

**CRIMINAL CAPACITY OF AND CRIMINAL JUSTICE FOR OFFENDERS WITH  
BIPOLAR DISORDER**

by

**Lucy Scarlett Lessing Bredenkamp**

STUDENT NUMBER

2013177569

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SUPERVISOR: Dr Rinda Botha

CO-SUPERVISOR: Prof. Magda Slabbert

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## ABSTRACT

According to the World Health Organisation, bipolar disorder is the sixth most prevalent disability in the world.<sup>1</sup> Despite this, bipolar disorder remains largely uncharted within the South African juridical landscape. Therefore, the thesis investigates whether sufficient provision is made, both in the context of criminal justice and criminal capacity, for offenders who suffer from bipolar disorder within the South African criminal justice system. In doing so, the criminal justice systems of South Africa, the Netherlands, and the United States of America (USA) are examined, with specific reference to the tests for criminal capacity, relevant legislation, case law, and what constitutes both expert evidence and expert witnesses, respectively.

Sentencing options and alternative sentencing options, as they relate to mentally ill offenders, are also examined. Particular consideration is given to *terbeschikkingstelling* in the Netherlands and mental health courts in the United States. In addition, the advantages and disadvantages of both systems are thoroughly analysed. A proposal for a uniquely South African mental health court model is subsequently put forward, in the hope that this will pave the way in ultimately providing an improved alternative to conventional sentencing for offenders suffering from bipolar disorder.

**Key terms:** Bipolar disorder; criminal capacity; mentally ill offenders; criminal law; criminal liability; expert evidence; expert witnesses; sentencing; *terbeschikkingstelling*; mental health courts; criminal justice, therapeutic justice.

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<sup>1</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

## CHAPTER ONE: INTRODUCTION

### 1.1 BACKGROUND

A clear and complete insight into the nature of madness, or a correct and distinct conception of what constitutes the difference between the sane and the insane has as far as I know, not yet been found.<sup>2</sup>

According to the World Health Organization (WHO), bipolar disorder is ranked as the sixth most prevalent cause of disability in the world.<sup>3</sup> Despite this, juridically speaking, bipolar disorder remains relatively uncharted territory in South Africa. If criminal capacity is lacking due to a mental illness, an offender cannot be held liable or punished for the criminal act.<sup>4</sup> However, the realm and indeed the depths of the human mind often remain shrouded in mystery and, accordingly, proving the presence of a mental illness or defect by way of legal tests so beloved by our courts is, at best, an inexact science. The mere fact that there is no concise definition of what constitutes insanity or madness is primed to provoke controversy. After all, who is the gatekeeper in terms of what someone should and should not be?<sup>5</sup>

It is asserted that human functioning and, accordingly, legal competency can be divided into four realms, namely “the ability to: communicate a choice; understand the information; to appreciate the situation and its consequences; and to reason about the treatment options”.<sup>6</sup>

It is immensely difficult to determine what the state of mind of an accused was at the time that a criminal act was committed and, accordingly, to assess the liability of the accused. The clinical diagnosis of bipolar disorder is likewise much maligned as there is no conclusive medical test that will prove a diagnosis of bipolar disorder. No pathogen or protein will show up in a blood test; neither are there any physical neurological markers in the brain that will appear on a magnetic resonance imaging (MRI)<sup>7</sup> scan or a computed tomography (CT) scan. A CT scan “combines a series of

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<sup>2</sup> Le Roux & Stevens 2012: 46.

<sup>3</sup> Motlana. “Medication Use in Bipolar Disorder”, <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>4</sup> Bal & Koenraadt 2000: 219-220.

<sup>5</sup> Oosterhuis & Loughnan 2016: 4.

<sup>6</sup> Meynen & Oei 2011: 532-533.

<sup>7</sup> Mayo Clinic. “MRI”, <https://www.mayoclinic.org/tests-procedures/mri/about/pac-20384768> (accessed 7 November 2022). “Magnetic resonance imaging is a medical imaging technique

X-ray images taken from different angles and uses computer processing to create cross-sectional images, or slices, of the bones, blood vessels and soft tissues inside [the] body”.<sup>8</sup> Therefore, diagnosis based thereon is purely clinical.

