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SENTENCING OF YOUTH OFFENDERS
FOR HOUSEBREAKING WITH INTENT
TO STEAL: PRACTICES AND
ATTITUDES OF MAGISTRATES AND
PROSECUTORS

BY

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CYPRIAN G.H. HLATSHWAYO

RESEARCHER

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CHAPTER I: BACKGROUND

1. INTRODUCTION

South Africa is faced with an ever-increasing number of children who are in conflict with the law. There is currently a need for the transformation of the child and youth care system in order to prevent children from getting deeper into the criminal justice system. There have been moves to create a child justice system in an attempt to address this issue, and these include, *inter alia*, diversion services and the establishment of youth-centred restorative justice programmes for the youth. Proposals for the new child justice system are based on international instruments including the United Nations Convention on the Rights of the Child, the United Nations Guidelines for the Prevention of Juvenile Delinquency (Beijing Rules), the United Nations Rules for the Protection of Juveniles deprived of their Liberty, as well as the Inter-Ministerial Committee on Young People at Risk policy recommendations, and the South African Constitution (Act 108 of 1996).

Sentencing is the most neglected aspect of the criminal justice system. The research topic was chosen to examine some of the issues affecting the sentencing of youth offenders, with emphasis on the sentencing practices and attitudes of magistrates and public prosecutors in housebreaking offences. The study also focuses on some of the factors that often affect the sentencing decisions of judicial officers, the various sentences that are likely to be imposed in housebreaking cases, as well as the main objectives of punishment that the judicial officers hope to achieve by imposing certain sentences for housebreaking crimes.

In an attempt to address the question of sentencing in general, the South African Law Commission issued a discussion paper known as "**A New Sentencing Framework, Discussion Paper 91, Project 82**" (31 May 2000), for comment and input by members of the public, individuals and

organizations. The research does not however examine the details of this discussion paper but only a few aspects of it are referred to in this study. Furthermore, due to time and financial constraints, this study is limited to housebreaking offences by youth offenders within the Germiston magisterial district. As Mouton puts it, "You usually have to delimit the time-frame of the study (e.g. study corruption events since 1995), or the geographical boundaries (studying corruption in one province rather than in all provinces), or draw a sample from a population (the public opinion study)" (Mouton, 2001: 51).

2. BACKGROUND AND AIMS OF THE STUDY

The researcher's knowledge and experience in probation work, including conducting pre-sentence investigations and compiling pre-trial and pre-sentence reports, inspired him to want to find out more about the attitudes and sentencing practices of magistrates and public prosecutors, specifically in housebreaking offences. Some individuals and communities hold a notion that offenders normally break into properties and steal goods or items mainly because they are hungry, destitute, unemployed, or have no visible means of income. Such a belief may, to a large extent, influence or shape judicial attitudes in the sentencing of youth offenders for housebreaking crimes. On the other hand, judicial officers have a moral and legal duty to protect society against criminals. In terms of section 9 of the South African Constitution, "Everyone is equal before the law and has the right to equal protection and benefit of the law". (The Constitution of the Republic of South Africa, 1996: 7).

The study will therefore highlight some important issues around sentencing, and assist judicial officers in imposing penalties that are appropriate and proportionate to the offence allegedly committed by youth offenders.

The aims of the study include examining the practices and attitudes of magistrates and public prosecutors regarding sentencing of youth offenders for housebreaking crimes. The study also explores the various factors and types of penalties that are often considered by judicial officers in the sentencing process. The researcher believes that examining the practices and attitudes of judicial officers in the sentencing of youth offenders may assist the sentencers in imposing sentences that are proportionate to the nature and gravity of the offence committed by the offender.

The overall aims and goals of the research therefore include the following:

- To examine the practices and attitudes of magistrates and prosecutors when imposing penalties on youth offenders accused of committing housebreaking crimes.
- To ascertain the various types of sentences imposed on youth offenders in this regard.
- To determine the main factors affecting the magistrates and prosecutors' sentencing decisions in housebreaking cases.
- To determine the objectives or aims of punishment that the judicial officers are most likely or hope to achieve when imposing penalties on housebreaking youth offenders.

3. THE SCOPE OF THE RESEARCH

The study will cover the following main topics:

In Chapter 2, relevant literature is discussed, namely, literature read by the researcher in order to ascertain how other researchers have approached the research topic that he is studying. The first section (subsection 2.1) deals with the concept of **punishment**, that is, a brief outline on the difference between punishment and sentencing; motivation for punishing offenders; aims or principles of punishment (retribution, deterrence, prevention,

rehabilitation), and lastly (subsection 2.2), some basic factors which judicial officers take into consideration when imposing sentences. The second section (subsection 2.3) focuses on the procedure that is followed after an offender has been convicted of an offence in court; the role of a probation officer is sentencing; as well as the manner of dealing with children who are accused of having infringed or are in conflict with the law. In the third section (subsection 2.4), the various types of sentences that judicial officers may impose on offenders as outlined in Section 276 of the Criminal Procedure Act (Act 51 of 1977), are discussed. Subsection 2.5 highlights the problems with current sentencing practices in South African courts, including disparity and inconsistency in sentencing, lack of training in sentencing among judicial officers; and so on. The concept of burglary and housebreaking is briefly discussed in subsection 2.6 and includes aspects such as the elements of burglary, classification of burglary, as well as the characteristics of a burglar.

Chapter 3 deals with the transformation of child justice in South Africa. Issues covered in this chapter include new approaches to the sentencing of children who are in conflict with the law, such as restorative justice programmes, and the proposed new Child Justice Bill.

Chapter 4 of the study outlines the design of the study and the methodology followed in the research process, including instruments or techniques used in the study, sampling techniques, details of the data collection process, and analysis of the data collected.

The findings of the study are presented and discussed in Chapter 5. From this information, conclusions are drawn and recommendations formulated in Chapter 6, which is the final chapter of the dissertation.

CHAPTER II: LITERATURE REVIEW

1. INTRODUCTION

Some literature relevant to the study on sentencing and housebreaking (burglary) was obtained and discussed in the study. Such literature includes the aspect of punishment and sentencing, sentencing procedures in court, sentencing options that are at the disposal of judicial officers, problems that are common in the sentencing practices, the concept of burglary or housebreaking, and lastly, the transformation of child justice in South Africa,

2. HOUSEBREAKING AND SENTENCING

2.1 Theories of Punishment

There is limited information available on the subject of punishment in the South African context. The literature by Rabie, Strauss and Maré, is the only major South African source on this subject. These authors provide a comprehensive discussion on the aspect of punishment.

2.1.1 Punishment and sentencing

There is a fundamental difference between punishment and sentencing. Punishment is an infliction of pain on the offender and is an unpleasant experience for him. It normally follows a conviction. Van der Merwe defines punishment as "something symbolically re-affirming public condemnation of a certain course of conduct" (van der Merwe, 1991:3-7). According to Rabie et al "... criminal punishment is regarded as an instrument through which society expresses its condemnation and disapproval of the offender's act, and is associated with the authoritative infliction of suffering on account of a crime which has been committed...", and retribution is said to be a central feature of punishment, or "... the only true theory of punishment" (Rabie, Strauss and Mare, 1994:46).

Reid describes punishment as "Any of a series of impositions (such as a fine, probation, work service, incarceration and so on) imposed upon a person by authority of law after that individual has been determined to be a criminal offender" (Reid, 1997:79). Punishment, as a sanction of criminal law, has two outstanding characteristics, namely:

- (a) Intentional infliction of suffering upon an offender, and
- (b) Expression of the community's condemnation and disapproval of the offender and his conduct (Rabie & Strauss, 4th Edition, 1985:6).

Van der Merwe also maintains, "punishment is a moral issue and should therefore exactly raise moral issues" (van der Merwe, 1991:3-9). The main aim of punishment is commonly perceived to be the protection of society against crime. There is, however, no consensus as to which method is the best to achieve this aim. Punishment also serves to deter or discourage potential criminals from committing crimes or further crimes. Wasik states that the term "**sentence**" includes punishment, such as a fine or a custodial sentence, which the court imposes upon an offender for the offence " (Wasik, 1993:6). He further explains that the term also includes other orders (conditions) imposed by court at the same time as the punishment, for example, committal to a treatment centre or institution, compensation or reparation, and so on.

Van der Merwe (quoting from an article by Ashworth) describes **sentencing**, on the other hand, as "a public quantification of the individual offender's blameworthiness, determined according to acceptable standards of proportionality" (van der Merwe, 1991:1-6). He further defines sentencing as the "practical application to a specific accused, in a specific case, of the general principles of punishment" (van der Merwe, 1991:3-1). He goes on to say that punishment should be treated as a necessary step towards treating the wider concept of sentencing.

The South African Law Commission maintains that “the purpose of a sentence is to punish those offenders, and only those, who have been found guilty of a particular offence and that the punishment must be limited by the restrictions contained in the Constitution, including the constitutional prohibition of cruel, inhuman or degrading punishment or treatment” (South African Law Commission, Discussion Paper 91, A New Sentencing Framework: 47).

In determining a sentence to be imposed on the offender, the sentencing official normally takes into consideration certain factors, and some of these are outlined by Ruby as follows:

- The degree of **premeditation** involved;
- The **circumstances** surrounding the actual commission of the crime, that is, how it was committed – use of violence, weapon, the degree of active participation by each offender;
- The **gravity** of the crime committed;
- The **attitude** of the offender after committing the offence, which shows, *inter alia*, the type of a person he is;
- The **previous convictions** of the offender, if any;
- The age, mode of life, character and personality of the offender;
- Any **mitigating** or other circumstances brought to the attention of the court;
- **Prevalence** of the crime in the area of jurisdiction;
- Sentences which are normally imposed for similar offences; and
- Mercy (Ruby, 1980:19).

The above factors are also applicable to perpetrators of housebreaking offences. Others, namely, aggravating and mitigating factors in sentencing, will also be discussed in some detail below.

2.1.2 Justification for Punishment

The question: **"Why should people (offenders) get punished?"** is not an easy one. Several theories have been developed in order to justify the use of punishment or corrective measures. Rabie et al state that: "Punishment is an evil, an unpleasantness; it requires that someone suffer. Its infliction demands justification" (Rabie, Strauss & Maré, 1994:54).

There is legal and moral justification of punishment. **Legal justification** relates to punishment of a person who has transgressed the law, that is, the State versus the accused person. The State will therefore impose punishment so as to eliminate or reduce crime, and thus offer protection to society. **Moral justification** on the other hand, is concerned with a person who has violated the norms and laws of society. Punishment is regarded as some form of social control, and highlights society's disapproval of the offender's unacceptable behaviour and a need to change him into a responsible and law-abiding member of society. According to Ashworth "Society has an interest in crime control – that is, in ensuring that its laws are duly obeyed – and this provides a justification for taking punitive measures against those who have broken the law. Punishment is justified not merely because it is deserved but also because it contributes towards crime control" (Ashworth, 1983:18).

Rabie *et al* further explain that: "The most obvious ultimate justification for the imposition of punishment would seem to be that organised society has the right (perhaps even the duty) to protect itself, and that punishment is considered rightly or wrongly – as the most suitable weapon against criminals" (Rabie, Strauss & Maré, 1994:55). In order for punishment to be legitimate and justifiable, it should, therefore, aim at maintaining law and order, and protecting the rights of people.

The issue of concern for this study is the justification of punishment for housebreaking offenders. Housebreaking victims who have suffered considerable losses or damage due to burglary by housebreakers, are most

likely to justify punishment for such offenders. The community at large will also be more likely to support such victims because they feel vulnerable and threatened as well. Retribution will therefore be more prominent in such instances. Some authors also believe that only retribution justifies the imposition of punishment because it "... provides a basis for justifying punishment on account of it being deserved ... a person can be punished only when he deserves it and, conversely, he cannot be punished if he does not deserve it. The fact that punishment must be deserved is regarded as one of the basic principles of justice" (Rabie, Strauss & Maré, 1994:49).

2.1.3 Aims or principles of punishment

Different authors justify the purposes and aims of punishment for offenders and have formulated various theories of punishment. According to Rabie et al, such theories "... have played an important role as far as criminal law is concerned. They have traditionally been developed as moral justifications of punishment and have been instrumental in the clarification of the nature of punishment. Moreover, they have revealed important clues as to the purpose of punishment and as such have been of importance to legislators, police, prosecutors, courts and prison administrators" (Rabie, Strauss & Maré, 1994:19). The authors maintain that, in principle, theories of punishment belong to one of two groups, namely:

- **The absolute theory of retribution; or**
- **The relative theories of prevention, including incapacitation, rehabilitation and social defence; or**
- **To a combination of these theories.** (Rabie, Strauss & Maré, 1994:19).

For purposes of this study, the following core objectives of punishment will be briefly discussed: **retribution, deterrence, prevention, and rehabilitation.**

2.1.3.1 Retribution

In the theory of retribution, the commission of crime is regarded as the destabilisation of the balance in the law and order of society, and this balance can only be restored if the offender is punished accordingly. This theory is based mainly on the principle of returning evil for evil, that is, imposing an equivalent evil on the offender erases the commission of crime. In other words, the punishment must fit the crime, or be proportional to the gravity or seriousness of the offence committed. Rabie et al quote Gardiner as saying that: "The desire to make the offender suffer, not because it is good for him (as when guilt is purged by suffering), not because suffering might deter him from further crime, but simply because it is felt that he *deserves* to suffer, is the essence of retribution " (Rabie, Strauss and Maré, 1994:20).

Retribution is, however, different from **revenge**. "The basic difference between the two is that while revenge knows no balance between the injury done by the person taking revenge and the injury occasioned to him, retribution implies, as has been pointed out, that punishment be proportional to the gravity of the crime. Some commentators view the difference between revenge and retribution as pertaining to the motives underlying the reaction against the wrongdoer" (Rabie, Strauss & Maré, 1994:23).

Victims of housebreaking cases are most likely to be in favour of retribution because of the great losses they normally suffer when housebreakers steal their valuable possessions or goods. Such goods are often acquired over a long period of time and at great expense to the owner. Furthermore, most property owners cannot afford to insure the contents of their households, and are therefore unlikely to get compensation for their losses or damage. As a preventive measure, some communities have resorted to forming neighbour-hood watch groups, street committees, or community policing forums, in order to safeguard

their properties. Some have converted their communities into virtual fortresses, closing off streets, erecting high walls and fences.

Youth offenders in housebreaking cases are most likely to benefit from retribution because of their tendency to submit to external influence, particularly peer pressure. Retribution may be more effective to young offenders especially those who are first offenders, that is, it teaches them a lesson not to commit offences again. There is, however, less emphasis on the aspect of retribution in modern times, and more focus is placed on prevention, rehabilitation or deterrence, and **restorative justice**, particularly in housebreaking cases.

2.1.3.2 **Deterrence**

The purpose of deterrence is to prevent criminals or potential criminals from offending or re-offending because of fear of punishment. Some authors differentiate between **individual** and **general** deterrence. **Individual deterrence** is directed at an individual offender who has committed an offence. *can prevent other young offenders from committing a crime*

General deterrence on the other hand, aims at deterring or threatening society in general so as not to engage in criminal activities. The threat of possible punishment or of punishment imposed on other people will make a potential offender think twice before committing an offence. Rabie *et al* (quoting from Hoerster) refer to this restraint as "**psycho-logical coercion**" (Rabie, Strauss & Maré, 1994:39). It should be noted, however, that general deterrence does not necessarily prevent would-be criminals from committing crimes.

If heavy sentences imposed by court, for instance, are publicised in the media, it is believed that society at large will be deterred and therefore refrain from committing crimes. But Rabie and others also give opposing views regarding this issue by stating that "the success of general

deterrence is more dependent upon the relative degree of certainty that punishment will follow the commission of a crime, than upon the severity of the penalty ... Neither fear of punishment nor respect for the law is likely to hold back potential offenders effectively if this (i.e. law enforcement) is known to be inadequate" (Rabie, Strauss & Maré, 1994:41).

2.1.3.3 Prevention

In this theory, prevention simply means preventing crime from being committed. This is particularly relevant in a case where there is a possibility of an offender committing crime again (recidivism), although this is usually difficult to predict. Previous convictions or a criminal record (SAP69) for instance, may, to some extent, serve as an indication that the offender will commit further crimes. There is a fundamental difference between prevention and deterrence. Prevention refers to preventing a person from offending, especially if there is a possibility for him or her to do so. The offender is restrained or prevented from committing a crime by way of incapacitating, intimidating, or reforming him or her. Deterrence, on the other hand, means discouraging or dissuading a person from committing an offence. This does not necessarily mean that the offender will not offend or re-offend.

Rabie and others have this to say regarding the theory of prevention: "... punishment is justified by the value of its consequences, i.e. the prevention of crimes ... and crimes are to be prevented in order to protect society. The basic idea underlying most preventive theories is that *offenders* should *become*, and *citizens generally* should *remain law-abiding*" (Rabie, Strauss & Maré, 1994:25). These authors differentiate between **individual prevention** (also known as **direct prevention**), that is, prevention which is aimed at offenders who have already been convicted of crimes; and **general prevention (indirect prevention)**, that is, preventing people in general from committing crimes, in other

words, making them law-abiding citizens (Rabie, Strauss & Maré, 1994: 25 & 36).

Regarding **individual prevention**, Rabie *et al* state that the offender should be prevented from repeating his criminal behaviour by way of incapacitating him or intimidation by punishment or reforming (rehabilitating) him. This theory is also based on an assumption that an offender who has previously committed a crime is dangerous and is likely to re-offend unless he is somewhat restrained from doing so (Rabie, Strauss & Maré, 1994:26-27). Furthermore, this theory also assumes that if punishment is imposed on one individual, it is likely to serve as a threat to other potential offenders in future (**general prevention**). "Some people seem to learn only through own experience while others learn through warnings or through the example provided by others (which in the case of their punishment also amounts to a warning). This is the basis of the distinction between individual and general deterrence " (Rabie, Strauss & Maré, 1994:37).

Van der Merwe maintains that prevention "... should come into play ...when it becomes clear that there is no hope of influencing the hardened, next type of offender, either by means of educating him (retribution), curing him (rehabilitation) or frightening him (deterrence). (Van der Merwe, 1992:3-14).

In conclusion it should be noted that most housebreaking offenders are unfortunately not easily deterred, partly because some of them take drugs or alcohol before breaking into other people's properties and stealing their valuable possessions.

2.1.3.4 Rehabilitation

The main aim of rehabilitation is to change or influence the offender's behaviour in such a way that he becomes a responsible, respectable, and

70216 } law-abiding member of society. The cognitive behavioural approach maintains, *inter alia*, that people's behaviour and actions are, to a large extent, influenced by their way of thinking, including negative distortions, irrational beliefs, unrealistic world-view, as well as negative conclusions which they draw about themselves, and so on. The theory of rehabilitation or reformation is based on the assumption that "... human behaviour is the product of antecedent causes, that these causes can be identified, and that on this basis therapeutic measures can be employed to effect positive changes in the behaviour of the person subject to such treatment" (Rabie, Strauss & Maré, 1994:29).

According to van der Merwe, rehabilitation should follow upon retribution in the scale of aims of punishment because a person who needs rehabilitation has already made a few wrong choices, and this indicates that the educational process of proper retribution did not work in his case. "In fact, a perception of fair retribution is probably an indispensable precondition to proper rehabilitation" (van der Merwe, 1992:3-14). In rehabilitation, more emphasis is placed on the offender as a person including his personal circumstances, and not much on the crime, which has been committed. Previous convictions or the offender's background information, for example, may be used to determine or assess his prospects for rehabilitation. The main focus is on treatment or corrective measures rather than punishment. This view however, contradicts the fact that the interests and protection of society should be given priority as well.

Although there has recently been considerable interest in the rehabilitation of offenders, there appears to have been very little success in this particular form of punishment. Rabie et al state, "... There is little empirical proof that rehabilitation programmes have been employed with success. Merely showing that offenders who have been subjected to a rehabilitation programme display less criminal tendencies, is not sufficient proof of its success. In order to judge the effectiveness of a programme, it needs to

be evaluated comparatively... Perhaps a realistic assessment of rehabilitation as it is practiced today is that rehabilitative measures are applied simultaneously with punishment, i.e. that the offender is rehabilitated while he is being punished" (Rabie, Strauss & Maré, 1994:32-33).

Youth offenders who have committed housebreaking offences are likely to benefit from rehabilitation programmes in the community, especially if some of the underlying causes or problems are addressed. For example, offenders who are addicted to drugs or alcohol should be committed to a rehabilitation centre for treatment. Others may, of course, be ordered to do community service without remuneration for the benefit of the community, and so on. According to Rabie et al, rehabilitation has been a great success for youth offenders. " Youths are, in fact, generally more susceptible to influence and therefore more amenable to rehabilitative measures than adults who have already developed more or less fixed personalities". (Rabie, Strauss & Mare, 1994:29).

Finally, some sentencers strongly believe in sending offenders to prison for rehabilitation. There is unfortunately very little rehabilitation in our prisons today because of various reasons including prison overcrowding, heavy caseloads for prison personnel and social workers, lack of adequate resources, the impact of HIV/AIDS in prison, violent crimes inside prison itself, and so on.

2.2 Basic Considerations in Imposing Sentence

The following are some of the fundamental factors which are normally considered by the court when a decision is taken on an appropriate sentence to be imposed on the offender:

2.2.1 The triad in Zinn

Mr Justice Rumpff in *S v Zinn* (1969) stated that: "What has to be considered (in sentencing) is the **triad** consisting of the **crime**, the **offender** and the **interests of society**" (Zinn, 1969[2] SA 537[A]). Presiding officers and public prosecutors when determining suitable sentence for an accused person commonly use this statement. In imposing a sentence, the sentencing official has to take into consideration the seriousness or gravity of the offence, the personal circumstances of the offender, as well as the interests and protection of the community.

In *Sparks* 1972, a **fourth element** was introduced, namely: "Punishment should fit the criminal as well as the crime, be fair to the State and to the accused and be blended with a measure of mercy" (*Sparks* 1972[3] SA 396[A]). Sentencing involves a complex evaluation of each of the three or four considerations, and a process of weighing up each against the other. None of these elements should however be over-emphasised at the expense of the others. A balanced sentence should be determined, and the sentencer's ultimate aim should be to achieve fairness and consistency in sentencing.

