases in which psychopathy occurred. In addition, law reports contain the judgments of the court, written by a judge or judges. They are not actual transcripts of the court proceedings although they may contain extracts from the proceedings. As always, studies are as good as the data they rely on and, in this case, this is the strongest data that could be collected, given the limitations set by a Master's project.

#### **1.5. Framework**

In addition to this chapter, the thesis contains four other chapters:

- Chapter 2 reviews the related literature, encompassing key themes.
- Chapter 3 describes the method used, as well as the study's limitations.
- Chapter 4 analyses the results to identify key trends emerging from the cases examined.
- Chapter 5 concludes by relating the key results to the research questions, as well as identifying future areas for potential research.

An appendix is included containing a synopsis of each the identified cases.

## Chapter 2: Literature Review

This chapter examines, from a historical perspective, the literature relating to the contribution of psychological testimony to the criminal justice system. The relationship between psychology and law is considered broadly, as well as any difficulties that might arise in the court room as a result of their different conceptual and methodological foundations.

In criminal law, issues relating to mental illness largely relate to the question of responsibility. The historical evolution of the legal concept of 'insanity' is considered, as is the legal test to establish whether an accused person can be held criminally responsible or even partially responsible.

The literature relating to psychopathy is discussed to understand how the construct has evolved. As a legal phenomenon, psychopathy is well established in South Africa, despite questions concerning its existence and nature.

From a legal perspective, psychopaths are usually held responsible for their actions but medical and psychological evidence is more nuanced, especially as the construct has not remained static since first described by Pinel in the early nineteenth century (Andrade, 2008; Millon, Simonsen, & Birket-Smith, 1998). The law has grappled with achieving a balance between views that regard the psychopathic offender as 'mad' and, therefore, someone whom it would be unreasonable to hold responsible; or 'bad', inherently evil even, deserving the full wrath of the law. If the law were to recognise psychopathy as a mental illness in the legal sense, this would need to be accommodated within existing legal principles. However, fear that the diagnosis could be abused and of what dangerous psychopaths could do if unchecked has influenced the way in which the law has developed in this area. In South Africa, several official inquiries have considered an appropriate response to dangerous psychopaths. Their findings have been influential, contributing to important policy and legislative reforms.

## 2.1. The relationship of psychology and law

As experts, psychiatrists and psychologists are attributed with specialised knowledge that can assist judges in making better informed decisions (Garb, 1992; Greenberg, Shuman, & Meyer, 2007). Judges rely on the expertise of these professionals to assist them in making decisions on a range of legal issues, including a defendant's competence to stand trial, his or her mental state at the time the crime was committed and to decide an appropriate sentence (Blau, McGinley, & Pasewark, 1993; Cohen & Malcolm, 2005; Garb, 1992; Weijers, 2004). In South Africa, historically, psychiatrists have featured more prominently as expert witnesses in criminal trials but, increasingly, clinical psychologists are used as expert witnesses for forensic purposes (Louw & Allan, 2001; Styles, 2007).

The relationship of psychology and law is longstanding (Weijers, 2004), as both disciplines are interested in human behaviour (Tredoux & Foster, 2005). In law, this shared interest is apparent in the many legal concepts that, since the mid-nineteenth century, have "become imbued step by step with psychological thinking" (Weijers, p. 195).

Haney (1990) claimed three possible roles for psychology in the legal context (as cited in Tredoux & Foster, 2005):

- The first views psychology primarily as a tool for the use of the courts, which "may in untroubled fashion take or leave the psychological wisdom or insights" (Tredoux & Foster, p. 25). Psychology's role is to assist the courts in the form of clinical assessment or reporting results of psycho-legal studies.
- The second envisages far greater interaction between the disciplines: in this role the possibility exists for empirical evidence of a psychological nature to shape or influence legal reform.
- The third possible role is described as "psychology of the law" and implies a relationship that has all legal subjects the subjects of psychological knowledge – "legal procedures regarding child witnesses, judge's decisions and eyewitness testimony would all be shaped by psychological information" (Tredoux & Foster, p. 25).

Tredoux and Foster argue that, overall, there is broad agreement that psychology has had little influence on law and is, “at best, a supplement to the law” (2005, p. 25). This is somewhat surprising. As both disciplines share an interest in “understanding and predicting human behaviour” (Tredoux & Foster, p. 25), it would be logical to assume a “mutually supportive relationship” (Tredoux & Foster, p. 24). Frequently, the disciplines appear even to be “at odds” (Haney, 2002).

The Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters, or Rumpff Commission, observed that the relationship between psychiatrist and jurist in the courtroom can be mistrusting:

As it is so often true of partners in a joint enterprise where each has a different job to perform for the success of the whole, disagreements are likely to arise. Lawyers tend to look upon psychiatrists as fuzzy apologists for criminals, while psychiatrists tend to regard lawyers as devious and cunning phrasemongers (Republic of South Africa, 1967, p. 3, para. 1.12).

The disciplines differ in their conceptual and methodological foundations. Legal theory of human behaviour was mostly formulated during the early nineteenth century but shaped many of the legal doctrines and procedures that still apply. Haney explains that in the United States, for example, the theory of ‘psychological individualism’ dominated:

Individuals were the causal locus of behaviour, that socially problematic and illegal behaviour arose from some defect in the individuals who performed it, and that such behaviour could be changed or eliminated only by effecting changes in the nature of such characteristics of those problematic persons” (2002, pp. 5-6).

As law tends to be slow to change, the assumptions that conduct is the product of free will remain extremely prominent in legal thinking. Specifically, in criminal law, assumptions about free will and rational choice underpin legal thinking when it come to assigning blame (Hirstein & Sifferd, 2010). The prevailing legal explanation of human behaviour is largely individualistic: “The subject of law in our system, the ‘legal man’, has been the rugged individualist, who stands and falls by his own claim or defence and is presumed to have intended the natural and probable

consequences of his act” (Haney, 2002, p. 7). As such, it would be unreasonable to punish someone who acts without intention: “People who lack the capacity for rational guidance are not morally responsible and should not be held criminally culpable” (Hirstein & Sifferd, p. 2).

Generally, in law, concerns about the broader context in which a crime occurred are largely inconsequential to deciding guilt. Contemporary psychology, however, recognises that human nature is determined, in part, by social conditions (Haney, 2002). In other words, any explanation of human behaviour should look both at individual characteristics and the applicable context or environment.

The disciplines differ also in their method. In terms of approach, legal authority rests mainly on logical argument and reasoning, whereas almost all branches of psychology draw on empirical research for legitimacy: “The discipline and its practitioners place great value in systematic observation of the world and its inhabitants”(Tredoux & Foster, 2005, p. 9). Tredoux and Foster (2005) argue that this may limit their potential for genuine partnership, as in the court room jurists may place logical argument ahead of scientific evidence.

These conceptual and methodological differences become apparent when considering the ‘insanity defence’. The insanity defence is a legal - not psychological - construct but relies on psychological testimony to establish its presence. Weijers (2004) describes how, since the mid-seventeenth century, growing acceptance of insanity as a condition that can altogether negate or at least diminish criminal responsibility has contributed to “a new view of criminal proceedings and a changing view of madness” (2004, p. 198). Furthermore, Weijers argues that studies of madness undertaken by alienists or medico-psychologists in the nineteenth century established them as experts in the field, “whose diagnosis would be vital in court” (p. 198). Despite this, difficulties have arisen from the sometimes imperfect fit between the legal question at issue and the information leading to the clinical diagnosis (Greenberg *et al.*, 2004).

Critics argue that psychological evidence in the court room can also mislead (Blau *et al.*, 1993; Coles & Veiel, 2001; Garb, 1992 Greenberg *et al.*, 2004; Lamont, 1966; Perlin, Birgden, & Gledhill, 2009, Styles, 2007). Coles and Veiel (2001) list common failures of psychiatric and

psychological testimony in the courtroom: these include presenting idiosyncratic theories, making inappropriate conceptualisations, inappropriately quantifying data, selectively collecting, presenting and interpreting the data, and lacking the necessary objectivity .

Perlin *et al.* also question the extent to which courts make appropriate use of expert evidence, pointing to the dangers of “outcome determinative reasoning” whereby courts select the evidence that best supports their decisions (2009, p. 60). The chance of this happening is greater in adversarial legal systems, such as South Africa, which places almost total responsibility on the parties to bring the case, develop the applicable legal theories, produce evidence, and decide which witnesses to call. “As the common law depends upon the parties rather than on a ‘neutral observer’ to gather and present evidence, it relies at least as much on the powers of persuasion and rhetoric than on a formal, scientific-like investigation” (Perlin *et al.*, p. 65). Faced with conflicting evidence from the experts, the judge must decide which one to give more weight to. Consequently, there is increased risk that “[s]ocial science that enables judges to satisfy predetermined positions are privileged, whilst data that would require judges to question such ends are rejected or subordinated” (Perlin *et al.*, p. 60).

Differing approaches of psychiatry and psychology can also lead to conflicting evidence being placed before the court (Kaliski, 2006; Styles, 2007). This is because “psychiatry is more concerned with providing a medical explanation of mental illness, whereas psychology is concerned with the psychosocial aspects of mental functioning and personality, assessing and evaluating how mental illness impacts on the moral appreciation and competency of the accused” (Styles, 2007, p. 25). The court must then evaluate the probative value of the conflicting expert evidence.

## **2.2. Criminal responsibility**

Criminal law is concerned with assigning responsibility to a specific person for his or her unlawful and wrongful conduct (Snyman, 2002). The law requires that the conduct in question be accompanied by a guilty mind (*mens rea*) but this implies certain mental capabilities: an accused must be capable of understanding the nature of the proceedings being brought against him or her

so as to conduct a proper defence (Snyman, 2002). A person, who is not fit to stand trial, is dealt with in terms of the applicable legislation (Burchell & Milton, 2005). However, if an accused is competent, his or her mental state at the time of the conduct in question becomes relevant. If an accused is found insane, he or she cannot be held accountable. Also, mental illness can be a circumstance that diminishes responsibility for the purposes of sentencing (Burchell & Milton, 2005; Snyman, 2002).

### **2.3. A legal test for criminal responsibility**

The law assumes that all people are responsible,<sup>1</sup> but this can be challenged on certain grounds, mental illness or disease being among them (Burchell & Milton, 2005; Snyman, 2002). As mentioned before, insanity is a legal concept despite its reliance on psychiatric and/or psychological evidence for proof. A defence of insanity alleges a lack of criminal responsibility arising from some disease or pathology that affects a person's mental faculties. A legal test is applied to determine the relevance of an accused person's mental illness or defect to their ability to tell right from wrong or to control their actions. Burchell and Milton explain, “[m]ental illness that impairs only affective capacity, or which does not deprive the sufferer of insight or self control, does not come within the concept of insanity” (2005, p. 374).

The legal meaning attributed to insanity has evolved over time. Roman law and Roman Dutch law both accepted that lunatics and idiots should not be punished but as theories of mental illness evolved, this was no longer adequate. South African criminal law drew heavily on English criminal law, applying the M’Naghten Rules to decide criminal responsibility. These Rules provided that a defence of mental illness could only succeed if it were possible to prove that at the time the act was committed, an accused, “through disease of the mind or mental defect, did

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<sup>1</sup> In limited cases, the law presumes a lack of capacity. For example, in terms of the common law, children under the age of seven years are irrebuttably presumed to lack criminal capacity; children between the ages of seven and fourteen years are presumed to lack capacity but this presumption could be rebutted; and children older than fourteen years were treated as adults (Burchell & Milton, 2005). The Child Justice Act 75 of 2008, however, increased the age of criminal incapacity to ten years. The State can allege that a child between the ages of ten and fourteen years has capacity but must prove this.

not know the nature and quality of his or her conduct or that it was wrong” (Republic of South Africa, 1967, p. 12, para. 3.25).

Weijers (2004) provides some background to the M’Naghten Rules. These were formulated, in 1843, at the trial of Daniel M’Naghten, accused of killing the personal secretary of the British Prime Minister. M’Naghten claimed persecution and believed that by killing his victim he would solve not only his own problems but also those of all working class men. M’Naghten was successful in his defence that he was insane but this produced public outrage. Consequently, the House of Lords requested that the judges pronounce the criteria for determining legal insanity. Weijers notes, however, that the rules repudiated the M’Naghten verdict, “as the judges said that knowledge that an act was right or wrong was the basic test of insanity! Delusion could also be a defence, but only conditionally” (p. 202).

In South Africa, the rules were found to be too narrow in scope and were supplemented by the ‘irresistible impulse’ rule: Even if an accused knew that what he or she did was wrong, he or she would not be liable if an irresistible impulse prevented him or her from controlling that conduct.<sup>2</sup> Weijers (2004) gives an account of the origins of this rule. In another famous English trial, in 1800, James Hadfield stood accused of shooting at the King. His Counsel succeeded in his defence, convincing the court that Hadfield was not guilty by reason of insanity. Notably, his defence was able to persuade the court that insanity could be established if it could be proved that an accused committed the crime as a consequence of a compelling delusion: “The crux was that the accused had been compelled to do what he did by the irresistible force of his impulse” (Weijers, p. 199).

In South Africa, in 1966, following the assassination of the Prime Minister Dr Verwoerd, the Rumpff Commission was mandated –

To inquire into and to report on the efficacy of existing statutory provisions and legal rules regarding the: (a) adjudication of criminal cases involving persons alleged to be

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<sup>2</sup> R v Koortz 1953 (1) SA 371 (A) and, then, confirmed in S v Mahlinza 1967 (1) SA 408 (A)

suffering from some form of mental derangement,<sup>3</sup> (b) the responsibility and the criminal liability of such person, and (c) the prevention of acts by such persons which are dangerous to others and to make recommendations (Republic of South Africa, 1967, p. 1, para. 1.1).

The Commission considered the M’Naghten rules and irresistible impulse test, finding fault:

The formulation [for criminal responsibility] is in conflict with the generally accepted psychological idea of the integrated unity of the cognitive functions, the affective functions, and the conative activities of the individual (Republic of South Africa, 1967, p. 51, para. 9.89).

The Commission reasoned that the psychological basis for criminal responsibility flows from “first, the capacity for free choice, decision and voluntary action; and, second, the capacity to distinguish between right and wrong, good and evil, (insight) before committing the act” (p. 45, para. 9.30).

The Commission concluded that legislation should formulate a test for capacity that reflects both criteria of insight and self control. Consequently, the Commission recommended that the “existing formulation of the criteria for non-responsibility should be altered by a provision in the Criminal Procedure Act to the effect that an accused who in respect of an alleged crime was not capable on account of mental illness or mental defect of appreciating the wrongfulness of his act, or of acting in accordance with such appreciation, shall be held not responsible” (Republic of South Africa, 1967, p. 51, para. 9.97).

The Commission noted that, in practice, confusion could arise between criminal non-responsibility and certifiability. A further recommendation was, therefore, that the procedure for the examination and trial of persons alleged to be suffering from a mental disorder be removed from the Mental Disorders Act 38 of 1916 (MDA) and be placed within a Criminal Procedure Act. These provisions should ensure that “the distinction, at law, between non-responsibility,

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<sup>3</sup>The Commission explains that it took its definition of “persons suffering from some form of mental derangement to mean persons suffering from a morbid or pathological mental disorder” and, so, the inquiry did not extend to persons whose mental faculties are temporarily impaired (Republic of South Africa, 1967, p. 1, para. 1.3).

unfitness to stand trial and certifiability under the Mental Disorders Act is clearly preserved” (Republic of South Africa, 1967, p. 59, para.10.52). Also,

when a person is found not responsible on account of morbid mental disorder, the verdict shall be one of ‘not guilty on account of mental disease’ and he or she should be detained in a mental institution or prison hospital as a State President’s patient (p. 59, para. 10.52).

The Commission’s recommendations gave rise to the present section 78(1) of the Criminal Procedure Act 51 of 1977 (CPA), which sets out the test for criminal responsibility:

A person who commits an act which constitutes an offence and who at the time of such commission suffers from a mental illness or mental defect which makes him incapable – of appreciating the wrongfulness of his act; or of acting in accordance with an appreciation of the wrongfulness of his act, shall not be criminally responsible for such act.

This formulation includes both the ability to tell right from wrong and to act in accordance with that appreciation. When deciding whether an accused has capacity, a court must consider the following: First, is the accused able to tell right from wrong? This is the ability to differentiate, to reason or to have insight (the cognitive function). Second, can the accused act in accordance with his or her appreciation of the wrongfulness of the conduct in question? This element relates to an individual’s self control or power to resist (the conative function) (Snyman, 1990). Both must be present for the person to possess the necessary criminal capacity.

### ***2.3.1. The principle of diminished responsibility***

Weijers (2004) argues that the notion that mental disorder can exist in degree expanded the role of psychiatrists and psychologists in the court room in the United States and the United Kingdom. In the United States, the Supreme Court of Appeals ruled that criminal responsibility could no longer be decided on the sole basis of the ability to tell right from wrong: The Durham Rule, therefore, provided that “an accused is not criminally responsible if his unlawful act was the product of mental disease or defect” (p. 211). Similarly, in Britain, legislation introduced a plea of diminished responsibility. As this allowed judges some discretion in sentencing, it

“appeared to mark the legal recognition of a medical truth that mental disorder existed in degree” (p. 211).

A formulation of criminal responsibility, which included self control, made it possible for an accused to have the necessary insight but suffer from a mental abnormality that diminished his or her ability for self control. The question then arose whether such an accused is less morally blameworthy?

In South Africa, the Rumpff Commission specifically explored the contribution of psychiatry and psychology to the criminal law. This is discussed in greater detail later in this chapter. Concerning psychopathy and diminished responsibility, however, the Rumpff Commission argued the existence of something that lies between responsibility and non-responsibility:

Practical experience teaches us that the normal person can be held responsible and that the totally abnormal person, the obviously insane person, can be deemed completely unaccountable. Practical experience also teaches however – and psychology and psychiatry confirm this – that there are gradations of normality and that it is difficult in some cases to draw a dividing line between normality and abnormality for the purposes of the law” (Republic of South Africa, 1967, p. 35, para. 8.1).

The Commission noted the resistance to any acceptance of partial responsibility where mental abnormality was at issue:

Unqualified mitigation of punishment in such cases could actually be detrimental to society since a person who could be dangerous owing to the cause of his diminished responsibility is given a lighter punishment on account of that very condition than he would have received had he been normal (Republic of South Africa, 1967, p. 35, para. 8.3).

The Commission argued that diminished responsibility, which already applied in South African law – albeit inconsistently - be retained but that dangerous offenders (such as psychopaths) receive a special or different sentence: “For the protection of the public, provision should be made by legislation for the establishment of a hospital-prison for psychopaths where psychopaths

who are a danger to the may be detained for long periods and where they may be treated” (p. 42, para. 8.45).

The Commission’s recommendation concerning diminished responsibility was taken up in section 78(7) of the Criminal Procedure Act 51 of 1977, which provides that:

If the court finds that the accused at the time of the commission of the act in question was criminally responsible for his acts but that his capacity to appreciate the wrongfulness of the act or to act in accordance with an appreciation of the wrongfulness of the act was diminished by reason of mental illness or defect, the court may take the fact of such diminished responsibility into account when sentencing the accused.

### ***2.3.2. Legal procedure to establish criminal responsibility***

As the law presumes that every person is capable in law, medical evidence is required to assist the court where this is disputed. In South Africa, the Mental Disorders Act 38 of 1916 (MDA), provided for the involuntary confinement of the mentally ill but was succeeded by the Mental Health Act 18 of 1973 (MHA), which focused on voluntary commitment.

Laurenson and Swartz (2011) note the strong links that existed historically between South African and English psychiatry (as is the position relating to aspects of South African law). Many South African doctors in the field of psychiatry had received their training in Britain and followed developments there. In Britain, the establishment of a National Health Service in 1948 boosted the professional development of both psychiatry and psychology. Still South Africa lagged behind, and most psychiatrists and psychologists received their training in Britain before returning to South Africa.

Section 29 of the MDA, 1916, regulated the procedure for when persons charged of a crime were found to be mentally disordered or defective:

When in any indictment, summons or other criminal charge any act or omission is alleged against any person as an offence, and evidence (including medical evidence) has been given on the trial of such person for that offence that he was mentally disordered or

defective so as not to be responsible according to law for the act or omission charged, at the time when the act was done or the omission occurred, then, if it appears to the jury, or in the case of a trial before a court without a jury, to the court or to the magistrate or other judicial officer before whom the such person is tried, that he did the act or made the omission charged but was mentally disordered or defective as aforesaid at the time when he did or made the same, the jury, court, the magistrate, or other judicial officer (as the case may be), shall return a special verdict or finding to the effect that the accused was guilty of the act or omission charged against him but was mentally disordered or defective as aforesaid, at the time when he did the act or made the omission. (2) The presiding judge, magistrate or other judicial officer (as the case may be) shall thereupon order the accused to be kept in custody in some prison or gaol pending the signification of the Governor-General's decision.

As mentioned before, the Rumpff Commission (Republic of South Africa, 1967) also recommended that the procedure for examining and the trial of mentally deranged persons be removed from the MDA, 1916, altogether and placed within a Criminal Procedure Act. This would help to clarify the distinction between 'non-responsibility', 'unfitness to stand trial' or competency and 'certifiability'. The CPA, 1977, does just this.<sup>4</sup>

The CPA, 1977, does not define mental illness or defect (unlike the MDA, 1916, and the MHA, 1973). This is a matter for expert opinion although the legal question of criminal responsibility remains to be decided by the courts. The court must appoint a panel comprising of psychiatrists and, since 1998, may appoint clinical psychologists too whenever an accused person's fitness to stand trial or criminal responsibility in connection with the commission of a crime is at issue.