A study of family members who have a loved one who suffers from bipolar disorder found that 23 per cent of bipolar disorder sufferers had threatened to hurt someone and eleven per cent had made good on these threats. In addition, it was found that almost 50 per cent of all manic episodes, as part of bipolar disorder, are characterised by at least one act of physical violence. The clinical picture of mania is one characterised by “criminality, perverse sexuality or psychosomatic problems”.<sup>9</sup> In its manic phase, bipolar disorder is characterised by *inter alia* extreme irritability, behaving impulsively, and engaging in pleasurable, high-risk behaviours.<sup>10</sup> In the depressive phase, sufferers may experience homicidal and suicidal tendencies upon which they may often act.<sup>11</sup>

A likelihood thus exists in patients suffering from bipolar disorder of exhibiting “anti-social, unstable and even schizoid qualities” compounded by “immature and manipulative behaviours, impulsivity, interpersonal instability, poor social judgement, hostility, rebelliousness, exhibitionistic (behaviour) and (a proclivity towards) drug and alcohol abuse”.<sup>12</sup> Most pertinent of all is that, in some quarters, it is felt that severely depressed or manic patients have difficulty in satisfying the cognitive requirements for criminal capacity<sup>13</sup> or fitness to stand trial.<sup>14</sup> Despite this, the Diagnostic and Statistical

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that uses a magnetic field and computer-generated radio waves to create detailed images of the organs and tissues in [the] body”.

<sup>8</sup> Mayo Clinic. “CT scan”, <https://www.mayoclinic.org/tests-procedures/ct-scan/about/pac-20393675> (accessed 7 November 2022).

<sup>9</sup> Kunjukrishnan & Varan 1992: 571.

<sup>10</sup> Holmes et al. “Conceptualizing impulsivity and risk taking in bipolar disorder: importance of history of alcohol abuse”, <https://www.ncbi.nlm.nih.gov/pmc/articles/pmc4187105/> (accessed 7 November 2022).

<sup>11</sup> Kunjukrishnan & Varan 1992: 570.

<sup>12</sup> Laher & Rebolo 2010: 159.

<sup>13</sup> Sec. 78(1)(a)-(b) of the CPA holds that “a person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or [mental defect] intellectual disability which makes him or her incapable of appreciating the wrongfulness of his or her act or omission; or of acting in accordance with an appreciation of the wrongfulness of his or her act or omission, shall not be criminally responsible for such act or omission”. The terms criminal capacity, criminal accountability and criminal responsibility are equivalent and will be referred to in this thesis as per the source used.

<sup>14</sup> Kunjukrishnan & Varan 1992: 572.

Manual of Mental Disorders-5 Text Revision (hereinafter referred to as the “DSM-5-TR”)<sup>15</sup> criteria for bipolar disorder are, according to some experts, unduly rigid.<sup>16</sup>

The original intention of the Diagnostic and Statistical Manual of Mental Disorders (DSM) was to encourage research into the validity of the diagnoses contained therein. Over the years, however, the courts have routinely relied on the DSM diagnoses to decide cases and, by virtue of this, it has served to provide uniformity in psychiatric diagnoses. However, the DSM-5, and the latest edition, the DSM-5-TR, specifically caution against the use of its categories for legal purposes, the logic being that diagnostic labels do not equate with judicial matters of competency and capacity.<sup>17</sup> This will only serve to further muddy the waters for courts dealing with a mentally ill accused.

The nature of bipolar disorder and its symptoms outlined in the preceding two paragraphs beg substantial judicial questions regarding both criminal capacity and criminal justice for an offender who suffers from bipolar disorder. Paradoxically, and despite the severity and high prevalence of the illness, bipolar disorder is largely uncanvassed in South African case law and very little literature exists specific to bipolar disorder in a forensic context. A report by the Judicial Inspectorate for Correctional Services (hereinafter referred to as “JICS”) stated that in the 2015/16 period, 984 inmates were diagnosed with mental illnesses of which psychosis, depression, bipolar mood disorder, and schizophrenia were the most common.<sup>18</sup>

The interests of both the mentally ill offender and justice must be weighted equally for juridical fairness to prevail. There is no exception in respect of an accused diagnosed with bipolar disorder. It is however worrying that numerous factors are present within the South African legal context that are not conducive to either justice or criminal liability of an accused diagnosed with bipolar disorder.

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<sup>15</sup> The Diagnostic and Statistical Manual of Mental Disorders, 5<sup>th</sup> edition, Text Revision (DSM-5-TR) 2022.

