

SENTENCING IN A MULTI-RACIAL AND MULTI-ETHNIC SOCIETY

(Address to the Law Reform Conference at Sun City, Bophuthatswana, August 13th, 1980)

by Barend van Niekerk

It seems that I am doomed — or is it *pre-destined*, in our more Calvinistic parlance? — to continue speaking the unspeakable and mentioning the unmentionable in this complex-ridden society of ours.¹ There can be no gainsaying one basic fact and that is that there is a heavy pall of silence, both formally imposed by the law and informally bolstered by social taboos about the possible obtrusion of race and also ethnic origin as a factor which influences sentencing in the Republic of South Africa and possibly also in other societies³. In this paper I shall endeavour to look at a few aspects of the possible interaction between race and sentencing, especially in a South African context.

There are, I think, two fundamental sociological propositions about which I confidently submit there can be no serious qualms either in an audience of this standing or even in any group of serious academic standing, despite the fact that the very statement of these propositions is very rare — at times even perilous — and their analysis of their implications even rarer. First, race is one of the most important social phenomena of South African society. It is a phenomenon as stark in its reality as it is at times ineffable in its tragedy for the peoples and the destiny of this part of the world and nowhere is this reality more vividly entrenched than in South African law. Even at a time long before race was written large on the banner of the dominant political group in South Africa this fundamental reality was understated as follows in a judgment of an Appeal Court judge:

'The statement that all are equal before the law cannot be accepted unreservedly. It is undoubtedly subject to important qualifications and as far as the Transvaal (Province) is concerned, it is manifest that Europeans and Non-Europeans have in important respects never been equal. Separation runs through our complete social structure in the Union (of South Africa).⁴

The other proposition which, I believe, will hardly commend itself to dispute in any society where but the faintest knowledge obtains about the great verities of the jurisprudential school of modern realism is that there is an obvious and direct but by no means uncomplicated link between sentencing policy on the one hand and societal norms on the other hand. Interlinked with the previous phenomenon of the

pervasiveness of race in the South African kaleidoscope of social realities, this latter phenomenon of the relationship between dominant societal norms and criminal sentencing policy can at times become a cause of deep injustice. From the opulent array of facts flowing from the interrelationship of these two basic social phenomena I wish to highlight only four broad constellations of issues or factors which more than merit our concern as lawyers if social justice had any place in our hierarchy of values. However, before someone else does so, let me first illuminate a basic conscious premise on which my depiction of these issues will be based. It is this: racism in the sense of penalizing a man for the race he belongs to is a scourge upon which the larger part of civilized humanity has overwhelmingly turned its back, in the same way as it once did upon slavery and, theoretically also, upon torture as an instrument of crime detection and for that basic reason also it ought never to constitute — or be suspected of constituting — a factor of aggravation in sentencing policy. This is a proposition which I shall not defend here, despite the regularity of its inapplication in our clime. It is a proposition which stands or falls on the basis of one's *Weltanschauung* here in the evening of the twentieth century which has turned its back on race as a criterion of someone's worth.

To come now to the four constellations of issues which I wish to highlight; first, the mere consideration of a person's race or ethnicity in sentencing need not always and necessarily trigger off one's early warning system of injustice. Circumstances often arise where beliefs prevalent in a certain community — witchcraft being the obvious example in our black communities — would have to be considered as mitigating or exonerating or simply explaining factors.⁵ Where such beliefs are genuine or understandable their ethnic or racial origin can obviously not be ignored since they would often provide a key — albeit perhaps a dangerous one — to a fuller understanding of someone's psyche. *Where* lines must be drawn and *where* certain beliefs must be discounted I do not now consider beyond stating that the process must involve wisdom of the first order of a kind which a truly competent and independent judiciary would find the intellectual resources to muster.

But there is, secondly, the other side of the coin where lack of wisdom and of spiritual independence may lead a judicial

officer to apply racial considerations against an accused either in the sense of additionally penalizing such accused for racial reasons or, more broadly, exonerating accused essentially for racial reasons in a way dictated not by compassion or wisdom but by simple racism, albeit perhaps inverted racism. We approach here the crux of what we may term *open racism* for which there is in South Africa ample ground for grave suspicion. In this context race — and mostly race alone — becomes either a badge for repression or a kind of qualified *carte blanche* for crime. In South Africa there is little doubt that the obtrusion of racial considerations in this fashion is widely suspected in wide circles and there is little doubt also that this suspicion is a major reason why aspects of our essentially white administration of justice is viewed with deep suspicion by large — perhaps overwhelming — sections of our black population. What then is some of the evidence on which these suspicions are fueled?