The court may appoint a panel where the crime being tried involves serious violence (murder, culpable homicide, rape, etc.); where the court believes it necessary in the public interest; or where the court in any particular case directs. Suitable persons to be appointed to the panel

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<sup>4</sup> Section 77 of the CPA, 1977 deals with the capacity of accused to understand proceedings; section 78 provides for mental illness or defect and criminal responsibility; and section 79 contains provisions relating to the panel for purposes of inquiry and report under sections 77 and 78.

include the medical superintendent of a psychiatric hospital designated by court or psychiatrist appointed by the medical superintendent at the request of the court; psychiatrists appointed by the court but not employed full-time by the state; a psychiatrist appointed for the accused by the court; and a clinical psychologist (where the court so directs and only if the accused is charged with a seriously violent crime).

The Court can commit the accused to a psychiatric hospital or other relevant institution for observation for up to 30 days (but this can be extended). The report must include a full description of the nature of the enquiry; and include a diagnosis of the mental condition of the accused. If the referral is in terms of section 77, the report should state whether the accused is capable of understanding the proceedings so as to make a proper defence. If the enquiry is in terms of section 78(2), it must include a finding regarding the extent to which the capacity of the accused to appreciate the wrongfulness of the act in question or to act in accordance with that appreciation at the time of the commission was affected by mental illness or defect or by any other cause.

The relevant psychiatrists and psychologists are appointed from a list compiled by the Director-General Health, although a court can also appoint someone whose name is not on list for practical reasons. The Act states, “[f]or the purpose of this section a psychiatrist or a clinical psychologist means a person registered as a psychiatrist or a clinical psychologist under the Health Professions Act 56 of 1974” (section 79(12)).

The final decision, however, regarding whether an accused lacks criminal responsibility rests with the Court,<sup>5</sup> after considering all the evidence presented. If the finding is that the accused is not criminally responsible for reason of mental illness or defect, the verdict is not guilty even if

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<sup>5</sup>S v Harris 1965(2) SA 340 (A) sets out the correct approach: “It must be borne in mind that ... in the ultimate analysis, the crucial issue of establishing the appellant’s criminal responsibility for his actions at the relevant time is a matter to be determined not by psychiatrists but by the court itself. In determining that issue – initially the trial court and on appeal this court – must of necessity have regard not only to the expert medical evidence but also to all other facts of the case, including the reliability of the appellant as witness and the nature of his proved actions throughout the relevant period” (p. 365).

the accused committed the act in question,. In cases involving serious violence, or if the court considers it in the public interest, the court may order in terms of section 78(6) that the accused be detained in a psychiatric hospital or prison pending the decision of a judge in chambers; be admitted to and detained in an institution stated in the order and treated as if he or she were an involuntary mental care health user; released subject to appropriate conditions; or released unconditionally.

#### **2.4. The psychologist as expert witness**

As a general rule, opinion evidence is inadmissible unless it can assist the court. There is no 'fixed class' of expert witness, rather it is their special skill and knowledge on a specific topic that better qualifies them to draw inferences than the judicial officer: "There are some subjects upon which the court is usually quite incapable of forming an opinion unassisted, and others upon which it could come to some sort of independent conclusion but the help of an expert would be useful" (Hoffmann & Zeffertt, 1988, p. 97).

However, the court's assessment of the evidence tendered – its probative value – can prove difficult. Hoffmann and Zeffertt explain that "[t]he court does not usually have any means by which it can verify the witness's conclusions, and if there is a conflict of expert testimony it may be thrown back upon doubtful factors such as the rival witnesses' reputation and experience. A court which relies upon an expert's opinion is therefore to a greater or lesser extent, taking a step in the dark – something which should be done with considerable caution" (1988, p. 103). Also, a 'bald statement of opinion' is not generally regarded as helpful: "Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert (pp. 102-103).

As discussed earlier, Weijers (2004) identifies the acceptance of partial insanity as creating greater scope for the introduction of psychiatric and, to a lesser extent, psychological expertise in the court room. In the United States, psychologists only appeared as experts in the court room regularly from the 1950's onwards. The following are credited as contributing to their greater acceptance by the legal fraternity: psychologists had contributed to the war effort; and their

expertise was used to answer legal questions, such as the credibility of witness testimony (Weijers, 2004). In addition, in 1954, psychological evidence revealed the impact of government-sanctioned segregationist educational policies in the United States on school children, which brought attention to the profession (Weijers, 2004). Importantly, Weijers notes also the contribution of educational and clinical psychologists, who “began to find themselves frequently providing evidence for court, albeit vicariously, as part of their routine duties” (p. 212). However, it was only, in 1964, that the United States’ Supreme Court of Appeals declared that psychologists were entitled to present autonomous expert testimony (Weijers, 2004).

#### ***2.4.1. Growing recognition of psychological expertise in South Africa***

In South Africa, official recognition of psychological expertise lagged behind the situation in other countries: it was only in 1974 that the Health Professions Act 54 of 1974 provided for the compulsory registration of psychologists, which gave them increased professional recognition (Laurenson, 2006; Laurenson & Swartz, 2011). Historically psychiatry has dominated the psy-sciences (Laurenson & Swart, 2011). Laurenson (2006) writes, however, that in the 1950s “psychiatry [in South Africa] was in its infancy” (p. 14); and psychology was even further behind in terms of its professional development. She argues that, in the 1960’s, the assassination of Prime Minister Verwoerd shifted “mental health from being a peripheral to a more central issue in the national consciousness” (2006, p. 27). This happened at a time that the “psy-sciences were seeking greater professionalisation” (2006, p. 27).

Since the 1970s, psychological expertise has increasingly been used in both civil and criminal legal proceedings in South Africa, although more often in civil proceedings (Allan & Louw, 2001; Cohen & Malcolm, 2005). Before then, psychologists were largely overlooked as experts able to give testimony regarding an accused person’s mental state. Allan and Louw, however, note “an increasing trend to use psychologists in those areas where they are allowed to testify” (2001, p. 12). Issues on which psychologists have testified include evidence about: “repressed memory syndrome”; “child sexual abuse”; the “behaviour of a rape survivor after the incident”; and “the criminal responsibility of defendants where insanity was not alleged” (Allan & Louw,

2001, p. 12). Allan and Louw observe that the weight attached to that evidence “tend[s] to be very conservative” (2001, p. 12).

Louw and O’Brien, however, have documented earlier instances of psychological testimony in relation to the psychological effects of solitary confinement, which they argue suggests a “history to the relationship between law and psychology that pre-dates the mid-1970s in this country” (2007, p. 97).

These cases challenged the admissibility of statements made by political detainees who had been held in solitary confinement. Defence counsel argued that the statements were neither voluntary nor reliable as the psychological effects of solitary confinement rendered a person particularly susceptible to suggestion (Louw & O’Brien, 2007). Analysis of the transcripts of the psychological testimony reveals a number of themes that were employed to discredit it, including psychology as a young science, a lack of theoretical unity, the profession’s status; and the possibility of political bias. While it appears that the courts were not, in the end, persuaded by the psychological arguments presented, these cases appear to have raised the profile of psychologists as expert witnesses (Louw & O’Brien, 2007). The involvement of psychologists as expert witnesses in political trials continued in the 1980s, particularly at the sentencing stage on the issue of collective violence (Louw & O’Brien, 2007); and by the 1990’s “no court ha[d] entirely rejected expert psychological evidence on crowd or collective violence, but were all cautious on the way they treated such evidence” (p. 103). Despite this, Allan and Louw comment that “acceptance of psychology in the courts has been neither spectacular, nor sustained, and even today forensic psychology as a field remains poorly defined” (2001, p. 12).

Evidence of the acceptance of the role and value of psychological services for the treatment of the mentally ill, however, can be found in the reports of several official inquiries conducted from the mid-1960’s onwards. It is of interest that, to a greater or lesser extent the reports of these bodies all mention dangerous psychopathic offenders.

The Rumpff Commission (Republic of South Africa, 1967) reasoned that the nature of the inquiry also necessitated consideration of the differing roles of jurist, psychiatrist and

psychologist in the criminal trial of an accused who is ‘mentally deranged’ (although the report does not clearly state the role of the psychologist). The Commission noted that controversial issues, especially those relating to punishment, insanity and responsibility can create tension between jurists and mental health experts.

The report captured criticism by the psychiatric and psychology professions of the legal tests to establish insanity: briefly, submissions received from the mental health professions argued that the M’Naghten Rules and ‘irresistible impulse’ tests lagged behind scientific theory; the methods employed to establish insanity were scientifically valueless; and the tests and their application had caused many people, who were clinically mentally disordered, to be treated in law as sane and to be punished (Republic of South Africa, 1967).

Preferring a mutually supportive relationship between the disciplines, the Commission provided what it believed to be the correct approach of each to the other:

What is required of the psychiatrist and psychologist is a sense of responsibility towards the views of society and the purpose and essence of punishment, and what is required of the jurist and of the public is appreciation for the development of psychiatric and psychological knowledge” (Republic of South Africa, 1967, p. 3, para. 1.20).

Notably, the Commission expressly acknowledged the possible contribution of psychological evidence. It recommended that the provisions of the MDA, 1916, dealing with the inquiries into a person’s mental condition be amended to require the evidence of a psychiatrist and/or medical practitioner and a clinical psychologist. Also, in criminal trials, where the mental condition of an accused was an issue, the Commission recommended that the accused be sent away for psychiatric observation.

The Commission of Inquiry into the Mental Disorders Act, the Van Wyk Commission, noted that compared with other Western countries, clinical psychological services in South Africa - in 1972 - were relatively undeveloped (Republic of South Africa, 1972a). The Commission attributed this state of affairs to the law’s failure to give full professional recognition and status to clinical psychologists, as well as the fact that the South African Medical and Dental Council (with whom

psychologists were permitted to register) categorised clinical psychologists as paramedical. The Commission noted that “many psychiatrists and medical practitioners are of the opinion that the clinical psychologist should confine himself to psychological testing and research, and that he is not qualified to enter the field of psychotherapy” (Republic of South Africa, 1972a, p. 24, para. 2.16.1 (iv)). The Commission disagreed with this view, noting the extensive training given to clinical psychologists and the shortage of specialist services required to treat the mentally ill. These provided a cogent argument for recognition of the clinical psychologist as part of a multi-disciplinary team. Specifically, the Commission recommended that a special committee of inquiry look into the request that clinical psychologists be allowed to examine and treat certain types of patients autonomously, and that the clinical psychologist be “given greater recognition as regards his role as psychotherapist” (p. 24, para. 2.16.9). It also recommended that more posts be created for clinical psychologists in state facilities and that their salaries brought in line with comparable professions.

The Minister of Health, at the time, however, did not support the recommendation that clinical psychologists be permitted to certify persons as mentally ill:

An aspect on which I differ at this stage with the Commission is its recommendation that clinical psychologists be empowered to certify a person as mentally ill. The problem I encounter in this regard is that the causes of mental illness often vary and might be physiological and not only psychological. The clinical psychologist is not trained to diagnose physiological and somatic diseases and defects and in a case of this nature it may well happen that a person could be certified as mentally ill while his illness could be cured by means of surgical or other medical procedure. The medical practitioner, on the other hand, receives a comprehensive training and is best equipped to make a correct diagnosis. In the interests of public, it is therefore been decided to retain the established practice in empowering only medical practitioners in this regard (Kruger, 1980, p. 64).

As mentioned previously, in 1974, the professional situation of clinical psychologists improved when the Health Professions Act 54 of 1974 provided psychologists with greater professional recognition and status.

In following years, other official inquiries also argued for an expanded role for psychologists and following on the recommendation of the South African Law Commission on the Declaration and Detention of Persons as State Patients under the Criminal Procedure Act, Act 51 of 1977, and the Discharge of Such Persons under the Mental Health Act, Act 18 of 1973, Including the Burden of Proof with regard to the Mental State of an Accused or Convicted Person (1995), the CPA, 1977, was amended to include clinical psychologists in the panel appointed by a court to inquire into the criminal responsibility of a person accused of certain serious crimes.

## **2.5. Psychopathic offenders**

Psychopathic offenders create difficulties for courts, which must grapple with questions concerning the extent to which their disorder excuses responsibility. Levy observes, “Psychopaths are deeply puzzling. They seem to be in control of their actions, to do just what they want to do just because they want to do it, and therefore, to be responsible for their actions. They seem, in many ways, to be sane and rational. Yet in other respects they seem quite irrational; so much so that the term moral insanity has sometimes been applied to them” (2007, p. 129). Not all psychopaths are criminals or even dangerous but there is a perception that this category of offender is high-risk, requiring unusual measures. Generally, psychopaths are regarded, in law, as being responsible, but the question of diminished responsibility requires the input of psychiatric and/or psychological experts. Although the law was slow to give official recognition to the autonomous status of clinical psychologists as expert witnesses, the Van Wyk Commission expressly recognised psychologists as suitably qualified to contribute to the treatment of, among others, personality disorders requiring psychotherapy” (Republic of South Africa, 1972a, p. 24, para. 2.16.9).

### **2.5.1. Historical perspectives on psychopathy**

There are many theories concerning the origins and clinical characteristics attributable to the psychopathic personality pattern (Millon *et al.*, 1998). These theories have been criticised for having little in common, except to group together certain unrelated behaviours that were regarded as repugnant to the “social mores of the time” (Millon *et al.*, p. 3). Millon *et al.* note

that despite this “few clinicians today will fail to “get the picture” when they hear the designations “sociopath” or “antisocial personality”” (p. 3).

Andrade identifies three broad categories of persons, who are typically labelled as psychopaths: “first, individuals exhibiting some form of psychopathy; second, individuals who exhibit some form of psychopathology that cannot be attributed to psychosis; and, third, individuals who commit morally or unethical unjust acts” (2008, p. 329). The role of psychiatry in the medicalisation of criminal behaviour is criticised by some: Szasz, for example, is strongly opposed to psychiatry’s role in the “restraint and punishment of troublesome individuals justified as hospitalisation and medical care (2009, p. 12). He questions the “myth of mental illness” (1960, p. 113), which he argues obscures the reality that “the diversity of human values and the methods by means of which they can be realised is so vast, and many of them remain so unacknowledged, that they cannot fail but lead to conflicts in human relations” (Szasz, 1960, p. 116).

. The wide meaning attached to the concept has contributed to some believing that there is no justification for the construct as a separate clinical entity (Davis, 1983; Roux, 1981). Nevertheless, there are many who regard psychopathy as a distinct clinical entity and argue its usefulness (Hare, 2007). More recently, the latter position has been strengthened by the development of diagnostic tests that are largely regarded as both reliable and well-validated (Andrade, 2008).

The construct has a long history, undergone many transitions, but has remained elusive (Andrade, 2008). Psychopathy was the first personality disorder to be recognised in psychiatry (Millon *et al.*, 1998). In the early nineteenth century, the French psychiatrist, Pinel, diagnosed cases of *manie sans deliré* or mania/insanity without delirium. Before this, the view existed that a disintegration of reason and intellect necessarily accompanied insanity. Pinel described a group of patients entirely lacking or with shallow affect (Andrade, 2008). The diagnosis was groundbreaking, as it recognised that the absence of rational thought was not a prerequisite for madness.

In 1812, an American physician, Rush, described a similar condition, which he called ‘moral derangement’: “There are many instances of persons with sound understanding and some uncommon talent who are affected with this disease.... It differs from exculpative, fraudulent and malicious lying in being influenced by none of the motives of any of them. Persons with this disease cannot speak the truth on any subject” (cited in Roux, 1981, p. 50). This formulation emphasised the “irresponsible and antisocial nature of such individuals” (Herve, 2007, p. 33). As Rush believed that the aetiology was attributable to birth defect or disease, he advocated that these patients be treated in a mental hospital rather than a prison.

In 1835, Pritchard described psychopathy in terms of morality or, more precisely, its absence (cited in Herve, 2007). Pritchard, an English physician, introduced Pinel’s *manie sans deliré* to the English-speaking world as ‘moral insanity’: Pritchard’s morally insane person knew right from wrong but was compelled to act out of inherent deficiency (cited in Herve, 2007).

The various descriptions in the nineteenth and early part of the twentieth century failed to arrive at a single definition of psychopathy. Psychiatric confusion reigned concerning the diagnostic boundaries of the disorder resulting in a ‘wastebasket’ effect, in which “many (antisocial) individuals were wrongly diagnosed with psychopathy based on value judgements rather than sound clinical observations” (Herve, 2007, p. 36). For example: Kraepelin (1915) identified two categories of psychopath exhibiting a wide range of characteristics: the first was obsessive, impulsive, and exhibiting sexual deviations; the second had seven subgroups – the excitable, the unstable, the impulsive, the eccentric, liars and swindlers, the antisocial and the quarrelsome (cited in Andrade, 2008).

Scheider (1928), Partridge (1930), Henderson (1947), Karpman (1946), East (1948), Lipton (1950), Cleckley (1955), Arieti (1963) McCord and McCord (1964) and Hare (1980) also provided influential descriptions or theories of psychopathy (cited in Herve, 2007; cited in Roux, 1981). Partridge (1930), an American psychologist, advocated a single disorder, which he termed sociopath to highlight how the disorder could be a product of either environment or biology (cited in Herve, 2007). He described gradations of psychopathy, from mild to severe. Some

cases, however, were so severe and immutable to any punitive techniques that they deserved a class of their own.

Cleckley (1941) narrowed the construct, describing 16 core characteristics of the psychopath: superficial charm and good intelligence; absence of delusions and other signs of irrational thinking; absence of nervousness or psychoneurotic manifestations; unreliability; untruthfulness and insincerity; lack of remorse or shame; inadequately motivated antisocial behaviour; poor judgement and failure to learn by experience; pathologic egocentricity and incapacity for love; general poverty in major affective reactions; specific loss of insight; unresponsiveness in interpersonal relations; fantastic and uninviting behaviour with drink, and sometimes without; suicide rarely carried out; sex life impersonal, trivial and poorly integrated; and failure to follow any life plan. The emphasis was on interpersonal and affective rather than behavioural traits (cited in Andrade, 2008).

In clinical literature, two overlapping but distinct constructs emerged in the mid to late twentieth century. The first is that of the psychopathic or sociopathic personality and, later, the antisocial personality disorder (APD) first found in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders and, subsequently, revised (American Psychiatric Association, 1952). The second is that of the 'Hare psychopath', named after R.D. Hare, which emerged to satisfy research requirements in the early 1980s.

The American Psychiatric Association (APA) included the term 'sociopathic personality disturbance' in the Diagnostic and Statistical Manual of Mental Disorders, First Edition (DSM-I) (American Psychiatric Association, 1952). While the intention was to promote greater consistency in the use of the term 'psychopath' (Slovenko, 2009), revisions to the DSM have created confusion.

Partridge's work on sociopaths was extremely influential in the construct's initial formulation:

This term refers to chronically anti-social individuals who are always in trouble, profiting neither from experience nor punishment, and maintaining no real loyalties to any person, group or code. They are frequently callous and hedonistic, showing marked emotional

immaturity, with lack of responsibility, lack of judgement and an ability to rationalise their behaviour so that it appears warranted, reasonable, and justified (cited in Herve, 2007, p. 46).

Although the use of the term sociopathy was “an attempt to acknowledge the impact of social or societal forces on personality formation and mental abnormality”, the decision to include behavioural criteria was criticised for being over inclusive of general criminal behaviour (Andrade, 2008, p. 331). The inclusion of anti-social behaviours in the construct, prejudices the issue. Clinical assessments should identify the personality features that can lead to certain behaviours instead of assessing behavioural symptoms to determine a diagnosis (Andrade, p. 330).

The terms sociopathy and psychopathy continued to be used interchangeably. The DSM-II (1968) adopted the term ‘anti-social personality disorder’ (as did the World Health Organisation’s International Classification of Disease) for the aggressive or antisocial psychopath or sociopath (Slovenko, 2009).

The DSM-III (1980) and DSM-III-R (1987) heralded another shift. Sociopathy was included under the antisocial personality disorder (APD) but with no reference to psychopathy. Behavioural criteria, not personality traits, defined the construct. An additional requirement was a history of relevant behaviours before the age of 15 years.

The DSM-IV (1994) subsumed psychopathy within the antisocial personality disorder (APD). APD is defined as a

pervasive pattern of disregard for and violation of the rights of others occurring since the age of 15 years, as indicated by three (or more) of the following: Failure to conform to social norms; deceitfulness, repeated lying, use of aliases, or conning others; impulsivity or failure to plan ahead; irritability and aggressiveness; reckless disregard for safety of self or others; consistent irresponsibility, failure of consistent employment, financial irresponsibility; lack of remorse, as indicated by being indifferent to or rationalising having hurt, mistreated or stolen from another (cited in Andrade, 2008, p. 331).

The classification has been criticised: APD is a broad diagnosis that includes both the classic psychopath and people who engage in anti-social behaviour. This can lead to erroneous predictions for dangerousness and poor treatment response (Greenberg *et al.*, 2004, p. 10). The criteria for APD are heavily weighted towards behavioural characteristics, failing to capture adequately the personality features that are, arguably, essential in discriminating psychopaths from other criminals (Herve, 2007):

As a result the relationship between APD and psychopathy has consistently been found to be asymmetrical. Although ‘both conditions share criminal propensities, psychopathy is undoubtedly a better predictor of general, violent, and sexual recidivism, institutional maladjustment, and treatment failure than APD in forensic and civil-psychiatric settings (p. 47).

There is an additional confusion. The DSM-III-R made no reference to the term ‘psychopath’. Despite research that indicated that APD and psychopathy were distinct disorders, the DSM-IV, noted that APD had been “referred to as psychopathy, sociopathy or dissocial personality disorder” (Andrade, 2008, p. 331).

Drawing extensively on Cleckley’s work, Hare and his colleagues devised a clinical rating scale, which attempted to operationally define the interpersonal, affective, behavioural and lifestyle characteristics associated with psychopathy – the Hare Psychopathy Checklist (PCL) and, later, the Hare Psychopathy Checklist-Revised (PCL-R) (Hare, 1980, 1991). The PCL-R contains 20 items that fall into two correlated, but distinct, factors (affective/interpersonal and lifestyle/antisocial). Both must be present for a diagnosis. The instrument is regarded as the ‘gold standard’ in the assessment of psychopathy (Herve, 2007).<sup>6</sup> More recently, three and four-factor models have been developed (Andrade, 2008).