<sup>16</sup> Singh & Rajput 2006: 58.

<sup>17</sup> Kaliski 2012: 13.

<sup>18</sup> Gasa. “Horror stories of mental illness in SA prisons”, <https://www.news24.com/health24/Mental-Health/News/horror-stories-of-mental-illness-in-sa-prisons-20180802> (accessed 7 November 2022).

Snyman<sup>19</sup> lists the elements of a crime as the act, meeting the definitional elements of the crime, unlawfulness and culpability, while Burchell lists the elements for criminal liability as:

- a) voluntary conduct which is unlawful and that this conduct was accompanied by
- b) criminal capacity and;
- c) fault

which the state must prove beyond a reasonable doubt.<sup>20</sup>

Incongruously and despite the state's onus of proving the guilt of an accused beyond a reasonable doubt,<sup>21</sup> an accused has to prove on the balance of probabilities<sup>22</sup> that he or she suffers from a mental illness or intellectual disability, should this defence be raised by the accused. Criminal capacity is thus brought into sharp focus here as it is entirely conceivable that because of the symptomatic ambiguity of bipolar disorder that ranges from mania at one end and depression at the other end,<sup>23</sup> a misdiagnosis or a diagnosis could be made where there is none, thus wrongfully diminishing or expunging criminal capacity. Conversely but of equal importance, diagnostic accuracy is vital with regard to court decisions and the attendant implications for personal liberty and freedom.<sup>24</sup>

Jules Farlet<sup>25</sup> coined the precursor term of *folie circulaire* (circular insanity) in 1854 when describing patients who experienced both depressive episodes and episodes of heightened mood. While the genesis of the formal diagnosis of bipolar disorder can be charted back to over 160 years ago, it is, as alluded to in the previous paragraph, arguably one of the most challenging mental illnesses to diagnose, thus rendering misdiagnosis rife. A study by the National Depressive and Manic-Depressive Association found that 69 per cent of patients were initially misdiagnosed and one-third of these patients remained without a correct diagnosis for at least ten years.<sup>26</sup>

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<sup>19</sup> Snyman 2020: 127.

<sup>20</sup> Burchell 2016: 51.

<sup>21</sup> *Criminal Procedure Act* 51 of 1977: sec. 105A(2)(a)(i).

<sup>22</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(1A).

<sup>23</sup> Kaliski 2012: 13.

<sup>24</sup> Swanepoel 2009: 111-112.

<sup>25</sup> Singh & Rajput 2006: 58.

<sup>26</sup> Singh & Rajput 2006: 58.

The integrity and veracity of expert medical testimony and reports provided for the defence are particularly pertinent in respect of criminal capacity. The increasing prevalence with which psychiatrists appear in the courtroom, it has been asserted, serves to both humanise the legal process but also serves to unduly minimise criminal capacity.<sup>27</sup> Forensic psychiatry and psychology occupy a strange no-man's land between benevolence towards and doubt of the human mind and spirit. They straddle the ostensibly vastly different disciplines of ethics and science.<sup>28</sup> Kant<sup>29</sup> argued that humans will make moral decisions as the most fundamental prescript of morality is pure reason. Hume<sup>30</sup> argued that the basis of moral decision-making lies in emotion although psychopathy renders this averment somewhat moot. Somewhat less optimistically, Foucault<sup>31</sup> felt that forensic psychiatry had a pivotal influence in the normalisation of medico-legal mechanisms aimed at social control. He went so far as to assert that legal truth was becoming exponentially defined by the so-called psy-sciences.<sup>32</sup>

In similar vein, Oosterhuis and Loughnan<sup>33</sup> avers that forensic psychiatry fuses knowledge and power in the "control and management" of abnormal psychology. However, Römken<sup>34</sup> asserts that viewing law and psychiatry as two competing disciplines is short-sighted because courts are ultimate arbiters of fact in the evaluation of evidence. Swanepoel<sup>35</sup> does however caution that courts cannot decide on matters of criminal capacity solely of their own accord and must make use of expert psychiatric or psychological evidence.

Forensic psychology and psychiatry have thus, whether for better or for worse, become an inescapable reality in courtrooms across the globe. As such, the phenomenon of the so-called "hired gun" is not peculiar to South African criminal

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<sup>27</sup> Oosterhuis & Loughnan 2016: 5.