From the host of possibilities as regards 'open racism' I choose but four readily available bits of evidence to substantiate the suspicions of a direct unjust obtrusion of racial factors into the sentencing policy of South Africa. Firstly, the comments of knowledgeable observers from whose ranks I choose a man with unrivalled experience as criminal lawyer, Harry Morris KC⁶ writing in 1948:

'A white man is rarely hanged. The privilege is reserved for the Native. Lashes for the White man have almost been entirely forgotten, and caning is only half remembered . . .

When a White man, in cold blood, lashes a Native to death, the worst that, so far with one exception, has happened to him is a fine . . . When a Native fatally stabs another Native in a drunken brawl he gets lashes and plenty of time to think over the pronouncement of the Court — 'The Court will not tolerate the use of a knife' . . . (S)erious offenders are too often punished with scandalous inadequacy, except in the case of Natives.

I have never heard of a European being sentenced to death for rape. Natives have been hanged.

The tenderness for the white man and the penal differentiation between white and black in Transvaal are by now part of our traditions.'

If a change has come about since 1948 in the situation depicted by Morris — and it may well have — I am awaiting the first analysis of it. Many overt signs seem to point in the contrary direction.

Secondly, apart from cross-racial crimes to which I shall presently turn, there are the simple statistics that since Union only three executions have taken place of whites for rape of children of tender age whereas the figure for blacks is nearing 200, mostly (although the statistics are not entirely clear) for the rape of white women.

Then there is thirdly the notorious South African custom of what may perhaps be termed 'farm murders' or 'farm assaults', i.e. the callous beating to death or near death over long and protracted periods of black labourers under circumstances where I submit not only indirect *malice* or *dolus eventualis* but *dolus directissimus* is palpably present in the absence of insanity.⁷ All of us know these cases where in the past the finding has often been culpable homicide and where despite the most callous brutality, the sentence would perhaps even be a fine, sometimes of negligible importance.

Fourthly, as evidence of the unjustified direct obtrusion of racial factors there is also the circumstance of unjustified

leniency on racial grounds. In this regard the overt racism of our juries in the old days is a matter of public record. There has been talk in a recent Botswana judgment of the *Kafakarotwe* theory,⁸ named after the Rhodesian case ('as it then was', I should say) of the same name where Tredgold CJ formulated the nonsense that imprisonment is more onerous to whites than to blacks and should therefore be more sparingly used towards whites.⁹ As a general proposition this is about as correct as the proposition that Bophuthatswana will stage the next Olympics. There is another version of this cockroach sounding *Kafakarotwe* theory and that is excessive leniency by a white judiciary as regards violence committed by black on black; a situation amply documented also in the Southern states of America before the civil rights reforms of the last two decades.¹⁰ Mr Justice Claassen readily admitted to the existence of this state of affairs in homicide cases in South Africa when, in a kind of valedictory postscript to the first *Van Niekerk* contempt judgment, he readily admitted that in many cases involving blacks only a conviction for culpable homicide instead of murder is returned and he documented also the leniency of our attorneys-general in the same regard.¹¹ What he was referring to is of course known in the corridors of the *pro dea* section of the Johannesburg bar as 'Soweto culp'!

The third major and possibly most contentious question concerning racial considerations entering sentencing policy in South Africa is that relating to cross-racial crimes, especially of violence. The change here, needless almost to say, is that a consistent pattern of differential sentences would indicate a kind of hierarchy or scale of differential worths for the various races. Is there substance for suspecting the presence of such a danger in South Africa? I have already hinted that in the case of so-called 'farm murders', or simply 'farm assaults' of labourers there has indeed been an incredible leniency towards white farmers — broken obviously by some exceptions proving the rule — who displayed a callous brutality which in almost any Western state would have earned a prison sentence of between 10 and 20 years. And looking at the pattern of death sentences generally for rape and murder, one will be hard put to find that considered as a whole since Union these patterns do not display a consistent pattern of discrimination against blacks. These are the statistics: No death sentence ever imposed let alone executed since 1910 on a white man for the rape of a black woman, whereas the vast majority of the almost 200 executions of blacks seem to have been for the rape of whites. There can be no doubt that the judicial rule against the death sentence for whites for rape in practise is as strong as that of a statute, with only apparently three exceptions breaking the rule for the rape of children of tender age.¹² In this context it is not without interest to note that there is evidence — at least it was the case a few years ago — that more black women were raped by whites than vice versa. The same holds true, it seems, for murder and assault.¹³ For the ultimate crime of murder the pattern is equally disturbing.

Although the statistics are not entirely clear there seems to have been in the full sweep of the history of the Union and of the Republic of South Africa not more than ten — let's say a dozen — executions of whites for the murder of blacks and the number of death sentences imposed would probably be about double that figure.¹⁴ Transposed against the murder rate of blacks by whites this situation constitutes its own telling commentary.