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<sup>6</sup> Generalisation across populations should not, however, be assumed. Given the diversity of the South African population, the instrument would need to be standardized before any inferences should be made regarding its reliability and validity here. Kaliski notes that Psychopathy Checklist (PCL) and the screening version (PCL-SV), although valuable, “should be used to reinforce the general assessment and not used as the sole means of evaluation” (2006, p. 121).

The confusion that has accompanied the different constructs of psychopathy, especially the ambiguous relationship of APD with psychopathy found in the DSM-IV, has led some to doubt psychopathy to be a genuine disorder (Davis, 1983; Fine & Kennett, 2004). More recently, however, research supports its validity from both psychodynamic and neurobiological perspectives (Millon *et al.*, 1998, p. 28). The term remains in common use. There are also predictions that the psychopathy construct is likely to return, in some form, to a future DSM (Hare, 2007).

### ***2.5.2. Psychopathy in South African law***

Since 1916, mental health legislation has included psychopathy in its definition of mental illness. The MDA, 1916, created seven classes of mentally ill persons, of which ‘Class VI’ was applicable to psychopaths. The Class referred to the ‘moral imbecile’, meaning “a person who from an early age displays some permanent mental defect coupled with strong vicious or criminal propensities on which punishment has had little or no deterrent effect” (section 1).

In 1944, an amendment substituted the term ‘socially defective person’ for that of moral imbecile. This was “a person who suffers from mental abnormality associated with anti-social conduct, and who by reason of such abnormality and conduct requires care, supervision and control for his own protection or in the public interest”. In 1957, the Class was altogether deleted, as the category had created legal problems in cases that involved psychopaths (Republic of South Africa, 1972b).

The MHA, 1973, which replaced the MDA, 1916, defined psychopathy as a certifiable mental illness. In terms of the Act, a psychopath was,

a person who suffers from persistent disorder or disability of mind (whether or not this includes a sub-normality of intelligence) that existed before the age of 18 years and which results in abnormally aggressive or serious irresponsible conduct on the part of the patient” (section 1).<sup>7</sup>

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<sup>7</sup> The definition of psychopath was deleted from the Mental Health Act by the Criminal Matters Amendment Act 116 of 1993.

As noted before, the Act also allowed for the transfer of a convicted prisoner to a hospital or hospital prison for psychopaths. These hospital prisons were established in terms of the Prisons Amendment Act 88 of 1977 at Zonderwater and Brandvlei.

Laurenson and Swartz (2011) argue that the assassination of Dr Verwoerd drew special attention to the criminal responsibility and treatment of the mentally ill. The Rumpff Commission remarked that “public outcry is to be expected if the perpetrator is found to be insane while he appears to have acted deliberately and was apparently not bereft of his senses to the extent the layman would expect of an insane person in the popular sense of the word” (Republic of South Africa, 1967, p. 2, para. 1.9): This appears to describe the psychopathic offender. Overall, the Commission paid significant attention to the degree to which a psychopath should be held criminally responsible for his or her conduct:

“If it can be proved – by means of recognised scientific psychological testing techniques – that an accused’s insight or his volitional control was seriously impaired, then in our opinion he should not be held responsible. However, in such cases, purely clinical classification is not sufficient. Some indication of the degree of the disorder should be submitted, as this may give an indication of his sense of responsibility (p. 45, para. 9.35).

The Rumpff Commission argued that a finding of diminished responsibility in the case of a psychopath should not be seen as excusing the conduct. The court decision should, instead, attract a special sentence/remedy. It, therefore, recommended that dangerous psychopaths be confined to specially established hospital-prisons to reduce the risk to society that a finding of diminished responsibility might pose. Specifically:

[T]he principle of diminished responsibility as accepted in South African law should be maintained [but for] the protection of the public, provision should be made for the establishment of a hospital-prison for psychopaths who are a danger to the public may be detained for long periods and where they may be treated; Class VI, which was deleted from section 3 in 1957, should be reinserted in the relevant section, but the whole of section 3, and consequently of section 2, should be revised and brought into line with accepted modern concepts of psychology and psychiatry (Republic of South Africa, 1967, p.72, para. 8.46).

In 1973,<sup>8</sup> the Committee of Inquiry into Psychopathy commented on the considerable differences in descriptions of psychopathy but listed typical clinical characteristics that it believed could be attributed to the psychopathic person:

A lack of emotional depth; the inability to form deep interpersonal relationships; a lack of remorse and feelings of guilt; the absence of anxiety; irresponsibility; impulsiveness; pathological egocentricity and self-centredness; low frustration tolerance threshold; pathological lying and unreliability; an inability to learn anything positive from punishment; an outstanding manipulative ability; an inability to persevere with any purposeful activity and to follow a life plan; the absence of profound psychotic and neurotic symptoms and feeble-mindedness; and a lack of insight” (Republic of South Africa, 1972b, p. 6, para. 2.33).

It also observed, “in view of all these traits it is not surprising that the psychopath often comes into conflict with the norms of society” (p. 7, para. 2.35).

The Committee concluded “psychopathy is a definite clinical entity, which can be defined as such, and manifests in specific characteristics or features” (Republic of South Africa, 1972b, p. 41, para. 9.1). It noted that psychopathy presents in varying degrees but “[i]t is only when the disorder has been present from an early age and has shown a relatively constant pattern that one can speak of a pronounced psychopathic personality or disorder” (p. 7, para. 2.35). The Committee, therefore, recommended that the following legal definition be adopted:

Psychopathic disorder is a mental illness, whether or not including sub-normality of intelligence, which is characterised from an early age (before 18 years) by persistent anti-social behaviour and misconduct. The condition may result in abnormally aggressive or seriously irresponsible conduct (p. 6, para. 2.30).

With respect to convicted psychopaths, the Committee agreed that these individuals should be placed in a special hospital prison for dangerous psychopaths. Section 30 of the MDA, 1973 provided for the placement of convicted psychopaths in a hospital prison for psychopaths. However, despite official recognition of and the resources spent towards the detention and

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<sup>8</sup> The Committee’s report is dated 1972 but it appears that the report was only made public in 1978 (RP 93/78).

treatment of convicted psychopaths, doubt concerning the usefulness of psychopathy as a distinct legal phenomenon began to emerge in the mid-1980s. Davis writes: “Given the lack of clarity concerning the clinical existence and nature of the psychopath together with the uncertainty as to the success of treatment programmes and the lack of empirical support for the reliable prediction of dangerousness, the question which needs to be answered is why the psychopath has been grafted on to our criminal code with provision being made for a separate legal dispensation” (1983, p. 269).

The hospital prisons for psychopaths were abolished in 1998,<sup>9</sup> on the recommendation of the Kommissie van Ondersoek na die Voortgesette Insluiting van Psigopatie as Sertifiseerbare Geestesongeldheid en die Hantering van Psigopatiëse en ander Gewelddadigers (the Booyesen Commission) (1992). The Booyesen Commission noted that, cumulatively, the fact that psychiatrists no longer regarded psychopathy as a mental illness and the statutory criteria for criminal capacity in terms of which psychopaths were no longer unaccountable had caused the numbers of psychopaths in prison to wane. The Commission’s research indicated that the number of psychopaths in prison had declined (from 62 in 1980/81 to 25 in July 1991 and 13 in February 1992); the Brandvlei hospital prison for psychopaths had closed; and fewer offenders were being certified (p. 14, para. 7.2.5). Consequently, the Commission believed that the high cost of detaining and treating psychopaths separately was unwarranted. In any event, its research had indicated that recidivism among treated and discharged psychopaths was not markedly different to that of ordinary offenders (p. 14, para. 7.2.6).

Following these recommendations, the inclusion of psychopathy as a certifiable mental illness was re-considered and the relevant statutory provisions were removed.<sup>10</sup> However, in 1993, the CPA, 1977, was amended to provide for a new category of dangerous offenders that included psychopaths.<sup>11</sup>

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<sup>9</sup> Criminal Matters Amendment Act 68 of 1998.

<sup>10</sup> Criminal Matters Amendment Act 116 of 1993.

<sup>11</sup> Section 286A was inserted in 1993 by the Criminal Matters Amendment Act 116 of 1993.

## 2.6. Summary

The background provided by the literature suggests additional questions that serve to refine the intended study: How have the South African courts dealt with the criminal responsibility of the psychopathic accused? What role has the element of degree or the severity of the disorder played in deciding diminished or partial responsibility? What role has legal perceptions of 'dangerousness' and 'risk to society' played in judicial decision-making? Is there evidence that alternative sentencing for psychopaths was utilised and in what circumstances? What have our courts said about the expert evidence presented? Is there evidence that psychologists have appeared as autonomous experts in criminal cases that involve psychopaths? What have the experts said concerning legal thinking on psychopathy? How have the courts dealt with medical confusion and even conflicting evidence concerning the psychopathic construct?

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## **Chapter 3: Method**

### **3.1. Study design**

The purpose of the study is to explore the relationship between psychology and law in South Africa over time. The nature of the study is historical, covering slightly more than fifty years of criminal case law in which the courts made pronouncements on psychopathy. The data selected for collection and analysis were historical documents in the form of criminal case records as reported in South African Law Reports, for the period 1947 to 1999, with a focus on psychopathic offenders. As the purpose of the study is inductive, the research design employed a qualitative method to “uncover important categories, dimensions and inter-relationships by exploring genuinely open questions rather than testing theoretically derived (deductive) hypotheses” (Kelly, 2006).

### **3.2. Scope of study**

The study is set in the past, spanning the second half of the Twentieth-century. Historical research was, therefore, undertaken making use of already available information (Fox & Bayat, 2007). The year ‘1947’ was chosen as a ‘starting point’ for theoretical and practical reasons.

The decision to focus on the period after World War II took into account that important shifts happened in medical and legal approaches to the mentally ill during this period. The professional status of psychiatry and psychology were advanced. Also, far-reaching legislative developments relating to psychopathy occurred during this time.

Practically, it proved difficult to be sure that all the relevant criminal cases of superior courts prior to 1947 were identified. The law reports are accessible in print form and can be searched manually through indexes but the search categories were broad, requiring a great deal of sifting, the results unsatisfactory. Still, a manual search, using Juta’s Index and Annotations for each division of the High Court was conducted, but yielded no results.

Appellate Division (AD) cases prior to 1947 are available online and are, therefore, fully searchable electronically using keywords and phrases. A search of AD cases prior to 1947 was conducted but do not form part of the results. Two cases possible were identified: Rex v Hymans 1927 AD 35, in which the accused was described as being of a psychopathic type; and R v Hugo WLD 285, in which the court was satisfied that the accused was a psychopathic person to a degree amounting to substantial abnormality.

A 'cut-off' date of 1999 was decided. This was shortly after the transition to democracy in 1994. The Bill of Rights contained in the 1996 Constitution brought far-reaching changes, including the abolition of the death penalty. Legislative amendments removed special reference to psychopaths in mental health and penal legislation and, in 1993, provisions were inserted in the CPA, 1977, to cater for dangerous criminals (including but not limited to psychopaths) and provide for their indefinite imprisonment. Also, a preliminary search of cases in the years since 2000 found nothing. Thus, the period between 1947 and 1999 was chosen as most likely to yield results.

### **3.3. Data sources**

South African law has several possible sources but law reports are unique, containing both the facts of a case, a discussion of the legal issues and the 'dictum' or words of our judges who apply legal principles to the facts. As the study is inductive, concerned with the relationship of law and psychology, the insights that can be gleaned from these judgments are vital for the study.

The data chosen for collection are criminal (not civil) law reports, containing judicial pronouncements on psychopathy. Law reports are standardized reports of legal proceedings and judgments, which are readily accessible. The information found in these reports typically includes the details of the parties, the court in which the proceedings took place and the name(s) of the judge(s) who heard the matter and gave judgment, a summary of the legal issues and the facts of the case, the judgment itself and the court order. Notably, judgments are reported in the

language in which they were delivered, historically English and Afrikaans (Barratt & Snyman, 2005).

### **3.4. Procedure adopted**

The major task of this work in terms of collecting the necessary data was to identify all relevant cases to consider. In order to identify the criminal cases that contain judicial pronouncements relating to psychopaths, a search of both the 'Jutastat' and 'Lexis Nexis Butterworths' electronic law report series was conducted.

The AD decisions have been reported since 1910 (Barratt & Snyman, 2005). Barratt and Snyman explain that, in 1947, Juta began publishing, in print form, the amalgamated South African Law Reports (SALR). These included the leading judgments of all the South African superior courts, as well as selected cases from Namibia (formerly South West Africa (SWA)) and Zimbabwe (formerly Rhodesia (RA)). The reports are published monthly and then bound into between four and six volumes for the year. Juta has also published several specialized law reports since 1990, including the South Africa Criminal Law Reports (SACR).

The other major South African legal publisher, Butterworths, launched its series of law reports, also in 1990s, including the All South Africa Law Reports (All SA) (Barratt & Snyman, 2005). Butterworths is now 'Lexis Nexis Butterworths'.

In addition to the print version, the law reports - dating from 1947 - are available electronically. Juta and 'Lexis-Nexis' also provide the reports of the Appellate Division, pre-1947, in an electronic form. The advantages of these electronic legal databases are that they are fully searchable, allowing quick and easy access to the reports. (The law report series are well indexed, providing multiple ways of access by case name, citation, court, judge, topic, key words and phrases and subject).

As the study focuses on judicial pronouncements on psychopathy, a keyword search of Juta and Lexis Nexis was conducted, using the following terms , 'psychopath\*', 'antisocial personality

disorder', 'insanity', 'mental'. In addition, stemming was used ('psychol\*' and 'psychia\*') and a 'search within results' was conducted for 'psychopath\*'. Cases that related to civil matters (four in total) were excluded.

Further, a thorough search of legal textbooks, relevant policy documents and academic articles was conducted to ensure that potential cases did not escape the electronic searches. The reported cases themselves refer to other applicable cases. These were examined to identify any cases that had not been captured in the electronic searches.

A summary of the cases used in the study is included in the appendix at page 89.

### **3.5. Limitations**

It is possible to identify several limitations in this method of constructing an empirical base. The research makes use of reported judgments. These reports are confined to the superior courts and do not contain cases heard in the magistrate's courts. Also, the reports are selected by the legal publishers, using unknown criteria. This limits the pool of cases for study and undermines the general application of the findings. The study found that most of the cases identified were appeal cases, involving serious violent crime, in which the sentence given was the death penalty or life imprisonment. Thus, the study draws on an incomplete subset of all the cases that would have appeared before the South African courts during the period studied, but there is really no reasonable alternative to this.

While judgments draw on oral and/or written evidence placed before the court, they are not transcripts of the proceedings and, therefore, do not contain a complete record of what happened in the proceedings. In addition, while there may be reference to passages from affidavits and other supporting documents filed by expert witnesses, for example, these are chosen selectively to support the judge's decision. Consequently, the judgment reflects mainly the voice of the jurist, who views the evidence through a legal filter, and not that of the expert witness, despite his or her expertise on a subject.

To establish the contribution of expert witnesses in the courtroom, it is necessary to refer to selected and incomplete extracts from trial transcripts and passing remarks by the court on the evidence presented. Ideally, one would have liked to have access to trial transcripts and supporting documents but that this was not possible in this study. For a more comprehensive study, which may take a lot of effort and cost much more, this could be done, provided that the records are still available. The time elapsed since these cases were heard may preclude any meaningful reconstruction the proceedings.

The study is confined to the years between 1947 and 1999. Ideally, all reported cases of the superior courts from Union (1910) to date would have been included to strengthen the findings but the scope of the search required to have accomplished this task would require resources beyond the present study. A solution could have been to confine the study to that of Appellate Division cases only from 1910 to date but that would have eliminated several interesting judgments of trial courts reported after 1947. As already mentioned, a manual search was conducted for relevant cases prior to 1947; and an electronic search of cases from 2000 yielded no results.

### **3.6. Ethical considerations**

The study is confined to historical records, which are already in the public domain. It is unlikely that any questions of infringement of privacy would arise. Nevertheless, the study received ethics clearance from an ethics review committee of the Faculty of Humanities, University of Cape Town.

## Chapter 4: Results

In terms of the limits set on the time period, the study covers slightly more than 50 years of case law. Although the facts of each case differ, the legal questions asked and answered broadly concern the extent to which psychopathic offenders should be held responsible for their crimes and, given their perceived dangerousness, what sort of sentence was appropriate.

Ideally, one could expect a smooth progression of the legal principles applied by our courts but this was not strictly the case here. In South Africa, historical events, such as the assassination of Dr Verwoerd in 1966, focused unusual attention on the criminal responsibility of mentally deranged persons, especially that of the psychopathic offender. The findings and recommendations of several official inquiries since the mid-1960's influenced legal thinking and, also, led to legislative reforms, which provided specifically for psychopathic offenders. Further developments saw a reversal in the official approach to this personality disorder: by the late 1990's, psychopathy had been removed as certifiable mental illness and the special hospital prisons for psychopaths no longer existed.

### 4.1. Overview of results

A total of 33 criminal law cases were found to contain judicial pronouncements on psychopathy. (One case - *S v Banda and Others* 1991(2) SA 352 (BG) - was excluded as it made a passing reference to psychopathy when discussing the correct approach to sentencing).

Of the 33 cases, two concerned applications in terms of the MHA, 1973, by convicted prisoners, who had been certified as psychopaths after their conviction and were being detained indefinitely at a hospital prison for psychopaths. These were included in the study as both refer to the prison psychological services and were, therefore, of interest.

Of the remaining 31 cases, all but one related to serious, violent crime: in 27 of the total 33 cases (or 81% of the cases), the crime committed was murder (if the two applications are excluded, this

percentage rises to more than 90% of the cases). The remaining cases concerned the following crimes: kleptomania (*R v Bayne* 1960(4) 752 (T)); indecent assault (*S v Sigenu* 1977(3) SA 1097 (C)); rape (*S v V* 1972(3) SA 611(A) and *Thomson v S* [1997] 2 All SA 127 (A)).

#### **4.2. Appeals against conviction and sentence**

A total of 25 (or 75%) of the 33 cases studied were taken on appeal. In an appeal, an appellant argues that the trial (or lower) court made a wrong decision on the facts or misinterpreted the law. Appeals flow from a lower to a higher court, for example, from a Magistrate's court to a High Court or from a High Court to the Appellate Division (or Supreme Court of Appeal).<sup>12</sup>

Appeals are usually argued on the record, which includes a full record of the trial court proceedings and heads of argument. An appellate court, therefore, usually makes its decision based on written and not oral, evidence. Unless the court decides otherwise, no fresh evidence is permitted and there is no further cross-examination of witnesses. This means, however, that an appellate court must rely heavily on the trial transcripts, as well as the trial judges' evaluation of the evidence presented. Expert evidence is not presented in the first person. Consequently, an appellate court is limited in its ability to test the evidence for itself, unless it departs from the general rule, which rarely happens.

As the results showed, most of the cases identified were matters taken on appeal. Consequently, judicial interrogation of expert evidence was confined to passive examination of the information contained in the trial transcripts. In contrast, the few trial cases revealed far greater interaction between judge and expert witness. This short extract, which is translated from the original Afrikaans, appeared in *S v Phillips and Another* 1985(2) SA 727 (N) illustrates the point. The Court had asked Prof Plomp, a state psychiatrist, why psychopathy was regarded as a mental

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<sup>12</sup> Until 1996, the highest court in land on all matters was the Appellate Division (later renamed the Supreme Court of Appeal. The Constitution of the Republic of South Africa, 1996, established the Constitutional Court as the highest court in the land in constitutional matters, although the Supreme Court of Appeal remains the highest court in non-constitutional matters.

illness. His response was that he sometimes wondered whether psychopathy was merely an excuse for evil:

The Judge continues: ‘This is precisely my problem. ... What does it actually mean? Is not just a way of describing an evil person or a horrible person? –

Prof Plomp: ‘I can not answer you. I only know that there are many people who think so [that psychopathy is a description for inherent evil. The Professor cites Slovenko as one such person]. .. We might as well speak of a SOB ...but my problem is that after a Commission of Inquiry and many months of consideration, at least one of our laws, the Mental Health Act recognizes that the condition exists. Rules have been made for it. I have accepted it, although I do not understand where psychopathy comes from (p. 740).

As already mentioned, the general rule is that only in very unusual circumstances will an appellate court allow new evidence to be presented. In a small number of the identified cases, application was made to consider admission of new evidence relating to the appellant’s mental condition but was refused. For example, in *Rex v Odendaal* 1949(3) SA 1114 (A), the Appellant applied for new medical evidence to be admitted to establish diminished responsibility. A medical practitioner, with an honorary lectureship in social medicine and in psychopathology at the University of the Witwatersrand, had examined the applicant – but only after he was convicted. Although he had not diagnosed the applicant to be a psychopath, he concluded that the murder had a “psychopathologic basis” (p. 1116).