2.2.1.1 The crime

A thorough investigation of the offence needs to be done and detailed background information should be obtained before a penalty is imposed on the offender. The offence should also be weighed against the personal circumstances of the accused and the victim, without placing more emphasis on the crime, which has been committed. In housebreaking cases, for instance, the victim's personal circumstances need to be considered as well, including the damage or loss that he has incurred, as well as his personal needs and feelings regarding the offence in question. The circumstances surrounding the offence should also be clearly spelt out and dealt with.

2.2.1.2 The offender

The offender, as a person, has his own needs and problems, which have to be taken into account in the sentencing process, for example, a young offender who breaks into somebody's house and steals goods in order to sell them for money so as to be able to buy food, clothing and other necessities of life. Background information on the offender's personal and home circumstances, his family and social environment, his psychological and emotional problems, his motive for committing the crime, aggravating and mitigating factors regarding the offence in question, previous convictions, and so on, would assist the judicial officer in taking an objective sentencing decision on the accused. It is, therefore, essential that the offender's punishment should be **individualised**. In this regard, Rabie & Strauss state that: "in order to individualise punishment, the court has the duty to enquire into the subjective elements concerning the crime committed, particularly where the accused is unrepresentative. The facts elicited by such investigation must be recorded and must be weighed carefully in the determination of an appropriate sentence" (Rabie and Strauss, 1985: 268-269).

Van der Merwe also adds that: "When looking at a list of the extenuating factors made use of by South African courts in sentencing, it becomes clear that not all of them can be related to the accused's subjective or objective blameworthiness in committing the offence. There are a whole range of factors which have nothing to do with the commission or the results of the crime itself, but with the effect which the particular punishment is likely to have on the particular accused " (Van der Merwe, 1991; 5-17). A comprehensive pre-sentence report compiled by a probation officer will, therefore, provide valuable information to enable the judicial officer to gain a better understanding of the offender, and assist him in taking a rational sentencing decision on the offender.

2.2.1.3 The interests of society

Justice seems to have been done if the interest of the community is safeguarded, and citizens are protected against crime. This is achieved through punishing the perpetrators of crime, and strengthening law-enforcement in the community. Some people believe that retribution is a necessary form of public revenge, which protects the interest of society. Reid states that retribution regards punishment as "a positive moral duty. It regards crime as a violation or disturbance of the divine or moral order. When Cain kills Abel, the very earth cries for vengeance. The moral order can be restored or the violation atoned for only by inflicting evil (generally pain) upon the one guilty" (Reid, 1997:82).

In protecting the interests of society, all the elements in the so-called 'triad' in Zinn, need to be weighed against one another in order to determine a more appropriate sentence for offenders. It is however not easy to maintain a balance between the interests of the community and the crime committed by the offender, on the one hand, as well as the interests of the community and the interests of the offender, on the other. As Rabie and Strauss put it, quoting from Clausen 1982, it is difficult for "... a court in the assessment of sentence to balance the interests of society and the seriousness of the crime against the accused's personal circumstances" (Rabie and Strauss, 1985: 266).

In a newspaper article in the Sunday Sun entitled "**Burglars resembled locusts: Everything stolen except the toilet**", written by Steve Dlamini, it is described how burglars broke into a house in Kensington, Johannesburg, and, like a horde of locusts, they consumed everything. The owner of the house was said to have been away on holiday. "Although they didn't manage to steal the toilet, which was securely anchored to the floor, they weren't put off. The thieves, still at large, managed to take away the geyser, ball-and-claw bath, basin and taps – and everything else" (Sunday Sun, 26 May 2002). It is also alleged in this

article that police failed to respond promptly. They only responded 14 hours later even though the robbery was reported to them while the burglars were still on the job.

In this example of a housebreaking case, it would be interesting to know how a balance will be maintained between the interests of the victim (including the community) and that of the perpetrators should they be found and convicted by the court of law. In passing sentence, it would however be more appropriate to focus more on the interests and needs of the victim as against those of the perpetrators who were obviously intent on taking everything from the house. In this instance, the consideration of motive, pre-meditation, and extent of damages, would play an important role. The victim suffered a great loss of his valuable possessions. (See discussion of aggravating factors below.)

2.2.1.4 The element of mercy

Mercy in the criminal justice system means that "justice must be done, but it must be done with compassion and humanity, not by rule or thumb, and that a sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weaknesses of human beings and their propensity for succumbing to temptation ... But it must also be borne in mind that the consideration of mercy must not be allowed to lead to the condonation or minimisation of serious crimes" (Rabie & Strauss, 1985: 267- 268).

Before the aspect of mercy can be considered by the sentencing judge, it is imperative that he should understand the accused's personality, the reasons or motive for committing the crime, the prospects of rehabilitating the offender, and so on. A psychosocial report on the offender's circumstances compiled by a probation officer or correctional official, is therefore indispensable in this instance. In this way, the sentencer will be in a better

position to impose an effective and objective sentence on the offender, which is "blended with a measure of mercy".

2.2.2 Aggravating Factors

During the sentencing process, aggravating factors relating to the crime committed, may be presented to court. Such factors often affect or increase the sentence to be imposed on the offender. The South African Law Commission proposed amongst others, the following aggravating factors to be considered in the sentencing process:

- Presence of actual or threatened violence or the actual use or possession of a weapon, or imitation thereof.
- Previous convictions.
- Manifestation of excessive brutality or cruelty towards the victim.
- Vulnerability of the victim in terms of age or infirmity, for instance.
- Existence of multiple victims or multiple incidents.
- Substantial economic loss suffered by the victim.
- Breach of trust by the offender.
- Planned or organized crime. (South African Law Commission, Appendixes to Discussion Paper 91, Project 82, 31 May 2000:34).

For purposes of this study, a brief discussion on the following aggravating factors will be presented: **previous convictions; motive for committing the offence; prevalence of the crime** in the area of jurisdiction; and **magnitude of the crime**. There are other aggravating factors, which judicial officers may take into account in sentencing, but these are more relevant in housebreaking crimes.

2.2.2.1 Previous convictions

In determining an appropriate sentence after conviction, the offender's previous convictions have to be taken into account. The SAP 69 (criminal record) is commonly used in court for this purpose. Previous convictions

assist the court in imposing a suitable sentence, which is intended to protect society against crime, to assess the effect of penalties previously imposed on the offender, and to assess his prospects for rehabilitation.

If an offender repeatedly commits crime or commits the same offence as the previous one, this can be regarded as an important aggravating factor and may lead to severe punishment. It may also be an indication that the previous sentence imposed on the offender did not have a deterrent effect on him. Rabie and Strauss, quoting the case of Makielie 1976 (1) PH H56 (C), state that: "Where previous offences of which the accused was convicted differ materially from the offence of which he is convicted now, they are far less of an aggravating feature than where they are similar" (Rabie & Strauss, 1985:390). More emphasis should however be placed on the gravity or seriousness of the current offence, and previous convictions should not be over-emphasised.

2.2.2.2 Motive for committing offence

The offender's intention to commit crime is vital in the sentencing process. As Graser puts it: "When a crime involves pre-meditation, it acts as an aggravating factor in the determination of a penalty, while a crime which is committed at the spur of the moment will usually be less severely punished" (Graser, 1981:128). Rabie and Strauss, citing a case of Moyo 1979 (4) SA 61 (RZA), also state that "One of the most important considerations in sentencing an offender is his moral guilt, and logically his motive in committing the offence bears strongly upon such moral guilt" (Rabie & Strauss, 1985:277).

A housebreaking offence or burglary which is carefully planned or calculated, for instance, may serve as an aggravating factor in determining a suitable sentence for the accused. For example, a burglar might be having a bunch of keys or a master key in his possession to enable him to unlock the victim's house or property.

2.2.2.3 Prevalence of the crime

A crime, which is rife in an area of jurisdiction of a particular magisterial district, may invite heavy penalties in order to serve as both an individual and general deterrence for other potential criminals. It should however be noted that prevalence of a particular crime in a particular area, should not result in the passing of sentences that are out of proportion with such a crime. Each case has to be treated on its own merits, and other factors as outlined in Zinn, should also be considered.

Rabie and Strauss, however, hold a slightly different view in this regard. They caution against over-stressing the deterrent value of a sentence, and also add that "The fact that the offence is fairly common should not be given undue weight. The court must consider the personal blameworthiness of the accused, bearing in mind that first offenders should as far as possible be kept out of prison, particularly in the case of statutory offences". The two authors go on to say that "... it is dangerous to generalise as to the increase in a certain type of offence, for an apparent increase may be attributable to population growth. Such an increase is normal ... and does not constitute an aggravating factor" (Rabie and Strauss, 1985:300).

Regarding housebreaking cases, there is a popular belief that residents from disadvantaged communities who are unemployed and who live in informal settlements (shacks) that are situated next to a suburb, are mainly responsible for the prevalence of burglary cases or a sharp increase in such cases in the area. This is, however, a mere conjecture, which is not substantiated by any empirical proof. It could also be argued that a population's general poverty and inability to obtain employment could constitute an extenuating circumstance in passing sentence.

2.2.2.4 Magnitude of the crime

The extent of the loss or damage caused in a housebreaking case, that is, the value of the goods stolen by the burglar, should be taken into account when imposing a penalty on him. The higher the value of such goods, the more likely is a heavy sentence to be imposed on the accused. In addition to premeditation in the commission of an offence, Graser states that the magnitude of the crime also plays an important role, "... that is, whether a life was taken, whether a great deal of harm was caused, or whether a large sum of money was involved" (Graser, 1981:128). However, the magnitude of the crime, like all the other factors in Zinn, should also not be over-emphasised at the expense of the others.

2.2.3 Mitigating Factors

Mitigating factors may assist the offender in getting a less severe punishment, but these have to be taken into consideration together with other sentencing factors. Such mitigating factors, which the South African Law Commission recommends, include the following:

- Absence of previous convictions.
- Physical or mental impairment of the offender.
- Youth or advanced age of the offender.
- Evidence that the offender was under duress.
- Provocation by the victim.
- Restitution or compensation to be made by offender.
- Degree of participation or minor role played by offender in the offence (South African Law Commission, Appendixes to Discussion Paper 91, Project 82, 31 May 2000:34).

In this study, the following mitigating factors, which are more relevant to housebreaking offences, will be discussed: **accused's first offendership; youthfulness of offender; mental or physical health of offender; influence or peer pressure; accused's remorse or contrition; and**

alcohol and drug addiction. There are, however, other mitigating factors that may be taken into consideration when a sentence is imposed on the offender, including those that have been recommended by the South African Law Commission (refer to second paragraph above).

2.2.3.1 Accused's first offendership

An offender, who has never been convicted of committing any crime before, is likely to get a less severe punishment. Even in terms of the **mandatory minimum sentences** (Criminal Law Amendment Act No. 105 of 1997), first offenders get a lighter sentence than second or third offenders, for instance, although they may also have to go to prison without an option of a fine or a suspended sentence. First offenders are, to some extent, regarded as well-behaved and law-abiding persons unless they prove themselves otherwise.

Rabie and Strauss have this to add regarding first offendership: "The fact that the accused is a first offender will often be taken into consideration in mitigation of sentence, but it must be weighed with other factors such as the gravity of the offence" (Rabie & Strauss, 1985:279). Housebreaking is one of the serious crimes for which the court is likely to impose a severe penalty. A minimum sentence for this type of offence is five years' imprisonment as provided for in Section 51 of the Criminal Law Amendment Act (Act No. 105 of 1997).

2.2.3.2 Youthfulness of offender

According to Graser, "The youthfulness of an offender often acts as a mitigating factor in sentencing" (Graser, 1981:129). Children may still be immature and experimenting when they commit offences, and they therefore need a lot of guidance in life. Van der Merwe also maintains "... youth usually has the effect of lessening the quantum of punishment, because it is felt that the young offender does not have the same insights and powers of resistance to temptation which a more experienced person

might have " (Van der Merwe, 1991:5-20). Citing a case of Diedericks 1981 (3) SA 940 (C), Rabie and Strauss state that "... the court accepted that juvenile immaturity might per se constitute a mitigating circumstance. Of more importance, however, as a characteristic feature of young persons, is their lack of experience and their susceptibility to be influenced by others, particularly by adults" (Rabie & Strauss, 1985:284).

In housebreaking offences, however, it is normally young people who break into other people's properties and steal their valuable goods. It is therefore imperative that a probation officer's report is obtained before sentencing children who are in trouble with the law.

2.2.3.3 Mental and physical health of offender

In terms of the Criminal Procedure Act, an offender who suffers from a **mental illness** or **mental defect** at the time of the commission of an offence shall not be criminally responsible for such an offence (Criminal Procedure Act No. 51 of 1977, Section 78). In such an instance, an inquiry into the offender's mental condition shall be held in terms of Section 79 of the said Act. The offender may be sent to a mental institution for observation or psychological assessment. Graser explains that: "When psychiatric evidence indicates that a person's criminality was strongly influenced by a particular mental state or abnormality, the judicial officer may view this as an apology for such a person's crime; that is, that irresistible forces were driving him to act in a certain way" (Graser, 1981:137). In this regard, Van der Merwe quotes the interesting case of *R v The State* in which "... an accused was sentenced to 28 months' imprisonment on several counts of housebreaking, but was then identified during prison tests as a psychopath and detained in Zonderwater for a longer period than the original sentence imposed" (Van der Merwe, 1991:5-18). It appears, therefore, that although mental illness should act as an extenuating factor, it may have the opposite effect, in that it may lead to longer detention than what the offence justifies.

Physical ill health or poor health may also be taken into account when punishment is meted out. This does not necessarily mean that an offender who is sickly may not go to prison. An offender who is in a poor state of health may also receive severe punishment or be sent to prison, as there are also medical facilities available in prison. However, ill health would normally result in a lesser sentence, as determined by the Appellate Division in the case of *S v Zinn* (Zinn, 1969 [2] SA 537 [A]).

In conclusion, it should be re-emphasised that other sentencing factors as stipulated in *Zinn*, need to be considered together with the offender's mental or physical state. In determining an appropriate sentence, no factor should be considered in isolation from other factors that play a role in a particular case.

2.2.3.4 Influence or peer pressure

Most youth offenders easily succumb to peer pressure and are easily influenced to commit housebreaking crimes. The young person's resistance to temptation is therefore weakened due to pressure or influence from friends, including adults who are determined to exploit children because of their vulnerability. Coupled with this influence or peer pressure, is the young offender's degree of participation in the commission of the offence. In this regard, Rabie and Strauss state that: "The degree of participation of each offender must therefore be assessed individually and suitable differential sentences imposed" (Rabie and Strauss, 1985:295).

2.2.3.5 Accused's remorse or contrition

Generally speaking, an offender who is repentant and accepts responsibility for his wrongdoing is more likely to get a less severe punishment. According to Graser, if an offender displays "an attitude of genuine remorse and, where appropriate, a willingness to compensate the

victim for damages or suffering, his chances of receiving a more lenient sentence are good. If, on the other hand, the accused maintains a non-repentant, or even arrogant attitude, it could act as an aggravating factor in sentencing" (Graser, 1981: 129).

An offender who is sincerely remorseful also stands a great chance of rehabilitating and correcting his deviant behaviour. Remorse or contrition is, however, not easy to prove. An accused may plead guilty in court not because he wants to, but to persuade the court to be merciful and sympathise with him, and thus impose a lenient sentence on him. Others would plead guilty so as not to waste the court's time.

Rabie and Strauss, citing two cases regarding contrition on the part of the accused, state that: "In *Mvelase* 1958 (3) SA 126 (N) the court was of the opinion that those of a number of accused who had pleaded guilty showed some degree of penitence and ought to be treated more leniently. But in *Mtataung* 1959 (1) SA 799 (T) it was held that a mere plea of guilty is not a mitigatory factor; it must be indicative of penitence on the part of the accused before it can have a mitigating effect" (Rabie and Strauss, 1985:291-292).

Graser mentioned another very important aspect in this discussion, namely, the offender's willingness to compensate the victim. This is more appropriate in housebreaking cases where the victim often suffer not only materially, but also emotionally, psychologically, and so on. Victim compensation or restitution is discussed in some detail under "Restorative Justice" in Chapter IV (Transformation of Child Justice in South Africa).

2.2.3.6 Alcohol and drug addiction

In some instances, alcohol or drug addiction is the main cause of housebreaking offences. The use of alcohol or drugs before an offence is committed, may serve as a mitigating factor when punishment is imposed,

unless it can be proved that the offender intentionally imbibed liquor in order to get the courage to commit such offence. Rabie and Strauss, quoting Eksteen, also state that: "the excessive use of intoxicating liquor is a human weakness which has afflicted established communities through the ages. Alcoholic addiction has in our century been considered a disease which can only be overcome by sympathetic treatment and positive motivation" (Rabie & Strauss, 1985:312).

2.3 Sentencing Procedures

2.3.1 Procedure after conviction

After an accused person has been convicted but before his sentencing, the court may prove his previous convictions, if any. Thereafter, the defence and the prosecution are given an opportunity to address the court on sentences about issues and facts that are relevant to sentencing. In general, the court allows the parties considerable leeway in the presentation of evidence and address on sentencing, and is not too strict in this regard.

2.3.1.1 Previous convictions

In terms of Section 271 of the Criminal Procedure Act (Act No 51 of 1977), prosecution may, after an accused has been convicted but before sentence has been imposed upon him, produce to the court for admission or denial by the accused a record of previous convictions (SAP 69) alleged against the accused (Criminal Procedure Act, Act No 51 of 1977). The South African Law Commission is of the view that similar provisions should be included in the Sentencing Framework Bill, and recommends, "provision be made for **proof of previous convictions, the lapsing of previous convictions, a fingerprint-based register** as proof of previous convictions and evidence on further particulars in respect of previous convictions. Of these, the only provision that is potentially controversial is that dealing with the lapsing of previous convictions". Since the investigation was on sentencing, the South African Law Commission concentrated only on "whether, and if so, at what stage, previous

convictions should lapse for the purpose of determining sentence. For the purpose of sentence, there is no doubt that a previous conviction should have less impact if considerable time has lapsed since the punishment was served for the last crime committed". The South African Law Commission proposed, "ten years must elapse without any further offence being committed after the last sentence has been fully served". (South African Law Commission Report, Project 82, 2000:87).

The South African Law Commission therefore recommended that the following provisions relating to previous convictions be included in the Sentencing Framework Bill: -

- "After a person has been convicted and before sentence is imposed, the prosecution may tender a record of previous convictions alleged against such a person.
- The court must ask the person concerned whether the previous convictions are admitted.
- If the person concerned denies such previous convictions, the prosecution may tender evidence that such person was so previously convicted.
- If the prosecution tenders no evidence of a previous conviction, the court may, at the request of a victim or of its own accord, solicit evidence of such conviction.
- Where a period of 10 years has passed from the date of completion of the last sentence and the date of commission of any subsequent offence for which a person is to be sentenced, the last conviction and all convictions prior to that, must be disregarded for purposes of sentencing". (The South African Law Commission Report, Project 82, 2000:88)

Judge Ngcobo in *S v Muggel* 1998 (2) SACR 414 (c) made a judgment, which contained "a useful statement of rules and principles applicable to

previous convictions in sentencing. The seven points listed by the learned judge may be paraphrased as follows:

- 1) The court is required by Section 271(4) to take proved previous convictions into account.
- 2) Section 271A excludes past convictions for less 'serious' offences if (i) ten years has elapsed since the conviction and (ii) the accused has not during that period been convicted of a 'serious' offence (i.e., an offence for which more than six months' imprisonment without the option of a fine may be imposed). Any previous conviction excluded by Section 271A may not take into consideration at all; the court has no discretion since the conviction 'falls away as a previous conviction'.
- 3) Although required to take previous convictions into account, the sentencing court retains discretion as to the weight to be accorded to the previous convictions.
- 4) In exercising that discretion, the court should 'have regard to the nature, the number and the extent of similar previous convictions and the passage of time between them and the present offence'. Commonality with the present offence affects relevance and weight.
- 5) Previous convictions unrelated to the present offence are relevant only to the limited extent that they may indicate either the effectiveness of prior punishments as deterrents or the prospects of the offender's reform.
- 6) The passage of time should not be ignored since even a criminal is entitled to have the lid closed on the distant past.

- 7) A court of appeal will interfere if the degree of emphasis placed on previous convictions is disturbingly inappropriate." (South African Journal of Criminal Justice, Vol. 12, No 1, 1999:136-137).

An example is cited in the above-named journal, of a 27-year-old appellant who was sentenced to seven years' imprisonment for housebreaking with intent to steal and theft. "He had a substantial list of previous convictions (principally, housebreaking and theft or assault) spanning about 11 years, but none had resulted in more than 6 months' imprisonment. On appeal, it was held that the regional magistrate had overemphasized the previous convictions.... an appropriate sentence was held to be five years' imprisonment of which two years was conditionally suspended". (South African Journal of Criminal Justice, Vol. 12, No 1, 1999:137).

"When the prosecution seeks to prove previous convictions, a record, photograph or document that relates to a fingerprint,.... constitutes prima facie proof of the facts it contains.... the admissibility of such record, photograph or document is not affected by it being obtained against the will of the person concerned" (The South African Law Commission Report, Project 82, 2000:88).

Proof of previous convictions in the form of SAP 69 plays a vital role in a case where the probation officer has to compile a pre-sentence report on an accused person. Such a criminal record provides valuable information on the offences previously committed by the accused, as well as the various penalties or sentences that were imposed in each case. The probation officer (or correctional official) who is compiling the pre-sentence report, can therefore determine which sentences were 'effective' or 'ineffective', and those that are likely to have an impact on the accused's behaviour in respect of the current offence under investigation.

2.3.1.2 Evidence on sentencing

A sentencing phase is different from the rest of the trial in the sense that "it is not characterised by the same clinical exercise that is part of determining the guilt of the accused. There are no fixed issues and formal evidential burdens. Facts are less important while impressions assume more significance. Considerations such as motive, which are irrelevant at the trial stage, are now much more important and relevant". (The South African Law Commission Report, Project 82, 2000:89).

Section 274 of the Criminal Procedure Act provides that a court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. The court has to decide which evidence has the potential to provide the necessary information, and the court has the discretion to allow such evidence. If the necessary information is not forthcoming from the parties, the court is required to obtain that information in order to be able to pass an appropriate sentence". (The South African Law Commission Report, Project 82, 2000:89-90). For example, a pre-sentence report may be obtained from the probation officer or correctional official.

The South African Law Commission recommended that the following provision be included in the Sentencing Framework Bill:

- "A court may, before passing sentence, receive such evidence as it thinks fit in order to inform itself as to the appropriate sentence.
- The court must allow the offender and the prosecutor to call witnesses or to adduce evidence relevant to sentencing, and may it call witnesses or adduce evidence.
- The court must assist an undefended offender to place facts relevant to sentence before the court.
- Before passing sentence, the court must allow the offender and the prosecutor to address it on any relevant evidence and the appropriate sentence.