Now of course these bland statistics tell their own story but — and I don't need another prosecutor to tell me that —

they obviously do not tell the full story. At the very least, however, they do tell a story which must inevitably lend strong support to the suspicion on the part of the larger part of the population that in certain areas of the law and under certain circumstances different standards obtain and that the highest legal value, the sanctity of life, may not be pitched so high when a black is involved. It would, however, be surprising if this suspicion is confined to the question of interracial crime where the death penalty may be involved.

At least two other important factors may enter the picture of interracial crimes and indeed the whole picture of sentencing in a multi-racial and multi-ethnic society; first, different economic statuses leading to different possibilities for adequate and sympathetic defence — a situation so obvious but yet so pervasive that I need say no more beyond stating that in the ultimate analysis one needs no Marxist theory to comprehend that in this *de facto* situation of massive poverty resides the greatest built-in factor of inequality in our legal system towards blacks, a situation where the legal aid system has only most recently started to make a dent. From this inequality of wealth which runs quite eerily along the racial Rubicon in our society flows also the basic racial inequality of monetary sentences where a R50 fine in the one case can be laughed off and where in the other case it will mean the end of a man's freedom as surely as if it were a compulsory prison sentence.

But there is yet another factor of potential racial inequality in sentencing which dare not be ignored, despite the fact that it may in a sense be more elusive than any other although not less real. I refer here to the presence of a constellation of factors which we may label *cultural discrimination* and which refers to the situation, partly undoubtedly inevitable, that the customs, views, attitudes, idiosyncrasies and the like which would go into and be reflected in the judicial lawmaking at this time — also as far as sentencing is concerned — would largely be reflective of the particular part of the white community from which they derive or which set the tone in the matters concerned. This problem is a multi-faceted one, but what is basically involved here is the psychological inability of an average judicial officer, perhaps more especially of our lower courts, to gain a sufficient understanding of and insight into the problems and stresses besetting the average black who passes through the floodgates of our criminal courts. The problem is well illustrated by the *kafakarotwe* case itself where Tredgold CJ gave a clear indication of his inability even to *begin* to comprehend what effect imprisonment may have on blacks. Echoes of this inability, which, in the view of some, approximate undiluted racism, are also to be found in older decisions of certain civil courts where

the pain and suffering of blacks were assessed on, as it were, a different Richter scale of pain as that for whites.

Finally, having delineated in very broad outline some of the basic threads of racism in the fabric of criminal law I wish to delineate in very tentative terms only a possible solution to what is undoubtedly a very real and grave problem. I offer merely two very broad indications of the direction in which our legal system must move in order to escape the label which it undoubtedly now carries of being impregnated by subtle and not so subtle forms of direct and indirect forms of racism — in short, in order to be legitimized as a national system of justice and not a racial system of injustice. In the first place, the problems must be recognized and they must be openly talked about. There has to this very day been a conspiracy of silence, co-perpetrated to some extent by all of us (or most of us!) on the problem of racial inequality within and before the law. No subject has been more subjected to stultifying taboos which ill-befit an academic and journalistic community like ours which so often vaunt their own spiritual freedom.^{1 5} If there is one message which the jurisprudential school of American realism imperatively teaches us it is surely that any civilized legal system must be able to tolerate open discussion about its problems as a first step towards possibly solving them. Now racism — need I say it at all? — is like the problem with your wife which you can never solve, but which you can only defuse and learn to live with by scaling it to manageable levels. By not even talking about it we are obviously not even beginning that process of adaptation. If I plead for anything here I plead for frankness about a problem which deeply bedevils our legal system's claim to being civilized.

Of course, in the second place and in the long run, there must be an infusion of black ideas, concepts, visions and dreams, and also of realities from the black human condition into the practically lily-white legal system before it will become, albeit haltingly and never perfectly, a truly South African legal system and, as far as sentencing is concerned, a cause for pride and not for shame. And if I may just pinpoint one very obvious area where there is a crying and palpably obvious need for the infusion of black concepts and especially black realities into the judicial process it would be in the field of psychiatric services. To put the situation very bluntly and boldly it can be said that as far as blacks are concerned these services are practically meaningless and largely non-existent, despite the fact that such important legal consequences may flow from their operations. But this is a story I have told elsewhere and for which time is not available at this stage.^{1 6} □

Footnotes on p. 20

A POSTSCRIPT — OUR MAN IN MMABATHO?

A personal comment by Julian Riekert on the reception of Professor Barend van Niekerk's paper, *Sentencing in a Multi-Racial and Multi-Ethnic Society*, at the Conference on Southern African Law Reform which took place at Sun City, Bophuthatswana, from August 11 to 14, 1980.