The Court refused to entertain the application as it could see no reason to re-open the trial, despite the expert evidence that suggested the presence of mental illness. Adherence to established legal rules appeared to outweigh the probative value of the evidence:

But there does not appear to be any substance in the contention that the doctor’s affidavit discloses evidence of a special or exceptional character, such as would warrant the reopening of trial. No doubt after many murder trials that excite public notice, theories based perhaps on some personal investigation of the fact, may be advanced by persons interested in the relation of psychology to crime, and more particularly in family and personal history as a factor in crime; and these theories may very possibly not have occurred previously to the accused person or his legal advisors. But the due administration of justice would be seriously hindered if the production for the first time after the conclusion of the trial of any such theory were to be treated as a ground for letting in fresh evidence to support it. This does not mean that an approach such as that indicated by the passage quoted from the affidavit may not be entitled to serious consideration if it is advanced at the trial of an accused person; but it does not mean that the propounding after conviction, of such a theory as to the mental processes which may have led the accused person to do what he did could hardly ever justify an appeal court

permitting a case to be reopened. Every person who commits a serious crime has, of course, his own background, and it is commonly an unfortunate one; in a large proportion of cases the prisoner's criminal conduct could probably be shown to have been, to a greater or lesser extent, conditioned thereby. How far it is practicable or useful for a criminal court to probe into factors of the kind referred to in the affidavit for the purpose of fixing the person's guilt or assessing his punishment may be the subject of differences of opinion. But what cannot be disputed is that under the existing system of criminal justice the only proper stage at which to investigate these matters, so far as they are relevant to guilt or punishment, is during the trial, when the accused is in person before the Court and any theory can be fully tested in relation to the facts of the particular case. This was clearly, in our view, not a case for the exercise of the power to order the taking of further evidence, whether before this Court or before the trial Court, after reconstitution (pp. 1117-8).

### **4.3. The nature of the crimes committed**

The crimes committed in the identified cases were almost always violent: In the majority (27 or 81% %) of the cases identified, the accused was convicted of murder (or multiple murders) and received either the death sentence or life imprisonment (24 of the 33 cases or 72%).

Some of the cases were gruesome, possibly reinforcing the perception that psychopaths were dangerous offenders. For example, the Appellate Court in *R v Roberts* 1957(4) SA 265 (A) described the case as 'a horrible sex murder' (p. 265). In the extract below, Roberts, the appellant, tells of how he murdered a woman and then mutilated her body:

In the flat I took off my jacket and Clara and myself lay on the divan. ... We started making love. ... I then asked her if she would have intercourse with me. She then said to me that a man had never had her in her life yet. I tried to persuade her. She wouldn't. I then suddenly grabbed her by the throat and started strangling her. She was stronger than what I thought so I hit her with my fist in her face. I grabbed a pillow lying next to us and I smothered her with a pillow. Afterword's I went to the kitchen. I got a table knife out of one of the drawers. I then threw her on the floor and cut her throat with the knife after which I dragged her into the bathroom. Then I cut her stomach open and I stabbed her in the chest and the knife broke when I stabbed her. I then washed my hands in the wash basin in the bathroom. I dried my hands on a towel hanging up in the bathroom. I then went into the other room and I put my jacket on; as I was leaving I saw her purse lying on the table. I picked it up and found a [money]. I took this money and the keys. I then went out and closed the door. Then I walked down a street towards the Gardens. I then threw the keys in a drain along the street. After which I went down the Grand Parade, I then asked a taxi driver to get a woman for the night. He said I must wait and he'd go and fetch me one. Later he came back with a woman and we went for a drive out Three

Anchor Bay way. I had intercourse with the woman and paid her ... . We then came back to town' (p. 268).

The judgment also contained a description of the manner in which the Appellant mutilated the body and his feelings when he did so:

And then? I dragged her into the bathroom.

And then? – (pause) I am afraid you must just go on and tell us? – I then started cutting her with the knife.

Where? – Her body.

The whole body? Yes.

And then, when you cut her with the knife – what happened to the knife? – I stabbed her and the knife broke.

Anything else? – I also bit one of her breasts. Do you remember that? - Yes.

Then what did you do? – I cut her some more with the knife. ...

Then what did you do next?

By the Court: Could you see her when she was in the bathroom? – (pause) Yes. I think so.

Mr Gordon (contd.): Why do you hesitate such a long time? How does it come back to you, as a real thing or not? – It is more like a dream.

What next did you do? – Then I got hold of her intestines and pulled them out.

How did you get hold of them? – My hand, and pulled them out.

What did you do with them? – I held them in my hand.

What did that do to you? – While I was holding them I got very excited.

You got very excited? Nice, excited feeling' (p. 269).

In another case, *S v Nell* [1968]2 All SA 508 (A), the appellant had brutally murdered two women. Both were employed by him as domestic workers. He took the women separately for a drive into the countryside and, after an altercation, 'savagely' assaulted them in or near his motor vehicle. The victims were disposed of in the bushes and a little later set on fire. He took both his children (aged 15 and 12) with him on the first trip. On the second trip, only his daughter accompanied him.

The two accused in *S v Phillips* (1985) embarked on a crime spree, murdering four men in 16-days. Phillips, who was young and attractive, lured their victims to a secluded spot. The pair used a pistol to rob their victims and killed their victims to prevent detection.

The cases of *S v Oosthuizen* 1991(2) SACR 298 (A) and *Thomson v S* (1997) also contain details of the crimes committed, both of which were especially brutal.

It is not possible to make any inferences from the fact that the majority of the identified cases concerned seriously violent crimes - the fact that these were capital crimes that were taken on appeal may have been persuasive in the decision to report these particular cases. It is possible, if not likely, that there were other cases involving psychopathic offenders accused of less serious crimes but that these were not reported. Pertinently, the Committee of Inquiry into Psychopathy (Republic of South Africa: 1972b) argued that many psychopaths who committed serious crimes of violence had been previously convicted of for non-violent crimes: “Our investigation has shown that a psychopath who has not committed a serious crime of violence is often just as much of a social, and particularly an economic burden to the community” (p. 31, para. 6.41). However, the extreme nature of the violence perpetrated by some psychopathic offenders, as illustrated by the extract from Roberts (1957) above, may have reinforced commonly held perceptions that psychopaths were extremely dangerous criminals – serial murders and rapists. Indeed, Delaney and Peters (1966) described this case as the leading case (at the time) on the psychopathic problem” (p. 68). AS such, it would have been widely referred to as legal authority.

#### **4.4. Psychopathy and criminal responsibility**

None of the courts in the identified cases accepted that the accused or appellant’s psychopathy rendered him or her altogether not responsible or incapable in law. Although during the period studied, the tests for legal responsibility changed the courts resisted finding that psychopathy could negate criminal responsibility in the same way that insanity would – even in cases where the psychopathy was severe.

In *R v Kennedy* 1951(4) SA 431 (A), the Appellate Division considered whether the appellant’s psychopathic personality was a mental disorder. Defence counsel attempted to establish that the appellant had acted under the influence of irresistible impulse: The appellant’s psychopathic personality meant that “he is a person who, because of a stimulus, may perform acts without knowing the nature and the quality of his conduct...” (p. 434).

Dr Cooper, a psychiatrist for the Defence, described a psychopath as “a type of person in whom there exists an emotional immaturity and instability which manifests itself from an early age in an inability to conform to the accepted moral and social standards demanded by the society in which he lives” (p. 434). He contended that: “[s]uch a person, according to the evidence, may suffer an emotional storm, due to external circumstances, and during the impact of that storm, may be in a condition of mental disorder and therefore not legally responsible for his acts” (p. 434).

Despite having accepted that the appellant was a psychopath, the Court held that the “abnormality from which the appellant suffers does not in itself amount to mental disorder in law” (p 434). It was not enough for the appellant to prove that he was a psychopath, he needed also to show that ‘he was suffering from an impulse and that this involved proof by him of the circumstances which are alleged to have created the impulse’ (p. 434). The judgment identified the facts that would need to be proved: “(1) that he is of the type indicated, (2) that the external circumstances leading up to the occasion of the alleged storm are such as are likely to cause it, (3) that his conduct during the storm and immediately after it, and his account of it are such as to be expected of the condition did supervene” (p. 434).

Similarly, in *R v Von Zell* 1953(3) SA 303 (A), the appellant argued that if he had killed his wife, “it was committed under an irresistible impulse due to defect of mind” (p. 306). The judgment referred to the trial judge’s summation to the jury:

There must be a defect of mind or mental defect. There must be one or other of these two factors. First of all, either that he was prevented from knowing the nature or quality of his conduct or (b) that he had an irresistible impulse. There is no suggestion here that he was prevented from knowing the nature and quality of his conduct, the only question his counsel has put before you is that he was subject to an irresistible impulse. But you have heard evidence here that he is not certifiable under the Act. Dr Woolf who examined him while he was in gaol, and the doctor who gave evidence, Dr du Plessis, both say that he does not specifically come under this, that he has not got that mental disease which leads to such an impulse which is not irresistible (p. 306).

The Appellate Court opined that certification as a psychopath in terms of the MDA, 1916, could “in certain circumstances assist to rebut the presumption that he is sane for the purposes of determining his criminal responsibility” (p. 303). But, in this case, both doctors had testified that

the appellant was not certifiable. The Court was of the view that the evidence concerning the appellant's mental state:

Amounted to no more than this, the appellant belonged to a type of person who is emotionally unstable and whose powers of inhibition are relatively weak. There is evidence that person of that class are incapable of controlling their actions; we are not concerned with that, but with the appellant's ability to control his actions at a particular moment (p. 310)

In Roberts' case (1957), Steyn JA delivered a minority judgment, in which he agreed with the decision to dismiss the appeal but considered the test for criminal responsibility and the conflicting medical evidence presented on this. "Toerekeningsvatbaarheid" – criminal responsibility – required that not only the ability to appreciate right from wrong, but also the ability to act in accordance with that appreciation.<sup>13</sup> In this case, the medical experts were divided on the issue of the appellant's criminal responsibility at the time when he committed the crime. But the jury had found that he did not act as a result of an irresistible impulse. Still, the jury had found that the appellant was a psychopath and an abnormal person. One medical expert, Dr McGregor, expressed the view that, although the appellant was not unaware of what he was doing, it was possible that he could not control his actions. Dr Weinberg's testimony was preferred:

Wat ons dus hier het, is 'n erkende patologiese reaksie wat, hoewel dit voortgespruit het uit 'n besonder sterke drang, nie onbedwingbaar was nie. Dit plaas die geval in die middel, tussen kranksinnigheid aan die een kant en gesonde geestesvermoëns aan die ander kant (p. 272) [What we have here is a recognised pathological reaction which, despite flowing from an exceptionally strong urge, was not uncontrollable. It puts the case in the middle, between insanity on the one hand and sound mental capacity on the other]<sup>14</sup>.

The Judge acknowledged that there was some opposition to imposing the death penalty in cases where there was pathology. Those opposed argued that there should be a finding of diminished responsibility and the person should be treated.

In *S v Steyn* (1963) 1 All SA 114 (W), the court considered the burden of proof (onus) where insanity is alleged: The party who alleges must prove this on a balance of probabilities. The

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<sup>13</sup> This is the test for criminal capacity now contained in the section 78(1) of the CPA.

<sup>14</sup> Author's own translation of the original Afrikaans text.

defence contended that a previous declaration of mental disorder shifted the burden of proof to the state. The accused was certified by two doctors because he had cut his wrists or his arms on being admitted to a casualty ward, “and apparently not very successfully as seems to have been his habit on a number of occasions” (p. 116).

Despite certification, the Court found the accused sane at the time he committed the crime – he had acted during a lucid interval. The Court commented further that in this case, even if the onus had rested with the state, the evidence revealed that the accused was sane when he committed the crime.

When the MHA, 1973, replaced the MDA, 1916, a definition of psychopath was once more included within the definition of mental illness. Defence counsel attempted to argue that that certification as a psychopath in terms of the MHA implied the absence of criminal capacity in terms of the CPA.

In *S v Du Toit* 1976(1) SA (W), the trial took place after the MHA, 1973, came into operation but the offence had been committed some time before. The legal question was whether the MDA, 1916, which had been repealed except for sections 27 through 29 bis, still applied. Before pleading, the Defence had requested in terms of the 1916 Act that the accused be committed to prison or an institution pending his being declared a State President’s patient. Defence counsel argued that, as subsections 2 and 3 of the 1916 Act had been repealed, the words ‘mentally disordered’ in section 28 of the 1916 Act, which were still in operation, should be interpreted in light of the new definitions of mental illness and psychopathic disorder found in section 1 of the 1973 Act.

If the Court had accepted the argument, the accused - described as a 5-star psychopath - would be certifiable and, therefore, not responsible. The argument did not succeed, as the Court held that sections 27-29bis had to be applied with reference to sections 2 and 3 of the 1916 Act, from which all references to psychopathy had been removed. The accused was, therefore, not certifiable.

In *S v Phillips* (1985), the Court clarified that while psychopathy might fall within the definition of mental illness or defect in the MHA, 1973, it did not follow that a psychopath suffered from mental illness or defect as referred to section 78 of the CPA, 1977 or that the person had diminished responsibility as intended in section 78(7) of that Act.

In *S v Kotzur* 1988(3) SA 926 (A), Dr Berman, a specialist psychiatrist and also the principal psychiatrist at Sterkfontein Hospital, gave evidence on behalf of the State on the merits of the case. He and two private psychiatrists, Drs Fine and Wolf, conducted an inquiry after the appellant was referred by the court for observation in terms of the CPA. Their joint report stated that the appellant was a psychopath but there was nothing to “suggest that either his ability to appreciate the wrongfulness of the acts in question or his ability to act in accordance an appreciation of such wrongfulness was affected by mental illness or defect at the time of the alleged commission of the offences” (p. 930).

The judgment considered whether a psychopath could tell right from wrong and had the necessary self control. Dr Berman explained that a psychopath is capable of knowing “that a thing is wrong” (p. 931) and that there were consequences for doing wrong. In his opinion, however, psychopaths had poorer impulse control than non-psychopaths, meaning that “if an act were committed in an instantaneous way in seconds in response to some triggering factor, one could argue that there is perhaps a lesser ability to control himself. If an act is such that it requires summing up a situation and then with clear logic formulating a plan, there I would see a psychopath in the same light as any non-psychopath” (p. 931). He did not believe that the appellant’s psychopathy had reduced his responsibility: his actions were thought out and the evidence did not support diminished impulse control.

The cases showed that even when the evidence suggested that the pathology was severe, the courts would not find a psychopath to be ‘insane’.

#### **4.5. Psychopathy and diminished responsibility**

The cases show that the Courts were inconsistent in finding psychopathy to be a factor that diminished responsibility. A finding that there are extenuating circumstances present is especially relevant for the purposes of sentencing. Extenuating circumstances are any facts that are relevant to the commission of the crime that reduce the accused's moral blameworthiness, and are distinct to his or her legal culpability.<sup>15</sup> Although the study showed that psychopathy never negated responsibility, the courts sometimes found it to be an extenuating circumstance but not in all instances.

The CPA now contains a statutory formulation of diminished responsibility. Before this, the case law was clear that the mere fact that an accused was a psychopath did not compel a finding of diminished responsibility. Factors that the South African courts have considered in this regard include the severity of the disorder, the seriousness of the crime committed, and the extent to which impulsiveness and a lack of control played in the commission of the crime (Republic of South Africa, 1972b).

In some cases, however, the courts felt bound to impose the death penalty even where psychopathy was found to be an extenuating circumstance. The Roberts' case (1957) illustrates that the courts were not compelled to impose a more lenient sentence in cases where psychopathy was found to be an extenuating circumstance. In that case, the jury found that the accused was "a psychopath and patently abnormal person" (p. 269). Despite this finding, the trial judge gave the death penalty. The trial judge reasoned that the appellant had dangerous criminal tendencies and that the public needed to be protected from him. On appeal, the Appellate Division upheld the sentence.

In *S v Nell* [1968]2 All SA 508 (A), the Appellate Division considered whether the appellant's psychopathy should be considered an extenuating circumstance for the purposes of deciding diminished responsibility and the appropriateness of the death sentence. The trial court accepted that the appellant was a psychopath but not certifiable in terms of the applicable legislation. The trial court declined to find the psychopathy to be an extenuating circumstance:

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<sup>15</sup> See, for example, *S v Letselo* 1970 (3) SA 476 (AD)

We have found that the accused committed two murders within a comparatively short period of each other, within the same year in any event. In both cases it would appear that there was not elaborate planning or premeditation. We accept this fact, because one, on one occasion, two on the other occasion, of the children of the accused were present in the vicinity when the offence was committed. It appears that on both occasions some form of difference occurred between the accused and his victims which fits the pattern of the evidence we have heard of a quick tempered man who could in the circumstances act impulsively and quickly, appreciating but not thinking of the consequences. Beyond that we know nothing. We don't know why the attack took place in either case. We know of no provocation that he received. There has been no suggestion of liquor. There has been no suggestion of a motive which might explain what eventually happened. The only factor in our view that has to be considered, is whether or not the condition deposed to by Dr. Huggins, [the appellant's psychopathy] constitutes in itself an extenuating circumstance.

I appreciate that, from the definition Dr Huggins has given and from the evidence he has given, a man who is a psychopath, must have from the very definition, a blunted sense of moral values. He doesn't follow the normal norms of society. He is deficient in a moral sense, as judged by ordinary conventional standards, and he lacks the ability and desire for self-control, discipline and co-operation. It comes down, in my view, to this: The accused has committed two murders. He did so probably impulsively, but appreciating right from wrong; probably not then thinking of the consequences, but having the ability to appreciate them (pp. 573 - 574).

The trial court concluded that:

Here we have a man who, because of a failure to follow the moral norm of conventional society, has been led to commit two offences. The fact that his make-up is such that he is devoid of self-assessment and deficient in moral sense as judged by ordinary conventional standards, does not in our view constitute a factor which reduces the moral guilt of the accused, for the crimes of which he has been found guilty.

The mental condition stands alone. We accept that it exists, but my assessors and I are satisfied that, in the circumstances of this case, it does not constitute extenuating circumstances (p. 574).

The Appellate Division refused to interfere with the trial court's decision and dismissed the appeal.

The courts appeared more inclined towards leniency where there were other circumstances present, such as the accused's youthfulness, intoxication or the influence of others. In *S v Webb* 1971(2) SA 343 (T), for example, the accused argued that he was temporarily insane when he murdered his wife and, therefore, not legally responsible for his acts. The evidence indicated that

the accused was a psychopath but in the Court's view that fact alone would not have been enough for a finding that there were extenuating circumstances. However, the Court took into account several other factors: the accused was a drug addict and was to some extent under the influence of alcohol and drugs when he committed the murder; he was in emotional turmoil at the time fearing that his wife would leave him while he undertook military service; and his family history had led to his father rejecting him. Taking all these factors into account, the court concluded that there were extenuating circumstances and sentenced the accused to 15 years imprisonment.

In *S v J* 1975(3) SA 146 (O), the accused, who was 16 years old at the time, committed murder. The Court considered his youth, that he was intoxicated when he committed his crimes and had a defective personality (psychopathy) when it found diminished responsibility.

In *S v Lehnberg en 'n Andere* (1975), the trial court found there to be no extenuating circumstances and imposed the death sentence. The trial judge emphasised that the crime was pre-meditated:

I accept that this young woman became infatuated with a middle-aged man. I accept that he must have had some influence over her and that he may even have encouraged her to hope that they might at some time get married. And I accept that this infatuation was what led to what counsel described as a crime of passion. ... In this particular case it was, as the Attorney-General said not committed in hot blood on the spur of the moment, but it was planned over a matter of months and it must be remembered that the accused was not the innocent party in this triangle. She knew that Van der Linde was married; she knew he had a wife and two sons and a daughter. She was the one who took the initiative and tried to persuade Mrs. Van der Linde to give up her husband after they had been married for many years and when she failed to persuade her on the telephone she went to see her and tried to persuade her to grant a divorce, and again she failed. When this was refused, she decided to satisfy her passion by killing the woman who stood in her way. Stated in those blunt terms, one may well ask how her conduct may be described as being in any way extenuating.

The trial judge was not prepared to take into account her youthfulness (she was 19 years old) as a factor:

The youth of an accused person is always taken into account by the Courts, but each case must be looked at individually. This young woman has not given evidence before me, but as far as I can judge from the other evidence I have heard she is fairly mature, she has left home and she has been working for some few years and she appears to have conducted

herself in her social and sexual life as a grown-up person. In short, there is no evidence before me which would justify me in finding that she was so immature that her youth would excuse or mitigate her actions (p. 446-447).

In the application for leave to appeal after conviction and sentence, medical evidence was led to establish whether or not Lehnberg was a psychopath or whether she was suffering from some form of mental illness or mental disorder. But the trial court concluded the applicant had not discharged the onus of proving that she was a psychopath: “[N]ot one of the four psychiatrists who examined Lehnberg before the trial came forward to say that she was a psychopath. The most that can be said is that she displays some psychopathic tendencies” (p. 447).

On appeal, the Appellate Court agreed that she was not a psychopath. It cautioned against adopting a deterministic approach to psychopathy, so that a diagnosis of psychopathy would inevitably be regarded as an extenuating circumstance. Although it found that Lehnberg was “cold-blooded, callous and cruel” (p. 449), the Court accepted that the evidence showed that she had not committed the murder from inherent evil but that her affair with a man considerably older than herself had, in its opinion, undermined her personality, which was at a formative stage when the relationship began. The Court took her youth, as well as Van der Linde’s influence, into account when reducing the sentence to 20-years imprisonment.

In *S v Harman* [1978]4 All SA 827 (A), testimony before the trial court that the appellant was a certifiable psychopath in terms of the Mental Health Act 18 of 1973 was not sufficient to prevent a death sentence. The trial court judge wrote that

[i]n regard to sentence I have taken into account the youthfulness of the accused, his background and the fact that he is a psychopath, but when the nature of the crime, the manner of its execution, and all other facts bearing upon the accused’s conduct before, during and after the commission are borne in mind it cannot, in my view, be found that his age or his condition or background in any way diminished his responsibility to such a degree as to reduce his culpability (p. 829).

On appeal, however, the majority judgment was prepared to accept that the appellant’s youth and psychopathic personality were extenuating circumstances and overturned the sentence, altering it to that of imprisonment. The Appellate Division argued that,

It is difficult to view this abhorrent crime dispassionately. But to exact retribution by the supreme penalty would be to assess the appellant in the same manner as one would assess an adult with unimpaired judgment. Not only was the appellant barely 17 years old when he committed the offence, but a State psychiatrist, Dr Pascoe, considered him to be 'certifiable as a psychopath in terms of the Mental Health Act'. According to Dr Zabow, a specialist psychiatrist, his psychopathy is evinced inter alia by immaturity and lack of moral values and judgment, and he is "unlikely to have the self-control which one would expect from a person who would fall into the more normal category of social behaviour (p. 828).