- Any fact relevant to the determination of an appropriate sentence must be proved to the satisfaction of the court". (The South African Law Commission Report, Project 82, 2000:94).

2.3.1.3 The role of probation officer in sentencing

The probation officer, as an expert witness in court, performs important functions including **presentence investigation, compiling of presentence report on the accused, and presenting the report in court**. Details on how the probation officer should handle a pre-sentence investigation; how to compile a pre-sentence report; how he should conduct himself in court when presenting the report; other practical problems he is likely to encounter in the process; and so on; are discussed in the chapter on "Problems with the current sentencing process in South Africa".

The probation officer's report forms an integral part of the sentencing process, particularly the motivation and recommendation contained in the report must be objective and well motivated. There are various sentencing options at the disposal of the probation officer who is compiling a pre-sentence report, for example, a sentence of a fine, imprisonment, caution and discharge, and so on. Such sentencing options form part of the probation officer's recommendation, and can influence the decision of the presiding officer in the sentencing process.

Another type of recommendation a probation officer can make in his report, is referral of the accused to a treatment centre (Section 296 of the Criminal Procedure Act No 51 of 1977), or in the case of a child who is under the age of 18 years, referral of such a child to a reform school (Section 290 of the same Act). Alternatively, the recommendation may be that the child be dealt with in terms of the Child Care Act No 74 of 1983.

2.3.1.4 Sentencing judgement

In passing judgment, the judicial officer gives his own verdict regarding the case and is more often expected to give reasons for his choice of a particular sentence. Wasik states that: "The choice of sentence in many cases involves the careful consideration of different and often conflicting factors. A judge may be faced with a direct clash between the needs of a particular offender and the necessity to protect the public Another argument in favour of an obligation to give reasons is that the rationalisation of sentencing which would follow the imposition of such an obligation would lead in turn to greater consistency of sentencing policy both in the immediate context of a particular court and in the wider context of the system at large. Certain factors would become recognised as valid reasons for the choice of particular sentences, others would be rejected as irrelevant". (Wasik, 1997:108-109). The giving of reasons for sentence aims, *inter alia*," ... to restrain the courts from taking a particular course without making proper inquiries and giving the matter careful consideration. But it is essential that all courts should make proper inquiries and give careful consideration to the matter before passing any sentence". (Wasik, 1997:114).

Wasik also outlines four reasons for passing a sentence:

- **The seriousness of the offence** - for example, the value of goods stolen in a housebreaking case; injuries sustained in an assault; the actions of the offender and the helplessness or potential risk to the victim; and so on.
- **The offender's previous history of offending** - a brief reference to previous convictions is often made and used to explain why a custodial or non-custodial sentence should be imposed, rather than why a particular disposal is chosen. A previous conviction is sometimes used as the basis of inferences about the character or

behaviour of the offender, and together they form the explanation of sentence.

- **The principle underlying the sentence** - that is, the sentencer's opportunity to express to the offender, defence counsel or the public what is hoped to be achieved by the sentence, for example, individual deterrence, rehabilitation, or incapacitation.
- **The perceived cause of the crime** - that is, the sentencer's perception of factors, which have led to the commission of the offence, and such perception affect his sentencing decision. "Mitigation speeches are important in this respect and, while sentencers acknowledge their value, evaluative comments are rare in the course of a trial. It is when pronouncing the sentence that the judiciary has the best opportunity to indicate the relevance of the causes which have been suggested". (Wasik, 1997:124-127).

According to the South African Law Commission, reasons should be given for every sentence passed, although this may not always be possible. However, legislation should insist that any departure from sentencing guidelines be justified. Community sentences should also be explained in the judgement of the court, for the benefit of both the offender and the community. To ensure that reparation is considered, a note to this effect is required in every judgement.

The court should comment specifically when it wants some factor in the sentence considered by a parole board or similar authority. Such a body cannot retry a case to determine the seriousness of the offence, as that would amount to the offender being placed in a form of double jeopardy. Nevertheless, it should act on an informed view of the decision of the court and, in particular, on any information that the sentencing court thinks may be relevant to a prognosis on the release of the offender.

The South African Law Commission recommended the following provision on the sentencing judgement:

Every judgment on sentence must include: -

- the sentence imposed;
- the reasons for sentence where there is a departure from a sentencing guideline and wherever practicable in all other cases;
- in the case of a community penalty, a brief explanation of the implications of the sentence;
- a note that reparation has been considered as a requirement;
- any comments that the court may wish to bring to the attention of the authorities responsible for the release of a person sentenced to imprisonment (The South African Law Commission Report, Project 82, 2000:89-99).

The above discussion highlights the importance of the **motivation** and **evaluation** of facts contained in a pre-sentence report compiled by a probation officer. In compiling the report, the probation officer should be objective, impartial, and possess analytical and evaluative skills. He should be able to correlate and evaluate the facts or information obtained from the offender and other sources of information, and is able to draw inferences from such information. This is essential in assisting the judicial officer to formulate objective and rational reasons for imposing an appropriate sentence on the offender.

2.3.1.5 Manner of dealing with children who are in conflict with the law

South African law differentiates between two categories of children: those under the age of 18 years, and those who are above 18 years but under the age of 21 years. Section 28(3) of the South African Constitution defines a "child" as a person who is under the age of 18 years.

In terms of Section 337 of the Criminal Procedure Act No 51 of 1977, estimation of a person's age must be done by the presiding officer if, in any criminal proceedings, the age of a person is a relevant fact of which no or insufficient evidence is available at the proceedings. The presiding officer may estimate the age of such a person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless it is subsequently proved that the said estimate was incorrect. The presiding officer should record what his finding is in regard to the age of the accused, and record briefly his grounds for his finding.

The general rule is that the best admissible evidence must be used to estimate the accused's age, and the following may be used in this regard:-

- A birth certificate;
- evidence by the child's parent or guardian;
- evidence of family or other persons with knowledge of the child's birth; or
- expert evidence, that is, medical evidence regarding the physical development and even X-rays. (Justice College notes, No 172A, 1998:2).

The law also makes provision for alternative methods of dealing with children who are in conflict with the law, and such methods should aim at giving children a chance of proper rehabilitation. In Smith 1922 TPD 199, Wessels, J. stated that "the State should not punish a child of tender years as a criminal and stamp him as such throughout his after life, but it should endeavour, by taking him out of his surroundings, to educate and uplift him and to make him gradually understand the different between good conduct and bad conduct". (Justice College Notes, No 172A, 1998:1).

In Jansen 1975(1) SA 425(a), 427h-428a, Botha, J.A. stated that: "In the case of a juvenile offender it is above all necessary for the court to determine what appropriate form a punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society" (Justice College Notes, No. 172A, 1998:1).

Some of the methods or procedures of dealing with children who are in conflict with the law, including the new Child Justice Bill, will be briefly discussed below. These include:

- referral to a Children's Court;
- dealing with a convicted child; and
- the new Child Justice Bill.

a) Referral to a Children's Court

In terms of Section 254 of the Criminal Procedure Act (Act 51 of 1977), the court may refer a child offender to a Children's Court if it appears to the court during criminal proceedings that the child in question is "**a child in need of care**" as defined in Section 14(4) of the Child Care Act, Act 74 of 1983. An enquiry will then be held by the Children's Court in order to ascertain whether or not the child is a child in need of care. The Children's Court may then order that: -

- the child be returned to or remain in the custody of his parents or guardian;
- be placed in the custody of a suitable foster parent designated by the court, under the supervision of a social worker;
- be sent to a children's home designated by the Director-General; or

- be sent to a school of industries designated by the Director-General.

The provisions of Section 254 of the Criminal Procedure Act actually mean that the court may stop the trial and order that the accused be referred to a Children's Court for an enquiry. Such an order may be made before or after the conviction.

In a case where a trial involving a child in a Criminal Court is converted into a Children's Court inquiry and such a child has to be dealt with in terms of the Child Care Act, a social worker or probation officer should open an inquiry, conduct an investigation into the child's psycho-social circumstances, and compile a report with a recommendation regarding the child's future placement.

b) Dealing with a convicted child

Section 290 of the Criminal Procedure Act No 51 of 1977 stipulates that the court, which has convicted a person who is under the age of 18 years, may, instead of imposing punishment upon him for any offence, order that:

- such a child be placed under the supervision of a probation officer or correctional official;
- the child be placed in the custody of any suitable person designated in the order;
- deal with him both in terms of the two points above;
- he is sent to a reform school.

c) Placement of a child under the supervision of a probation officer or correctional official

A child may be subjected to compulsory supervision and control of a probation officer or correctional official for a period of two years in cases where his criminality arose from lack of discipline. This is aimed

at restricting the child from further criminal conduct. The supervising official should create a relationship of trust with the child in order to improve his social environment as well as his attitude towards society.

d) Placement of a child in the custody of any suitable person designated in the order

A child who is under the age of 18 years may be placed in the custody of a suitable person recommended by the probation officer. For example, a child may be placed in the care of a suitable foster parent.

e) Referral of a child to a reform school

An order may be made for a child who is under the age of 18 years, to be sent to a reform school in addition to a sentence of a fine (Section 290(2) of the Criminal Procedure Act No 51 of 1977). In terms of Section 290(3) of the said Act, a person who is over the age of 18 years but under the age of 21 years, who is convicted of any offence, may also be sent to a reform school.

Sending a child to a reform school is a drastic measure and needs to be carefully considered. The implication of reformatory detention is that the child will be removed from his family and friends for a period of at least two years, and is more likely to come into contact with bad elements in the reform school. A factual basis for such a decision is therefore necessary before the court can make the order. (Justice College Notes, No 172A, 1998:10-12).

The following factors need to be taken into consideration before referring a child to a reform school:

- ❖ a reform school is not suitable for first offenders since the child is likely to come into contact with negative elements;

- ❖ referral to a reform school is a desirable alternative to direct imprisonment where conviction arose from a serious offence;
- ❖ it does not serve any purpose to send to reform school a person who has already spent a long time in prison;
- ❖ the age of the accused must be established, and a finding in this regard must be made on record;
- ❖ a probation officer's report is almost indispensable in this regard. (Justice College Notes, No 172A, 1998:12-13).

Parents whose children are said to be uncontrollable or are playing truant at home or at school, usually approach social workers or probation officers and request that they be sent to a reform school even if such children have not committed any offence. There is a common belief among parents that a reform school (normally referred to as "stoutskool" in Afrikaans) can mould a child and correct his deviant behaviour. This is however not necessarily true, particularly due to the fact that in such an institution the child is likely to mix with bad elements and his behaviour then becomes worse off. Furthermore, a child who is 16 years old or above, for instance, may not be compelled to attend school in terms of the South African Schools Act (Act 84 of 1996).

Other problems, which are prevalent at reforms schools, include the availability of drugs, sodomy, abscondments, and so on. Lastly, it should be noted that the Gauteng Province, which has a high rate of crime especially amongst the youth, does not have a single reform school. Reform schools in the nearby Mpumalanga Province are utilised by Gauteng instead, for example, Thokomala Reform School in Kinross, and Vikelwa Reform School in Ogies.

In H 1978 (4) SA 385(E), the appeal court set out the following procedure to be followed prior to sentencing a child, especially where a probation officer is involved:

- 1) The accused's parents must be present, or at least, the mother of the accused.
- 2) To be established from the probation officer:
 - ✓ What services and supervision can be rendered to the accused within his community or present environment so as to provide him with the necessary guidance and discipline that he may need, and to enhance his social functioning;
 - ✓ To what extent such supervision and services are likely to prove beneficial to the accused;
 - ✓ What facilities exist at the reform school in order to cater for the particular needs of the accused;
 - ✓ What negative influences exist at the reform school, and what role are they likely to play in the life of the accused, etc.
- 3) The child's parent or guardian to be given an opportunity to question the probation officer on his investigations and recommendations.
- 4) The parent or guardian to be afforded an opportunity of giving or leading evidence relating to the recommendations of the probation officer.
- 5) The court to call for further evidence or investigation as it considers necessary to arrive at an objective sentencing decision.

- 6) The court to consider an appropriate punishment to be imposed on the accused in the light of all the circumstances, bearing in mind that sending an accused to a reform school is a drastic measure which should not be taken lightly and is normally undesirable for a first offender (Justice College, No 172A, 1998:4-14).

2.4 Sentencing Options

The various types of sentencing options which are at the disposal of the sentencing or judicial officer, are outlined in Section 276 of the Criminal Procedure Act (Act no 51 of 1977). These are: imprisonment; periodical imprisonment; declaration as a dangerous criminal; declaration as a dangerous criminal; correctional supervision; fine; committal to a rehabilitation or treatment centre; postponement of passing and suspension of sentence; caution and discharge. The South African Law Commission also recommends that provision be made for a general clause specifying the following sentencing options: imprisonment; a fine; community penalty; reparation; caution and discharge. It should however be noted that these sentencing options are still proposals by the South African Law Commission and have not yet been passed into law.

Before a sentencing official can begin with the search for the most appropriate sentence in a particular case, the different types of sentences, which he/she may legally impose, have to be determined. The main purpose of sentencing, as proposed by the South African Law Commission, is "to punish convicted offenders for the offences they have committed by limiting their rights and imposing obligations on them in ways that are not contrary to the Constitution of the Republic of South Africa, Act 108 of 1996" (South African Law Commission, Discussion Paper 91, Project 82:53).

For purposes of this research, the under mentioned sentencing options, as outlined in Section 276 of the Criminal Procedure Act (Act no 51 of 1977), will

be discussed briefly. Some of these sentencing options may be imposed on youth offenders who have been convicted of housebreaking offences, and these include: imprisonment; fine; correctional supervision; postponed and suspended sentences. It is also important to note that the regional court deals with most housebreaking cases.

2.4.1 Imprisonment

Imprisonment is normally imposed in cases of serious offences in order to protect society against offenders who are perceived to be a danger or threat to society. The offender gets punished for his crime, he is deprived of his liberty, and he is separated from his family and friends. Such a sentence should however not be taken lightly. Before it is imposed, an objective and rational decision must be taken regarding the gravity and serious nature of the offence, the personal circumstances of the offender, as well as the protection and interests of society. Consideration should be given to the offender's personal circumstances, his age, background, family circumstances, level of education, motive for committing the offence in question, his first offendership, the effect of punishment on him, and more importantly, whether a sentence of imprisonment should be imposed or not. Such factors are important to consider when dealing with housebreaking cases, which are regarded as very serious crimes in society.

First offendership, in particular, does not necessarily mean that an offender cannot be sent to prison, especially for serious crimes such as housebreaking. On the other hand, the first time offender who is sentenced to imprisonment is placed in an environment where he usually comes into contact with hardened criminals with very low morals.

Idealistically speaking, a prison sentence should afford the offender an opportunity to rehabilitate, to correct his deviant behaviour, and to become a more responsible and law-abiding citizen in the community. Unfortunately, very little rehabilitation takes place in prison for a number of reasons, such as

overcrowding, heavy caseloads for prison officials including social workers, lack of resources, the problem of HIV/AIDS, and so on. It should also be noted that forced labour in prison was outlawed in South Africa in terms of Section 13 of the Constitution.

Another form of imprisonment is what is referred to as **periodical imprisonment** (also known as weekend imprisonment). This type of sentence (Section 285 of the Criminal Procedure Act, Act no 51 of 1977) may be imposed on a person convicted of any offence, especially drunken driving. The offender may serve not less than 100 hours but not more than 2000 hours in prison, usually over weekends. It is more suitable for an offender who is permanently employed and who should also be allowed to continue working and supporting his family while serving his sentence. Periodical imprisonment is unlikely to be suitable for housebreaking cases. The South African Law Commission also admitted that this sentence is rarely used because of practical difficulties with its implementation.

Life imprisonment is the longest prison sentence, which a court may impose, and it lasts for the whole of the natural life of the offender. It is only imposed in cases of extreme seriousness where the protection of society is paramount and mitigating factors have little effect on the blameworthiness of the offender. It is applicable to certain serious offences listed in the Criminal Law Amendment Act (Act no 105 of 1997), for instance. These, however, do not include housebreaking offences.

2.4.2 Fine

A sentence of a fine is extensively used in our criminal justice system, and may be imposed for any offence committed by the offender. Section 289 of the Criminal Procedure Act (Act no 51 of 1977) makes provision for the court to enforce payment of a fine. The offender may be unable to pay a heavy fine if imposed on him by the court. It is therefore important for a probation officer who is conducting a pre-sentence investigation and compiling a pre-

sentence report for the court, to establish from the accused if he will be able to pay a fine if required to do so, and this should be indicated in the report. An accused person may however request the court to allow him to pay a fine in monthly instalments up to a period of five years, depending on the amount that is involved. This is known as the **deferred** fine/payment.

An important argument with regard to the payment of a fine is whether the offender should pay compensation to the victim instead of paying a fine to the State. In a spirit of restorative justice, it is recommended that the victim of a housebreaking offence, for instance, should be compensated (in cash or in kind) rather than a fine being paid to the State. In restorative justice, an offence is regarded as an injury caused to an individual (or individuals) rather than a crime against the State.

2.4.3 Correctional supervision

A youth offender, who has been convicted of a housebreaking offence, may be sentenced to correctional supervision by the court. Correctional supervision, as a form of punishment, is a community-based sentence. The offender is required to serve his term of sentence or part thereof (Section 276[1][i]) within the community, and to do community service without remuneration for the benefit and interests of the community. Initially, this type of punishment was imposed indirectly, mainly as a condition of suspension or postponement of a sentence of imprisonment. But since 1991, correctional supervision has been imposed directly as a community-based sentence in terms of Sections 276A(1)(h) and 276A(1)(i) of the Criminal Procedure Act, Act 51 of 1977.

Correctional supervision is far less expensive than direct imprisonment where the community (taxpayer) is responsible for keeping and maintaining the offender in prison. The offender can still continue with his employment, support his family, and not be subjected to negative influences of prison life, whilst serving his sentence and being rehabilitated within the community.

In order to be a suitable candidate for correctional supervision, the offender has to meet some criteria including: pleading guilty to the offence and accepting responsibility for his actions; he must have a permanent residential address; he must be permanently employed; he must be a non-violent person; he need not be a first offender; he also doesn't need to be a juvenile offender. Furthermore, the offender must not be under the age of 15 years, and must perform not less than 50 hours of community service.

Correctional supervision is subdivided into two sections, namely, sections 276A(1)(h) and 276A(1)(i) of the Criminal Procedure Act (Act no 51 of 1977). In the first instance, the offender is placed under house arrest for not more than three years. House detention is usually coupled with monitoring, that is, telephonic monitoring at the offender's home or workplace, physical visits to his home or workplace, or compulsory visits by the offender to the correctional official's office. The latest form of monitoring includes electronic monitoring.

The second part of correctional supervision, namely section 276A(1)(i), provides for the imprisonment of the offender for a period not exceeding five years. The offender may later be released on parole after serving a significant portion of his prison term. The period of imprisonment, which an offender has to serve in prison before he can be placed under house arrest, is regulated by the policy of the Department of Correctional Services.

2.4.4 Postponement of passing of sentence

The postponement of sentence in terms of Section 297(1)(a) of the Criminal Procedure Act means that no sentence is passed. An order is made for postponing the passing of sentence either **conditionally** or **unconditionally** for a period not exceeding five years. If certain **conditions** are imposed, the court must order that the accused appears before it at the expiration of the period specified by the court. Should the court be satisfied thereafter that the accused has observed or complied with the stipulated conditions, it is obliged

to discharge him without passing a sentence? Such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction. An accused that fails to comply with any of the conditions imposed on him, may be arrested or detained and the court may impose any competent sentence.

Conditions which may be imposed by the Court include amongst others: compensation; rendering of community service; submission to correctional supervision; sub-mission to instruction or treatment; submission to supervision or control; compulsory attendance or residence at some specific centre; good conduct; and so on.

In a case where the passing of sentence is postponed **unconditionally**, the accused may appear before court only if called upon to do so before the expiration of the specified period. If not, he will be regarded as being discharged with a caution in terms of Section 297(1)(c). If he is called upon to appear, the court is then obliged to impose a competent sentence in terms of Section 297(9)(b).

2.4.5 Suspension of a sentence

The court may impose a sentence but suspend the whole or part of it, for a period not exceeding five years, on certain conditions. The conditions are the same as those discussed under 2.4.4 above. Conditions to be attached to a suspended sentence must be stated clearly and unambiguously. The sentencing official must therefore take care when formulating such conditions.

If a penalty of a fine is imposed, the payment of such a fine may be suspended for up to five years, or it may be paid over a period not exceeding five years in instalments and at intervals to be determined by the court. This is provided for in Section 297(5)(a) and (b) of the Criminal Procedure Act, and is popularly known as deferred fine.

The operation of a suspended sentence may further be suspended on any existing or additional conditions at the discretion of the court. Furthermore, if the court is satisfied that the accused has, through circumstances beyond his control, been unable to comply with any conditions for some good reason, it may further suspend the operation of the sentence. It is, however, important to note that suspended sentences of another country cannot be enforced.

In conclusion, it should be emphasised that sentencing options, which may be imposed by the court for housebreaking crimes, are not limited to the ones discussed above. Each case is unique and needs to be treated on its merits. There could be other extreme cases such as an offender who habitually commits housebreaking offences and is posing a threat to society. In such an instance, the provisions of Section 286(1) of the Criminal Procedure Act should be applied. In terms of this section, a superior or regional court "which convicts a person of one or more offences, may, if it is satisfied that the said person habitually commits offences and that the community should be protected against him, declare him a **habitual criminal**, in lieu of the imposition of any other punishment for the offence or offences of which he is convicted". The same can be said about an offender who needs to be declared a **dangerous criminal** in terms of Section 286A of the Criminal Procedure Act.

The sentencing officer, therefore, needs to properly apply his mind before selecting the most appropriate sentence for the accused. At the end, justice should be seen as been done and, most importantly, serious consideration should be given to compensating the victim of a housebreaking case for the loss he/she has suffered.