<sup>28</sup> Oosterhuis & Loughnan 2016: 4.

<sup>29</sup> Wilson & Denis. "Kant and Hume on Morality", <https://plato.stanford.edu/archives/fall2022/entries/kant-hume-morality/> (accessed 7 November 2022).

<sup>30</sup> Wilson & Denis. "Kant and Hume on Morality", <https://plato.stanford.edu/archives/fall2022/entries/kant-hume-morality/> (accessed 7 November 2022).

<sup>31</sup> Oosterhuis & Loughnan 2016: 5.

<sup>32</sup> Römken 2000: 384.

<sup>33</sup> Oosterhuis & Loughnan 2016: 21.

<sup>34</sup> Römken 2000: 384.

<sup>35</sup> Swanepoel 2009: 169.

defence. The rules formulated in *Daubert*,<sup>36</sup> known as the *Daubert* standard, determine whether expert medical evidence “meets the standards of reliability and relevance” and is thus “evidence-based”.<sup>37</sup> The question whether these rules should find application in South Africa is accordingly ripe.

Ultimately, the mental abilities one must possess to have criminal capacity rest on the legs of the “ability to appreciate (the) [unlawfulness]” of one’s conduct and the “ability to act in accordance with such an appreciation” of the unlawfulness of one’s conduct.<sup>38</sup> Accordingly, when one is “incapable of either appreciating the [unlawfulness] of his or her act or omission, or of acting in accordance with an appreciation of the [unlawfulness] of his or her act or omission”<sup>39</sup> due to mental illness, one can indeed not be subjected to the same criminal justice system as an offender who does not suffer from a mental illness or disorder.

The relevance of mental health courts comes to the fore and particularly the question of whether these courts would provide improved criminal justice to the offender suffering from bipolar disorder in South Africa. In the United States of America (hereinafter referred to as the “US” or “USA”), a comparative study of which will be undertaken in chapter five, mental health court(s) (hereinafter referred to as “MHC” and “MHCs”) are a variation of “problem-solving courts that divert offenders diagnosed with mental illness from the criminal justice system into community-based treatment services”.<sup>40</sup>

Ultimately, these courts serve to minimise problems associated with treatment compliance and, in so doing, reduce the number of mentally ill offenders that are in jail.<sup>41</sup> This is particularly relevant in a South African context where overcrowding of prisons poses a very real challenge.<sup>42</sup>

Related hereto is the issue of punishment. An offender who lacks criminal capacity or is found to have diminished criminal capacity by virtue of a mental illness or intellectual

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<sup>36</sup> *Daubert v Merrell Dow Pharmaceuticals* 113 S. Ct. 2786 (1993) US Supreme Court.

<sup>37</sup> Kaliski 2004: 319.

<sup>38</sup> Snyman 2020: 138.

<sup>39</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(1)(a) & (b).

<sup>40</sup> Seltzer 2005: 570.

<sup>41</sup> Hughes & Peak 2012: 20.

<sup>42</sup> Bantjes *et al.* 2017: 2.

disability can surely not be subjected to the penal system in the same manner as an offender who lacks such a condition. Pertinent here is the question of whether a two-track penal system would afford better justice for the offender diagnosed with bipolar disorder. The two-track system is one “that offers the possibility of accumulation of a criminal punishment (e.g. imprisonment and a criminal measure e.g. compulsory treatment)”.<sup>43</sup> Such a system has been implemented successfully in the Netherlands.<sup>44</sup> In South Africa, we are limited to the provisions of section 78(6) of the *Criminal Procedure Act* 51 of 1977 (hereinafter referred to as the “CPA”) and this, accordingly, highlights the importance and relevance of an examination into the viability of a two-track system in South Africa.

Ultimately, if one has no concept of one’s wrongdoing in the execution of a criminal act and a custodial sentence has, at its core, rehabilitation as its end, how can a sufferer of bipolar disorder be rehabilitated in this conventional sense? It stands to reason, therefore, that should an accused completely lack criminal capacity or indeed have reduced criminal capacity due to mental illness, the subsequent punishment should be reduced or have treatment as a goal.

## **1.2 RESEARCH QUESTIONS**

### **1.2.1 Main research question**

Is adequate provision made, in the South African criminal justice system, for offenders with bipolar disorder, specifically pertaining to the defence of criminal incapacity and criminal justice in general?