The court also took into account that the appellant was not ordinarily violent.

In *S v Mnyanda* [1976]3 All SA 211 (A), the Appellate Division considered whether a clinical diagnosis that the appellant was a psychopath diminished his responsibility. The court discussed the concern that psychopathy be nothing other than an excuse for wickedness:

The lawyer's objection to treating psychopathy as an excuse for crime rests chiefly on the difficulty of distinguishing psychopaths from habitual criminals who have always been with us. Everyone knows that some persons appear to be beyond the reach of punishment spending their lives in and out of prison and hitherto they have been regarded merely as exceptionally troublesome or wicked people. True, we are now better able to understand the springs of behaviour than formerly, but to explain conduct is not necessarily to excuse it. It would certainly be odd if a moderately wicked person were regarded as responsible and subject to punishment while a very wicked person were regarded for that reason as mentally sick and therefore exempt. There might be a ground for distinction if a recognised medical procedure existed for treating psychopathy, but it would go too far to say that it exists (p. 217).

In *S v Pieterse* [1982]4 All SA 202 (AD), the trial judge imposed the death sentence despite the accused being a certified psychopath. The psychiatric evidence was that the appellant knew what he was doing and was in control of his actions. There was some disagreement between the trial judge and the assessors on whether extenuating circumstances were present. The majority felt that his psychopathy, with other factors, constituted extenuating circumstances, but the trial judge exercised his discretion to impose the death penalty on both counts of murder.

The Appellate Division confirmed that the fact that an accused was a certified psychopath was not compelling. The Court set out the factors to be taken into account when the question of accountability in the context of psychopathy was to be considered. These included: the severity of the disorder; the seriousness of the crime committed; and the background circumstances. In its view, the severity of the psychopathy must have bordered on mental illness.

In *S v Sibiya* 1984(1) SA 91 (A), the appellant was sentenced to death for committing a series of violent crimes, including assaults, murder and rape, in a two week period. The appeal was against sentence. The trial court held that the appellant was probably not a psychopath and had not found any other extenuating circumstances. However, it had taken into consideration the possibility that an appeal court might find otherwise:

It is so that the accused did act in a grossly irrational and anti-social manner. It seems to me quite possible that the Appeal Court might find that there existed some form of diminished responsibility on the part of the accused and that this necessitates a finding of extenuating circumstances (p. 95).

The psychiatric testimony initially addressed the appellant's fitness to stand trial. Dr Ramsundhar, a senior psychiatrist at the Midlands Hospital and Dr Lind, a psychiatrist not in the full-time service of the State, concluded that the appellant was competent and that there was no evidence to suggest that, at the time of the alleged offences, he was mentally ill.

After the verdict, the Defence called Dr Ramsundhar to testify on the presence of extenuating circumstances. He referred to the appellant's actions as being "amazingly brutal" (p. 94) and diagnosed him as suffering from a personality defect. In his opinion, the appellant suffered from "a persistent disorder of personality or disability of mind which induced in him abnormally aggressive or seriously irresponsible conduct" (p. 94). But for the lack of any evidence to show that the appellant had been abnormally aggressive before he was eighteen, he would have certified the appellant as a psychopath. In his opinion, "the prognosis [was] poor and ... psychiatrists can offer very little help" (p. 94).

Dr Lind differed. He had concluded that the appellant was not mentally ill. He contended that there was not enough evidence to justify classification as a psychopath but conceded that the appellant might have some sort of defective personality. However, Dr Lind interpreted the legislation as precluding any personality disorder other than psychopathy as being exculpatory. On appeal, the Court held that there was no basis for this interpretation of the legislation. As a result, the Appellate Division found the appellant's personality defect to be an extenuating circumstance and altered the sentence to life imprisonment.

In *S v Phillips* (1985) the Court held that certification as mentally ill in terms of the MHA, 1973, did not necessarily mean that a psychopath was mentally ill for the purposes of criminal law or that his or her psychopathy diminished criminal responsibility.

The Court also discussed the usefulness of the psychopathic construct in criminal law, especially since psychopathy was no longer a distinct psychiatric diagnosis. It seemed to the Court that the construct was merely a catchall “basket of characteristics that exist in a number of criminals with criminal and aggressive tendencies” from an early age (p 739). The psychiatric evidence was also ambivalent in this regard.

On the question of extenuating circumstances, the Court found that the defendant’s psychopathy was not sufficiently severe so as to border on mental illness, nor was its relevance to the crimes established. However, her age, background and the undesirable influence of her lover (and accomplice) were taken into account and she was sentenced to life imprisonment.

In *S v Koztur* 1988(3) SA 926 (A), the Appellate Court confirmed that a psychopathic condition was not of itself an extenuating circumstance:

Whether it is or not may be a difficult matter to decide and must in each such case be carefully considered. This is so because of the variable effect of the condition. In certain instances it may affect the moral blameworthiness of a psychopathic accused, in others not at all (p. 938).

The Appellate Division, however, laid down the correct approach to be followed when the accused is diagnosed as severely psychopathic:

Where, as here, an accused convicted of murder and facing a possible death sentence, suffers from a severe degree of psychopathy, a trial Court must be careful in its assessment of the effect of that condition upon the moral blameworthiness of the accused. When, in such a case, a finding by the trial Court that despite such a condition there are no extenuating circumstances is taken on appeal, this Court should likewise scrutinise the evidence and the finding of the trial Court with great care. If there is furthermore a possibility, as is the case here, that such an accused was also under the influence of drugs when he committed the offences in question, then a fortiori there should be careful scrutiny. For that reason the evidence has been dealt with at greater length and in finer detail than would have been done in a case not similarly complicated (p. 939).

In *S v Cotton* 1992(1) SACR 531 (A) the appellant had been convicted of murder without extenuating circumstances and sentenced to death. The Appellate Division considered, once more, the question of psychopathy as a mitigating circumstance. Whether his youth and immaturity, alone or cumulatively, should be regarded as mitigating factors in sentence was also debated.

The psychiatric evidence at the trial described the appellant as a certifiable psychopath but considered him criminally responsible. The court's summarised the evidence concerning the relevance of the appellant's psychopathy as follows:

He had throughout had control over his actions and could at any stage of the events have desisted from his nefarious conduct. His leading and assertive role in the perpetration of the offences led Dr Berman to say that appellant was 'handling his immaturity remarkably well'. He [Dr Berman] agreed with the assessment by the trial Court (Vermooten AJ and assessors) that the appellant was arrogant, overbearing and intolerant of any opposition. These characteristics, said the doctor, were typical of a psychopath. Opposition in particular could cause violent reaction. This was especially to be seen in the vindictive way appellant had, in the instant case, executed his attack on the deceased. Psychopaths had no feelings of conscience and displayed callousness towards others. They were innately mendacious and tended to behave impulsively in their quest for immediate gratification, showing no remorse afterwards (p. 534).

The Appellate Division was not persuaded that the appellant had established a connection between his being a psychopath and the crimes committed. It felt that the motive for the murder was revenge. The court mentioned that the manner in which the crimes were planned and executed suggested that they were not committed on impulse. This, in its view, was inconsistent with the profile of the psychopath.

However, the court did not feel it necessary to pursue this line of thought any further, as the appellant's youth and associated immaturity constituted, cumulatively, a substantial mitigating factor. All the objectives of punishment would be achieved by a life sentence of imprisonment. The Court proposed that the relevant authorities be informed of the judgment and the psychiatric evidence led at the trial. The order included a direction to the Registrar to forward a copy of Dr Berman's evidence to the Department of Correctional Services.

In *S v Van Vuuren en 'n Ander* 1992(2) SACR 148 (A), the Appeal Court held that the correct approach was for a Court to first have regard to “the nature and severity of the psychopathy as does not exhibit the same symptoms in each and every case. Then the Court must consider the nature of the crime and the circumstances in which it was committed” (p. 150).

The appellants had committed murder and robbery. On appeal, the Court remarked that “it was difficult to imagine a more reprehensible crime than the instant one” (p. 150). The only possible mitigating factors were the first appellant’s youth and his relatively clean record (he was 22 years old when the crimes were committed and had no previous convictions for violent crime). The Court discounted any anti-social tendencies, “as the murders were not committed from impulsiveness or frustration, as was often the case with anti-social personalities, but had been planned and premeditated crimes” (p.150).

The second appellant was slightly older - 24 years old at the relevant time – and of a very low level of intelligence. He, unlike the first appellant, had a long list of previous convictions, although none were related to crimes of violence. The appellant had been diagnosed as a psychopath but this was not seen to be a mitigating factor. The second appellant’s psychopathy was found to have played no role in the murders.

Given that the majority of the cases concerned capital offences, for which the accused were given the death penalty or life imprisonment, it is to be expected that so many would seek to establish extenuating circumstances. This rather lengthy discussion of the cases highlighted that psychopathy, even if severe, was not on its own usually regarded as an extenuating circumstance. The courts looked for other factors in mitigation, such as youthfulness, substance abuse, background and the influence of others.

There also appeared to be suspicion on the part of jurists that a diagnosis of psychopathy could be abused to escape accountability. Proof of a connection was required between the psychopathy and the crime if it were to be relevant to the question of responsibility.

The courts took into account the severity of the psychopathy but, in a few cases, despite accepting that the psychopathy was severe, the courts refused to find diminished responsibility and sentenced the accused to death. In these cases, the courts appeared to have considered the risk that these offenders pose to society as insurmountable.

#### **4.6. Significance of dangerousness and the ability to treat to sentencing**

The purposes of sentencing are deterrence, prevention, rehabilitation and retribution. When deciding on an appropriate sentence, the courts must take into account the nature of the crime, the personal characteristics of the offender and the interests of society. The object is to achieve a balance between these three elements. The punishment should “fit the criminal as well as the crime, be fair to society and be blended with a measure of mercy according to the circumstances” (Holmes JA in *S v Rabie* 1975 (4) SA 855 (A)).<sup>16</sup>

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<sup>16</sup> *S v Banda and Others* 1991(2) SA 352 (BG) at 354 - 355 explains which factors are to be taken into account when determining the appropriate sentence: These are the purposes of criminal punishment, which are deterrence, prevention, reformation (rehabilitation of the offender) and retribution. The other factor to be taken into account is achieving a balance between ‘the triad consisting of the crime, the offender and the interests of the society’. As a tension exists between these elements, the object of sentencing is to achieve ‘a judicious counterbalance between these elements in order to ensure that one element is not unduly accentuated at the expense of and to the exclusion of the others’ (p. 354).

The Court should, therefore, consider the nature of the offence, the characteristics of the offender and his (or her) circumstances and the impact of the crime on the community. Friedman J then lists various criteria that a court can take into account when considering the characteristics of the offender and his or her circumstances. Included in this list is the prospect of reformation and correction, the presence or absence of remorse and so on. Interestingly, although this was a case of treason, the court specifically considers psychopathy under the interests of the community: ‘A weighty consideration in imposing sentence is also the protection of the community. If an offender is a psychopath or a danger to the community, society needs to be protected, and the Court has a bounden duty to protect society by imposing an appropriate sentence. In this respect the prospects of rehabilitation or reformation of an offender must be given due weight’. The Court, however, emphasized that due weight must be given to the accused’s personal circumstances throughout the sentencing process (p 356).

The courts interrogated the dangerousness of the accused or appellant in many of the cases. The possible risk to society if a dangerous psychopath was to escape or to re-offend once released appeared to be a real concern. The severity of the psychopathy and the chances of recovery or rehabilitation were taken into account, as were treatment options. Youth appeared to be another factor that weighed against imposing the death penalty, as the courts seemed more inclined to believe that younger offenders could change in time. In *S v Oosthuizen* (1991), the Appellate Division noted that legislation had put in place safeguards to prevent the untimely release of prisoners. An amendment to the Prisons Act 8 of 1959 provided that a person serving life imprisonment could only be released from prison on the authority of the Minister of Justice, acting on the recommendation of the Release Advisory Board. The Court intimated that it would be incorrect to impose the death penalty on the basis of speculation concerning the ability of corrections to prevent escapes.

Before the hospital prisons for psychopaths were established, the State's ability to take care of convicted psychopaths was limited. For example, the Rumpff Commission (Republic of South Africa, 1967) noted that the mental hospitals were unable to accommodate aggressive psychopaths.

It recommended that hospital-prisons for psychopaths be established where dangerous psychopaths could be detained and treated (Republic of South Africa, 1967). The Van Wyk Commission also reported its concern that psychopaths were a disruptive influence in prisons (Republic of South Africa, 1972a). The recommendation to establish hospital prisons for psychopaths was taken up at Zonderwater and at Brandvlei in the 1970s (Davis, 1982). However, by the early 1990s, these special hospital prisons had fallen into disuse and the relevant legislation establishing them was subsequently repealed. The cases below illustrate the weight that the courts placed on protecting the public.

In Roberts' case (1957), the trial judge imposed the death penalty because it was his belief that he had a duty to protect the public from the appellant's dangerous criminal tendencies, despite the jury having found there to be extenuating circumstances. The accused was simply too dangerous to ever be allowed free. The trial judge reasoned that:

The accused suffers from strong sexual urges and, under the influence of liquor, experiences a desire to rape and do violence to women. It is this criminal tendency that makes him the dangerous killer that he is. I have given careful consideration to the extenuating circumstances found by the jury, as well as to what Mr Gordon (counsel for the appellant) has said, but I must do my duty as I see it. My duty is to protect the public against the accused and other would-be killers. The accused belongs to a class of person whose conscience is gravely impaired. They are deterred only by fear of detection and punishment. I believe the fear of the death sentence is still the strongest single deterring factor with this type of person. I have a strong feeling that if the accused were ever to be set free again this desire to rape and to do violence to women when under the influence of liquor may well manifest itself again. As I see it, anybody who should give the accused his liberty again will be risking somebody else's life. The accused committed a horrible murder, a typical sex murder, and may strike again if given the opportunity (p. 269).

In *S v V* 1972(3) SA 611 (A) the issue of risk was once more a consideration when sentencing. The appellant had been found guilty on multiple counts that included rape and attempted rape. He was sentenced to death “to protect the public” (p. 611). A psychiatrist, Dr Freed, gave evidence on the prospects of rehabilitation. His testimony reflected divergent views within the psychiatric community on whether psychopathy was in fact treatable. In his opinion, a psychopathic personality was an acquired characteristic, which could be treated psychiatrically but some psychiatrists considered psychopathy “to be constitutional and that, in South Africa, the majority are of the opinion that a psychopath is beyond rehabilitation” (p. 619).

The trial judge disagreed with the psychiatric evidence that the appellant suffered from psychopathy. Instead, he held that the appellant “was an irresponsible young sexual criminal and nothing else” (p. 611). The judge’s concern for public safety was evident; nor was he convinced regarding the prospects of treatment:

I find I have a duty which goes beyond the possible effect of the sentence upon the accused. My duty is not solely to look to a remote possibility of the problematical rehabilitation of the accused. He is one person, and his continued existence becomes completely irrelevant when the ultimate good of the community is taken into account. My paramount duty in this case is to protect the public, and particularly young females, from the possibility of the accused doing exactly what he did when he had a suspended sentence passed a few months ago – and that is embarking upon a series of similar offences. The public is entitled to be protected. The pity one has for a person like the accused cannot take precedence over the paramount duty of the protection of the public. I cannot let the public run the risk of the accused perhaps escaping from custody or being released because of good behaviour, at a time and a place when he will again be able to embark on this type of crime. Even if he were a psychopath, my finding would be the

same. The public has to be protected from psychopaths and from what, as I have said, I find him to be, namely, a sexual criminal (p. 620).

On appeal, however, the Appeal Court held that the trial judge had gone too far. The court reasoned that:

The risk of the public being endangered by the possible escape of a dangerous criminal is inherent in every sentence of punishment imposed on such criminal, but it could hardly, by itself, turn the balance between a sentence of death and one of imprisonment – in the case of the insane criminal, society does not demand a sentence of death because of the possibility of escape. The consideration that upon his release at the expiration of his sentence, or sooner by an error of judgement on the part of the authorities concerned, an accused could still constitute a danger to the public, rests upon the assumption that a sentence of imprisonment, however long, would fail to have any corrective effect ... In the present case, the learned judge speaks of ‘the remote possibility of the problematical rehabilitation of the accused’. This in my view is not supported by the evidence. Once Dr Freed’s opinion that the applicant is psychopath is rejected, his concessions in regard to the difficulties of rehabilitation fall away, and there remains no evidence nor basis for thinking that a substantial sentence of imprisonment would not damp the fires of irresponsible youth (p. 621).

The Appeal Court accepted the trial court’s finding that the applicant was not a psychopath, despite acknowledging Dr Freed’s “most impressive qualifications” (p. 619), sidestepping altogether the question of whether psychopaths could be rehabilitated. On its reasoning, the Appeal Court might have upheld the death sentence if it had been found the appellant to be a psychopath.

In *S v Nell* [1968] 2 All SA 508 (A) reference was made to the difficulties that the staff at psychiatric hospitals had with treating aggressive psychopaths, specifically the inability to control such persons. The trial court questioned the Dr Huggins about treating psychopaths. Although he conceded that there were medical authorities that believed otherwise, Dr Huggins felt that treatment would not help and that the accused would always need to be under supervision.

In *S v P* [1972] 3 All SA 445 (A), the appellant, a 15-year old boy, appealed against his conviction for murder. The appellant contended that his intention was merely to escape custody and was not to kill the victim. At trial, Dr Zabow, a psychiatrist, testified that although the boy

was a psychopath, there was some hope. However, in his opinion, the public still needed protection from the appellant, as he was a potential threat. Dr Zabow recommended that “the accused be isolated from the public for an undetermined period” (p. 448).

The trial court found the appellant guilty of murder with extenuating circumstances and sentenced him to twelve years imprisonment. Notably, a further sentencing recommendation was that the accused be treated at a psychopathic institution. Specific mention was made of Weskoppies Psychiatric Hospital.

Although the Appeal Court disagreed with the verdict and found the accused guilty of culpable homicide, it confirmed the recommendation that the accused be sent to a psychopathic institution for treatment when a place became available:

The psychiatric evidence is unanimous that prolonged treatment at the proposed institution would benefit the boy and protect the public because, in his present state and in view of his history of grossly anti-social behaviour associated with aggressive and seriously irresponsible conduct, he is a potential threat to society, since he might again react as explosively and violently. ... Of course, if the boy should respond favourably and safely to the envisaged treatment, the authorities could let him out earlier, whether on parole or otherwise (p. 453).

In *S v Sigenu* 1977 (3) SA 1097 (C), the possibility of the accused receiving specialised treatment in prison for his psychopathy was mentioned. The accused was sentenced to imprisonment on account of his physical maturity, despite being 13-years of age. Dr Pascoe, the medical superintendent at Valkenberg Hospital, was of the opinion that the boy was a psychopath in terms of the Mental Health Act. He felt that the appellant should be referred to the prison psychology department concerned with psychopaths. The judgement noted that the accused had previously been voluntarily admitted to Valkenberg for treatment and to protect the community against him. The court took into account both the appellant’s ‘dangerousness’ and the prospects of him receiving specialised treatment within a correctional facility when sentencing. Dr Pascoe, who had observed the accused, reported that:

The disturbed family and social background from which he comes taken together with precocious puberty have led together with other factors, to the development of a serious and dangerous degree of psychopathy expressed in abnormally aggressive behaviour and serious irresponsibility. I am of opinion that the peculiar circumstances of this case warrant an approach which in other cases would be reserved for someone slightly older.

My opinion therefore is that he is not psychotic and is not mentally retarded, but that he is a psychopath in terms of the Mental Health Act and that he should be brought to the attention of the Prison Psychology Department concerned with psychopaths (p. 1098).

The court concurred, directing that the magistrate impose a prison sentence but also directed the attention of the prison authorities to Dr Pascoe's report.

In *S v Sampson* 1987(2) 260 (A), the trial court felt that both the appellant's dangerousness and the poor prospects of his being able to be rehabilitated, outweighed the presence of extenuating circumstances and sentenced him to death. The trial judge expressed the view that he would be failing in his duty if he allowed for the possibility that some day the appellant could be released. A psychiatrist, Dr Magner, had examined the appellant at Valkenberg in terms of the CPA, 1977. He diagnosed the appellant as having a serious psychopathic personality that was close to being certifiable.

Dr Magner testified both on the issues of dangerousness and prognosis. His view was that psychopaths could not be cured:

This sort of personality requires a prolonged period of attention wherever he goes. It's extremely difficult to treat... (W)hatever attention he is given, should be given over a prolonged period of time... I feel, in fact the panel felt quite strongly that he in fact should be removed for a considerable time from society because this sort of disorder just doesn't disappear... With the present facilities that we have, I do not believe it is a curable disorder. Having said that, some cases over time, we use the term "burn out" to a degree. They soften, become less aggressive, they find themselves a little corner in society where they're not really troublesome anymore. Some of them do, a small number, perhaps a third, the rest remain psychopathic for the rest of their days so it's not a treatable disorder as we have for mental illnesses. It's not something we can give a drug or thing to. The treatment programmes that are available to some degree help them adjust, help the sort of personality adjust. I'm not sure of the success rate of the treatment programmes myself. I find it a particularly intractable disorder (p. 625).

The psychiatrist testified that the treatment programmes available were inadequate, requiring intensive long-term work, with uncertain results:

A lot depends on the programmes that are offered, how intensive they are and the success rates of the programmes that are used. We do not have that programme. I believe the Prison Services have some programmes but to my mind one is talking about periods of 10, 15 years of intensive working to effect some sort of possibility of a changed individual who may not be such a serious hazard to the community. That would be the

sort of time that I would be looking at from my aspect but again, it's a difficult question and I don't think there's any categorical answer. There may be 15 years and comes out exactly the same. I cannot predict that (p. 626).