2.5 Problems with Current Sentencing Practices in South Africa

There are numerous problems, which exist within the sentencing system in our country. The South African Law Commission gives a brief outline on some

of the shortcomings within the existing sentencing system which have been identified since 1994, and these include:

- “Like cases are not treated alike because of unfair discrimination against some offenders, particularly on grounds of race and social status. In the absence of clear sentencing guidelines and a very broad discretion exercised by sentencers, such allegations are difficult to deal with. In such a system, justice is not easily seen to be done.
- The judiciary does not give sufficient weight to the seriousness of particular offences, and therefore tends to impose disproportionately light sentences in such cases. In addition, the seriousness of some offences is being downplayed by not hearing the views of victims, either in particular cases or about the heinousness of a type of crime generally.
- Less serious offences are being dealt with by terms of imprisonment where more imaginative restitutive alternatives could provide solutions more satisfactory to all parties, while at the same time saving valuable prison resources for those offenders deserving harsher punishment.
- Offenders are released from prison and other forms of sentence without having served their full sentences, or even a significant part of them, and thus undermining the original sentences. It is also alleged that these release processes are themselves inadequate because they are carried out by closed bureaucracies according to unclear criteria, thus mirroring the shortcomings of the sentencing process itself” (South African Law Commission Report, Project 82, 2000:5-6).

For purposes of this research, the researcher will briefly discuss the following problems in the current sentencing practice: **lack of main focus on the sentencing objectives; inconsistency or disparity in sentencing; lack of training of judicial officers; insufficient background information on the accused; and finally, judicial attitudes in the criminal justice system.**

2.5.1 Lack of consensus on main objectives of sentencing:

Some of the problems regarding the current sentencing practice in our country emanate from the fact that there is no agreement as to the main **purposes** or **objectives** which sentencing should serve. The "objectives of sentencing are vague, and often mutually inconsistent, or even contradictory" (Graser, 1975:28-29). There is normally some confusion, uncertainty and disagreement among sentencers in their approach to the question of sentencing, and this in turn, leads to disparity in the sentencing process.

There is great uncertainty as to which sentencing aim or theory should be pursued. Some judicial officers regard **deterrence** as the most important consideration in the sentencing process, while others place more emphasis on **retribution** or **incapacitation** or **rehabilitation**, as the best method of preventing crime or protecting society. Graser maintains that there is "no clear definition of these objectives in our criminal procedure; nor is there an indication as to which of these goals are to be sought in particular instances". (Graser, 1975:29).

Walker and Padfield also state that: "A sentencer may have studied the reports about the offender, be aware of all the available background information which seems relevant, be conversant with the findings of research into the corrective, deterrent or educative effectiveness of different sentences, and yet be uncertain about a crucial aspect of his problem: **the aim which should govern his choice**... nor is he given much official guidance which tells him what his aim should be". (Walker and Padfield, 1996:108).

It is for this reason that there is so much discrepancy and inconsistency in the sentencing process. According to the South African Law Commission, "academics have also highlighted a number of factors which, in the past, were regarded as justification for discrimination in sentencing, such as race, gender, class, economic position and political background" (South African Law

Commission, Appendixes to Discussion Paper 91, Project 82, 31 May 2000:15).

2.5.2 Disparity in sentencing:

According to Graser, "greatly varying sentences are imposed on offenders who have committed similar crimes, often under relatively similar circumstances...." (Graser, 1975:28). The problem of **consistency** in sentencing is one of the major challenges facing the criminal justice system in our country today. Walker and Padfield describe the **consistency principle** as follows: "In a crude form,.... if two offences are indistinguishably similar, the penalties for them should be the same. In a less crude form, it says that they should be the same unless there is a respectable reason for differentiating them, for example, the different effects which a penalty would have on the two offenders" (Walker & Padfield, 1996:120). Such inconsistencies, which Graser refers to as "inequalities" have "a wide-ranging negative effect in that, if they are excessive and occur frequently, they may result in a general lack of respect for the criminal justice system". Graser goes on to say that "the major reason for **disparity** in sentencing probably lies in the lack of established and generally accepted **sentencing standards**" (Graser, 1975:28).

The next issue, which is raised by Shapland, is whether or not "**sentencing reasons** ... should be given and if so, in what circumstances" (Shapland, 1981:136). Walker also concurs with this view, and adds that "with a few exceptions, the court is not obliged by statute to give reasons for its choice of sentence. If the choice is more severe than usual, however, the sentencer is expected to justify it" (Walker, 1985:7). The researcher is of the view that this is also the situation in South Africa. According to Shapland, a view was also previously expressed that sentencing reasons should be given so that the defendant and the public, through the press media, "should be able to understand why there are disparities in sentencing between defendants charged with similar offences, due to their previous convictions and personal

circumstances" (Shapland, 1981:137). A judge is also quoted in Shapland's book as having said that "it's very difficult to give precise reasons. There are many, many factors that influence one's mind while thinking of the sentence and it's not possible to recall them all" (Shapland, 1981:137).

Following on the issue of sentencing reasons briefly outlined above, is the question of **public opinion** or **public attitudes**. Walker states that in practice, most sentencers take into consideration what is referred to as the public opinion. "Their beliefs are usually based not on scientifically planned surveys of opinion but on occasional protests in the news media against a sentence which has struck a reporter as exceptionally lenient or severe. A magistrate's bench is sometimes the target of criticism - usually for leniency - from a local newspaper To what extent such criticisms by the news media reflect public opinion, and to what extent they shape it, is a complex question" (Walker, 1985:64).

Cox and Wade state that: "There is little doubt that if we define discretion as the exercise of individual choice or judgment concerning possible courses of action, discretion is a normal, necessary, and even desirable part of the criminal justice network" (Cox & Wade, 1998:33). They also add that: "..... the exercise of discretion in the criminal justice network is extensive Is it possible to control discretion to avoid inequality, arbitrariness, discrimination, and oppression?" (Cox and Wade, 1998:36). The two authors classify discretion into various categories including: public discretion; police discretion; prosecutorial and defence discretion; judicial discretion; plea-bargaining as a form of discretion; as well as correctional discretion (Cox & Wade, 1998:36-41).

The above discussion therefore highlights, to some extent, why there is disparity in sentencing, and that this issue is a controversial one, which cannot be easily resolved. The discretion exercised by sentencers appears to be the major cause of disparity in the sentencing process.

2.5.3 Lack of training of sentencers

The majority of judges and magistrates in South Africa receive little training in the matter of sentencing, as well as very little, if any, in the social sciences. They are "experts in the field of law, but have little if any formal training or experience in the areas of sociology and psychology or psychiatry They cannot be expected to have an adequate understanding of the relevant sociological and psychological forces that underlie the offender's behaviour" (Graser, 1981:136).

Graser maintains that unless judicial officers undergo a well-planned and professionally organised training in sentencing, the sentencing practice will remain a random, haphazard and personal affair (Graser, 1975:30). In order to effectively deal with the offender, judicial officers also need the assistance and guidance from the behavioural science experts, particularly in psychiatry, psychology and social work. According to Walker and Padfield, some professional sentencers regard the "art" of sentencing as "a skill, which cannot be taught but has to be acquired by experience" (Walker & Padfield, 1996:109). The researcher regards such sentencers as misdirected individuals, and is not uncommon in our criminal justice system. They tend to make the sentencing process into what Graser refers to as "an intuitive and subjective rather than a rational and objective process" (Graser, 1975:30).

Even though judicial officers may lack the necessary training in behavioural sciences and have to utilize the expertise of probation officers and correctional officials (expert witnesses), the sentencing officers are not obliged to accept the recommendations of expert witnesses. Judicial officers still maintain the important task of exercising their discretion and impose appropriate sentences as they deem fit. This is normally the source of conflict between the expert witness who makes a recommendation on the one hand, and the presiding officer on the other hand, who may refuse to accept the recommendation and uses his own discretion instead. Expert witnesses (probation officers in particular) sometimes ask themselves if it was really

necessary to request for a pre-sentence report if the presiding officer had, prior to sentencing, already made a decision on a particular sentence to be imposed on the accused.

2.5.4 Lack of background information on the accused

It has already been mentioned above that a judicial officer needs to enlist the services and expertise of a behavioural scientist so as to obtain adequate information on the offender as a person, including his developmental history, social environment, as well as his social functioning. The behavioural scientist, for example, a probation officer or correctional official, acts as an **expert witness** in court, and presents a presentence report on the accused, which enables the court to pass an appropriate and effective sentence. The report provides information such as: **the accused's personality and character, his emotional and psychological problems and needs, his family life, the socio-economic environment where he grew up and lived, employment history, educational qualifications, recreational pursuits, marital and other social relationships, previous convictions (if any), his motivation for and attitude towards the current offence,** and so on.

When conducting a pre-sentence investigation, the expert witness should bear in mind that he is dealing with involuntary clients who have been referred to him by the court. Such clients are most likely to have feelings of resistance, guilty, denial, resentment, aggression, and so on, and the probation officer has to utilize his casework knowledge and expertise, including his interviewing skills, non-judgmental attitude, and should establish a good rapport with the clients so as to be able to deal with the situation.

After the investigation, the expert witness should compile a comprehensive report on the accused, which will give the court a clearer picture of the accused and his social circumstances, and also assist the presiding officer in imposing an objective and appropriate sentence on the accused. The report

should also contain an objective analysis or evaluation of the information gathered, as well as the professional opinion of the expert witness regarding the matter in question. It is important for the expert witness to check the information gathered, for accuracy and authenticity. The final report should also be proofread and checked for any spelling mistakes, grammatical errors, typing errors and so forth.

In an article entitled "Probation Officer's recommendations put to the test" by Julia Sloth-Nielsen, a probation officer is said to have submitted two probation officer's reports on the same offence allegedly committed by a 16 year old child, who is a first offender, and was convicted of stealing a dog collar valued at R38,49. The first report contained a recommendation to the effect that a post-poned sentence should be imposed on the accused on certain conditions.

After a month, a second supplementary report was submitted and it contained a totally different recommendation, namely, that the child should be committed to a reform school. The only new information in the second report was that the child was readmitted to school, but did not attend classes regularly, and this appears to have been the cause of the change in the recommendation. The second recommendation was described by the judge on review as "more in the nature of a punishment than a rehabilitative measure". The presiding officer is also said to have "imposed the recommendation contained in the second report, without subjecting this recommendation to critical analysis, or inquiring into why the recommendation had changed so drastically within the short period of a month". (Sloth-Nielsen in Article 40, Volume 3, Number 1, March 2001:5).

The review court decided to set aside the sentence, and confirmed that "a committal to a reform school should be considered only as a measure of last resort and in exceptional circumstances, and that this was required by Section 28(1)(g) of the Constitution". The court also stated that the presiding officer

had misdirected himself by "slavishly" following the view of the probation officer and not inquiring more deeply into the second recommendation to refer the child to a reform school.

The above case study shows us how the probation officer's recommendation in a pre-sentence report can influence the presiding officer into taking an irrational and unjustified sentencing decision on the accused person. Sloth-Nielsen also states that "this case teaches us that not only must judicial officers apply their minds carefully to recommendations in probation officers' reports, but also that probation officers themselves must recommend institutionalisation only sparingly, and only in cases where they can give good reasons for doing so". Furthermore, Sloth-Nielsen questions "why this case was not diverted from court in the first place, given that the accused was a first offender and the value of the stolen goods was very low" (Article 40, Volume 3, Number 1, March 2001:5).

According to Graser, when presenting the presentence report in court, it is imperative that the expert witness conducts himself in a professional and dignified manner in terms of appearance and behaviour. He should retain his confidence and composure as an expert witness, and should not allow himself to be intimidated by the defence counsel, prosecutor, or judicial officer. In order to be a credible witness, the expert witness should appear to be confident, comfortable and knowledgeable about the case, and be respectful of the court, the defence counsel, prosecution, and the judicial officer. He should inform himself of the exact charge and the issues surrounding it, as well as other relevant information such as medical or psychological reports. The credibility of the expert witness is likely to be damaged by uncertainty, vagueness, and confusion. (Class notes: Honours Lectures: 5).

2.5.5 Attitude, background, characteristics of sentencer

An attitude determines how an individual perceives or views his social environment; and it also determines his behaviour towards other people,

situations, ideas, and so on. Hogarth describes **judicial attitudes** in sentencing as "a set of evaluative categories, relevant to the judicial role, which the individual magistrate has adopted (or learned) during his past experience with persons, problems, or ideas in his social world Before an attitude can be expressed towards a tangible problem in the case before him, a magistrate is engaged in a process of judgment in which the crime, offender, idea, or problem is placed in a framework and assigned to a category. The category belongs to a psychological scale of judgment, which the individual magistrate has formed previously for that class of item. It is this scale of judgment, which forms the basis of his attitude. Attitudes are thus conceived as information - processing structures, and as such would appear to be relevant to the decision-process in sentencing" (Hogarth, 1971:100-101).

Regarding attitudes in sentencing (or judicial attitudes), the Law Commission states that "the point of view of the individual sentencer will largely determine his approach to a given set of facts, and there will therefore be as many different approaches as there are different sentencers". The Law Commission also adds that "most sentencers appear to approach the question of sentencing in an intuitive and unscientific manner". (South Africa Law Commission, Appendixes to Discussion Paper 91, Project 82, 31 May 2000:2 and 15).

Graser quotes one of the famous jurists known as Voet, whereby the court outlined the approach a judicial officer should generally follow, namely, that he should impose a sentence "not in a spirit of anger but in one of equity", and avoid "hastiness, the striving after severity and misplaced piety". In addition, the sentencer should be "watchful to see that no step is taken either more harshly or more indulgently than is called for by the case" (Graser, 1981:125). In this regard, the South African Law Commission recommends that sentences must:

- "be proportionate to the seriousness of the offence committed, relative to sentences for other categories or sub-categories of offences;
- seek to restore the rights of victims of the offence;
- seek to protect society against the offender; and
- give the offender an opportunity to lead a crime-free life in future" (South African Law Commission Report, Project 82: Sentencing, 2000:47).

The following are three major considerations, which, **in practice**, are normally taken into account by magistrates or judicial officers, and can, to some extent, influence their attitudes when imposing a sentence on the accused:

2.5.5.1 Serious nature and gravity of offence committed

Violet crimes such as rape, murder, violent robbery, car hijacking and theft, and so on, normally give rise to public anger, disgust and revulsion, and they tend to attract the harshest punishment. If a crime involves pre-meditation, it acts as an aggravating factor when a penalty is determined, and a crime, which is committed at the spur of the moment, will usually be less severely punished. The Criminal Law Amendment Act (Act No 105 of 1997) makes provision for **minimum sentences** to be imposed for certain serious offences such as murder, rape, robbery, and so on.

2.5.5.2 Personal circumstances of the offender

When imposing a sentence, the court also takes into account the personal circumstances of the accused. The following are some factors that the judicial officer may consider:

- **Accused's first offendership:** This normally has a mitigating effect on the penalty to be imposed, but may be considered in conjunction with other factors, including the seriousness or severity of the

offence. The accused's good character or behaviour may also be taken into account.

- **Accused's youthfulness:** Youthfulness also acts as a mitigating factor in the sentencing process.
- **Accused's old age:** Old Age or advanced age of the accused may also influence the sentencer's attitude in determining a sentence, particularly if it is coupled with poor health.
- **Accused's attitude:** If the accused shows repentance or an attitude of genuine remorse, he is more likely to receive a more lenient penalty.
- **Accused's race or cultural background:** The question of race as a factor, which can influence sentencing, is a very controversial and sensitive issue. Disparity in sentencing between sentencers of different race groups, can also be attributed to differences in culture and class rather than to race.

2.5.5.3 Interests and protection of society

The judicial officer usually exercises his discretion and decides what type of a sentence would be the best in serving the interests and offering protection to the community. Such a decision is normally determined by his background, values, attitude, personality, and so on.

Lastly, it is important to note that the sentencer's **cultural background** and **personal characteristics** can also play a major role and may be problematic when a sentencing decision is made in respect of an offender. The judicial officer or sentencer is also a human being with his own strengths and weaknesses, biases and personal prejudices. The Law Commission also states that "many sentencers imposed sentences with a

specific political background as a point of departure" (South African Law Commission, Appendixes to Discussion Paper 91, Project 82, 31 May 2000:15).

2.6 Burglary and Housebreaking

2.6.1 Definition of burglary

Burglary or housebreaking is a serious crime, and is becoming more prevalent in our society, including the Germiston magisterial district. Most people are scared of their houses being broken into, their precious and valuable goods getting stolen, their privacy invaded, and their lives in general being threatened and becoming more miserable. This has, in recent years, resulted in a sharp increase in insurance premiums, increase in expenditure on security measures, and thus causing unnecessary financial burden on the insured person. Housebreaking is a violation of a person's human rights in terms of the South African Constitution (section 14). The majority of people experience their first encounter with the police and the courts when their properties are broken into and their possessions stolen from them.

The terms "**burglary**" and "**housebreaking**" are synonymous, and will be used interchangeably in this study. According to Bennett and Hess, the word "**burglar**" is derived from the German words "**burg**" which means "**castle**", and "**laron**" meaning "**thief**" and literally, it means "**house thief**". The FBI Uniform Crime Reports defines "**burglary**" as "the unlawful entry of a structure to commit a felony or theft, even though no force was used to gain entry." (Bennett & Hess, 1981:326). Naude and Stevens define burglary or housebreaking as "the wrongful and wilful removal or displacement of some or other obstruction that allows access to a building or site which is suitable for human habitation or the storage of goods and the actual entry or penetration of the building or site with the purpose of committing a crime" (Naude & Stevens, 1988:145).

Cox and Wade state that a person entering a building **lawfully** but remains inside without permission or authorisation after closing time, is said to have committed a "**breaking in**". This is known as "**constructive breaking**" and it applies to acts of deception, which are used to gain entry. The two authors further explain that **unlawful entry** has to take place for a burglary to exist. "The entry may be very slight: reaching inside to extract some article is sufficient. Constructive entry, involving the use of a trained animal, rope, or other device, may also establish the necessary element of the offence" (Cox & Wade, 1998:69).

According to the Criminal Procedure Act, "A charge relating to housebreaking or the entering of any house or premises with intent to commit an offence, whether the charge is brought under the common law or any statute, may state either that the accused intended to commit a specified offence or that the accused intended to commit an offence to the prosecutor unknown" (Criminal Procedure Act No. 51 of 1977, section 95 (12):1033).

Gilbert briefly describes burglary as an act, which involves an individual, who: without authority, knowingly enters a building or structure, with the intent to commit a felony or theft. (Gilbert, 1986:167).

From the above definitions, three key elements of the crime of burglary can be identified, namely: **entering a structure; without authority; and with intent to commit a crime.**

2.6.2 Elements of burglary

2.6.2.1 Entering a structure

Entry includes an entry for the purposes of housebreaking, as compared to "entry" in ordinary speech. Bennett and Hess provide the following description of entry: "... walking through an open door, crawling through an open window or transom, reaching through an open door or window with a long stick or pole, climbing through a hole in the wall, through a

tunnel or through a ventilation shaft, climbing a ladder or stairs outside a building, descending through a roof skylight, hiding in an entryway, breaking a window and taking items from the window display, remaining in a store until after closing time, and then commit a burglary; etc” (Bennett & Hess, 1981:329).

A structure or premises initially meant a **physical structure**. Burglary as an offence, referred to a violation of the security of the habitation, and the crime was confined to actual dwellings. Cox and Wade further state that a structure does not only refer to the dwellings of others, but also includes “telephone booths, unoccupied buildings, auto-mobiles, aircraft, watercraft, and other forms of transportation or conveyance” (Cox & Wade, 1998:69). A housebreaking offence now includes an intrusion into all buildings, any house or building whatsoever. The dwelling might be a very rudimentary building, provided that a person sleeps in it on a continuous basis. The size of the premises is generally also not a factor, provided that the building is enclosed. In the South African context, the premises should either be used for human habitation or for storage purposes.

Coertzen and Sorgdrager maintain that housebreaking alone is not regarded as an offence unless it is coupled with an intention to commit some other offence (Coertzen & Sorgdrager, 1993: 231). A 16-year-old girl unlawfully entered an unlocked policeman’s office at the Germiston Police Station with the purpose of phoning her boyfriend after she was assaulted by her second boyfriend, and had come to report the matter to the police. She couldn’t find the boyfriend over the phone, and when she put down the receiver, she accidentally spilt ink on the policeman’s desk. When she left the office, she was seen by one of the police officers that were on night duty. The girl told the police officer that she was looking for someone to take her home in a police vehicle. The officer then offered to take her to her friend’s place in town. The owner of the office discovered

the spilt ink the next morning. After making enquiries from his colleagues who were on night duty, the girl was arrested by the same police officer that gave her a lift to her friends place the previous night. She was subsequently charged with housebreaking with intent to commit an offence unknown to the prosecutor, and was given a suspended sentence.

In another case cited by Coertzen and Sorgdrager, **S v Moore** 1981 4 SA 897 (O), the appellant, charged with housebreaking with intent to steal and theft, pushed a victim's door which was already slightly open. He opened it a little further, entered the house with intent to steal, and stole a number of items from the house. When an appeal was made, the court had to examine the question as to whether the accused did in fact break open the house as defined in housebreaking with intent to commit an offence. The court eventually ruled that the pushing open of the door amounted to a "breaking open" as required by the definition of housebreaking with intent to commit an offence (Coertzen & Sorgdrager, 1993:236).

In conclusion, Coertzen and Sorgdrager comment that: "The entering of a premises is completed the moment an accused is able to exercise control over the contents of the premises. Therefore, if an accused makes a hole in the window of a jeweller's shop and inserts a length of wire through the hole to remove the jewellery he is considered to have entered the premises" (Coertzen & Sorgdrager, 1993:238).

2.6.2.2 Without authority

According to Bennett and Hess, burglary means that "the entry must be illegal and must be committed without permission of the person with lawful authority, that is, the owner of the property, the legal agent of such person, or the person in physical control of the property such as a renter or part owner" (Bennett & Hess, 1981:329). Youth offenders who commit housebreaking offences or burglary, usually do not obtain permission or

consent of the property owner to enter his property. They therefore invade the victim's privacy or property without authority.

The question arises as to whether a shoplifter can commit housebreaking or not. Usually the shoplifter enters the premises on the invitation of the shop owner. There is therefore no violation of the security of the premises, and no unlawful entry, which constitutes burglary in the shop. Another issue arises regarding the breaking into one's own house since the crime has to take place in the premises of another person. This becomes a problem in the case of **inter-spousal burglary**, such as the entry of an estranged spouse into a house in which he has an ownership interest, or his entry of the family home in which he no longer lives.

The housebreaking exists to protect the occupant or possessor, rather than the owner, of the premises (Hoctor, 1996:275-280).