### **1.2.2 Secondary research questions**

- How is the complex nature of bipolar disorder provided for specifically pertaining to the test for criminal capacity?

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<sup>43</sup> Bal & Koenraadt 2000: 229. “[TBS] is a provision in the *Dutch Criminal Code* that allows for a period of treatment following a prison sentence for mentally disordered offenders.” (van Marle & Erasmus 2002: 83.) Its primary aim is the “protection of society and treatment of the offender, in order to rehabilitate patients into the community” (de Boer & Gerrits 2007: 459).

<sup>44</sup> Bal & Koenraadt 2000: 229.

- What mechanisms are in place to safeguard the integrity and veracity of expert medical testimony and reports where the defence of bipolar disorder is raised?
- Is it reasonable to subject the offender suffering from bipolar disorder to the same criminal justice system as the offender who does not suffer from any mental illness or disorder?
- Are there better, alternative forms of sentencing for offenders suffering from bipolar disorder?

### 1.3 VALUE OF THE RESEARCH

While complete lack of criminal capacity is not foreign in South African courtrooms, very few cases have bipolar disorder at their nexus. Bipolar disorder has, although with largely limited success, also been advanced as a factor in support of correctional supervision for a conviction of fraud<sup>45</sup> and was seemingly implied *obiter* to be a factor which contributed to an accused's ostensibly already tenuous emotional state which drove her to murder her child.<sup>46</sup> Bipolar disorder featured prominently and perhaps most notoriously in the case of Najwa Petersen<sup>47</sup> who was accused and ultimately found guilty of the murder of her husband Abdul Mutaliep "Taliep" Petersen. During trial, it was averred that the accused suffered from bipolar disorder.<sup>48</sup> During sentencing, however, the court held that there was insufficient expert evidence as to the accused's mental health on record.<sup>49</sup> It is trite that the side-effects from psychoactive medication used to treat bipolar disorder can adversely affect misdiagnosed patients from a therapeutic standpoint;<sup>50</sup> thus the court held that the long term use of psychoactive medication must have had a negative psychiatric effect on the accused and this contributed to the court's deviation from the prescribed minimum sentence.<sup>51</sup>

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<sup>45</sup> *S v Landau* 2000 (2) SACR 673 (W) 2000 (2) SACR: 673.

<sup>46</sup> *S v Herman* 2010 (2) SACR 263 (GSJ) 2010 (2) SACR: 273.

<sup>47</sup> *S v Petersen* 2008 JDR 1447 (C).

<sup>48</sup> *S v Petersen* 2008 JDR 1447 (C) 2008 JDR 1447: 5.

<sup>49</sup> *S v Petersen* 2009 (C) SS02/2008: 3.

<sup>50</sup> Singh & Rajput 2006: 60.

<sup>51</sup> *S v Petersen* 2009 (C) SS02/2008: 3.

Conversely, the case of Akmal Shaikh<sup>52</sup> is tragically illustrative of a mentally ill accused whose illness was not given credence to. Akmal Shaikh, who on the balance of probabilities suffered from bipolar disorder,<sup>53</sup> was convicted of importing heroin and subsequently executed in China.<sup>54</sup> Shaikh displayed hallmark symptomology of bipolar disorder and, in all likelihood, had the Chinese courts enquired, he would have denied his mental illness, and this would likely have been taken as fact.<sup>55</sup> It has been suggested that Shaikh lacked criminal capacity by virtue of his mental state and, accordingly, should not have stood trial, much less been executed. He was vulnerable to the manipulation and machinations of others by virtue of his mental illness and the “delusional and grandiose ideation” that flowed therefrom.<sup>56</sup>

The literature in terms of whether bipolar disorder qualifies as a valid defence of mental illness and for diminished criminal capacity in a judicial setting is weighted more strongly in its critics than its proponents. While the severity of a true bipolar disorder diagnosis is undisputed, the integrity of both lawyers and expert witnesses who peddle out the defence of bipolar disorder where there is clearly no such diagnosis applicable is professionally questionable at best. The “hired gun” is a much-maligned phrase that litters the literature herein. It is asserted that the “hired gun” “misleads the court with half-truths, innuendo, fabrications on predictions that have no scientific basis”.<sup>57</sup> Accordingly, the interests of the patron are served and not the interests of justice.