The Appeal Court felt that the trial court had misdirected itself on the psychiatric evidence concerning prognosis. Dr Magner had not altogether discounted the prospects of rehabilitation or some lessening in the severity of the appellant's condition:

Clearly, then, the prognosis advanced by the psychiatrist was not a good one (in the sense that he was not confident of appellant's psychopathy being curable). At the same time, however, he did not exclude the reasonable prospect of this happening or at least of the condition being alleviated. ... It should have been held that the real possibility existed that treatment in prison (which, it would seem, is available) would rid appellant of his psychopathic disposition to violent outbursts or at least substantially curb it. It must be borne in mind that the enquiry was not whether it was certain that appellant would not commit further crimes of violence should he not be condemned to death; what had to be assessed was the degree of risk of this happening after a long period of imprisonment (p. 626).

Although, the death sentence imposed by the trial court was changed to life imprisonment, the court observed that the appellant might be a substantial risk to his fellow inmates. It, therefore, directed that the prison authorities take the necessary steps to counter any danger the appellant might pose.

In *S v Eiman* 1989(2) SA 863 (A), the Appellate Division upheld the death sentence imposed despite there being extenuating circumstances. It agreed that the appellant was too dangerous to be imprisoned: he would likely murder again in prison and, if he were to escape (the court added that escapes were not uncommon), would be a threat to society. A clinical psychologist, Dr Raath, testified on behalf of the appellant at trial. His assessment was that the appellant was a psychopath and that his psychopathy was of an extreme degree.

Dr Raath had considerable experience working with psychopaths in South African prisons from 1974 to 1982, having headed the prison hospital for convicted psychopaths at Brandvlei. Despite his experience in treating psychopaths, Dr Raath told the court that the prospects for treatment were not encouraging as, typically, punishment or conventional behavioural conditioning methods did not work in the case of psychopaths. In his opinion, the treatment of psychopaths in

South Africa was still in its infancy. In the case of the appellant, Dr Raath argued that the he would need to be sentenced to a lengthy term so that his psychopathy could burn out. However, according to Dr Raath did not discount the possibility that the appellant would murder again in prison or on being released.

Again, in *S v Oosthuizen* (1991), the risk to society that a dangerous psychopathic offender might pose if released was a determining factor in sentencing. The appellant had been sentenced to death for murder and rape. Described as a 'five-star' psychopath with a history of non-conformity to societal norms and a propensity towards ill discipline, the appellant had previously committed crimes, some violent. Dr Shevel, a member of the panel that had observed the Appellant in terms of the CPA, testified that it was unlikely that an aggressive psychopath could be rehabilitated: "[W]e [don't] really know enough about the cause of psychopathy to find ... an effective treatment at this stage (p. 302).

In *Thomson v S* [1997]2 All SA 129 (A), the appeal was against a sentence of life imprisonment for the brutal rape and indecent assault of a young girl. When sentencing, the trial court had considered the danger the appellant posed to the community on account of his being a mixed personality type with little prospects of cure or rehabilitation. Dr Jedaar, a psychiatrist and member of the team, who had assessed the appellant at Valkenberg Hospital, told the court that he thought it likely that the appellant would re-offend, given his personality type and that imprisonment would not alter this. Also, given the lack of remorse, the appellant was at risk of future violence.

Mr Lay, a clinical psychologist and qualified social worker, also gave evidence on the prospects of rehabilitation. He mentioned the complexities of addressing personality disorders:

Mr Thomson's problem is essentially one of personality, personality is an incredibly complex concept, it's not changing one minor factor of a person's life or one minor behavior. I think the chances are that he will always have difficulties in his life, whether he'll do something like this again I can't begin to speculate on. I think it's likely that he will continue to have difficult relationships, probably have difficulties working under people, difficulties with authority figures (p. 126).

The trial court relied heavily on the medical experts' doubts concerning the appellant's prognosis when it imposed life imprisonment. After sentencing, however, the defence brought further evidence in an attempt to establish a different diagnosis and that there was a prospect that the appellant could be rehabilitated but the appeal was dismissed.

#### **4.7. Judicial attitudes to the expert evidence on psychopathy**

The judgments suggest some caution towards the medical evidence, despite recognition of expertise. Although some of the experts are described in the judgments as 'specialists' or having 'most impressive qualifications', this did not guarantee that the relevant court would agree with the testimony presented. The approach adopted by the courts was that a diagnosis of psychopathy was, on its own, insufficient to diminish guilt but must be shown to have directly contributed to the conduct in question. So, for instance, the argument that a psychopath was unable to control his or her emotions would be contradicted if the crime was pre-meditated. Cases in which a psychopath was argued to lack the ability to control his or her emotions were especially problematic as the expert evidence relied heavily on the accused's version of events and could not easily be corroborated.

The Rumpff Commission observed too that the courts were careful of psychiatric evidence concerning psychopathy to establish diminished responsibility (Republic of South Africa, 1967). The Commission noted that psychiatric testimony would not be acceptable to the courts: "(1) when the court does not accept the facts upon which the psychiatrist based his diagnosis; and (2) when the psychiatrist's conception of non-responsibility in a particular case does not agree with that of the court" (p. 23, para. 4.73).

In *R v Kennedy* (1951) the Appellate Court expressed the following concerning the inherent limitations of the medical evidence in that relied on the accused's recollection of events:

It appears from the evidence and is in fact generally accepted that there is at present no known method by which a medical expert, by examination of a person who has been found to be of psychopathic personality, can ascertain whether at the critical period he was suffering from such an emotional storm. This can only be decided on evidence of the events which are said to have led up to the creation of the storm, of his conduct during the time when he committed the act complained of and of his conduct thereafter,

including his own evidence as to his recollection of what happened in the commission of the act and thereafter. Naturally, in regard to the last-mentioned factor, it must be borne in mind that, in an attempt to establish his plea, the person concerned may deliberately give false evidence on matters which are not susceptible of denial by the Crown and the question of his intelligence and possible appreciation of what may favour his plea are matters to be borne in mind. It is relevant at this stage to say that a low mentality is not a necessary ingredient of psychopathic personality and that the evidence is that the appellant is of more than average intelligence (p. 434).

In *R v Von Zell* (1953), Dr du Plessis, a psychiatrist, provided evidence for the defence at the trial. On the question of the accused's ability to control his actions, Dr du Plessis conceded that "there must be 'hundreds and thousands of people going about who are psychopathic personalities but have all the rights and responsibilities of the average citizen who is responsible for his actions'" (p. 309).

The Appellate Division was not impressed by the psychiatric evidence, highlighting that:

... The evidence of the psychiatrist amounted to no more than this, that appellant belonged to a type of person who is emotionally unstable and whose powers of inhibition are relatively weak. There is evidence that persons of that class are incapable of controlling their emotions; we are not concerned with that, but with the appellant's ability to control his actions at a particular moment' (p. 310).

In *R v Bayne* (1960), however, the court expressed its displeasure at the manner in which the magistrate dismissed psychiatric evidence given at trial. During the trial, the magistrate had been especially scathing of the medical evidence, implying that the psychiatrist was attempting to make excuses for the appellant's actions:

Dr Watt stated that the act was impulsive and that the accused suffers from a condition known as kleptomania. It is well known that a kleptomaniac steals articles of little or no value to her. In the present case, the articles stolen were of considerable value and of use to the accused. A psychiatrist can always make excuses for the actions of a thief and term him or her to be a kleptomaniac. The accused was fully aware that she was doing wrong and judging by the manner in which the theft was perpetrated, it certainly was not done impulsively (p. 754).

On appeal, the Court expressed disapproval of the magistrate's statement regarding the Dr Watt's evidence:

It seems to me that the magistrate expressed himself in a most unfortunate manner. These words – 'A psychiatrist can always make excuses for the actions of a thief and term him

or her to be a kleptomaniac' seem to me to come very close to saying that the doctor in this case was not honest and that he was merely making excuses for a thief. It seems to me therefore in the result that the magistrate entirely rejected the uncontradicted evidence of the medical expert and paid no attention thereto (p 754).

In a short concurring judgment, Galgut J added,

one realises that judicial officers will always have difficulty in assessing the effect to be given to the evidence given by experts in this field of medicine., viz. psychiatrists and neurologists. The psychiatrist and the neurologist often have to rely on the history given to him by the patient. Nevertheless where eminent men in these branches of medicine do give evidence and that evidence is not contradicted or challenged, judicial officers are obliged to give full consideration and effect to the evidence placed before them. It seems to me that in this case the judicial officer failed to do this. He drew certain conclusions of his own which were not justified by the evidence (p 754).

In *S v Mnyanda* [1976] 3 All SA 211 (A), the Appellate Division considered the role of psychiatric evidence in assisting the Court to interpret the term 'psychopathic disorder' in section 1 of the MHA, 1973. Although psychiatric evidence could be of assistance in interpreting the meaning of the term, interpretation of legislation remained the court's prerogative.

The judgment also referred, approvingly, to certain passages from an American case, *United States of America v. Charles Freeman*, 357 F.2d.606 (1966), on the role of the expert witness: "Expert testimony, in short, will be admissible whenever relevant but always as expert testimony—and not as moral or legal pronouncement. Relieved of their burden of divining precise causal relationships, the Judge or jury can concentrate upon the ultimate decisions which are properly theirs, fully informed as to the facts" (p. 220).

In *S v Loubscher* 1979(3) 47 (A), the appellant had been convicted of murder, rape and theft. He was sentenced to death. After being sent for observation, he was found "fit to stand trial and [was] not defective or psychotic in terms of the Mental Health Act" (p. 52). The report also stated that the appellant was not a psychopath in terms of the Act.

After conviction, the appellant applied to place new evidence before the appellate court. Dr Hayden, a researcher attached to the Department of Genetics at the University of Cape Town, reported that the appellant suffered from Huntington-chorea but that further evidence was needed

to determine whether at the relevant time this had diminished his capacity to appreciate the wrongfulness of his acts or act in accordance with that appreciation (p 58). Drs Zabow and McGregor, both psychiatrists, also testified that the appellant had Huntington-chorea (in its early stages). The reports, however, did not address how the Appellant's mental illness related to the specific facts of the case (Although the Appellate Division accepted the diagnosis of Huntington-chorea, it remained un-persuaded that this diminished his responsibility).

The Appellate Division was openly critical of the medical experts' evidence. In its opinion, the experts had failed to relate the appellant's mental condition to the specifics of the crime. The evidence, instead, expressed general opinions concerning the appellant's mental condition:

It is the duty of an expert on mental conditions in a criminal case not merely to express general opinions, which in the medical field can perhaps be regarded as well-founded, but to give his opinions with a proper appreciation of what the task of a trial court is in the application of the criminal law and particularly in the consideration of criminal responsibility and criminal liability (p. 48).

The judgment quoted from the Rumpff Commission's report to highlight the ideal relationship between jurist and medical expert, based on co-operation in the best interests of society:<sup>17</sup>

Again in *S v Phillips* (1985), the court expressed discomfort about uncorroborated nature of the expert evidence and that there was a possibility that the experts could be manipulated in reaching their diagnosis. The Court expressed its difficulty as follows:

It is precisely in this area that difficulties arise in applying what has been said by Professor Plomp to the commission of the murders that are involved in this case. In the first place, it is apparent that Professor Plomp was dependent to a fairly large degree on what accused No 1 [Phillips] told him for his diagnosis that she is, in fact, a psychopath. The evidence of all her childhood 'crimes', her outbursts of passion and so on, was not able to be independently confirmed. No doubt, as he says, Professor Plomp very properly relied on what Miss Syfret said in her report, exh NN2, and no doubt Miss Syfret was a completely honest and reliable witness; but she, in turn, was dependent to some degree upon what accused No 1 told her. There are some independent records of course, such as for example the list of previous convictions of the accused, but as Professor Plomp himself pointed out, when it comes to other reports, for example of the family, all the positive side is over-emphasised and when it comes to the report, for example, of an

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<sup>17</sup> The majority judgment in this case was delivered by Rumpff JA, who also chaired the Commission of Inquiry into the Criminal Responsibility of Mentally Deranged Persons and Related Matters (Republic of South Africa, 1967).

employer who has been deserted by the alleged psychopath, he tends to magnify all the negative characteristics. This was expressly recognised by Professor Plomp in his evidence ... Greater difficulties arise when one has to rely on her version not with regard to her history and her interpersonal relationships and so on, but in relation to the surrounding circumstances at the time when the offences were committed. There is the further difficulty that we are not here dealing with crimes that were committed on the spur of the moment. They were planned, premeditated crimes and we have found that to be the position in fact (p. 741).

#### **4.8. Testimony by clinical psychologists**

With few exceptions, the expert evidence of an accused's mental state was presented by a psychiatrist or psychiatrists. In a few cases, from the mid-1980's onwards, there was mention of a clinical psychologist testifying.

Weijers (2004), writing about the United States, observes that until the mid-1960's psychologists in that country, testified vicariously. In South Africa, the Van Wyk Commission (Republic of South Africa, 1972a) noted that legally "a clinical psychologist may examine and treat patients only if he is a member of a team of which at least one member is a medical practitioner" (p. 23, para. 2.16.1(ii)). The study showed that in some earlier judgments, before the 1980s, reference was made to the accused's intelligence or to unspecified psychological tests having been administered. Although the qualifications of the persons who administered the tests were not mentioned in the judgments, arguably, the tests were administered by psychologists, possibly working as part of a larger team in a psychiatric hospital.

In *R v Kennedy* (1951), the court referred to the appellant being above average intelligence. This suggests that evidence to that effect would have been placed before the court, implying that the appellant had been tested.

Similarly, in *S v Matabane* 1975(4) SA 564 (A), the appellant had been convicted of murdering a four-year old girl. The appellant had been examined by two psychiatrists, Drs Grove and Erasmus, at Weskoppies Hospital, who recommended that he was fit to stand trial. Interestingly, Dr Erasmus' report states that two personality tests had been administered, one being the Szondi

test, suggesting psychopathic tendencies. Unfortunately, nothing is said about the qualifications of the person who administered the test.

The first clear indication of a clinical psychologist having been involved in the assessment of a psychopathic offender is found in *S v Mnyanda* [1976]3 All SA 211 (A) – although the reference is in connection to intelligence testing, not psychotherapy. Dr Pascoe, the medical superintendent at Valkenberg Hospital, mentioned that the clinical psychologist could not test the appellant's intelligence, as he had refused to co-operate.

In *S v Loubscher* (1979)3 SA 47 (A), the appellant had been referred to Valkenberg Hospital for observation in terms of the CPA, 1977. The panel of psychiatrists reported its findings, which were based on various tests and interviews, including an interview and testing by a clinical psychologist but no further details are given.

In *S v Phillips* (1985) the Court referred also to testimony concerning Phillips by Mr Carnie, a clinical psychologist. Mr Carnie described Phillips as an emotionally disturbed person. The court mentioned that it was his evidence, together with the basic facts provided by Ms Syfret, a social worker, which corroborated its view that Phillips was incapable of making sound moral judgments.

As mentioned before, in *S v Eiman* 1989(2) SA 863 (A), a clinical psychologist, Dr Raath, had assessed the appellant. He testified that he conducted a psychodiagnostic interview with the appellant for two hours; interviewing his parents for an hour-and-a-half; and administering psychometric tests. The appellant was of normal intellect and that there was no indication of him being delusional or especially anxious. Dr Raath concluded that the appellant was a psychopath, observing an extreme degree of psychopathy.

Several cases referred to testimony given by clinical psychologists who worked in prison services: Dr Raath, in *S v Eiman* discussed above, had headed up the Brandvlei hospital prison for psychopaths; Colonel Delpont was head of the Zonderwater hospital prison and Major Borchardt, head psychologist at Pollsmoor.

In *R v Die Staat* 1983(4) SA 768 (T), the applicant was certified a psychopath while serving a 24-month sentence. He was being detained at Zonderwater. Despite making good progress, the experts, who included Colonel Delpont, a clinical psychologist and head of the prison hospital, felt that he had not yet received sufficient benefit from the treatment. Understandably, the applicant was frustrated by his indefinite detention, especially as the original sentence had been for a much shorter period. The judgment referred to a report by Colonel Delpont, which gave insight into the programme for the treatment of psychopaths, which was based on psychotherapeutic principles. Inmates progressed through the programme's stages. Transgression of the rules resulted in being demoted to the beginning. The court acknowledged that Colonel Delpont was an expert in the treatment of psychopaths. Notably, this is the first case in which there was a reference to a psychologist providing evidence autonomously. It is an exception, however, as the case content concerned an application brought by a convicted prisoner, rather than a trial or appeal against conviction or sentence in which psychopathy was alleged.

In *Thomson v S* (1997)2 All SA 127 (A) evidence was given by more than one clinical psychologist on various issues, including diagnosis, treatment and prognosis and the psychological damage caused to the victim. The judgment lists the following clinical psychologists who gave expert evidence at trial: Mr Lay, who gave evidence on the prospects of rehabilitation; Mrs Strydom, who testified on the psychological damage caused to the complainant; Mr Collis, a clinical psychologist; and Major Borchardt, the head psychologist at Pollsmoor Prison, who gave evidence for the defence after sentencing.

The trial court relied heavily on the poor prognosis by the medical experts when sentencing. After sentencing, however, the defence presented further evidence by Mr Collis and Major Borchardt. Mr Collis disagreed with the diagnosis of the trial experts, arguing that the appellant had attention deficit hyperactivity disorder. Major Borchardt's testified that he had been counselling the appellant for about six months and during this time the appellant's insight had improved, he displayed signs of remorse and that "he was a good therapeutic subject with good prognosis" (p. 127). Major Borchardt's diagnosis, however, agreed substantially with that of the trial experts.

The Appellate Court is rather scathing of Mr Collis as a witness. It cited passages from the transcripts to discredit his evidence both concerning diagnosis and the prospects of rehabilitation. Mr Collis had disagreed with the diagnosis given by the other experts: the Appellate Division suggested that his diagnosis of attention deficit hyperactivity disorder, which was treatable, was somewhat convenient. Mr Collis was rigorously cross-examined on the diagnosis. The Court remarked, “Without going into detail I may say that he came off a bad second” (p. 139).

For the first time, a judgment referred to the evidence by a clinical psychologist on the impact of the crime on the victim.

#### **4.9. Legal and clinical understandings of psychopathy.**

There appeared to be difficulties in reconciling clinical and legal understandings of psychopathy. Although psychopathy was a well-established legal phenomenon during the period studied, a disjuncture between psychiatric and legal understandings of the construct was evident in several of the cases. In addition, differences of opinion among the experts of what precisely psychopathy was, contributed to doubt that the concept was useful in law.

This ‘mismatch’ could be seen in *S v Mnyanda* [1976]3 All SA 211, in which Dr Pascoe, the medical superintendent at Valkenberg Hospital, had diagnosed the appellant as a psychopath for clinical purposes. The judgment recorded Dr Pascoe’s difficulty, from a clinical perspective, with applying the definition of psychopathic disorder contained in the [Mental Health] Act.

From the medical perspective, the statutory definition of psychopathy was too limited, especially the requirement that a person exhibit psychopathic traits before the age of eighteen years. In addition, the use of the words ‘persistent’, ‘abnormally’ and ‘seriously’ suggested degree of the disorder was relevant. In Dr Pascoe’s opinion, “only certain psychopaths were covered by the legal definition, namely those whose behaviour has manifested psychopathy early, persistently, and in severe degree” (p. 213).

He agreed that, from a legal perspective, the limitation was necessary. Otherwise,

All those who repeatedly commit antisocial acts should be regarded as having a psychopathic disorder or disability of mind. It might be argued that repeated theft, robbery, assault, fraud, etc. indicate the presence of many of the features of psychopathy, such as failure to learn from experiences, failure to foresee the consequences of acts, egocentricity, unreliability, dishonesty and lack of remorse, as the presence of the opposite of these features would deter the person from repeating anti-social acts. If this view is accepted a very large number of criminals, probably the large majority of the recidivists in our prisons, must be regarded as psychopaths, and indeed a very large number of first offenders can be labeled as having some features of psychopathy (p. 213)

Dr Pascoe suggested that certification as a psychopath in terms of the Act should be kept for:

abnormally aggressive or seriously irresponsible conduct [that] must be shown to occur in a way which was not deliberately chosen or planned, but was only minimally subject to willed control, and that this type of reaction to situations has been persistent, thus demonstrating that it results from a 'persistent disorder or disability of mind', and that other features of psychopathy must also be present (p. 214).

The value of psychopathy in criminal law is discussed in *S v Phillips* (1985). The court noted that the term 'psychopath' had been replaced by 'anti-social personality disorder', although the experts disagreed whether these were the same clinical entities. The more important question, as far as the court was concerned, "whether the classification of a person as a psychopath or as a person with an anti-social personality disorder serves any useful purpose in the criminal law" (p. 739). The Court did not answer its question as there were other grounds for finding extenuating circumstances.

In *Thomson v S* (1997)2 All SA 127 (A), after considering evidence in which different diagnoses were put, the Appellate Court remarked that it might have been more useful for the trial court to have dealt with the case under section 286A of the CPA, 1977, which provided for a catchall category of dangerous offenders.

#### **4.10. Summary of key trends observed:**

Briefly, the following summarises the key results:

- Despite doubts regarding the usefulness of psychopathy to the criminal law, during the period studied, psychopathy was a well-established legal phenomenon.
- There were no cases in which an accused was found not legally responsible on account of being a psychopath.
- Psychopathy, however, could be contributing factor to a finding of diminished responsibility but was not a circumstance the courts were prepared to entertain on its own. Other factors, such as youthfulness and intoxication, appeared to be more compelling in the determination of sentence.
- In some cases, despite having found that psychopathy was an extenuating circumstance, the death penalty was imposed. Judicial concern about the potential danger that the accused or appellant might pose to the public outweighed the presence of psychopathy as an extenuating circumstance.
- The courts were clear regarding their expectations of the medical experts' evidence, especially concerning the importance of relating the diagnosis to the facts of the case.
- There were few references in the cases to psychologists having played a role in assessing the accused. The first mention of a psychologist autonomously providing expert evidence of psychopathy was in *S v Phillips and Another* 1985(2) SA 727 (N). But prior to this psychological evidence was given in an application (*R v Die Staat* (1983) concerning the release of a convicted prisoner being treated as a psychopath. It appeared from the cases that several psychologists were employed within the prison services and provided evidence in that capacity.
- In one case, *S v Mnyanda* [1976]3 All SA 211, a medical expert expressed his difficulty in reconciling his clinical diagnosis with the legal definition of psychopathy contained in the MHA, 1973.