Lastly, Bennett and Hess warn against what they call "fake burglaries", particularly in commercial burglaries where the property owner might be in financial difficulties and then decide to fake a burglary to cover a shortage of funds. They suggest that in such a case, the financial status of the property owner needs to be investigated (Bennett & Hess, 1981, p. 337).

2.6.2.3 With intent to commit a crime

An offender may be charged with housebreaking offence even if he has not committed any other offence or stolen anything in the process. He will therefore be charged with housebreaking with intent to steal and theft. Gilbert also adds that: "It is significant to realize that burglary does not always involve the successful taking of property. A suspect can be charged with the offence without actually having taken any property whatsoever. The essential element that must be proved is the **intent** to commit a felony or theft. There have been many cases in which, after having been apprehended in a dwelling without authority, the suspect claims that the

dwelling was entered by mistake" (Gilbert, 1986, p. 167). Bennett and Hess state that: "Whether burglary is planned well in advance or committed on the spur of the moment, **intent** must be shownif a person enters a structure without the owner's consent, the presumption is that it is to commit a crime, usually larceny or a sex offence" (Bennett & Hess, 1981: 329).

Citing the case of **S v Londi** 1985 2 SA 248 (E), Coertzen and Sorgdrager describe how the accused was charged with housebreaking with intent to commit an offence unknown to the prosecutor, and he subsequently pleaded guilty to the offence as charged. After interrogation in terms of section 112(1) (b) of the Criminal Procedure Act No. 51 of 1977, it was established that he broke a window of the Norvalspont post office and had no intention of doing anything inside the post office but to see what was happening inside. When the case was reviewed, the court confirmed that housebreaking must be accompanied by the intention to commit some other common-law or statutory offence, which does not form part of the break-in itself. No evidence therefore existed to the effect that the accused had an intention of committing any offence after the break-in (Coertzen & Sorgdrager, 1993:232).

In a similar case in the Germiston Magistrate's Court, two boys aged 14 and 15 years, broke into an old and deserted Standard Bank branch that was closed down some years ago, with the aim of finding something inside, possibly money. They were charged with housebreaking with intent to steal and theft. But because of their age, their case was diverted from the criminal justice system, and referred to NICRO for a diversion programme.

It is, therefore, not easy to prove the element of intent in a burglary case. The judiciary has to prove "both the intent to enter and the intent to commit a felony or theft once entry is gained. One who falls asleep in a

library and awakens after the library is closed, has not committed a burglary, nor has the individual who enters the wrong apartment while reasonably believing it to be his or her own" (Cox & Wade, 1998:69).

2.6.3 Classification of burglary

There are various types of burglaries, but for purposes of this study these will be classified into two categories, namely: **residential** and **commercial or business burglaries**.

2.6.3.1 Residential burglary

The majority of burglaries occur in private homes or residences. Gilbert defines a residence as "a place of habitation for one or more people. It may be an apartment, mobile home, or other type of dwelling" (Gilbert, 1986:170). There are a number of factors that can be attributed to the high incidence of residential burglaries as compared to commercial or business burglaries, for instance. These include, amongst others, the fact that most houses or residences do not have physical security, burglar alarms, adequate locking facilities, and so on, and as a result, housebreakers find it easy to gain entry. As Gilbert puts it, "Burglars are aware of the ease by which entry can be gained into the average residence. The youthful offender quickly acquires the low-level knowledge necessary to break into the majority of homes and apartments. A recent study in Seattle, Washington, indicated that in 40 percent of residential burglaries entrance was gained through open doors or windows. Shrubs, trees, fences, or other such landscaping features that obscure visibility of the residence contributes significantly to successful suspect entry" (Gilbert, 1986:170).

People who commit housebreaking offences are aware that most property owners are not at home during normal working hours and that they hardly notice who is present in their neighbourhood. Burglary crime rates increase during summer months. The reasons for this include, *inter alia*,

vacations, windows and doors that get opened for ventilation purposes, as well as an increase in the number of people who are walking in the neighbourhood during summer time (Gilbert, 1986: 168).

2.6.3.2 Commercial burglary

Commercial or business burglaries take place in business complexes, warehouses, factories, public buildings, shops, offices, churches, schools, and so on. According Bennett and Hess, the building is studied in advance in order "to learn about protection devices, opening and closing time, employee habits, people in the neighbourhood, or presence of a private watchman. Also, obtaining of information from an employee or by posing as a worker, repair person, in order to gain legitimate entrance" (Bennett & Hess, 1981:327). It is therefore imperative for a commercial burglar to do extensive research beforehand in order for his 'mission' to be a success.

Gilbert states that commercial burglaries usually occur when it is dark, and they involve people with higher levels of skill. Such burglars are also older and more experienced than the residential ones. The business burglar needs some skill because of the greater physical resistance encountered during forceful entry. Most businesses have at least adequate door and window locks or bars to resist simple forceful entry. The business burglar is also often skilled in opening locked safes.

Due to the fact that many retail businesses lock operating cash in safes, the business burglar naturally expects to come across a secured safe inside the store (Gilbert, 1986:171).

Another commercial burglary, which involves mainly the youth or school children that needs mentioning here, is the breaking into classrooms and school offices, followed by theft of equipment such as computers, fax machines, photocopiers, etc from the premises. In some instances, school

chairs, door handles and light fittings, were stolen from the township schools and exchanged for liquor and dagga at the local shebeens or taverns.

2.6.4 Characteristics of a burglar

2.6.4.1 Age

Although it is not easy to provide accurate information on the characteristics of burglars, the FBI Uniform Crime Report has shown that "the typical burglary suspect is a white male, under the age of twenty-one, living in a metropolitan area" (Gilbert, 1986:169). Gilbert further explains that youth offenders under the age of 18 years commit most burglaries. The reasons for this can be attributed mainly to considerable free time and lack of supervision while parents are at work; an increasing lack of family structure and other life-style that is characteristic of many lower-class families; and so on (Gilbert, 1986:169).

In this study, focus will be more on youth offenders (male or female) under the age of 18 years.

2.6.4.2 Gender

In most cases, males rather than females commit burglary. According to Reid, "... female burglars are more likely to steal in groups" (Reid, 1197:287).

2.6.4.3 The maturity of a burglar

Bennett and Hess differentiate between **amateur** burglars, that is, from age 15 to 25, and more **professional** ones, namely, from 25 to 55 years of age. An amateur burglar is normally an unskilled and inexperienced burglar who steals minor items such as radios, televisions, cash and other portable goods. He learns by trial and error, and is likely to make a mistake sooner or later, and then gets nabbed by the police whilst committing burglary (Bennett & Hess, 1981:331).

A professional burglar on the other hand, usually steals more valuable items and has been thoroughly trained by other professional burglars. Gilbert states that fewer adult burglars are arrested for burglary, possibly because they have "graduated" and became "more involved in other criminal activities yielding greater profit ... as some studies suggest, it may be that fewer older burglars are arrested because of their sophisticated methods of operation" (Gilbert, 1986:169).

2.6.4.4 Level of education

The majority of burglars are unskilled or semi-skilled individuals who are unable to secure jobs or find employment. They therefore resort to crime, especially housebreaking, in order to make a living. Furthermore, burglars are said to be "...motivated by a need for money, drugs, or by the excitement of the act itself" (Bennett & Hess, 1981:331).

2.6.4.5 Unemployment

It is a well-known fact that unemployment or poverty is one of the main causes of criminal behaviour in society. Most youth offenders, including housebreakers, come from the poor or disadvantaged communities especially the so-called informal settlements. The situation in such communities is so pathetic that some unemployed parents even encourage their children to go and steal so that the family can have something to feed their stomachs with.

2.6.5 Conclusion

It is evident that burglary causes hardship for property owners and tends to threaten the security and lives of ordinary citizens and business people alike. The burglars who often do not show any respect for other people's possessions and valuables, invade their properties and houses, thus causing them unnecessary suffering and misery.

In response to burglary or housebreaking crimes, some people group themselves and form neighbourhood watch groups, patrol groups, community policing forums, street committees, and so on. Community education or awareness campaigns may also assist in combating burglary. Individual property owners may also install burglar alarms, locking facilities, electronic devices, keep vicious dogs, or they may even subscribe to private security firms for the protection of their properties. This, however, creates more expenses for property owners.

An intercom device has also become counter-productive in certain households in the suburbs. Knowledgeable burglars use the intercom system to check if there is anybody inside the house before breaking into it.

Finally, it is advisable that people should refrain from buying stolen goods. Buying such goods encourages burglary, and opens up a market for housebreakers to sell them.

CHAPTER III: TRANSFORMATION OF CHILD JUSTICE IN SOUTH AFRICA

1. BACKGROUND

Cox and Wade state that, some two thousand years ago, the Roman Civil Law and Canon (church) Law differentiated between juveniles and adults in terms of **age of responsibility**. The same occurred in the British common law during the 11th and 12th centuries. Examples in this regard include "children under **7 years** of age were not subject to criminal sanctions because they were presumed to be incapable of forming **criminal intent**, or men's area; and children between the age of 7 and 14 were exempt from criminal prosecution unless it could be demonstrated that they had formed criminal intent, could distinguish right from wrong, and could understand the consequences of their actions". (Cox and Wade, 1998:256-257).

In the 16th Century, England attempted to settle disputes involving children confidentially and to separate those requiring confinement from adults' offenders. The aim was to help children avoid public shame and stigmatisation, and to avoid the harmful consequences of association with more hardened criminals (Cox & Wade, 1998:257).

In South Africa, children were previously involved in a struggle against apartheid, especially after the 1976 Soweto uprisings. They were detained without trial for their participation in the political revolution, and severely punished just like adults. Sloth-Nielsen states that: "Historically, children charged with criminal offences were treated in much the same way as their adult counterparts, with limited concessions being made in the course of criminal proceedings to account for their youth and immaturity" (Sloth-Nielsen 1999: 470).

After the 1994 democratic elections in South Africa, drastic steps were taken by the government to release children who were detained in prisons or police

cells whilst awaiting trial. Subsequently, the Correctional Services Amendment Act No 17 of 1994 was passed into law by parliament (in May 1995). This new law then amended Section 29 of the Correctional Services Act No. 8 of 1959, that is, children under the age of 18 years, were not to be held in prisons or police cells while they were awaiting trial. They had to be released to the custody of their parents or guardians, or placed in places of safety. Problems were experienced at the places of safety where staff members were not equipped to deal with children who were detained for criminal offences, and some of the children absconded from these centres. As a result, an Inter-Ministerial Committee on Young People at Risk (IMC) was established in order to deal with this situation and to address problems experienced in the juvenile facilities. The IMC aimed, *inter alia*, to "oversee plans to rebuild existing welfare facilities or, where necessary, to commission new accommodation, so as to provide one secure place of safety for detained children in each of the nine provinces" (Sloth-Nielsen 1999: 476). In this regard, the IMC then recommended (in September 1995) that secure care facilities be established in each province as an alternative to imprisonment for children who were awaiting trial.

According to Sloth-Nielsen, "it later became clear that the infrastructure to replace prisons with welfare facilities could not be obtained overnight" (Sloth-Nielsen 1999: 475). As a result, Section 29 of the Correctional Services Act was again amended (Act No. 14 of 1996) in May 1996, and this allowed for the holding of children in prison to await trial if they were charged with certain **serious offences** listed on a schedule to the Act. This second amendment also allowed that children could only be held in prison if **no secure place of safety within a reasonable distance from the court**, was available. If a child is detained in prison, he must appear before court every 14 days in order to determine whether or not further detention is necessary. Section 71A was subsequently inserted in the Criminal Procedure Act (Act No. 51 of 1977). In terms of this section, a child who is under the age of 18 years shall not be detained in a prison or a police cell or lock-up. In

certain circumstances, he or she may be detained in a police cell or lock-up for a period not exceeding 48 hours pending his or her first appearance in court after arrest. (Section 71A of the Criminal Procedure Act No. 51 of 1977).

On 16 June 1995, South Africa ratified the United Nations Convention on the Rights of the Child. Consequently, the South African Law Commission was assigned to conduct an investigation into child justice, and to make recommendations to the Justice Minister for the reform of this particular area of the law. According to the Report on Juvenile Justice, a separate Bill had to be drafted so as to provide for a cohesive set of procedures for dealing with children who are in conflict with the law. The draft Bill, known as the **Child Justice Bill**, "encapsulated a new system for children accused of crimes providing substantive law and procedures to cover all actions concerning the child from the moment of the offence being committed through to sentencing, including record-keeping and special procedures to monitor the administration of the proposed new system". (South African Law Commission, Report on Juvenile Justice, July 2000:x).

2. RESTORATIVE JUSTICE: A NEW APPROACH TO SENTENCING

2.1 Background Information

Restorative Justice is the underlying philosophy for the Child Justice Bill. According to Bazemore and Umbreit, Restorative Justice is not a new approach to the criminal justice system but it draws on ancient concepts and practices in many different cultures. In the Western world, restorative justice practices were abandoned during the middle Ages as the formal justice system emerged. During the 1970's and 1980's, an increase of interest in restorative philosophy and practice grew out of a number of movements, namely, reconciliation/ conferencing, restitution and victim's movement (Bazemore & Umbreit, 1995).

The principles of restorative justice date back to the traditional forms of justice of many indigenous African people, for example, traditional courts conducted by chiefs and indunas in rural areas, street committees in the townships, the Sotho practices of "lekhotla", that is, if an offence is reported to a traditional leader, he may call a "lekhotla" to a session. The victim, offender, family, and support people of both the offender, the victim, and community members usually attend the "lekhotla".

When a crime is committed, African tradition places more emphasis on putting the wrong right and promoting peace and reconciliation between the offender and the victim, than on mere retribution. The community intervenes because of a belief that the community as a whole has been violated, and the victim needs assistance and support from them.

In 1999, the South African Law Commission established a project committee to look into the question of sentencing and to review all aspects relating to sentencing on a continuous basis. The project committee identified a number of projects for investigation, one of which is aimed at improving the plight of victims of crime. One of the aspects identified by the project committee was community participation and individual interests in the sentencing process. Dr. H.F. Snyman, a former member of the committee, prepared a short paper reflecting some proposals for the improvement of our law in this regard, and these proposals include improved involvement of victims in the sentencing process by way of introducing victim compensation, victim impact statements, victim-offender mediation and greater consultation between victims of crime and public prosecutors (South African Law Commission Issue Paper, Project 82, 1997:1).

2.2 What is Restorative Justice?

Restorative Justice represents a way of dealing with victims and offenders by focussing on the settlement of conflicts arising from crime and resolving the underlying problems, which caused it. It is also, more widely, a way of

dealing with crime generally in a rational and problem-solving way. Central to the notion of restorative justice is the recognition of the community rather than the criminal justice agencies as the prime site of crime control (South African Law Commission Issue Paper, Project 82, 1997:4).

Van Ness suggested that the term Restorative Justice was first coined by Albert Eglash (1975) in a paper in which he distinguished between retributive justice based on punishment, distributive justice based on therapeutic treatment, and restorative justice based on restitution. The terms retributive and restorative justice, however, differ in that the former emphasises punishment while the latter stresses reparation and obligation to the victim. The emphasis in restorative justice is on the future rather than the past, as it is in retributive justice (Bazemore & Umbreit, 1995:312).

The South African Law Commission maintains that crime is best controlled when community members are the primary controllers through active participation in shaming offenders and, having shamed them, through concerted participation in ways of re-integrating the offender back into the community of law-abiding citizens. Low-crime communities are communities where people do not mind their own business, where tolerance and deviance has limits, where communities prefer to handle their own crime problems rather than hand them over to the professionals (South African Law Commission, Issue Paper, Project 82, 1997:4). The latter statement should however not be interpreted to mean that people should take the law into their own hands as it has happened previously in certain communities.

Frank et al quote Galaway and Hudson (1996) as saying that three elements are central to all restorative justice theory and practice, and these elements are:

- Crime is viewed primarily as a conflict between individuals that results in injuries to victims, communities and the offenders themselves, and only secondarily as a violation against the state.

- The aim of the criminal justice process should be to create peace in communities by reconciling the parties and repairing the injuries caused by the dispute.
- The criminal justice process should facilitate active participation by victims, offenders, and their communities in order to find solutions to the conflict. (Frank et al, 1997:3).

In its Issue Paper, the South African Law Commission states that there are a number of elements which are common among restorative justice programmes, namely, crime is regarded as an injury to victims and community peace; putting the wrong right; active participation by both the victim and the community; compensation of victims for their losses through restitution; and holding of offenders accountable for their actions. (South African Law Commission Issue Paper, Project 82, 1997:4-5).

2.3 Restorative Justice in South Africa

The term Restorative Justice was introduced into South African criminal justice debates through the work done by Nicro for its Victim-Offender Mediation Project in the early 1990's. The term later emerged in a document entitled **"Juvenile Justice for South Africa: Proposals for Policy and Legislative Change"** which articulated the vision of a group of non-governmental organizations and academic institutions for a future system for the administration of justice for young people. The themes and aims of restorative justice can very clearly be seen to be operative in the approach adopted by community courts (for example, street committees in the townships, informal settlements, etc), with a very strong focus being placed on the resolution of problems between community members through discussion and active involvement of the victim, the offender and other community members in reaching this resolution. Reparation to victims is also central to this process (Frank et al, 1997:16-17).

The majority of South Africans have personal and inherited experiences and knowledge of the resolution of problems through methods other than those that are offered by the formal criminal justice system. The Truth and Reconciliation Commission (TRC) in our country was a large-scale experiment in Restorative Justice, which represents an acknowledgement of the need for victims to find some resolution to their victim-status through testifying about their experiences, and being allowed the opportunity to hear the stories of the perpetrators of crimes against them. The **Promotion of National Unity and Reconciliation Act** (Act No. 34 of 1995) was introduced by Parliament in order to deal with this situation. The principles of restorative justice have been articulated in several key South African documents, such as the **National Crime Prevention Strategy, Justice Vision 2000** and the **South African Constitution**.

Focus has often been on offenders, and the South African criminal justice system has largely ignored victims. Victims are currently not part of the administration of justice, and they play a passive role in the court proceedings. They are only used as witnesses to testify in the State's case against an offender. In restorative justice, more emphasis is placed on the needs of victims, and the victims are made central to the administration of justice.

The criminal justice system has also focussed more on punishment, irrespective the nature of the offence and disregarding the effects of such offence on the victims and the community. This has, to some extent, discouraged the offender from accepting responsibility for his criminal behaviour (Frank et al, 1997:23-24).

The Inter-Ministerial Committee on Young People at Risk (IMC), a group established to develop a new child and youth care policy, has made proposals regarding children who are in conflict with the law. The IMC (1996) stated that: "the approach to young people in trouble with the law should focus on

restoring societal harmony and putting wrongs right rather than punishment. The young person should be held accountable for his/her actions and where possible, make amends to the victim" (IMC, 1996:18).

The Interim Policy Recommendations of the IMC also strongly recommended that sentencing should be based on what is "appropriate" for a particular case, after the offender, victim and the situation have been carefully considered. This requires a fundamental shift in sentencing practice, basing sentencing decisions on much more than a consideration of the offence and previous convictions.

Despite the fact that the presiding officer should exercise its own discretion regarding a case, the IMC suggests that it is only possible to ensure that this "appropriate" sentencing will take place if magistrates are provided with a set of principles that will strongly guide the sentencing practice. Some of the guidelines suggested by the IMC for the child justice system, include:

- The sentence should be proportion to the gravity of the offence, taking into account the particular circumstances of the young person.
- Restriction of personal liberty (detention) shall be imposed only after careful consideration, and then limited to the minimum possible (Frank et al, 1997:18-20).

Regarding the practical application of restorative justice principles in the South African context, there is a lot to learn from existing community structures such as street committees in the townships, community policing forums (CPF's), non-governmental organizations (NGO's), and other community-based organizations (CBO's), including organizations which are usually perceived to be 'radical', for example, Mapogo-A-Mathamaga.

3. THE CHILD JUSTICE BILL

The Child Justice Bill will be briefly discussed below, and the main focus will be on the **sentencing aspect**, including diversion, referral of a case to a Children's Court and legal representation, as proposed by the new Bill. It is not the purpose of this study to discuss the whole Bill in detail.

An official policy regarding children who are in conflict with the law (that is, accused of committing a crime) is outlined in the Interim Policy Recommendations for the transformation of the Child and Youth Care System. This is a document, which was published in 1996 by the Inter-Ministerial Committee on Young People at Risk, of which the Ministries of Social Development (formerly known as Welfare), Justice, Safety and Security, Correctional Services, and Education, were members. The document describes inter alia, an integrated service delivery model, in which every child arrested should be assessed by a probation officer, diversion is to be considered, and deprivation of liberty (detention) is to be considered only as a measure of last resort. The document also mentions the need for children to be placed in the least restrictive and most empowering residential option available and appropriate to their circumstances. This was the first South African policy document to mention a **secure care facility**.

There is currently no specific legislation, which deals with children who are in conflict with the law. There are, however, various Acts (for example, the Criminal Procedure Act and Correctional Services Act) that contain sections, which deal with youth offenders. Generally speaking, most child offenders are dealt with in the same way as adults. It was for this reason that the South African Law Commission drafted a **Child Justice Bill**, which aims at establishing a cohesive child justice system so as to prevent children from entering deeper into the criminal justice process, whilst holding them accountable for their actions. The Bill focuses on establishing "a comprehensive criminal justice system for children which aims to protect the

rights of children entrenched in the Constitution and provided for in international instruments, and to ensure an appropriate and individual response towards each child accused of committing an offence while still holding him or her accountable for his or her actions". (Child Justice Bill: 1997-1).

The Child Justice Bill outlines some important provisions in the new legislation, and these include:

- Establishing a criminal justice system for children in conflict with the law which aims at protecting their rights in terms of the Constitution and the United Nations Convention on the Rights of the Child;
- Providing for minimum age of criminal responsibility for such children;
- Description of the powers and duties of police and probation officers when dealing with such children;
- Description of circumstances under which such children may be detained and/or released from detention;
- Diversion of cases away from formal court procedures to be entrenched as a central feature of the proposed child justice system;
- Assessment and preliminary inquiry of each child to be made compulsory;
- Special rules for a child justice court to be established;
- Sentencing options and sentencing jurisdiction of the proposed child justice court to be increased;
- Restorative justice concept to be entrenched;
- Legal representation of children to be provided in certain circumstances;
- Appeal and review procedure and an effective monitoring system to be established (Report on Juvenile Justice, July 2000;x-xi).