If it seems incongruous that a conference on law reform should take place at Sun City, Sol Kerzner's extravaganza in the Pilanesberge, better known for its venal pleasures

than its academic rigours, it is not incongruous that it should have taken place in Bophuthatswana. Despite the fact that it owes its existence as an "independent" state to the South

African homeland policy with all that that entails. Bophuthatswana is a remarkable entity in many ways. Not the least of these is its very promising programme of law reform which is currently being undertaken. It is also the only state in southern Africa, other than Zimbabwe, to have a Bill of Rights in its constitution.

It was against this background that the Chief Justice of Bophuthatswana, Mr Justice V. G. Hiemstra, welcomed delegates to the Conference. He reminded them of the fact that they were now in a country which offered them complete freedom of speech which was guaranteed by the Constitution. This assurance produced spontaneous applause from the audience, many members of which were from South Africa. The Conference then proceeded with a paper on the legal status of black women in South African society by Mrs Carmen Nathan of the University of the Witwatersrand.

The fourth paper on the third day of the Conference was that of Professor van Niekerk, who, in his opening remarks, reminded delegates that they were, technically speaking on foreign soil. On a lighter note, he added that he had been advised that contempt of court was not an extraditable offence. As can be seen from the paper, it was a thoughtful and stimulating attempt to persuade his fellow-lawyers to admit to the unwelcome realities which intrude into the judicial sentencing process. It was, a plea from a lawyer to lawyers to admit what outside South Africa is unremarkable — the fact that judges are human beings, spared none of the human weaknesses.

To the astonishment of the delegates, one of the earliest speakers from the floor was the Chief Justice who accused Professor van Niekerk of "using Bophuthatswana as a launching pad for his attacks on the RSA". He was visibly angry and after he sat down his remarks received applause from a handful of delegates. Professor van Niekerk looked surprised at this development but, in accordance with the procedure which had been followed with other papers, did not comment immediately. Many of the delegates commenced whispered discussions.

Professor Marinus Wiechers, of the University of South Africa, came to Professor van Niekerk's defence by gently reminding the Chief Justice of his opening remarks. He went on to add that there was surely nothing improper in delivering such a paper at such a conference. After all, Bophuthatswana was a country which was moving away from racialism and if such factors were a part of the sentencing process, it was well that everyone should know that. He added that it was common knowledge that thousands of blacks went to jail every year in South Africa for so-called "black crimes" and that the resultant statistics were sometimes used to support claims that blacks were criminally-minded. He appealed to delegates not to refrain from raising "sensitive" issues.

In his reply to the questions raised, Professor van Niekerk stated that he was not attacking South Africa, but what was wrong in South Africa, and that if any price had to be paid for the exercise of freedom of speech he would continue to pay that price by refusing to be intimidated. Both Professor van Niekerk and Professor Wiechers were cheered by the great majority of the delegates at the conclusion of their speeches.

If, as was suggested at the Conference, the choice of venue was an attempt to demonstrate the vigorous independence of the fledgling Bophuthatswana, then the Chief Justice's outburst could not have been more ill-considered, for it raised a number of important questions. These are:—

- a) why does the Chief Justice of Bophuthatswana feel that he owes allegiance to the Republic of South Africa? His action in confirming that allegiance supports those critics of Bophuthatswana who argue that the Republic and its seconded officials are *in loco parentis* to Bophuthatswana. (One of the speakers inadvertently raised this point by stating that it was absurd to suggest that the Republic was *in loco parenthesis*!)
- b) did the Chief Justice not act improperly as a judicial officer in making what was essentially a political point? In other contexts members of the South African judiciary have steadfastly maintained that they may play no rôle in active public political life. This point derives some support from the fact that Bophuthatswana's Minister of Law and Order, Mr A. T. Gaelejwe, was present at the time of Professor Niekerk's address.
According to accepted conventions he, as the member of the executive charged with responsibility for justice, should have made any statement which required to be made. However he congratulated Professor van Niekerk on his paper and requested that a copy of it should be made available to him.
- c) does the Chief Justice dispute the facts set out in Professor van Niekerk's paper? If so, why did he not dispute them, or at least call upon Professor van Niekerk to substantiate them? He, as a very senior member of the judiciary, and as the Chancellor of the University of South Africa, should have known that this would have been a proper course to adopt at a law reform conference.
- d) does the Chief Justice's statement indicate a view that the Bophuthatswana Bill of Rights will be applied selectively i.e. by excluding foreign visitors from its operation? If so, it augurs ill for the future.
- e) can anyone now deny that a frank discussion of race as a factor influencing the sentencing process has become a taboo, which one breaches at one's peril?

There can surely be little doubt that the Chief Justice, having spoken in haste, must now be repenting at leisure. □

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