Section 78(2) of the CPA states that:

[i]f it is alleged at criminal proceedings that the accused is by reason of mental illness or intellectual disability or for any other reason not criminally responsible for the offence charged, or if it appears to the court at criminal proceedings that the accused might for such a reason not be so responsible, the court shall in the case of an allegation or appearance of mental illness or intellectual disability, and may, in any other case, direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.<sup>58</sup>

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<sup>52</sup> Freckelton 2010: 333.

<sup>53</sup> Freckelton 2010: 339.

<sup>54</sup> Freckelton 2010: 333.

<sup>55</sup> Freckelton 2010: 339.

<sup>56</sup> Freckelton 2010: 340.

<sup>57</sup> Noonan & Johnson 2002: 9.

<sup>58</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(2).

Thus, “any other reason” could conceivably provide the defence with innumerable possibilities that could be presented before the court.<sup>59</sup> It has been argued that South African courts will accept testimony from those who clearly lack the required expertise necessary all too quickly and willingly. In this regard, strict rules pertaining to reliability and relevance of expert medical testimony were developed in the USA in the case of *Daubert v Merrell Dow Pharmaceuticals*.<sup>60</sup>

Federal law in the USA takes a similar stance to that of South Africa in respect of mental illness that completely excludes criminal capacity by virtue of a mental disease or illness in the form of a defence of insanity.<sup>61</sup> While not explicitly, federal law also permits the defence of diminished criminal capacity by allowing courts to depart from minimum sentences by virtue of mental illness.<sup>62</sup> Accordingly, and because of their parallels to the CPA, Title 18 of the *United States Code* and the United States Sentencing Guidelines are studied in this thesis. The USA has also seen rapid proliferation of MHCs<sup>63</sup> throughout the country in part due to the allocation of federal funding.<sup>64</sup> This study will therefore include a theoretical examination of MHCs in the USA and the feasibility and possible implementation in South Africa.

Expert psychiatric and psychological testimony may be utilised<sup>65</sup> in order to satisfy the burden of proof embodied in section 17(b).<sup>66</sup> The *Daubert* standard is pertinent herein given that both South Africa and the USA make use of expert medical testimony in legal proceedings and, as such, this study will also comprise an examination of the *Daubert* standard. The *Daubert* standard was formulated in the United States Supreme Court and is accordingly federal in nature. Expert evidence used to ascertain lack of criminal capacity by virtue of mental disease or illness is, however, not constitutionally obligatory.<sup>67</sup> This, by default, substantially limits the defence of

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<sup>59</sup> Kaliski 2009: 4.

<sup>60</sup> Kaliski 2004: 319.

<sup>61</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17.

<sup>62</sup> United States Sentencing Guidelines: sec. 5K2.13.

<sup>63</sup> A variation of “problem-solving courts that divert offenders diagnosed with mental illness from the criminal justice system into community-based treatment services” Seltzer 2005: 570.

<sup>64</sup> Honegger 2015: 485.

<sup>65</sup> Torry & Billick 2010: 254.

<sup>66</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17.

<sup>67</sup> Robinson 2014: 238.

diminished criminal capacity as most evidence that would serve to prove diminished criminal capacity may only be presented for the defence of mental illness.<sup>68</sup>

A comparative study of the legal classification of mental illness that discharges criminal capacity and leads to diminished capacity in the Netherlands is also conducted. Lastly, the so-called two-track system as implemented in the Netherlands is analysed and the viability of its implementation in South Africa is explored. In the Netherlands, as with South Africa, mental illness is a defence which may exclude criminal capacity.<sup>69</sup> Additionally, Dutch courts may also “make use of reports by psychiatrists” when determining an offender’s criminal capacity.<sup>70</sup> In consequence, and because of the comparable nature of section 78 of the CPA and section 39 of the *Dutch Criminal Code*, it would be fitting to examine the appropriateness of entrustment orders as embodied in section 37a of the *Dutch Criminal Code*<sup>71</sup> within a South African context.

In this regard, the *Mental Health Care* 17 of 2002, the CPA 51 of 1977, the *Dutch Code of Criminal Procedure*, the *Dutch Criminal Code*, the United States Sentencing Guidelines, Title 18 of the *United States Code*, the Federal Rules of Criminal Procedure, the Federal Rules of Evidence and case law germane to offenders diagnosed with bipolar disorder are examined. Theoretical literature herein is investigated, and the contextual usefulness thereof analysed.