3.1 Diversion as a Sentencing Option

The South African Law Commission defines the term “**diversion**” as “**the referral of cases of children alleged to have committed offences away from the criminal justice system with or without conditions.**” (Child Justice Bill: 5). Diversion focuses on those children who are in conflict with the law or have been accused of delinquency but whose cases are not viewed as requiring official court action, that is, a formal trial or adjudication to determine whether or not the juvenile was in fact involved in the alleged offence.

The purposes of diversion include, among others, encouraging the child to be accountable for the harm caused by him or her; preventing stigmatisation of a child, which may occur through contact with the criminal justice system; and preventing the child from having a criminal record.

Diversion normally requires that the offender pleads guilty to the offence as charged, and is also accompanied by a requirement that the offender complies with certain conditions. Diversion may take place at virtually any stage in the justice process, including arrest, prosecution, and adjudication, sentencing and post-sentencing phases. If the conditions are met, the result may be suspension or dismissal of the formal court proceedings.

According to Sloth-Nielsen and Muntingh, the Juvenile Justice Discussion Paper (proposed Child Justice Bill) “..... do not limit diversion to children who have been accused of any particular offences, or to children who are first offenders, but recognizes that in more serious matters, or where a child has been diverted before, the matter may (and in many instances, will) be deemed too serious for diversion” (Sloth-Nielsen & Muntingh, 1998: 66).

To some extent, diversion is already being implemented in South Africa even though such a move has not yet been legislated. An example of diversion is the withdrawal of charges by prosecutors, usually on conditions that the child

attends a programme or undertakes to do a community service. The two authors further explain that "although the children referred for diversions are charged with a wide variety of offences, the majority (85%) are charged with property offences and specifically theft and shoplifting. A very limited proportion of housebreaking cases are referred. The overall impression is that diversion is used primarily for minor property offences ... A follow-up survey of 468 Nicro juvenile diversion clients countrywide found that only 6,7% re-offended in the first 12 months after attending a diversion programme" (Sloth-Nielsen & Muntingh, 1998:77).

3.2 Referral to a Children's Court

If a presiding officer in a preliminary inquiry (inquiry magistrate), has reason to believe that **the child accused of committing an offence, is in need of care** as referred to in Section 14 of the Child Care Act (Act 74 of 1983), he may order that the preliminary inquiry be closed and the matter be transferred to a Children's Court. Referral of a matter to the Children's Court must be considered by a probation officer or an inquiry magistrate for various reasons such as: for instance, if the child has on numerous occasions committed minor offences; is abusing drugs or dependence-producing substances; or does not live at home or in appropriate substitute care.

3.3 Sentencing

In terms of the proposed Child Justice Bill, before the court imposes a sentence, it must request for a **pre-sentence report** to be compiled by a probation officer or any other suitable person, particularly if a sentence with a residential requirement is considered. Such a report must be completed as soon as possible, but not later than one calendar month after the date of request. The court may however dispense with a pre-sentence report in case where the conviction is for an offence listed in Schedule 1 (for example, common assault; malicious injury to property which does not exceed R500; theft where the value does not exceed R500; trespass; and so on), or would cause undue delay in the finalisation of the matter, and which delay would be

prejudicial to the interests of the child (South African Law Commission, Report on Juvenile Justice, Project 106, July 2000:283). Practically, however, some problems might be experienced regarding the speedy compilation and submission of such a report within the required time frame, for example, delays in requesting the report by the prosecutor; delays in conducting a pre-sentence investigation by the probation officer mainly because of lack of resources.

Some of the **sentences**, which may be imposed on a child by a presiding officer in a Child Justice Court, include the following:

- **Community-based sentences:** These include placement of a child under the supervision and guidance order; referral to counselling or therapy; where a child is over the age of compulsory school attendance as referred to in the South African Schools Act (Act No. 84 of 1996), and is not attending formal schooling, compulsory attendance at a specified centre or place for a specified vocational or educational purpose for not more than 35 hours per week, to be completed within a maximum period of 12 months; performance without remuneration of some service for the benefit of the community under the supervision or control of an organisation or an institution, or a specified person or group identified by the court, or by the probation officer of the district in which the court is situated (South African Law Commission, Report on Juvenile Justice, Project 106, July 2000:285).
- **Restorative Justice Sentences:** A child who has been convicted by the court may be referred to a family group conference, victim-offender mediation or other restorative justice process at a specified place and time.
- **Correctional supervision:** The court may convert a sentence of imprisonment imposed as an alternative to a fine, into correctional

supervision in terms of Section 276A(1)(h) or 276A(1)(i) of the Criminal Procedure Act No. 51 of 1977. Section 276A(1)(h) allows the court to place the convicted person under **house arrest** for a period of not more than **three years**. Section 276A(1)(i) of the said Act makes provision for the offender to be **imprisoned** for a maximum period of **five years** but may be released on parole after serving part of his prison term. Correctional supervision may be imposed on a child who is 14 years or older, including a child convicted of housebreaking with intent to steal and theft. It is also not limited to specific offences.

- **Postponement or suspension:** The passing of any sentence may be postponed, with or without conditions, for a period of not less than three months but not exceeding three years. The whole or any part of any sentence may also be suspended, with or without conditions, for a period not exceeding five years. (Report on Juvenile Justice, Project 106, July 2000:289-290).
- **Fines:** A sentence of a fine may not be imposed on a child by a court. In a case where a penalty involving a fine and imprisonment in the alternative is prescribed for an offence, symbolic restitution, payment of compensation with a maximum of R500, or any other competent sentence, but not imprisonment, may be imposed by the court (South African Law Commission, Report on Juvenile Justice, Project 106, July 2000:291).

From the above discussion, it is evident that sentencing options for children in conflict with the law have been considerably increased. Such sentencing options are designed to be in line with the restorative justice model and diversion, which form the core of the proposed Child Justice Bill. The proposed new legislation complies with international norms and standards, particularly the United Nations Convention on the Rights of the Child, as well as the South African Constitution.

3.4 Legal Representation

Section 35(2) of the Constitution states that **everyone** (including a child) "who is detained, including every sentenced prisoner, has the right ... to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly ... (The Constitution, 1996:16-17)". This provision in the Constitution is in line with international standards as contained in the United Nations Convention on the Rights of the Child which stipulate, *inter alia*, that "...every child alleged as, accused of, or recognized as having infringed the penal law ... to be presumed innocent until proven guilty according to law ... to be informed promptly and directly of the charges against him or her ... and to have legal or other appropriate assistance in the preparation and presentation of his or her defence" (United Nations Convention on the Rights of the Child, Article 40, 1990:19).

The Child Justice Bill proposes that a child who is in conflict with the law has the right to give independent instructions concerning the case to a legal representative in the language of his or her choice, with the assistance of an interpreter where necessary. The child, the parent or an appropriate adult, may appoint a legal representative of own choice, in which case they would be liable for the payment of fees thereof.

Diversion must also be promoted where appropriate, whilst ensuring that the child is not unduly influenced to acknowledge responsibility. According to the United Nations Convention, the child should "... not to be compelled to give testimony or to confess guilt" (United Nations Convention on the Rights of the Child, Article 40, 1990:20). The South African Constitution also stipulates that anybody "who is arrested for allegedly committing an offence has the right ... to remain silent ..." (The Constitution, Section 35, 1996:16). In practice, though, some children normally allege that they were 'advised' or 'compelled' to plead guilty to the charges laid against them, especially by legal representatives from the Legal Aid Board. This, it is alleged, is being

done in order to speed up court proceedings and to make it easy for the accused to be given a more 'lenient' sentence by the presiding officer. Such allegations are usually revealed when the probation officer is conducting a pre-sentence investigation into the matter.

Furthermore legal representation must, upon conclusion of the preliminary inquiry, be provided at State expense, if the accused child is remanded in custody pending plea and trial in court; or the matter is remanded for plea and trial of **any offence**, and it is likely that a sentence involving a residential requirement may be imposed. A child in need of legal representation may not waive the right to such representation. If the child refuses to give instructions to the legal representative, this factor must be brought to the attention of the inquiry magistrate or the court, and the child concerned must be questioned so as to establish the reasons for such refusal, which will also be noted on the record of the proceedings. If the questioning shows that the child does not wish to have a legal representative, the inquiry magistrate or court must instruct a legal representative employed at a Legal Aid Clinic or a legal representative appointed in terms of Section 3 of the Legal Aid Act (Act No. 22 of 1969), to assist the child, and attend all hearings pertaining to the case (South African Law Commission, Report on Juvenile Justice, Project 106, July 2000:291-295). There is a popular belief among some children who are in conflict with the law, that legal representatives from the Legal Aid Board are government employees whose aim is to make sure that the court finds the accused guilty and convicted. Such a myth is, however, difficult to prove or disprove.

3.5 Monitoring of Child Justice

A monitoring system for child justice has been proposed by the new legislation. A **Child Justice Committee** must be set up for each magisterial district, comprising representatives from various stakeholders, namely, Departments of Justice, Social Development, Correctional Services, and South African Police Services. Some of the main functions of such a committee shall

include **monitoring** the following: the use of alternatives to arrest (especially by police officials); the use of diversion options; the release of children from police custody and their detention in custody; the reports submitted by probation officers.

According to the Report on Juvenile Justice, each province should also establish its own **Provincial Office for Child Justice. A National Office for Child Justice** should also be set up, and shall have representatives from Justice Department, Social Development, and Safety and Security. The National Office for Child Justice shall, inter alias, monitor and assess the policies and practices of the three departments regarding the implementation of the Child Justice Bill; review and make recommendations on the operation of the Bill; educate the public about the administration of child justice (South African Law Commission, Report on Juvenile Justice, Project 106, July 2000:296-307).

4. AMENDMENT OF THE PROBATION SERVICES ACT (ACT 116 OF 1991)

With the rate of crime rising sharply in South Africa, especially among children and youth, the Probation Services Act (Act No. 116 of 1991) needed to be amended accordingly. At a forum known as the Probation Advocacy Group (PAG), it was decided that a new occupational class called "Assistant Probation Officers" should be created in order to deal with the crime situation, and amendment be made to the Probation Services Act (known as the Probation Services Amendment Bill). (UCT Lecture Notes: "ASSISTANT PROBATION OFFICERS", distributed by Dr R Graser).

4.1 Probation Services Amendment Bill, 1999

Amendments to the Probation Services Act were formulated and submitted to Parliament, and they included the following:

- Definition of probation officer to include **assistant probation officer** - the latter will assist probation officers in the performance of their duties;
- inserting the definition of "**family finder**" whose main function is to trace the parents or guardian of an accused child so that they could attend court proceedings and assist the child concerned;
- introducing assessment, support, referral and mediation services in respect of **victims of crime**;
- introducing **crime prevention strategies** through the provision of early intervention programmes including diversion services and family group conferencing;
- establishment of **restorative justice programmes** and services as part of appropriate sentencing and diversion options;
- establishment of **assessment and referral services** and centres for children, and rendering of early intervention services and programmes. (Probation Services Amendment Bill, 1999:10).

4.2 The Role and Function of Assistant Probation Officers

In the Western Cape, a pilot project of assistant probation officers was established on 15 September 1998 and had to be terminated on 31 March 2001. The project was supposed to focus on the role and function of assistant probation officers regarding children in conflict with the law, with more emphasis on early intervention and prevention services. (UCT Lecture Notes: "ASSISTANT PROBATION OFFICERS", distributed by Dr R Graser).

Some of the functions and services rendered by assistant probation officers in the Western Cape included:

- **Supervision services:** these are rendered to sentenced youth under the supervision of a probation officer, and they entail home visits, consultations, school visits, and group work.

- **Crime prevention workshops/programmes:** they are developed and presented by assistant probation officers in conjunction with SAPS, Justice and Education.
- **House arrest project:** young persons who are awaiting trial at home are being monitored by means of unscheduled home visits by an assistant probation officer who also renders counselling to both the young persons and the parents.
- **Monitoring of young persons serving community service orders:** young persons are monitored and appropriate placement sometimes arranged by assistant probation officer in consultation with probation officer and NGO's concerned.
- **Support groups for parents:** group sessions are held with parents of young persons placed under the supervision of a probation officer.
- **Support services to young persons awaiting trial at places of safety:** an assistant probation officer renders this service at a local place of safety in a rural area, and also helps maintain contact between young persons and their families, and address related problems. (UCT Lecture Notes: "ASSISTANT PROBATION OFFICERS", distributed by Dr R Graser).

The above amendments to the Probation Services Act, including the proposed functions of assistant probation officers and family finders, introduction of services to be rendered to crime victims, introduction of early intervention programmes (diversion and family group conferencing) and reception, assessment and referral services, are all aimed at transforming the child and youth care system in our country.

5. MINIMUM STANDARDS FOR CHILD AND YOUTH CARE SYSTEM

A policy document was developed in May 1998 in order to facilitate the transformation of the child and youth care system, including young people in trouble with the law. The document outlined the minimum standards, which

would ensure that “transformation is monitored effectively and in a manner which promotes and guides change and development”. (Minimum Standards, South African Child and Youth Care System, May 1998: 8). The minimum standards include: **Prevention** (Level 1); **Early Intervention** (Level 2); **Statutory Process** (Level 3); and **Continuum of Care** (Level 4).

Prevention service delivery level includes strategies and programmes that strengthen and build the capacity and self-reliance of children, families and communities. **Early intervention** refers to services rendered to individuals, families and communities who are vulnerable or at risk, and provision of strengths-based developmental and therapeutic programmes so as to prevent any statutory intervention of any kind. Further deterioration and statutory intervention is prevented, and individuals, families and communities are restored and/or reunified within the shortest time frame possible. At **statutory process** level, an individual is already involved in the criminal justice system and is waiting for the finalisation of the court proceedings. Such a person may also be placed away from home or in a detention centre. Services that are rendered at this level should focus on supporting and strengthening those persons who are affected by the court proceedings. Finally, the **continuum of care** level focuses on community-based care services such as day care, foster care, probation supervision, prisons, secure care facilities for young people, rehabilitation centres, and various forms of residential care. (Financing Policy: Developmental Social Welfare Services. Notice 463 of 1999. Department of Welfare).

CHAPTER IV: RESEARCH DESIGN AND METHODOLOGY

1. FOCUS OF THE STUDY

Different judicial officers impose different sentences for similar offences, and this leads to disparity and inconsistency in sentencing practices. It should be noted that these officers come from diverse cultural backgrounds, they hold different beliefs, different norms and values, they have their own strengths and weaknesses, and so on. Mouton and Marais state that "...individuals are unique beings: each with their own set of value-orientations, own preferences and norms, own wishes and desires, and unique convictions and ideals". (Mouton & Marais, 1994:76) It is these personal attributes that determine the judicial officers' behaviour, attitudes, and affect their sentencing decisions, particularly with regard to young offenders who commit housebreaking crimes. Oppenheim has this to say regarding attitudes: "Attitudes are reinforced by *beliefs* (the cognitive component) and often attract strong *feelings* (the emotional component) which may lead to particular behavioural *intents* (the action tendency component)". (Oppenheim, 1993: 175).

In this study, it is suggested that the **lack of sentencing guidelines and principles regarding the aims or objectives of punishment that should be emphasised in the sentencing process, is the major contributory factor in the sentencing disparity and inconsistency.** Some sentencers, for instance, regard deterrence as the most important consideration in the sentencing process, while others place more emphasis on retribution or rehabilitation. There is obviously a clear absence of a systematic approach to sentencing. The research therefore seeks to examine some issues around sentencing disparities resulting from the practices and attitudes of judicial officers.

The study focuses on five major areas, namely:

- Attitudes and sentencing practices of magistrates and prosecutors (judicial officers);
- different types of sentences imposed by judicial officers on youth offenders for housebreaking crimes;
- factors that are commonly taken into account by judicial officers in sentencing young housebreakers;
- the main objectives of punishment that judicial officers tend to emphasise in the sentencing process; and
- suggestions and/or comments by judicial officers regarding effective sentencing options for youth offenders who commit housebreaking offences.

2. RESEARCH METHODOLOGY

Both **qualitative** and **quantitative** research methods were used in the study. The **qualitative** method was implemented so as to enable the measurement of attitudes of magistrates and public prosecutors (judicial officers) in the sentencing practice. The study is qualitative-exploratory, and aims at gaining a better insight and understanding into the attitudes and practices of judicial officers when sentencing housebreaking youth offenders. The researcher developed an interview schedule for the collection of data from judicial officers. This method of collecting data has an advantage of obtaining a high rate of responses from the research participants, thus affording the researcher an opportunity of interacting and establishing a positive rapport with the respondents. The researcher was able to establish such rapport, using his social work interviewing techniques and skills.

The data collected was analysed with the assistance of **quantitative** techniques. Graphs and tables were utilised for analysing the data. Furthermore, **documentary evidence**, that is, court records, court books, and databases, were also used to obtain more data. To improve the reliability of a research survey, it is advantageous to use various sources of information

in the data collection process. In this regard, Mouton and Marais state that: "...the inclusion of multiple sources of data collection in a research project is likely to increase the reliability of the observations. Denzin coined the term *triangulation* to refer to the use of multiple methods of data collection". (Mouton & Marais, 1994:91.)

2.1 Sampling Techniques

Before drawing a sample of the respondents, the researcher had to decide on a sample size that was representative, manageable, and convenient for the study. A list of all magistrates and public prosecutors in the Germiston Magistrate's Court was obtained from the control prosecutor. Such a list would ensure a probability of selection for all the respondents in the sampling process. The court has a total of 12 magistrates and 15 public prosecutors (judicial officers). Bless and Higson-Smith state that: "The major criterion to use when deciding on sample size is the extent to which the sample is representative of the population...Thus, the 'rule of thumb' for choosing a sample size that is five per cent of the population remains quite an inaccurate guide-line, though certainly usable when precise formulae are lacking". (Bless & Higson-Smith, 1995:96). A representative sample affords the researcher an opportunity of generalising the research findings to other populations.

A simple random sample of ten magistrates and ten public prosecutors was selected from the list of judicial officers (provided by the control prosecutor) in the district and regional courts of the Germiston Magistrate's Court. The sample comprised 7 male magistrates (58,3% of the total), 3 female magistrates (25% of the total), 4 male prosecutors (26,7% of the total), and 6 female prosecutors (40% of the total). Each respondent's name was allocated a number in order to avoid any form of bias. Small pieces of paper with the allocated numbers were put in a small box, and they were then randomly selected by the researcher. The names of 10 magistrates and 10 public prosecutors were selected separately using this method.

Each respondent was requested to provide personal details regarding his or her current position, years of experience, and professional qualification(s). Respondents were assured that such information would be treated confidentially, and would only be used for research purposes. This kind of information is referred to as **classification questions**. Oppenheim suggests that "such questions should come right at the end of the questionnaire, by which time we can hope to have convinced the respondent that the inquiry is genuine". (Oppenheim,1993: 132).

Another random sample of 30 (52,6%) housebreaking cases involving youth offenders was compiled from the court database and court files (documentary evidence). These included finalised cases of convicted young offenders for the period between May 2001 and May 2002. The courts handled a total of 57 housebreaking cases during this period. Out of these cases, a total of 20 finalised cases were randomly selected from the 5 district courts in the Germiston Magistrate's Court, that is, 4 cases from each district court. The different sentences imposed in each case, were used as criteria for the selection, namely, suspended sentences, correctional supervision, and imprisonment. A further random sample of 10 finalised cases was selected from 4 regional courts. Bailey states that "Although general rules are hard to make without knowledge of the specific population, around 30 cases seems to be the bare minimum for studies in which statistical data analysis is to be done, although some techniques can be used with fewer than 30 cases". (Bailey, 1987: 96). It is for this reason that the researcher chose the 30 cases from the court records.

2.2 Data Collection Process

An interview schedule (see Annexure "A") was developed by the researcher for collecting data from magistrates and prosecutors in the Germiston Magistrate's Court. Neuman defines an interview schedule as "a set of questions read to the respondent by an interviewer, who also records responses". (Neuman, 1997: 231-232). Such a measurement tool involves a

face-to-face interview with the respondent, and has an advantage of a high response rate. In this study, the researcher wrote letters to the respondents in advance requesting interviews with them. (Annexure B). The interview schedule was administered to 10 magistrates (83,3% of the total) and 10 prosecutors (66,7% of the total). The respondents were interviewed in their offices in court during their spare time, tea or lunch breaks. Instructions were given in the interview schedule, and respondents were requested to give their honest and professional opinions regarding the sentencing of youth offenders for housebreaking offences.

The interview schedule was divided into three different parts. Part A consists of multiple-choice type of questions, and respondents were requested to rate their responses in order of preference. Different weights, that is, 1 to 5, were allocated for each response. Respondents were also encouraged to add any comment(s) that they wished to make for each question asked.

Part B contained open-ended questions, and respondents were asked to respond to each question in their own words. In the third and final part of the interview schedule, Part C, respondents were requested to furnish their personal particulars regarding their current positions in their jobs, work experience and professional qualification(s).

The questions were designed to test the judicial officers' sentencing practices and attitudes towards housebreaking offences committed by young offenders. The scope covered by the questions included the following:

- Judicial officers' attitudes towards housebreaking offences and sentences therefore;
- judicial officers' views regarding the objectives or aims of sentencing;
- respondents' perceptions about important factors or considerations in determining appropriate sentences for housebreaking crimes;

- the most common sentences that they are likely to impose for such offences; and
- respondents' views regarding the most effective sentencing practice in housebreaking cases involving youth offenders.

Data was also collected from court records for the period May 2001 and May 2002. Information was obtained from the court database, court books (J 546), charge sheets, and other court documents. Sentences imposed on youth offenders for housebreaking crimes were recorded, and these ranged from suspended sentences and correctional supervision, to direct imprisonment. The responses of judicial officers were then compared to the information obtained from court records on sentences imposed on youth offenders convicted of housebreaking crimes.

2.3 Data Analysis

The data collected was analysed using the following variables: age and gender of offender, previous convictions (if any); sentence imposed on the accused for housebreaking offence; factors considered by judicial officers when imposing sentences; aims or objectives of punishment considered by judicial officers when sentencing the accused; position occupied by the judicial officer in his or her job; and judicial officer's years of experience in the job.