## Chapter 5: Concluding remarks

The questions that the study explored were intended to expand present knowledge of the history of psychology in this country. The questions addressed were as follows:

- Do the identified cases share any common characteristics?
- Did the law recognize psychopathy as a mental illness? If so, what were the consequences attached to being found in criminal law to be a psychopath?
- What legal challenges, if any, did psychopathy create for jurists applying South African criminal law? If so, how were these challenges been resolved?
- Is it possible to detect increasing acceptance by the South African courts of psychological testimony relating to psychopathy over time? If so, are there identifiable reasons for this trend?
- How have the role-players (judges, psychiatrists and psychologists) related to each other? What challenges may have been experienced regarding the nature of the testimony given?

A total of 33 cases were identified as being relevant to the study. Most of these related to violent crime and, unsurprisingly, the majority (75%) were appeals against the death sentence or life imprisonment. Several of the cases provided accounts of the crimes in which the brutality of the acts committed were described. Although the seriousness of the crime and sentences imposed may have been a factor when the cases were selected to be reported, it is possible that this series of cases may have reinforced judicial and public perceptions that psychopaths were especially dangerous offenders.

The study confirmed that, during the period studied, psychopathy was a well-established legal concept. Psychopathy was defined in legislation in 1973 as a certifiable mental illness and special hospital prisons were established within the prison services to provide treatment for convicted psychopaths. All of the official inquiries included recommendations aimed at protecting the public against dangerous psychopaths. The Van Wyk Commission had made an important observation concerning the shortage of professionals able to treat mentally ill persons and had specifically recommended that the expertise of clinical psychologists to provide

therapeutic treatment be recognized and that more posts be created in state institutions. In the 1990s, the Booyesen Commission, however, acknowledged that psychopathy had disappeared as a psychiatric diagnosis and argued that the special hospital prisons for psychopaths had failed. The general test for responsibility contained in the CPA, 1977, obviated the need to recognize specific categories of mental illness. It, therefore, recommended that the definition of psychopathy provided for in the MHA, 1973, be removed. The Commission also recommended that dangerous offenders be identified. An amendment to the CPA, 1977, accordingly, provided for dangerous offenders.

Despite psychopathy being seemingly well entrenched in the law, some jurists expressed their doubt of psychopathy's value to judicial decision-making. In *S v Phillips* (1985), the court expressly considered the question, asking whether psychopathy was of any use to the criminal law. The psychiatrist in that case also expressed his difficulty, answering the court's inquiry about whether he believed psychopathy was real by referring to the legislation: In short, if the legislation said psychopathy existed then it must.

The cases studied were clear that psychopathy – even in very severe cases - neither negated criminal responsibility, nor on its own reduced the blameworthiness of an accused. This is surprising, as the Rumpff Commission expressly considered psychopathy as providing a case for retaining diminished responsibility – although it linked this to a separate treatment regime for psychopaths within prison services.

The cases suggested that the courts were more comfortable to consider psychopathy an extenuating circumstance where other factors were also present. Overall, the cases studied suggested that jurists distrusted this “medicalising of deviance” (Davis, 1982, p. 156), appearing most concerned that society be protected from dangerous psychopaths.

Given this concern regarding the dangerousness of these offenders, the courts wanted to know whether psychopaths could be treated. Many of the experts, who testified, were unable to reassure the courts that psychopathy was treatable and it appeared that for many jurists the death penalty was the best solution. Interestingly, clinical psychologists from within the prison services

provided some testimony on the prospects of treating psychopaths (in *R v Die Staat* (1983), *S v Eiman* (1989) and *Thomson v S* (1997)). Their expertise in the field ensured that they were best placed to provide such evidence and their knowledge in this regard was recognized.

Overall, the cases studied suggested that, in the court room, psychology had limited influence on the law in the area of psychopathy. At best, it was a tool to assist jurists when making their decisions. The rules of litigation set rigid parameters that limit the nature of the engagement between jurist and expert. Expert evidence assists the court but it is the court that must decide how much weight to give that testimony. Even where legislation sets out a role for the expert, as found in the CPA, 1977, the court retains its authority to make the final decisions. Fox (1997) argued that law is not necessarily concerned with substantive justice but is, instead, “a rules-based social control system based on technicalities, categories and abstract principles” (as cited in Tredoux & Foster, 2005, p. 30).

In several of the cases, the appellate courts declined to intervene in the trial judges’ decision to impose the death penalty although the accused’s psychopathy was an extenuating circumstance. In these cases, the risk to the public that the offender might pose at a later stage outweighed all other considerations, even those of clemency. In some cases, the court refused to entertain new evidence concerning the accused’s mental condition, even though it might have established extenuating circumstances.

The cases showed that professional opinions required some shaping in order to meet legal understandings of psychopathy. For example, in *S v Mnyanda* (1976), Dr Pascoe expressed how difficult it was to reconcile the legislative definition of psychopathy with his clinical observations.

Although, the evidence suggested that psychiatric and psychological testimony had a limited effect on judicial decision-making, the relationship between psychology and law may have been mutually supportive in other contexts. Psychologists and psychiatrists appeared to have contributed to the official inquiries mentioned in the thesis, which led to legal reforms. For example, the Rumpff Commission (Republic of South Africa, 1967) and Van Wyk Commission

(Republic of South Africa, 1972a) both discussed the submissions received from psychologists and psychiatrists. In addition, the Rumpff Commission (Republic of South Africa, 1967) expressly recognized the potential contribution of psychiatry and psychology to the law and spelt out what was required for a mutually supportive relationship.

Weijers (2004) argued that in the United States and the United Kingdom, the notion of partial responsibility provided scope for psychiatrists and, some time later, psychologists to provide expert evidence on this question. Similarly, in South Africa, in almost all of the cases identified, psychiatric evidence of the psychopathy was provided. However, legal recognition of psychologists, as experts in the area of criminal responsibility, happened much later than in the United States or the United Kingdom.

The Van Wyk Commission, in 1972, acknowledged the stunted development of psychology in this country (Republic of South Africa, 1972a). As a consequence of its recommendations, psychologists received professional recognition in law but it was only in 1998 that clinical psychologists were recognized as experts for the purposes of making recommendations relating to a person's criminal responsibility. The legislative amendment to the CPA, 1977, provided that psychologists might be appointed by the court as part of a panel where a person is accused of committing a seriously violent crime.

Long before this, however, the results suggested that psychologists played a passive role in the court room by contributing to the psychiatric evidence collected as part of team of professionals and later presented to the courts. There are references to tests being administered as part of examining the accused and arriving at a diagnosis. Unfortunately, the references do not always mention the qualification of the person who had administered the test but it is possible to speculate that psychologists working as part of the hospital team administered some of these. The very first case to mention a psychologist giving autonomous expert evidence on the issue of psychopathy was *R v Die Staat* (1983). In this case, a convicted prisoner had been certified a psychopath and transferred to a hospital prison. Although he had been sentenced to two years imprisonment, he had been detained in the hospital prison for an indefinite period and was, therefore, requesting that he be released. The hospital prisons for psychopaths, established in the

1970s, made use of the services of psychologists. In this case, Colonel Delpont testified about the treatment programme that was being offered to psychopaths. These professionals were uniquely able to testify on the treatment programmes offered to convicted psychopaths by the prison services and, more generally, on the prospects of rehabilitation. In another case, a Dr Raath also provided testimony on the prospects of rehabilitating psychopaths. The Court specifically acknowledged his experience as head of a hospital prison for psychopaths as lending weight to his opinion. The first case, in which a psychologist gave evidence in a trial matter, was *S v Phillips*, 1985). In that case, the clinical psychologist gave evidence on the prospects of Phillips' treatment and rehabilitation.

The Rumpff Commission (Republic of South Africa, 1967) wrote frankly of the need for less distrust and greater mutual support. It acknowledged the contribution that psychiatric and psychological knowledge can make to ensuring better laws but warned that scientific knowledge was not the only consideration that needed to be taken into account – public sentiment and judicial concerns were also valid. Unfortunately, the cases suggested that the opportunities for psychology to contribute to developing the law or shaping legal concepts were few. Outside of the constraining arena of precedent and procedural and evidentiary rules, there was more scope for a mutually supportive relationship between the professions.

Legislative reform to the criminal procedure in the 1970's ensured a statutorily defined role for psychiatrists and psychologists in cases where fitness to stand trial, insanity and/or diminished responsibility were alleged. The CPA, 1977, provided for a panel to be appointed, comprising several experts representing both the state and the defence, to report to the court on the mental condition of the accused. Although, there was always the danger that jurists might unwittingly favour the evidence that best supported their own views, to some extent the risk was mitigated by procedural checks and balances. Even before this amendment, however, there appears to be acceptance that psychologists were competent to testify at trial on issues of responsibility.

### **5.1. Areas for future research**

The study suggested a number of issues that may be fruitful areas for further research:

Only three of the cases concerned women offenders: *R v Bayne* (1960); *S v Lehnberg en 'n Andere* (1975); and *S v Phillips* (1985). Of these cases, only one defendant (Phillips) was diagnosed as being a psychopath. In Lehnberg's case (1975), the psychiatric evidence was conflicting and the court accepted that, at best, she had psychopathic tendencies. In Bayne's case (1960), the diagnosis was doubtful as the sole basis for this conclusion was that she was a kleptomaniac. The Lehnberg (1975) and Phillips' (1985) cases were interesting as they both concern young women, each involved with a much older man, who exerted considerable influence on them. Although both women had accomplices, they were active participants in the murders. Still, both were sentenced to serve terms of imprisonment. It would be useful to look into the gendered aspects of the courts' treatment of dangerous women offenders.

In the past two decades, scientific knowledge of psychopathy has evolved. Tests, such as the PCL-R (Hare, 1980, 1991) have been developed. Given that in South Africa there is considerable interest in measures to reduce crime and prevent recidivism; fresh debate concerning the application of scientific knowledge of psychopathy to the criminal justice system may be timely.

In 1993, a legislative amendment to the CPA, 1977, inserted a category of dangerous offenders, which was intended to include psychopaths. This study did not look into the case law concerning this category of offenders but it may be interesting to look into the kinds of offences that attracted application of these provisions, the psychological evidence that was presented, as well as to how the therapeutic needs of these prisoners are taken care of within correctional services. Finally, the cases mention a range of investigative practices employed by experts when diagnosing mental illness. It might be of interest to look into how these have developed over time.

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## Cases

R v Hymans 1927 AD 35

R v Hugo 1941 WLD 285

R v Odendaal 1949(3) SA 114 (A)

R v Von Zell 1951(3) SA 393(A)

R v Kennedy 1951(4) SA 431 (A)

R v Roberts 1957(4) SA 265 (A)

R v Bayne 1960(4) SA 752 (T)  
S v Steyn (1963)1 All 114 (W)  
S v Nell 1968(2) SA 576 (A)  
S v Webb (1) 1971(2) SA 340 (T)  
S v Webb (2) 1971(2) SA 343(T)  
S v Radebe [1973]1 All SA 619 (A)  
S v P [1972]3 All SA 445(A)  
S v V 1972(3) SA 611 (A)  
S v J 1975(3) SA 146 (O)  
S v Lehnberg en 'n Andere 1975(4) SA 553 (A)  
S v Matabane 1975(4) SA 564(A)  
S v Du Toit 1976(1) SA 176 (W)  
S v Mnyanda [1976]3 All SA 211 (A)  
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S v Thomas and Another 1978(1) SA 329 (A)  
S v Harman [1978] 4 All SA 827 (A)  
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S v Phillips and Another 1985(2) SA 727 (N)  
S v Sampson 1987(2) SA 620 (A)  
S v Koztur 1988(3) SA 926 (A)  
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Thomson v S [1997]2 All SA 127 (A)

## **Legislation**

Criminal Procedure Act 51 of 1977

Criminal Matters Amendment Act 116 of 1993

Criminal Procedure Amendment Act 68 of 1998

Mental Disorders Act 37 of 1916

Mental Health Act 18 of 1973

University of Cape Town

## Appendix: Summary of cases

### 1. Rex v Odendaal 1949(3) SA 1114 (A)

**Court:** Appellate Division (AD).

**Judges:** Schreiner JA, Van Den Heever JA and Hoexter JA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal against conviction for murder (two counts) and death sentence. The appellant (Odendaal) had been convicted of murder on two counts. There were no extenuating circumstances found. On appeal, the appellant looked to bring new evidence to establish that his mental condition had diminished his responsibility for the murders.

**Expert evidence given:** An un-named medical practitioner, whose qualifications included an honorary lectureship in social medicine and psychopathology at the University of the Witwatersrand.

**Expert opinion:** The murder had a ‘psychopathologic basis’.

**Judgment:** The appeal was refused. The AD could see no special features in the medical evidence presented to warrant a departure from the general rule that a party is confined to the evidence presented at trial.

### 2. R v Kennedy 1951(4) SA 431 (A)

**Court:** Appellate Division.

**Judges:** Greenberg JA, Schreiner JA and Fagan JA.

**Crime committed and sentence:** Murder – imprisonment with hard labour (12 years).

**Case information:** Appeal against conviction. The appellant was convicted in the Witwatersrand Local Division (WLD) (Nestor J with a jury) of murdering his ex-wife and sentenced to 12 years imprisonment with hard labour. The defence argued that the combination of the appellant’s psychopathic personality and the circumstances preceding the shooting, created an emotional storm that prevented him from being responsible.

**Expert evidence given:** Dr Cooper, a psychiatrist (for the Defence).

**Expert opinion:** Psychopath.

**Judgment:** The AD was not persuaded by the medical and other evidence presented to it that the Appellant had suffered an emotional storm. The conviction was upheld.

### 3. R v Von Zell 1953(3) SA 303 (A)

**Court:** Appellate Division.

**Judges:** Van Den Heever JA, Fagan JA and De Beer AJA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal from conviction for murder with no extenuating circumstances and death penalty. The appellant had murdered his ex-wife. It was accepted that Von Zell was a psychopath. The defence argued that Von Zell acted from irresistible impulse – his psychopathic personality lessened his ability to control his emotions.

**Expert evidence given:** Dr Woolf, a ‘doctor’ and Dr du Plessis, a psychiatrist.

**Expert opinion:** Psychopath.

**Judgment:** Certification in terms of the MDA, 1916, was relevant as it could assist in rebutting the presumption that every person is sane. However, Von Zell’s psychopathic personality did not amount to a mental disorder in law. Nor was he able to establish that he had acted under irresistible impulse. The AD requested the trial judge to reconsider the sentence as there were extenuating circumstances, including psychopathy.

### 4. R v Roberts 1957(4) SA 265 (A)

**Court:** Appellate Division.

**Judges:** Hoexter AJA, Steyn AJA, Reynolds AJA, Beyers AJA and Hall AJA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal against sentence of death. The appellant was convicted of a sex murder, despite the jury finding extenuating circumstances (including psychopathy). The trial judge had given the death sentence to protect the public against the appellant’s dangerous criminal tendencies.

**Expert evidence given:** Drs McGregor and Dr Weinberg.

**Expert opinion:** Psychopath.

**Judgment:** The AD was not prepared to reverse the trial court’s decision to impose the death sentence, despite extenuating circumstances, including that he was a psychopath. In a minority

judgment Steyn AJA considered the test for criminal capacity ('toerekensvatbaarheid'), which required the ability to appreciate right from wrong and act in accordance with that appreciation.

**5. R v Bayne 1960(4) 752 (T)**

**Court:** Transvaal Provincial Division.

**Judges:** Claassen J and Galgut J.

**Crime committed and sentence:** Shoplifting and imprisonment (six months).

**Case information:** Appeal against sentence. An elderly woman had been convicted of shoplifting and was sentenced to six months imprisonment. The expert evidence was that she was both physically and mentally ill, and was psychopathic in that she suffered from kleptomania. At trial, the magistrate expressed his disbelief of the medical evidence presented.

**Expert evidence given:** Dr Watt, a psychiatrist.

**Expert opinion:** Psychopathic in that she suffered from kleptomania.

**Judgment:** On appeal, the court was disapproving of the magistrate's statement regarding the un-contradicted medical evidence. It held that the trial court's approach to the medical evidence was irregular.

**6. S v Steyn (1963)1 All SA 114 (W)**

**Court:** Witwatersrand Local Division.

**Judge:** Bresler J.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Application for leave to appeal against conviction for murder and the death. The case contained little information concerning the crimes committed or the Applicant's mental condition but he was described as a sex-sadist psychopath, a liar and suffering from epilepsy. There was no reference to medical evidence to support the diagnosis of psychopathy. However, the applicant had been certified previously when he had attempted suicide.

**Expert evidence given:** No details are provided.

**Expert opinion:** Psychopath. Applicant had been previously certified.

**Judgment:** The law presumes sanity and so it is for the party alleging insanity to prove otherwise. The applicant argued that being certified previously as mentally ill shifted this onus to

the State. The Court held that it did not and that he had acted in a lucid interval. The application was refused.

**7. S v Nell [1968]2 All SA 508 (A)**

**Court:** Appellate Division.

**Judges:** Ogilvie Thompson JA, Rumpff JA and Potgieter JA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal against death sentence for the murder of two women. The appellant had employed both as domestic workers. The legal question was whether a convicted murderer's psychopathy should be considered an extenuating circumstance for the purposes of deciding diminished responsibility and the appropriateness of the death sentence. The trial court had considered whether the appellant's psychopathy (although not certifiable) was an extenuating circumstance but had decided that it was not and imposed the death penalty.

**Expert evidence given:** Dr Huggins, a psychiatrist and the senior medical officer of the Fort England Mental Hospital at Grahamstown.

**Expert opinion:** Psychopath but not certifiable.

**Judgment:** The AD refused to interfere with the trial court's decision that there were no extenuating circumstances and dismissed the appeal.

**8. S v Webb (1) 1971(2) 340 (T); (2) 1971(2) SA 343 (T)**

**Court:** Transvaal Provincial Division.

**Judge:** Human J.

**Crime committed and sentence:** Murder – imprisonment (15-years).

**Case information:** The accused was on trial for murdering his wife. His defence was (1) that he was in a state of hysterical disassociation, which rendered him temporarily insane and, therefore, not legally responsible for his acts; or (2), alternatively, the State had failed to prove that the accused had intended to kill his wife. The Court accepted that the evidence clearly established that the accused was a psychopath.

**Expert evidence given:** Dr Morgan, acting superintendent of the Weskoppies Mental Hospital in Pretoria.

**Judgment:** The court held that the State had proven the intention to kill. Also, psychopathy, on its own, was not sufficient to establish extenuating circumstances. However, it concluded that there were extenuating circumstances when additional factors, such as the accused's drug addiction and emotional conflict, were taken into account. The accused was sentenced to 15 years imprisonment.

**9. S v P [1972]3 All SA 445 (A)**

**Court:** Appellate Division.

**Judges:** Holmes JA, Potgieter JA and Trollip JA.

**Crime committed and sentence:** Murder (culpable homicide) – imprisonment (12 years reduced to 8-years).

**Case information:** Appeal against conviction. A 15-year old European boy had strangled a guard while trying to escape. It was common cause that the accused did not intend to kill the guard but only to overpower him. The legal question was whether he was guilty of murder with extenuating circumstances or whether he was guilty of culpable homicide in that he objectively ought to have foreseen the consequences of his actions. He was found guilty of murder with extenuating circumstances and was sentenced to twelve years imprisonment. The sentencing recommendation was that the accused receive treatment at a psychopathic institution (Weskoppies Hospital). Leave was given to appeal.

**Expert evidence given:** Dr Zabow, a 'specialist psychiatrist' for the defence.

**Judgment:** The AD found the accused guilty of culpable homicide and reduced the sentence to eight years imprisonment. The recommendation that the accused be sent to a psychopathic institution for treatment was confirmed.

**10. S v V 1972(3) SA 611 (A)**

**Court:** Appellate Division.

**Judges:** Ogilvie Thompson CJ, Holmes JA and Jansen JA.

**Crime committed and sentence:** Rape – death penalty (reduced to 20-years imprisonment).

**Case information:** Application for leave to appeal against sentence of death and appeal. The 20-year old applicant had been found guilty of multiple counts of rape and attempted rape, as well as

crimen iniuria, theft and robbery. He was sentenced to death to protect the public. The trial court judge did not accept that the accused was a psychopath.

**Expert evidence given** by: Dr Freed, a psychiatrist.

**Expert opinion:** Psychopath.

**Judgment:** The application for leave to appeal against the sentence was granted but the parties agreed to dispose of the matter expeditiously. The AD felt that the trial court had misdirected itself in its concern to protect the public. The AD set aside the death sentence for a sentence of twenty years imprisonment (Ogilvie Thompson JA dissented).

#### 11. S v Radebe [1973]1 All SA 619 (A)

**Court:** Appellate Division.

**Judges:** Rumpff, JA; Wessels JA and Muller JA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal against conviction for murder. The appellant was convicted of murder with no extenuating circumstances and sentenced to death, although an assessor felt that the cruelty of the appellant's crime might possibly indicate that he was a psychopath.

**Expert evidence given:** Dr van Staaten.

**Expert opinion:** None mentioned, other than an assessor was of the view that the appellant might be a psychopath.

**Judgment:** The AD dismissed the appeal. Even if the appellant were a psychopath, in the absence of other considerations this would not constitute extenuating circumstances.