The Likert scale of attitude measurement is used in the study. Likert scales, as Oppenheim puts it, "...provide more precise information about the respondent's degree of agreement or disagreement, and respondents usually prefer this to a simple agree/disagree response". (Oppenheim, 1993: 200). A total of 20 attitude statements (questions) were developed by the researcher, and respondents had to respond to each statement by choosing from 5 given responses, ranging from 'strongly agree' to 'strongly disagree'. Other multiple-choice type of questions were also included in the interview schedule. The responses given were allocated different weights of 5,4,3,2, and 1 as scores

or ratings. The highest score of 5 represents a positive or favourable attitude, for instance, 'strongly agree'. The lowest score of 1 means a negative or unfavourable attitude, that is, 'strongly disagree'. The item scores in each category or statement, were then added up in order to obtain a total score. Since there were 5 given responses in each statement or question, the minimum total score could be 5, and the maximum 25 for each of the statements or questions.

Regarding the five open-ended questions in the interview schedule relating to the respondents' views on the most effective sentencing practice in housebreaking cases involving youth offenders, the responses of judicial officers were recorded and interpreted. The last three classification questions or factual questions regarding the respondents' personal details, were used to obtain a better understanding of the judicial officers' occupation, work experience, and professional qualifications.

A variety of questions should be asked in order to improve the reliability and validity of an attitude scale. Oppenheim states that "...we should not rely on single questions when we come to measure those attitudes that are most important to our study; we should have sets of questions or attitude scales". (Oppenheim, 1993: 147).

In this study, tables and graphs are also used to illustrate and describe the research findings.

3. LIMITATIONS OF THE RESEARCH

3.1 Unavailability of Relevant Literature

One of the main problems experienced in conducting the research was a lack of relevant material or literature on the subject of sentencing young housebreaking offenders. Due to lack of material for housebreaking or burglary in the South African context, mainly overseas literature had to be

used in the study. More research on this subject needs to be done in future in view of the increasing rate of housebreaking cases in the country.

3.2 Problems in the Interviewing Process

Interviews were time-consuming and dependent on the availability of the respondents, particularly the public prosecutors who were very busy most of the time. During interviews, some respondents had a tendency to deviate from the questions asked, and provided other information, which appeared to be irrelevant to the subject matter. This was, sometimes, valuable information that was enriching to the researcher, in that it deepened his understanding of the judicial officers' perspectives.

The researcher had to do probing in some instances in order to elicit appropriate responses from the respondents. Interviewing skills, observing, and building of good rapport, had to be utilised by the researcher. Furthermore, most respondents did not have any comments to add to the questions asked.

The recording of responses in detail during interviews, also posed some problems in this category. The researcher was cautious about problems in the recording or note taking of the participants' responses, and tried to be as accurate as possible so as to eliminate errors or misrepresentation of facts. A tape recorder was not used mainly because of the confidential nature of the interviews, and to avoid making some respondents feel intimidated.

3.3 Problems with Court Records

Details of cases in the court records were sometimes missing, insufficient, inaccurate or not legible enough for the researcher. Information available on the court's database is, unfortunately, too scanty and does not always indicate the age of the accused and/or charge laid against him/her.

The court records normally do not contain the verdict of the presiding officer and reasons for imposing a particular penalty on the offender. This is valuable

information for the researcher, which is likely to portray the judicial officer's attitude and practices in housebreaking cases involving youth offenders. Such information is, however, obtained during interviews with the respondents. However, it would have been helpful for the purpose of controlling information obtained during interviews, if court records also contained such information.

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CHAPTER V: RESEARCH FINDINGS AND DISCUSSION

1. INTRODUCTION

A simple random sample of ten magistrates was selected from a total of twelve magistrates in the district and regional courts of the Germiston Magistrate's Court. This sample represents 83,3% of the total number of magistrates. Another random sample of ten public prosecutors (66,7% of the total) was selected from a total of fifteen prosecutors also in the district and regional courts. The total sample of the research participants can therefore be said to be representative of the total number of magistrates and public prosecutors in the Germiston Magistrate's Court. An interview schedule was developed by the researcher and administered to the research participants, consisting of magistrates and public prosecutors (judicial officers). The researcher then interviewed the respondents and recorded their responses.

Attitudes of the respondents were then measured, using the Likert scale of attitude measurement. Responses to each statement or question in the interview schedule were assigned different weights, ranging from 5 to 1, for the purpose of scoring. There were 5 responses in each question or statement, and the minimum score could be 5, and a maximum of 25 for each statement or question. Additional information was obtained from the court records (documentary sources), as well as the court's databases in the Germiston Magistrate's Court.

After collecting data from the research participants and court records, the researcher then carefully studied the data in order to determine their relevance and significance in the study. According to the Open University Unit 17/18, "Reading through the data, the researcher notes down topics or categories to which the data relate and which are relevant to the research focus, or are in some other way interesting or surprising". (Open University

Unit 17/18: 15). Categories for analysing the data were then developed by the researcher.

Following is a presentation of the research findings.

1.1 The views of magistrates and prosecutors regarding the sentencing of youthful housebreaking offenders

1.1.1 Main objectives of punishment

The majority of magistrates and public prosecutors who participated in the study, regard **deterrence** and **rehabilitation** as the main objectives of punishment in sentencing youth offenders for housebreaking offences. The ten magistrates interviewed gave a highest score of 18 (out of 25) for deterrence; 16 for rehabilitation; 15 for retribution; 13 for protection of society; and 11 for prevention/incapacitation. The ten public prosecutors, on the other hand, scored 18 for deterrence; 17 for rehabilitation; 14 for retribution; 12 for protection of society; and 10 for prevention/incapacitation.

The average scores for both magistrates and prosecutors (out of 25) are:

Deterrence:	18 (72%)
Rehabilitation:	16,5 (66%)
Retribution:	14,5 (58%)
Protection of society:	12,5 (50%)
Prevention/incapacitation:	10,5 (42%)

There were no additional comments made by the respondents in this category.

Table 1: Main objectives of punishment

	DETERRENCE	REHABILITATION	RETRIBUTION	PROTECTION OF SOCIETY	PREVENTION INCAPACITATION
MAGISTRATES	18	16	15	13	11
PROSECUTORS	18	17	14	12	10

The above scores or data (Table 1) are an indication of the judicial officers' views regarding the main objectives of punishment that should be taken into account when sentencing youth offenders for housebreaking offences. The judicial officers seem to prefer deterrence and rehabilitation, to protection of society and prevention/incapacitation. Retribution appears to be in the middle of the scale. Such information is very important for a probation officer or correctional official who is conducting a pre-sentence investigation and compiling a pre-trial or pre-sentence report for the court.

1.1.2 Important factors in imposing sentences on housebreaking youth offenders

Both the magistrates and prosecutors gave high scores for 'personal circumstances of offenders' as an important factor in the sentencing of youthful housebreaking offenders. Scores of 21 for 'personal circumstances of offenders'; 19 for the 'protection of society's interests'; 9 for the 'protection of rights of the victim'; and 5 for 'compensation/reparation for the victim', were given by the magistrates who were interviewed in the study. Prosecutors scored 19 for 'personal circumstances of offenders'; 16 for the 'protection of society's interests'; 10 for the 'protection of rights of the victim'; and 9 for 'compensation/reparation for the victim'. There were no other factors suggested by the respondents, nor were there any additional comments were made in this category.

Table 2: Important factors in imposing sentences on housebreaking youth offenders.

	Personal circumstances of offenders	Protection of society's interests	Protection of rights of victim	Compensation or reparation for victim	Other
Magistrates	21	19	9	5	0
Prosecutors	19	16	10	9	0

Judicial officers tend to focus more on the offender's personal circumstances and protection of society's interests, than other factors in the sentencing

process (see Table 2 above). The other factors, namely, the protection of victims' rights and victims' compensation/reparation, received the lowest scores. This may be attributed to the fact that, traditionally, the criminal justice system concentrated more on the offender and his or her offence, than on compensating the victim for the damage or loss he or she has suffered because of the offender's criminal behaviour. The concept of restorative justice aims at addressing this issue by attempting to resolve disputes between offenders and victims of crime.

1.1.3 The value of goods stolen in the determination of sentences

Most judicial officers would take into consideration the value of goods stolen in their sentencing decisions. In response to a statement as to whether or not the value of goods stolen in a housebreaking case will affect the sentence to be imposed on a youth offender, both magistrates and prosecutors responded positively to this statement, and gave scores of 25 and 23, respectively. Some prosecutors also scored 2 for disagreeing with the statement. One prosecutor stated that "the offence itself, without consideration of value, should be the major consideration, except for cases where they just trespass or are just playing".

Table 3: The value of goods stolen in the determination of sentences

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know
Magistrates	25	0	0	0	0
Prosecutors	23	0	2	0	0

Table 3 is an indication on how seriously judicial officers take into account the loss or damage incurred by the victim or complainant in housebreaking offences. This may, to a large extent, influence their decisions when sentencing housebreaking youth offenders.

1.1.4 Severe punishment for housebreaking youth offenders

The majority of magistrates disagree with the statement that severe punishment should be imposed on young offenders for housebreaking crimes. They scored 18 (out of 25) in this category. Some of them, however, agreed with this statement, and gave a score of 15. Prosecutors, on the other hand, agreed that severe punishment should be imposed on such offenders, and they scored 17 in this category. Other prosecutors disagreed and gave a score of 15. No additional comments were made by the respondents in this category.

Table 4: Severe punishment for housebreaking youth offenders

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know
Magistrates	0	15	18	0	0
Prosecutors	0	17	15	0	0

It is interesting to note how little difference there is between responses of the respondents who agree and those who disagree, for both magistrates and prosecutors (Table 4 above). This shows a lack of consensus among judicial officers as to whether or not severe punishment should be imposed on youthful housebreakers. The prosecutors in particular, might be influenced by the fact that they represent the views and feelings of society within the criminal justice system.

1.1.5 Imprisonment is unlikely to rehabilitate a housebreaking youth offender

Regarding a sentence of imprisonment, the majority of respondents disagreed that such a sentencing option would rehabilitate a youth offender in housebreaking offences. The magistrates who disagreed with this statement, scored 18, and those who agreed, gave a score of 12. Prosecutors who disagreed, scored 17, and some agreed and scored 6 in this category.

A few participants made further comments regarding this particular issue. A prosecutor commented that sending a youth offender to prison will in all

probability, lead to him/her to mixing with bad elements and other hardened criminals in prison. A magistrate also felt that a youth offender might become a "skilled burglar" when he meets "professional criminals" inside prison. Another magistrate stated that some young offenders may be rehabilitated, depending on which prison they go to, as well as the availability of proper programmes for such offenders. From this, it appears that some judicial officers may be reluctant to send youth offenders to prison, particularly for housebreaking crimes. Others, though, still believe that rehabilitation might take place inside prison only if effective treatment programmes are in place.

Table 5: Imprisonment is unlikely to rehabilitate housebreaking young offender

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know
Magistrates	0	12	18	0	0
Prosecutors	0	6	17	0	0

Some interesting observations may be made about Table 5 above. Most judicial officers do not think that incarceration is a solution to housebreaking crimes. This might be an indication of their scepticism about rehabilitation inside prison. Other comments have also been made about the possibility of young offenders becoming worse off when they come into contact with hardened criminals in prison.

1.1.6 Minimum sentences to be applied in all housebreaking offences involving youth offenders

Mandatory minimum sentences, in terms of the Criminal Law Amendment Act (Act No. 105 of 1997), may be imposed by the court on housebreaking youth offenders who are 16 years or older at the time of the commission of the offence, especially if he or she was in possession of a firearm when the offence was committed. The minimum sentence in this instance is 5 years' imprisonment for a first offender, 7 years for a second offender, and 10 years' imprisonment for a third or subsequent offender. Most judicial officers interviewed in the study felt that there was no need for such minimum

sentences in housebreaking offences – they would rarely impose such sentences. Most magistrates disagreed with this statement, and gave a score of 21 in their response. Only a few of them agreed with the statement, and scored 5 in this regard. The majority of prosecutors also disagreed, and gave a score of 18, as opposed to those who agreed and scored 3 in their response. A small number of other prosecutors strongly disagreed with this statement, and gave a score of 2.

Table 6: Minimum sentences to be applied in all housebreaking offences involving youth offenders

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know
Magistrates	0	5	21	0	0
Prosecutors	0	3	18	2	0

According to the above table, minimum sentences do not seem to receive much support from the majority of judicial officers. The judicial officers are therefore unlikely to impose these sentences on youth offenders convicted of housebreaking crimes. Probation officers and correctional officials need to be aware of this when making recommendations in their pre-sentence reports in housebreaking cases involving young offenders.

1.1.7 The influence of alcohol and drug abuse on the imposition of sentence

Judicial officers who participated in the study, disagreed with the notion that drug or alcohol abuse leads to the commission of housebreaking offences by young offenders. A score of 19 was given by the magistrates who disagreed with this statement, and those who strongly disagreed, scored 13. Only one magistrate was unsure about this statement, and gave a score of 1. Prosecutors who disagreed, scored 23, and those who strongly disagreed, scored 11. A 'don't know' response received a score of 2 from the prosecutors.

A further comment was made by a magistrate to the effect that in some instances, young offenders often use drugs or alcohol and then break into family or friend's houses. When conducting pre-sentence investigations on housebreaking cases, the researcher has more often, found that young offenders were normally under the influence of alcohol or drugs when they committed housebreaking crimes.

Table 7: The influence of alcohol and drug abuse on the imposition of sentence

	Strongly agree	Agree	Disagree	Strongly disagree	Don't know
Magistrates	0	0	19	13	1
Prosecutors	0	0	23	11	2

The responses of the participants as reflected in Table 7 above, therefore negate the notion that offenders commit crimes because of their intoxication. The judicial officers expressed the view that offenders must accept responsibility for their wrongdoing, irrespective of whether they were intoxicated or not at the time of the housebreaking.

1.1.8 Sentences that judicial officers are most likely to impose on young housebreakers

The research participants (judicial officers) were asked to choose sentences they were likely to impose on young offenders convicted of housebreaking offences. Most magistrates preferred correctional supervision (that is, house arrest in terms of section 276 A (1) (h) of the Criminal Procedure Act No. 51 of 1977) to other forms of punishment. They gave a score of 16 in this regard. A suspended sentence was rated second, with a total score of 14. A small number of the magistrates chose imprisonment, for which they scored 3. Prosecutors, on the other hand, also scored high for correctional supervision, and their score was 17. They scored 12 for a suspended sentence. There were no scores awarded by the respondents for the other sentencing options, namely, a fine, postponed sentence, or 'other'.

In their additional comments, some prosecutors felt that youth offenders who commit housebreaking crimes, should be given a second chance to prove themselves in society. Magistrates, on the other hand, were of the opinion that direct imprisonment may be imposed in certain instances where the value of goods stolen was considerably high.

Table 8: Sentences that judicial officers are most likely to impose on young housebreakers

	Correctional Supervision	Suspended sentence	Imprisonment	Fine	Postponed Sentence	Other
Magistrates	16	14	3	0	0	0
Prosecutors	17	12	0	0	0	0

Correctional supervision, as a sentencing option, has become more acceptable to judicial officers in the imposition of penalties on offenders. It is currently widely accepted as an alternative to direct imprisonment since judicial officers are aware of the serious problem of overcrowding in prisons. Suspended sentences are also implemented regularly, especially if judicial officers decide to give the offender an opportunity to rehabilitate and correct his deviant behaviour. The above table (Table 8), therefore reflects the views of judicial officers regarding the extensive use of these sentencing options. Imprisonment, on the other hand, is not used regularly, particularly in housebreaking cases.

1.1.9. General views of magistrates and prosecutors regarding sentencing of young housebreaking offenders

Respondents were requested to comment on sentences that are imposed on youth offenders for housebreaking offences, and to state whether or not these do achieve the desired aims of rehabilitating the offender and/or protecting the interests of society. This was an open-ended question, and participants were asked to use their own words and elaborate on their responses. Various interesting comments were received from the judicial officers, most of whom expressed the feeling that sentences in the current

criminal justice system were not very effective. Some magistrates pointed out that most offender's re-offend after some time, and some are apprehended for the same offences time and again. Prosecutors felt that, if appropriate and effective sentences are imposed in the first instance, the offender is unlikely to be involved in criminal activities again. Other respondents commented that it was difficult to accurately respond to this question since the court does not normally maintain any contact with the offender after sentencing. It was the view of the magistrates that, in order to be more effective, sentences, particularly suspended sentences, should be coupled with appropriate treatment or rehabilitative programmes for young offenders. It is only in this way that the interests of society may also be protected. Another comment was that imprisonment was more effective than correctional supervision (Section 276A (1) (h) of the Criminal Procedure Act, Act 51 of 1977), for instance.

The views expressed by the judicial officers above, indicate a need for the transformation of sentencing practices in our legal system, especially those affecting children who are in conflict with the law. It is envisaged that the Child Justice Bill will be able to address some of these issues, and thus bring about drastic changes in the child and youth care system, which is in line with international norms and standards.

Suggestions were invited from the respondents regarding ways of improving the current sentencing process in order to become more effective in housebreaking cases involving youth offenders. The respondents suggested, amongst others, rehabilitative and life skills programmes for youth offenders; more reform schools to be readily available; children to be moved from their home environment to institutions so as to receive proper care and education until they reach the age of 18 or 19; each court to have its own probation officer who will attend to youth offenders, and be able to compile good reports for the court; and finally, more involvement of parents or guardians in rehabilitative programmes to be fostered. Furthermore, the researcher is of

the opinion that prevention and early intervention should be given priority by all the stakeholders in child care work, including the Department of Social Development, Justice, South African Police Service, Correctional Services, and other NGO's which provide child and youth care services.

Another open-ended question was posed to the respondents regarding sentencing options they would consider to be more effective in housebreaking cases involving youth offenders. Both magistrates and prosecutors were of the opinion that each case should be treated on its own merit, but they generally felt that correctional supervision was more appropriate in housebreaking cases. No distinction was, however, made between the provisions of section 276A(1)(h) and 276A (1)(i) of the Criminal Procedure Act No 51 of 1977. In the case of section 276A(1) (h) or 'house arrest', the offender serves his or her sentence under correctional supervision outside prison, for a period not exceeding three years. He or she is required to do free community service, attend community programmes, and comply with other conditions to be determined by the court and/or correctional official. Section 276A (1) (i) makes provision for the offender to serve the first portion of his or her sentence inside prison. The sentence should not exceed 5 years, and he or she may later be released on parole or placed under correctional supervision outside prison.

A suspended sentence was rated second, but the respondents emphasised that such a sentencing option must be coupled with certain conditions, to be determined by the court. Direct imprisonment, to be suspended for a specified period on certain conditions including supervision, was also suggested by one of the respondents in the study.

The most common motives for youth offenders who commit housebreaking crimes were perceived by the respondents to include peer pressure, poverty, greed, idleness, exposure to benefits of crime, a need to obtain petty items not available at home, lack of parental control, alcohol and drugs.

In conclusion, it is worth mentioning that the respondents in this study (judicial officers) highlighted some of the most important aspects regarding sentencing, objectives of punishment, factors that need to be considered in the imposition of sentences, as well as other issues that are pertinent to the subject of sentencing. The views expressed by the judicial officers concerning the sentencing of young offenders for housebreaking crimes, reflected their general attitudes towards sentencing as a whole, as well as the sentencing practices that they are likely to adopt in the sentencing process.

1.1 Court Records

A random sample of 30 housebreaking cases (out of a total of 57 cases) was obtained from the Germiston court records and database, for the period between May 2001 and May 2002. These were finalised cases of convicted young housebreakers. The following sentences were imposed on a total of 30 youth offenders during this period:

Fine:	0
Imprisonment:	2
Suspended sentence:	15
Correctional supervision:	13
Postponed sentence:	0

Figure 1: Sentences imposed on 30 housebreaking youth offenders (May 2001– May 2002)

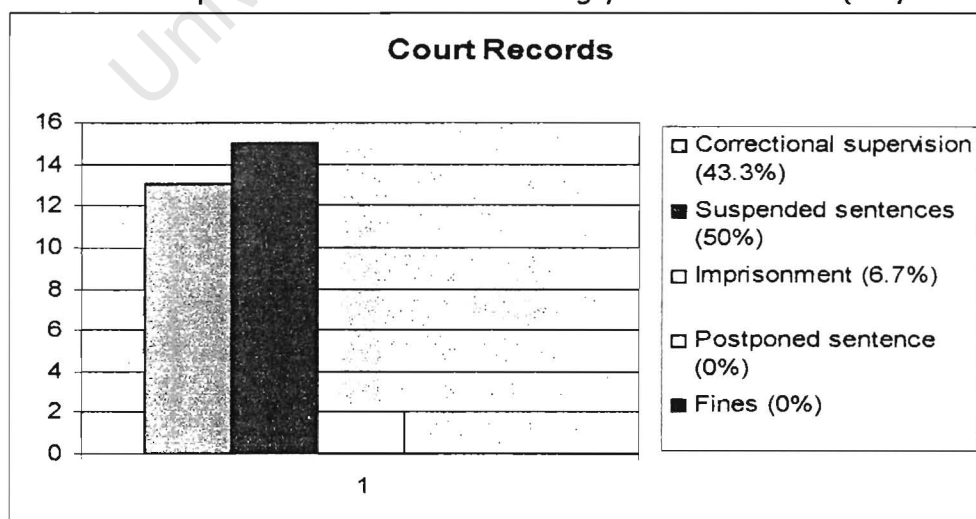


Figure 1 above indicates that the majority of housebreaking youth offenders received suspended sentences (50%), followed by correctional supervision (43,3%), and lastly, imprisonment (6,7%), during the period May 2001 to May 2002. No youth offender was sentenced to a fine or postponed sentence. It is also interesting to note that there is little difference between suspended sentences (50%) and correctional supervision (43,3%). This finding confirms the views of magistrates and prosecutors regarding the implementation of the two sentencing options, that is, correctional supervision and suspended sentences are extensively applied in housebreaking cases, particularly those involving children and youth offenders. This also serves as a guideline for probation officers and correctional officials who compile pre-sentence reports on young housebreakers.

CHAPTER VI: CONCLUSIONS AND RECOMMENDATIONS

1. CONCLUSIONS

From the research findings that were presented in the previous chapter, certain conclusions can now be drawn regarding the sentencing of young offenders for housebreaking crimes. In this regard, Bless and Higson-Smith state that "After interpreting the findings it is useful to summarize the aims of the research, compare them with the findings and draw conclusions on how much and in which manner the goal has been achieved". (Bless & Higson-Smith, 1995: 146). As indicated previously, the study aims at examining some issues relating to the sentencing of youth offenders accused of committing housebreaking crimes, and focusing specifically on:

- The sentencing attitudes and practices of magistrates and public prosecutors (judicial officers);
- factors affecting the sentencing decisions of judicial officers;
- the main objectives of punishment that judicial officers aim at achieving when imposing certain penalties on youth offenders in housebreaking cases;
- the kind of sentences that judicial officers are most likely to impose on housebreaking youth offenders; and
- any other matters relating to sentencing and punishment in general.

The following are some important findings in the study that need to be highlighted:

1.1 Core Objectives of Punishment

In the theories of punishment, researchers have formulated the main objectives of punishment as retribution, deterrence, prevention and rehabilitation. In this study, the researcher found that sentencing officials do not agree on the main objectives or purposes of punishment that should be

pursued in sentencing. This, together with the fact that there are also no established sentencing guidelines and standards that should guide sentencing officials and judicial officers in their sentencing practices, leads to disparity and inconsistency in the sentencing process. During interviews with the magistrates and prosecutors, it was evident that they also did not agree as to which objective of sentencing should be emphasised. It is interesting to note that the respondents chose all five responses that were given in the interview schedule regarding the main objectives of punishment (see Chapter V, Table 1). Furthermore, the discretion exercised by judicial officers in sentencing, seems to be one of the major causes for the imposition of different sentences on youth offenders for similar offences. This does not, however, mean that discretion is undesirable, and, as Cox and Wade put it, "discretion is a normal, necessary, and even desirable part of the criminal justice network". (Cox & Wade, 1998: 33). It should, however, be exercised within the framework of established principles and guidelines.

It may be concluded, therefore, that the way judicial officers perceive the main objectives of sentencing, will greatly affect their sentencing decisions, and eventually, their sentencing attitudes and practices.

1.2. Important Factors in the Sentencing Process

Judicial officers normally take into account certain factors when handing down a sentence for the accused, for example, personal circumstances of the accused, protection of the interests of society and the victim. It was indicated previously that judicial officers place more emphasis on the personal circumstances of the offender, as well as the protection of the interests of society, compared to the other factors that are considered in the sentencing process. The researcher concluded that this could be attributed to the fact that the criminal justice system seem to be concentrating more on the offender and his crime than the victim and the damage or loss that he has incurred.

It has also been established that alcohol or drug abuse may be the main cause of housebreaking offences. The use of alcohol or drugs before an offence is committed, may be regarded as a mitigating factor when a penalty is imposed, unless there is proof that the offender intentionally imbibed liquor in order to gain courage for committing such offences. Drug or alcohol addiction has, however, been regarded as a disease in our modern society, and needs, as Rabie and Strauss put it, 'sympathetic treatment and positive motivation'. (Rabie & Strauss, 1985:312). Judicial officers who participated in this study, refuted this statement, and stated that drug or alcohol abuse does not necessarily lead to the commission of housebreaking offences. In his personal experience as probation officer, the researcher has encountered several cases of young offenders who committed housebreaking crimes whilst under the influence of alcohol or drugs. Contrary to the views of the judicial officers, it can be concluded that intoxication does play a major role in the commission of housebreaking offences.

1.3. Problems in the Sentencing Practice

Another issue identified in the study concerns the various problems in respect of the sentencing practices of judicial officers in South Africa. One of the problems is the lack of training of judicial officers in the matter of sentencing. Sentencing officials have very little or no training in human behaviour, that is, training in the social sciences. As a result, judicial officers have to employ the services and expertise of behavioural scientists in order to obtain a better understanding of the offender and the offence he has allegedly committed. It can, therefore, be concluded that the judicial officers' lack of training in the social sciences is one of the obstacles that inhibit them from understanding human behaviour.

1.4. Sentencing Options

The study has highlighted certain important aspects regarding sentencing options. There are various penalties that judicial offices may impose on housebreaking youth offenders, including suspended sentences, postponed

sentences, a fine, imprisonment, correctional supervision, or even committal of the young offender to an institution. The views of judicial officers in this study indicate that correctional supervision and suspended sentences are widely used as an alternative to imprisonment. The data analysis that was carried out using a sample of 30 housebreaking cases, randomly selected from the court records and database, also confirmed that these two sentencing options were widely used in housebreaking cases involving young offenders. The proposed Child Justice Bill will also focus mainly on children who are in conflict with the law (accused of committing offences), and will protect their rights in terms of the Constitution, whilst holding them accountable for their wrongdoing. (The Child Justice Bill is discussed in some detail in Chapter III). The researcher is of the opinion that such a bill will bring about drastic changes that will affect the disposal of criminal matters involving children who are in conflict with the law. Such changes should conform to the international norms and standards, particularly the United Nations Convention on the Rights of the Child, as well as the children's rights as enshrined in the South African Constitution.

1.5 Transformation of the Child and Youth Care System

At the beginning of this study, it was stated that the child and youth care system in South Africa has to be transformed in order to meet the challenges of the rising crime rate, especially amongst young offenders. The researcher pointed out that new procedures were introduced in the criminal justice system regarding assessment of children in conflict with the law, detention of such children, diversion, the introduction of the new Child Justice Bill, and introduction of minimum standards for the child and youth care system. The Inter-Ministerial Committee on Young People at Risk (IMC) was established in order to deal with problems experienced in detention centres or secure care facilities for such children. The IMC was instrumental in implementing some important steps in the transformation of child justice in this country.

In view of these new developments, a conclusion may be made to the effect that the sentencing of children in conflict with the law will be adversely affected by the transformation in the child and youth care system.

2. RECOMMENDATIONS

Arising from the findings in this study, the following recommendations are put forward with regard to the sentencing attitudes and practices of judicial officers in housebreaking cases involving youth offenders:

2.1 Sentencing Guidelines

Sentencing guidelines relating to the core objectives of punishment, need to be formulated in order to assist magistrates and public prosecutors in imposing appropriate sentences on young offenders who have been convicted of housebreaking crimes. Such guidelines will reduce the disparities and inconsistencies that are currently experienced in the sentencing practices of judicial officers.

2.2 Training of Judicial Officers on Sentencing

It is highly recommended that magistrates and prosecutors should undergo special training in sentencing, social science, new developments in child justice in South Africa, United Nations conventions that are ratified by South Africa, and other international developments that affect child justice and the criminal justice system in general. Such training would hopefully change the attitudes and sentencing practices of the sentencing officials.

2.3 Pre-sentence Investigation and Report

It was stated in the discussion above that sentencing officials should enlist the services and expertise of behavioural scientists, namely, probation officers and correctional officials, in order to obtain more information on the offender as a person, including his developmental history, his social functioning and social environment. This is particularly important in cases involving youth

offenders, such as those who commit housebreaking offences. It is therefore recommended that judicial officers should ensure that the circumstances of every child who is in conflict with the law, are investigated and a psychosocial report is compiled by a probation officer or correctional official. The proposed Child Justice Bill makes provision for a pre-sentence report to be compiled on a child offender, and such report to be completed as soon as possible and not later than 30 days after a request for such a report has been made (section 85, The Child Justice Bill).

2.4 Imprisonment

Some sentencing officials have a tendency of easily imposing a prison term on youth offenders. The sentence of imprisonment should only be used as a last resort in cases of youthful housebreaking offenders. Sentencing should focus on rehabilitating the offender and correcting his deviant behaviour. Before direct imprisonment is imposed on youth offenders, it should be borne in mind that overcrowding, sodomy, violence, HIV/AIDS, and other negative factors, plague our prison system.

2.5 Cultural Diversity

Sentencing practices face numerous challenges in South Africa, a country with diverse cultures and eleven official languages. It is therefore imperative for judicial officers to understand and acknowledge the existence of cultural diversity in our country. It is, therefore recommended that sentencing officials should learn to speak and understand as many of the eleven languages as possible.

BIBLIOGRAPHY

1. Ashworth, A. 1983. *Sentencing and Penal Policy*. Weidenfeld and Nicolson, London.
2. Bailey, K. D. 1987. *Methods of Social Research*. Third Edition. The Free Press, New York.
3. Bazemore, G. & Umbreit, M. 1995. *Rethinking the Sanction in Functioning in Juvenile Court: Retributive or Restorative Responses to Youth Crime*. *Crime & Delinquency*, 41(3).
4. Bennett, W.W. & Hess, K.M. 1981. *Criminal Investigation*. West Publishing Co., St. Paul, Minnesota.
5. Bless, C. & Higson-Smith, C. 1995. *Fundamentals of Social Research Methods: An African Perspective*. Second Edition. Juta and Co., Ltd, Johannesburg.
6. *The Child Care Act No. 74 of 1983*.
7. Coertzen, E.J.S. & Sorgdrager, A.M. 1993. *Criminal Law Casebook: A Selection*. Butterworth Publishers (Pty) Ltd, Durban.
8. Cox, S.M. & Wade, J.E. 1998. *The Criminal Justice Network: An Introduction*. Third Edition. McGraw-Hill, Boston.
9. *Criminal Law Amendment Act No. 105 of 1997*.
10. *Criminal Procedure Act No. 51 of 1977*.
11. *Financing Policy: Developmental Social Welfare Services, Notice 463 of 1999*. Department of Welfare, Pretoria.
12. Fox, V.B. & Stinchcomb, J.B. 1994. *Introduction to Corrections*. Fourth Edition. Prentice Hall Career & Technology, Englewood Cliffs, New Jersey.
13. Frank, C., Van Eden, K., Eliasov, N. & Duffy, J. July 1997. *Restorative Justice: Position Paper, Commissioned by the Planning Unit, Ministry of Justice*, Pretoria.
14. Graser, R. 1975. *Crime, Punishment and Correction*. Vol. 4 No. 2. (Handout, University of Cape Town).

15. Graser, R.R. 1981. *Sentencing in the South African Courts: An Evaluation* (Handout, University of Cape Town).
16. Gilbert, J.N. 1986. *Criminal Investigation*. Second Edition. Charles E. Merrill Publishing Co., A. Bell & Howell Company, Columbus, Ohio 43216.
17. Hoctor, S.V. 1996. *The Crime of Housebreaking and Theft in South African Law: A Comparative Approach*. Rijksuniversiteit, Leiden.
18. Hogarth, J. 1971. *Sentencing as a Human Process*. University of Toronto Press, Toronto.
19. *Inter-Ministerial Committee on Young People at Risk*. 1996. Department of Welfare, Pretoria.
20. *Justice College notes, No. 172A, 1998*. Justice College, Pretoria.
21. Minimum Standards: South African Child and Youth Care System. May 1998. Inter-Ministerial Committee on Young People at Risk. Department of Welfare, Pretoria.
22. Mouton, J. 2001. *How to Succeed in Your Master's and Doctoral Studies*. Van Schaik, Pretoria.
23. Mouton, J. & Marais, H.C. 1994. *Basic Concepts in the Methodology of the Social Sciences*. Human Sciences Research Council, Pretoria.
24. Naude, C.M.B. & Stevens, R. 1988. *Crime Prevention Strategies*. Educational Publishers, Pretoria.
25. Neuman, W.L. 1997. *Social Research Methods*. Third Edition (Handout, University of Cape Town).
26. Open University Unit 17/18 (Handout, University of Cape Town).
27. Oppenheim, A.N. 1993. *Questionnaire Design, Interviewing and Attitude Measurement*. New Edition. Pinter Publishers, London and New York.
28. *Probation Services Act No 116 of 1991*.
29. *Probation Services Amendment Bill, 1999*.

30. Rabie, M.A. & Strauss, S.A. 1985. *An Introduction to Principles*. Fourth Edition. Lex Patria Publishers, Cape Town and Johannesburg.
31. Rabie, M.A. Strauss, S.A. & Maré, M.C. 1994. *Punishment: An Introduction to Principles*. Fifth Edition. Lex Patria Publishers, Cape Town and Johannesburg.
32. Reid, S.T. 1997. *Crime and Criminology*. Eight Edition. McGraw-Hill Higher Education Group, Inc, Boston.
33. Ruby, C.C. 1980. *Sentencing*. Second Edition. Butterworth & Co. Ltd, Canada.
34. Shapland, J. 1981. *Between Conviction and Sentence: The process of mitigation*. Routledge & Kegan Paul Ltd, London.
35. Sloth-Nielsen, J. 1999. *The Juvenile Justice Law Reform Process in South Africa: Can a children's rights approach carry the day?* Vol. 18:469 (Handout, University of Cape Town).
36. Sloth-Nielsen, J. *Article 40, Volume 3, Number 1, March 2001*.
37. Sloth-Nielsen, J. & Muntingh, L.M. *Juvenile Justice Review 1998*. South African Criminal Justice.
38. South African Journal of Criminal Justice. Vol. 12, No. 1. 1999.
39. South African Law Commission. *Appendixes to Discussion Paper 91, Project 82*. 31 May 2000.
40. South African Law Commission. *Discussion Paper 91, Project 82. Sentencing: A New Sentencing Framework*. 2000.
41. South African Law Commission. *Draft Child Justice Bill*. 1997.
42. South African Law Commission. *Issue Paper, Project 82. Sentencing*. 1997.
43. South African Law Commission. *Report, Project 82. Sentencing: A New Sentencing Framework*. 2000.
44. South African Law Commission. *Report on Juvenile Justice, Project 106*. July 2000.

45. *South African Schools Act No. 84 of 1996.*
46. Sparks 1972 (3) SA 396(A).
47. *Sunday Sun*, 26 May 2002.
48. *The Constitution of the Republic of South Africa. Act 108 of 1996.*
49. *United Nations Convention on the Rights of the Child, Article 40. 1990.*
50. UCT Lecture Notes: *ASSISTANT PROBATION OFFICERS.*
51. Van der Merwe, D.P. 1991. *Sentencing.* Juta & Co., Ltd, Kenwyn.
52. Walker, N. 1985. *Sentencing: Theory, Law and Practice.* Butterworth & Co Publishers Ltd, London.
53. Walker, N. & Padfield, N. 1996. *Sentencing: Theory Law and Practice.* Second Edition. Butterworths, London, Dublin & Edinburgh.
54. Wasik, M. 1993. *Emmins on Sentencing.* Second Edition. Blackstone Press Limited, Great Britain.
55. Wasik, M. 1997. *The Sentencing Process.* Dartmouth Publishing Company Limited, Paris, France.

ANNEXURE A: LETTER TO SENT TO RESPONDENTS PRIOR TO INTERVIEW

TO: The Magistrate/Prosecutor

SUBJECT: Questionnaire for research study

Dear Sir/Madam

I am currently conducting research on the sentencing practices of magistrates and prosecutors, and I am focusing specifically on sentencing of youth offenders for housebreaking with intent to steal. I have chosen the Germiston magisterial district for my research since it is more accessible for me as a resident probation officer/social worker.

Your honest and professional opinion regarding this subject will be highly appreciated. I wish to emphasize that your response will be treated in the strictest confidence, and information obtained will be used only for the research purposes, e.g. your name and/or your identifying details.

It is envisaged that the completion of the questionnaire and interview with you will not take more than 30 minutes.

Your assistance in this regard will be appreciated.

CYPRIAN HLATSHWAYO

ANNEXURE B

INTERVIEW SCHEDULE ADMINISTERED TO MAGISTRATES AND PROSECUTORS

INSTRUCTIONS:

The research is designed to obtain your confidential opinions on some issues relating to the sentencing of youth offenders for housebreaking with intent to steal. There is no RIGHT or WRONG answer to each of the questions asked, except that of your completely frank personal opinion.

The first part of the questionnaire consists of multiple-choice type of questions and you are requested to rate them in order of importance so as to describe your honest and professional opinion or response regarding sentencing of youth offenders for housebreaking with intent to steal.

The second part consists of open-ended questions to which you are requested to respond in your own words.

The third and final part of the questionnaire, comprise of questions regarding your personal details, work experience, as well as your current position in your job.

NB: When responding to the questions asked, please feel free to add any comment that you may wish to make.

PART A:

1. Which of the following concepts best describes your opinion regarding the main objective of punishment:

Retribution:

	5
--	---

Deterrence:

	4
--	---

Rehabilitation:

	3
--	---

Prevention/Incapacitation:

	2
--	---

Protection of Society:

	1
--	---

Comment (if any):

2. When imposing a sentence on a youth offender for housebreaking with intent to steal, which of the following factors would you consider to be of utmost importance?

Personal circumstances and rights of the offender

	5
--	---

Protection and rights of the victim

	4
--	---

Protection and interests of society

	3
--	---

Compensation or reparation for the victim

	2
--	---

Other (Please specify):

	1
--	---

Comment (if any):

3. The most important considerations in determining the sentence to be imposed on the youth offender for housebreaking, should be:

Nature and gravity of the offence:

	5
--	---

Previous convictions of offender:

	4
--	---

Mitigating or aggravating factors:

	3
--	---

Attitude or remorse of offender:

	2
--	---

Age of offender:

	1
--	---

Comment (if any):

4. After considering all relevant factors/circumstances, an appropriate sentence that you are most likely to impose on a housebreaking youth offender is:

Imprisonment:

Correctional supervision:

Fine:

Suspended/Postponed sentence:

Other (Please specify):

Comment (if any):

	5
	4
	3
	2
	1

5. Housebreaking offences have been increasing over the past twelve months:

Strongly agree:

Agree:

Disagree:

Strongly disagree:

Don't know:

Comment (if any):

	5
	4
	3
	2
	1

6. It is important to sentence each young offender for housebreaking on the basis of his individual needs and not on the basis of the offence he has committed:

Strongly agree:

Agree:

Disagree:

Strongly disagree:

Don't know:

Comment (if any):

	5
	4
	3
	2
	1

7. The value of goods stolen in a housebreaking case will affect the punishment/sentence to be imposed on the offender:

Strongly agree:

Agree:

Disagree:

Strongly disagree:

Don't know:

	5
	4
	3
	2
	1

Comment (if any):

8. In sentencing a young offender for housebreaking, there should always be a balance between the sentence imposed and the crime committed by the offender:

Strongly agree:

	5
--	---

Agree:

	4
--	---

Disagree:

	3
--	---

Strongly disagree:

	2
--	---

Don't know:

	1
--	---

Comment (if any):

9. Young offenders should be punished for their crimes whether or not the punishment benefits the offender:

Strongly agree:

	5
--	---

Agree:

	4
--	---

Disagree:

	3
--	---

Strongly disagree:

	2
--	---

Don't know:

	1
--	---

Comment (if any):

10. Severe punishment or harsher sentences should be imposed on youth offenders who have committed housebreaking offences.

Strongly agree:

	5
--	---

Agree:

	4
--	---

Disagree:

	3
--	---

r Strongly disagree:

	2
--	---

Don't know:

	1
--	---

Comment (if any):

11. The current punishment for housebreaking young offenders is too harsh:

Strongly agree:

	5
--	---

Agree:

	4
--	---

Disagree:

	3
--	---

Strongly disagree:

--

 2

Don't know:

--

 1

Comment (if any):

12. Most youth offenders are deterred by the threat of heavy penalties:

Strongly agree:

--

 5

Agree:

--

 4

Disagree:

--

 3

Strongly disagree:

--

 2

Don't know:

--

 1

Comment (if any):

13. Imprisonment is unlikely to rehabilitate the young offender in a housebreaking case:

Strongly agree:

--

 5

Agree:

--

 4

Disagree:

--

 3

Strongly disagree:

--

 2

Don't know:

--

 1

Comment (if any):

14. Most youth offenders (housebreaking) do not pose a threat to society and can be placed under the supervision of a probation officer/correctional official:

Strongly agree:

--

 5

Agree:

--

 4

Disagree:

--

 3

Strongly disagree:

--

 2

Don't know:

--

 1

Comment (if any):

15. Most youth offenders who commit housebreaking crimes, deliberately choose to prey upon society:

Strongly agree:

--

 5

Agree:

--

 4

Disagree:	<input type="checkbox"/>	3
Strongly disagree:	<input type="checkbox"/>	2
Don't know:	<input type="checkbox"/>	1
Comment (if any):	<hr/> <hr/> <hr/>	

16. Minimum sentences (Criminal Law Amendment Act 105/1997) should be applied in all housebreaking offences:

Strongly agree:	<input type="checkbox"/>	5
Agree:	<input type="checkbox"/>	4
Disagree:	<input type="checkbox"/>	3
Strongly disagree:	<input type="checkbox"/>	2
Don't know:	<input type="checkbox"/>	1
Comment (if any):	<hr/> <hr/> <hr/>	

17. The sentence imposed by the court for housebreaking crimes should always express an emphatic disapproval or denunciation by the community of the crime:

Strongly agree:	<input type="checkbox"/>	5
Agree:	<input type="checkbox"/>	4
Disagree:	<input type="checkbox"/>	3
Strongly disagree:	<input type="checkbox"/>	2
Don't know:	<input type="checkbox"/>	1
Comment (if any):	<hr/> <hr/> <hr/>	

18. The use of drugs or alcohol normally leads to the commission of housebreaking offences:

Strongly agree:	<input type="checkbox"/>	5
Agree:	<input type="checkbox"/>	4
Disagree:	<input type="checkbox"/>	3
Strongly disagree:	<input type="checkbox"/>	2
Don't know:	<input type="checkbox"/>	1
Comment (if any):	<hr/> <hr/> <hr/>	

19. The needs and concerns of the housebreaking victim should be given priority when sentencing a youth offender:

Strongly agree:	<input type="checkbox"/>	5
Agree:	<input type="checkbox"/>	4
Disagree:	<input type="checkbox"/>	3
Strongly disagree:	<input type="checkbox"/>	2
Don't know:	<input type="checkbox"/>	1

Comment (if any):

20. The housebreaking victim should be compensated by the youth offender:

Strongly agree:	<input type="checkbox"/>	5
Agree:	<input type="checkbox"/>	4
Disagree:	<input type="checkbox"/>	3
Strongly disagree:	<input type="checkbox"/>	2
Don't know:	<input type="checkbox"/>	1

Comment (if any):

PART B:

21. In your experience, do the sentences imposed on youth offenders for housebreaking offences; achieve the desired aims of rehabilitating the offender and/or protecting the interests of society? Please elaborate.
22. What else, in your opinion, should be done to make the sentencing process an effective and efficient one in housebreaking cases involving youth offenders?
23. What would you consider to be an effective sentencing option for youth offenders who commit housebreaking crimes?
24. What are common motives for young offenders to commit housebreaking offences?
25. Do you have any other information, comment, suggestion, etc, regarding sentencing of youth offenders for housebreaking?

PART C:

Kindly provide the following information regarding your current position in your job, experience and qualifications. The information will be treated confidentially and is only meant for research purposes. Names and identifying details are not used.

26. Position in your job (e.g. Magistrate, Public Prosecutor):
27. Number of years in your current position:
28. Professional qualification(s):

Thank you very much for your valuable information.

RESEARCHER
/LB