#### 12. S v J 1975 (3) SA 146 (O)

**Court:** Orange Free State Provincial Division.

**Judge:** Steyn J.

**Crime committed and sentence:** Murder – imprisonment (15-years, 3 of which were suspended).

**Case information:** The defendant, a 16-year old, was accused of committing murder.

**Expert evidence given:** A social worker and Mr Kruger, the vice-principal of the J.J. Serfonteinskool, Queenstown.

**Judgment:** The court found extenuating circumstances: The accused was intoxicated and this had affected his defective personality, which was attributed to youthfulness, immaturity and psychopathy. He was sentenced to 15-years imprisonment, three years of which were suspended.

**13. S v Lehnberg en 'n Andere 1975(4) SA 553 (A)**

**Court:** Appellate Division.

**Judges:** Rumpff CJ, Muller JA and Galgut Acting JA.

**Crime committed and sentence:** Murder – death penalty (on appeal 20-years imprisonment).

**Case information:** Appeal against death sentence. The appellant and an accomplice were convicted of murder and sentenced to death. Lehnberg was 19-years old when she conspired to murder her lover's wife. After conviction, the Defence argued that she was a psychopath as an extenuating circumstance but the trial court was not persuaded on sentence.

**Expert evidence:** Dr Shubitz, psychiatrist; Dr Strydom, psychiatric social worker and senior lecturer at the University of Cape Town; Dr Steytler; Dr Beaumont; Dr Karelse; Dr Morgan, medical superintendent at Weskoppies; Prof Bodemer; Prof Helm; and Ms Wolmarins. On behalf of the State: Dr Pascoe and Ms Swanepoel, a social worker.

**Judgment:** The Appellate Court found that Lehnberg had not proved that she was a psychopath but found her youth and the influence that her lover had on her personality extenuating circumstances. It set aside the death sentence, sentencing her to 20-years imprisonment instead.

**14. S v Matabane 1975(4) 564 (A)**

**Court:** Appellate Division.

**Judges:** Rumpff CJ, Muller JA and Galgut Acting JA.

**Crime committed and sentence:** Murder – death penalty (on appeal 20-years imprisonment).

**Case information:** Appeal against death sentence. The appellant was convicted of the murdering a four-year old girl. He was 17-years of age at the time the murder was committed. The trial court found no extenuating circumstances and he was sentenced to death.

**Expert evidence given:** Drs Grove and Erasmus, psychiatrists at Weskoppies Hospital.

**Judgment:** The AD found that the trial court should have considered the appellant's youthfulness as an extenuating circumstance and altered the sentence to 20 years.

**15. S v du Toit 1976(1) 176 (W)**

**Court:** Witwatersrand Local Division.

**Judge:** Irving Steyn J.

**Crime committed and sentence:** Murder – no information on sentence.

**Case information:** The accused had committed murder and made his first appearance before the new MHA came into operation on 27 March 1975. The defence applied, before pleading, to have the accused committed to a prison or an institution pending his being declared a State President's patient but argued that the definition of mental illness contained should be read into the MDA, as the accused would then be certifiable. The accused was diagnosed as a psychopath, described as being of the 'five-star' variety, with poor prognosis.

**Expert evidence given:** Dr Rosenberg and Prof Bodemer.

**Diagnosis:** Psychopath of 'five-star' variety.

**Judgment:** The Court, however, did not accept the argument and the defendant was, therefore not certifiable in terms of the MDA.

**16. S v Mnyanda [1976]3 All SA 211 (A)**

**Court:** Appellate Division.

**Judges:** Rumpff CJ, Jansen JA and Muller JA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal against conviction and sentence. Although the appellant was clinically diagnosed as a psychopath, he was convicted of murder with no extenuating circumstances and sentenced to death. The appellant contended that that the trial court erred in finding that he did not have a psychopathic disorder, as defined in the MHA, 1973, and that there were no extenuating circumstances present. He applied for a special entry, in terms of which he would be committed to a jail or institution pending his signification as a State President's patient.

**Expert evidence given:** Dr Pascoe, the medical superintendent at Valkenberg Hospital

**Expert opinion:** Clinically a psychopath but not certifiable in terms of the MHA.

Judgment: The AD considered the meaning of psychopathic personality as defined in the MHA and whether being found by a court to be a psychopath, diminished responsibility. The appeal was unsuccessful.

**17. S v Sigenu 1977(3) SA 1097 (C)**

**Court:** Cape Provincial Division.

**Judges:** Diemont J and Schock J.

**Crime committed and sentence:** Indecent assault.

**Case information:** Sentencing: A 13-year old boy had been convicted of indecently assaulting a six-year old girl. The trial took place in the magistrate's court but sentencing was postponed so that the case could be taken on review to the Cape High Court.

**Expert evidence given:** Dr Pascoe, superintendent at Valkenberg Hospital.

**Expert opinion:** Psychopath in terms of the MHA, 1973.

**Judgment:** The Court considered various sentencing options (corporal punishment was rejected as the Criminal Procedure Act, although not yet in force, prohibited whipping in the case of psychopaths) but held that the defendant be punished according to his physical maturity and not his chronological age. This entailed a prison sentence. The Court also directed the magistrate to bring the case to the attention of the prison authorities for possible detention in a prison hospital for psychopaths.

**18. S v Thomas and Another 1978(1) 329 (A)**

**Court:** Appellate Division.

**Judges:** Trollip JA, Muller JA and Diemont JA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal from conviction for murder. The first defendant, Thomas, was convicted as an accessory in respect of the murder of two and was also convicted of murdering a third person. The trial court found that extenuating circumstances in respect of his conviction for the murder and he was sentenced to periods of imprisonment for all crimes. Thomas was appealing against his conviction and sentence for murder. The second defendant, Leisher, was found guilty of murdering all three, without extenuating circumstances, and was sentenced to death.

**Expert evidence given:** None mentioned.

**Expert opinion:** Not applicable.

**Judgment:** Thomas' appeal was dismissed. The AD upheld the trial court's conviction and sentence. Leisher' counsel, however, contended that there was medical evidence that he suffered from a psychopathic disorder as defined in the MHA and was, therefore, mentally ill as defined. Counsel argued that the AD should remit the case to the trial court for an enquiry in terms of section 79 of the CPA into Leisher's mental disorder and criminal responsibility at the relevant time. However, the CPA was not yet in operation at the time that criminal proceedings had begun. The AD was asked to interpret 'criminal proceedings' in such a way that the appeal procedure would be fresh proceedings for the provisions of the CPA to apply and the enquiry could then take place. The AD dismissed the argument and the appeal.

**19. S v Harman [1978]4 All SA 827 (A)**

**Court:** Appellate Division.

**Judges:** Jansen JA, Trollip JA and Trengove AJA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal against sentence. The appellant, a 17-year old, had been convicted of murder and sentenced to death. The trial judge had discretion not to impose the death penalty but still did so.

**Expert evidence given:** Dr Pascoe, a State psychiatrist; and Dr Zabow, a specialist psychiatrist.

**Expert opinion:** Dr Pascoe – A certifiable psychopath in terms of the MHA, 1973; Dr Zabow – psychopath.

**Judgement:** The AD (majority judgment) held that the appellant's youth and psychopathy were reason not to impose the death penalty. The sentence was changed to 20-years imprisonment. Trollip AJA dissented: The appellant had appreciated the nature of what he had done and the consequences. He, therefore, agreed with the trial court's decision to impose the death penalty.

**20. S v Loubser 1979(3) SA 47 (A)**

**Court:** Appellate Division.

**Judges:** Corbett JA, Galgut AJA and Rumpff CJ.

**Crime committed and sentence:** Murder and rape – death penalty.

**Case information:** The appellant had been convicted of murder, rape and theft and sentenced to death for the murder. During the trial proceedings, he was referred to Valkenberg Hospital for observation terms of the CPA but was found competent. After conviction and sentence, application was made to the AD for leave to appeal and to bring new evidence concerning the appellant's mental condition (that he was neither psychotic, nor certifiable as a psychopath, but suffered instead from Huntington-chorea).

**Expert evidence:** Panel inquiry - Dr T Zabow; Dr M Moss and Dr B R Lakie (included Psychiatric interviews and consultation with colleagues; physical examination and EEG studies; social worker's reports; interview and testing by clinical psychologist; and observations by ward psychiatric nursing staff.

New medical evidence: Drs Zabow, Hayden; MacGregor and Handler.

**Expert opinion:** Panel inquiry – not mentally ill and competent. New evidence: Huntington-chorea.

**Judgment:** The application for leave to appeal and to place new evidence before the court was dismissed. Despite accepting that the appellant suffered from the disease, the Court was not persuaded that his illness had diminished the appellant's responsibility. The Court also addressed the relationship between jurist and medical expert.

## 21. S v Pieterse 1982(3) SA 678 (A)

**Court:** Appellate Division.

**Judges:** Jansen JA, Cillie JA and Rumpff CJ.

Crime committed and sentence: Murder and rape – death penalty.

**Case information:** Appeal against death sentence. The appellant was convicted of murder and rape in the Pretoria by a judge and two assessors and sentenced to death. The assessors felt that there were extenuating circumstances (including psychopathy) but the Judge exercised his discretion to impose the death penalty.

**Expert evidence given:** Prof Plomp, a state psychiatrist at Weskoppies Hospital.

**Expert opinion:** Psychopath with epilepsy.

**Judgment:** The AD held that the trial judge had exercised his discretion correctly: There were no extenuating circumstances. The appeal was dismissed.

**22. R v Die Staat 1983(4) SA 768 (T)**

**Court:** Transvaal Provincial Division.

**Judges:** Van der Walt J en Ackermann J.

**Crime committed and sentence:** Not specified.

**Case information:** The applicant, who had been certified a psychopath while serving a 24-month sentence, was being treated at a prison hospital for psychopaths. Despite making good progress, the psychiatric experts felt that he had not yet received sufficient benefit from his treatment for him to be released even though the original sentence had been for a much shorter period.

**Expert evidence given:** Dr Weinbrenn, a psychiatrist; Prof Plomp, a professor in psychiatry at the University of Pretoria; Colonel Delpont, clinical psychologist and head of the hospital-prison for Psychopaths at Zonderwater; Dr Steenkamp, a psychiatrist attached to the hospital-prison.

**Expert opinion:** Certifiable psychopath. Prof Plomp was of the opinion that although the applicant was certifiable in 1977 he had progressed and was now a person with psychopathic tendencies. Colonel Delpont and Dr Steenkamp were of the opinion that the applicant was still certifiable.

**Judgment:** The Court held that it seemed that the applicant was on his way to being rehabilitated. Although it would be irresponsible too 'summarily' release the applicant without preparing him, a definite date should be fixed for his release and that the appropriate steps should be taken to prepare him for this event.

**23. S v Sibiyi 1984(1) SA 91 (A)**

**Court:** Appellate Division.

**Judges:** Viljoen JA, Hoexter JA and Howard AJA.

**Crime committed and sentence:** Murder – death penalty (on appeal, changed to life imprisonment).

**Case information:** Appeal against the death sentence for two counts of murder. The appellant was convicted for assaults, murder and rape, committed in a two-week period. The appeal was against the sentence imposed. The trial court found no extenuating circumstances.

**Expert evidence given:** Dr Ramsundhar, a senior psychiatrist at the Midlands Hospital and Dr Lind, a psychiatrist not in the full-time service of the State.

**Expert opinion:** Dr Ramsundhar testified that the appellant had a personality defect, either dys-social or psychopathic. Only the absence of any evidence to show that the appellant had been abnormally aggressive before he was eighteen prevented Dr Ramsundhar from classifying him as a psychopath. Dr Lind was of the view that the appellant had a defective personality.

**Judgment:** The appellant was not a psychopath but the AD found that his personality defect was a ‘disorder or disability of mind’ as provided for in the CPA. The appellant’s responsibility was diminished and the sentence was altered to life imprisonment.

#### **24. S v Phillips and Another 1985(2) SA 727 (N)**

**Court:** Natal Provincial Division.

**Judge:** Milne JP.

**Crime committed and sentence:** Murder and robbery – Phillips received life imprisonment and Grundlingh, the death penalty.

**Case information:** Criminal trial and subsequent application for leave to appeal. The two accused, Phillips and Grundlingh were charged with four counts of murder and four counts of robbery with aggravating circumstances, as well as fraud and theft. The murder and robbery charges were linked.

**Expert evidence given:** Prof Plomp, a psychiatrist, and Ms Syfret, a social worker.

**Expert opinion:** Phillips was a psychopath.

**Judgment:** The Court found that despite Phillips being a psychopath, her psychopathy was not sufficiently severe to have reduced her self-control to such an extent that it bordered on mental illness. Even if it did, it found no link between her being a psychopath and the murders, which were pre-meditated. Phillips was found guilty but there were extenuating circumstances (her youth, her background, a history of taking drugs and the influence of Grundlingh). She received life imprisonment Grundlingh was sentenced to death but granted leave to appeal.

#### **25. S v Sampson 1987(2) 620 (A)**

**Court:** Appellate Division.

**Judges:** Hoexter JA, Nestadt JA and M T Steyn AJA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** The appellant, a 19-year old, was convicted and sentenced to death on two counts of murder despite extenuating circumstances – his psychopathic personality, his intoxication at the relevant time and youth.

**Expert evidence given:** Dr Magner, a psychiatrist, had examined the appellant at Valkenberg Hospital.

**Expert opinion:** Serious psychopathic personality, close to certification.

**Judgment:** The AD held that the trial court had misdirected itself in excluding the possibility that the appellant might be rehabilitated or that his condition might at least be alleviated (although the prospects were not good). The trial court had also not given sufficient weight to the appellant's youthfulness. The appeal was upheld and the sentence changed to life imprisonment.

## 26. S v Koztur 1988(3) SA 926 (A)

**Court:** Appellate Division.

**Judges:** Van Heerden JA; Smalberger JA and MT Steyn JA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** Appeal from sentence of death. The appellant broke into his stepfather's house to steal but, in doing, so, assaulted and then murdered the woman who was there as a domestic worker as she could identify him.

**Expert evidence given:** Dr Berman, a specialist psychiatrist and principal psychiatrist at Sterkfontein Hospital, and two private psychiatrists, Drs Fine and Wolf, had conducted an enquiry in terms of the CPA, 1977.

**Expert opinion:** Psychopath with focal brain disorder but fit to stand trial and having criminal capacity.

**Judgment:** The AD confirmed that a psychopathic condition is not by itself an extenuating circumstance. The appeal was dismissed.

## 27. S v Eiman 1989(2) SA 863 (A)

**Court:** Appellate Division.

**Judges:** Hefer JA, Grosskopf JA and Steyn JA.

**Crime committed and sentence:** Murder – death penalty.

**Case information:** The appellant was convicted of murder with no extenuating circumstances and the death penalty was imposed.

**Expert evidence given:** Dr Raath, a clinical psychologist.

**Expert opinion:** Psychopathy (of extreme degree).

**Judgment:** The AD upheld the trial court judge's decision to impose the death sentence despite the court having found that there were extenuating circumstances. The appellant was a dangerous, violent psychopath, who would pose a risk to fellow prisoners if incarcerated. The only alternative was a death sentence. The Appeal Court agreed with the trial court's reasoning that the appellant was too dangerous for imprisonment to be the appropriate sentence: The evidence showed that the appellant could again commit murder in prison and that should he escape, he would be a threat to society.

## **28. S v Lawrence 1991(2) SACR 57 (A)**

**Court:** Appellate Division.

**Judges:** Goldstone JA; Hoexter JA and Eksteen JA

**Crime committed and sentence:** Murder – death penalty (on appeal – life imprisonment).

**Case information:** Appeal against sentence. The appellant was convicted of brutally murdering a young girl. The trial court held that extenuating circumstances were present (psychopathy, under the influence of drugs and alcohol) but exercised its discretion to impose the death penalty.

**Expert evidence given:** Drs Plomp, le Roux, and Holloway, Weskoppies Hospital; and Dr Verster, as well as Mrs Krynauw, a social worker; and Dr de Miranda, the director and head of clinical services of SANCA (on substance abuse).

**Expert opinion:** psychopath (in a severe form).

**Judgment:** The AD (majority judgment) held that the appellant was no danger to the prison community or that he could not be prevented from escaping from prison. It would be prejudicial for the court to speculate on this possibility. The AD found that "heinous and brutal" nature of the murder proclaimed mental illness and that appellant's mental illness was directly connected to his conduct at the relevant time (p. 60). In a minority judgment, Eksteen JA dissented, upholding the death penalty.

## **29. S v Oosthuizen 1991(2) SACR 298 (A)**

**Court:** Appellate Division.

**Judges:** Kumleben JA.

**Crime and sentence:** Murder – death penalty (on appeal – life imprisonment).

**Case information:** Appeal against sentence. The appellant was convicted of murder without extenuating circumstances and sentenced to death. For the conviction of robbery with aggravating circumstances, he was sentenced to imprisonment.

**Expert evidence given:** Dr Shevel, a psychiatrist and member of the panel which had observed the appellant in terms of the CPA.

**Expert opinion:** Psychopath (five-star psychopath).

**Judgment:** The legal question concerned whether psychopathy was a mitigating circumstance? The court held that on its own it was not. The key question was the nature of the “aberrant behaviour and the role it played in the commission of the crime under consideration” (p 302).

The possible risk to society of a dangerous psychopathic offender if he or she were to be released was also considered but the AD reasoned that this danger was now addressed by an amendment to the Prisons Act 8 of 1959, which provided that a person serving a life sentence could only be released from prison on the authority of the Minister of Justice, acting on the recommendation of the Release Advisory Board. The AD, therefore, held that, in the circumstances, the risk of the appellant behaving aggressively and unlawfully, whether before or after release, was not enough to warrant the death penalty.

### **30. S v Cotton 1992(1) SACR 531 (A)**

**Court:** Appellate Division

**Judge:** Howie AJA

**Case information:** Appeal against sentence. The appellant was convicted of murder without extenuating circumstances and sentenced to death. He was also convicted of robbery with aggravating circumstances, for which he was sentenced to imprisonment. The psychiatric evidence at the trial described the appellant as a certifiable psychopath but considered him criminally responsible.

**Expert evidence given:** Dr Berman, senior psychiatrist at the Sterkfontein Hospital. Defendant's counsel also briefly alludes to a psychological report that was submitted to the Review Panel to the effect that the appellant behaved well in a controlled environment (such as prison).

**Expert opinion:** Psychopath.

**Judgment:** The AD was not persuaded that the appellant's psychopathy was relevant to the crimes committed, suggesting that the motive for the murder was revenge. However, the AD did not feel it necessary to pursue this line of thought any further, as it felt that the appellant's youth and associated immaturity constituted, cumulatively, a substantial mitigating factor. All the objectives of punishment would be achieved by a life sentence of imprisonment.

### **31. S v Van Vuuren en 'n Andere 1992(2) SACR 148 (A)**

**Court:** Appellate Division.

**Judges:** E M Grosskopf JA.

**Case information:** Appeal against sentence. The appellants were convicted of murder and robbery and sentenced to death.

**Expert evidence given:** First appellant: Prof Plomp; Dr le Roux; Dr Stahmer. Second appellant: Prof Plomp and Drs Verster and Rose diagnosed him as having an antisocial personality disorder (psychopathy).

**Expert opinion:** First appellant: Disagreement between the experts that the appellant's anti-social tendencies diminished his responsibility. Second appellant: Psychopath.

**Judgment:** The AD held that the only mitigating factors were the first appellant's relative youth and his relatively clean record (He had been 22 years old when the crimes were committed and had no previous convictions for crimes of violence). The Court discounted his anti-social tendencies as the murders were pre-meditated. The second appellant was diagnosed as a psychopath but this was not a mitigating factor and the second appellant's psychopathy had played no role in the murders: The appeal was dismissed and the death sentences confirmed.

### **32. Ex parte J 1993 (1) SACR 621 (T)**

**Court:** Transvaal Provincial Division.

**Judges:** Van Dijkhorst J and Smit J.

**Crime and sentence:** Not applicable.

**Case information:** Application for an enquiry in terms of the MHA, 1973, into reasons for detention as a psychopath. The applicant was being detained at Zonderwater hospital prison for psychopaths.

**Expert evidence given:** Drs Groenewald and Olivier, psychiatrist at Weskoppies Hospital certified the applicant.

**Expert opinion:** Certified psychopath.

**Judgment:** The Court held that the *audi alterem* rule had not been applied and, therefore, the certification as a psychopath could not be upheld, even if the experts subsequently confirmed the diagnosis.

### 33. Thomson v S [1997] 2 All SA 127 (A)

**Court:** Appellate Division/Supreme Court of Appeal.

**Judges:** Grosskopf JA; Schutz JA and Streicher AJA.

**Crime and sentence:** Murder – life imprisonment.

**Case information:** Appeal against sentence. The appellant was convicted of brutally - 'savagely' - raping and indecently assaulting a 15 year old girl. The trial court had considered the danger the appellant posed to society if released on account of his being a mixed personality type with little prospect of cure/rehabilitation.

**Expert evidence given:** At trial: For the defence, Dr Teggin, a psychiatrist; for the state, Dr Jedaar, a psychiatrist; and Mr Lay, a clinical psychologist and qualified social worker. Dr Jedaar and Mr Lay had formed part of the team that assessed the appellant at Valkenberg hospital.

For the defence on sentence: Mr Currie, a clinical psychologist; Major Borchardt, head psychologist at Pollsmoor Prison.

A clinical psychologist, Mrs Strydom, gave evidence of the victim's psychological damage.

**Expert opinion:** The diagnosis of the Valkenberg team was that the appellant was a 'personality disordered (mixed type with pronounced narcissistic traits). Dr Teggin, for the defence, agreed adding that there were features of at least four personality disorders, including an anti-social personality disorder (psychopathy). Although the Valkenberg team's initial diagnosis had been of psychopathy, it had 'dropped' this as not all the criteria were present.

**Judgment:** The AD declined to uphold the appeal.