#### **1.4 RESEARCH METHODOLOGY**

The conceptual basis for this study is a theoretical account of both the scope and content of criminal capacity and justice for offenders with bipolar disorder in South Africa. The research is non-empirical, as it analyses the existing legal position as revealed through case law and legislation on how bipolar disorder is treated as a defence and as factor for diminished criminal capacity in South Africa. The research also encompasses a study of theoretical literature regarding the *Daubert* standard and

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<sup>68</sup> Brown 2012: 109.

<sup>69</sup> Tak 2008: 132.

<sup>70</sup> Tak 2008: 74.

<sup>71</sup> Tak 2008: 120-122.

MHCs in the USA because of its successful implementation of the former<sup>72</sup> and subsequent proliferation of the latter.<sup>73</sup>

A comparative analysis is also undertaken regarding the legal classification of mental illness that both discharges criminal capacity and leads to diminished capacity in the Netherlands, as it is widely considered the most progressive country globally regarding both its practices and treatment of mentally ill offenders.<sup>74</sup> An analysis of the two-track system and its implementation in the Netherlands is thus also undertaken.

## 1.5 CHAPTER BREAKDOWN

Chapter one introduces the objectives of the study and delineates the attendant value of the research and the research questions that will be investigated. The research methodology used in the study and a chapter breakdown is also included. The failures and challenges of the *status quo* within the South African criminal justice system are briefly outlined to contextualise both the importance of the study and to highlight the need to evenly weight the interests of both justice and accountability for offenders with bipolar disorder.

Chapter two discusses the clinical elements of bipolar disorder and provides context to the rest of the thesis. Bipolar disorder is defined, the nature of the illness is described, and the differences between its two primary subtypes – bipolar I and bipolar II disorder – are explained. An overview of bipolar disorder symptoms, the DSM-5-TR diagnostic criteria and treatment options are given. Lastly, the ostensible relationship between bipolar disorder and crime is briefly explored and serves as a prologue to the thesis.

Chapter three examines the present legal position in South Africa. The chapter details the elements of crime with specific focus on the element of criminal capacity that bipolar disorder may exclude. It also contains a conspectus of legislation pertinent both to mentally ill offenders and, by extension, those with bipolar disorder. The role of expert psychiatric and psychological evidence within a South African context is

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<sup>72</sup> Kaliski 2009: 4.

<sup>73</sup> Hughes & Peak 2012: 20.

<sup>74</sup> Bal & Koenraadt 2000: 220.

studied, its pitfalls are examined, and its relevance is analysed against the backdrop of South African case law. The chapter sets out sentencing options for offenders who lack criminal capacity and discusses how offenders who both lack criminal capacity and who have diminished criminal capacity have historically been sentenced in South Africa. Lastly, the chapter contains a compendium of criminal case law in which both mental illness and bipolar disorder are thematic.

Chapter four is an analysis of the present legal position in the Netherlands, which is the first of two comparator countries. Accordingly, it also sets forth the elements of crime, the test for criminal capacity and legislation germane to mentally ill offenders which, thus, also encompasses offenders with bipolar disorder. Sentencing options for offenders who both completely lack criminal capacity and for those with diminished capacity are delineated. The primary focus of this chapter is however the two-track system wherein an offender is sentenced to both a term of imprisonment and a so-called entrustment order which is served in a *terbeschikkingstelling* (TBS). Furthermore, the chapter addresses the role of expert psychiatric and psychological testimony within the Dutch criminal justice system. As with all comparator countries studied in this thesis, a compilation of case law illustrative of topics covered in this chapter *inter alia* expert psychiatric and psychological evidence, offenders with bipolar disorder, and the sentencing of mentally ill offenders is also included.

Chapter five studies the present legal position in the USA which is the second and final comparator country. As such, the test for criminal capacity and the element of crime with specific reference to the elements that bipolar disorder excludes are included. Legislation applicable to mentally ill offenders, and in consequence those who have bipolar disorder, is also detailed. The *Daubert* standard of expert evidence and expert psychiatric and psychological testimony within the sphere of the USA criminal justice system are examined. In addition, and in a similar vein, the phenomenon of the so-called “hired gun” is analysed. The chapter also contains a critical evaluation of MHCs. The chapter furthermore addresses how mentally ill offenders are sentenced in the USA. Lastly, a compendium of case law with particular focus on offenders with bipolar disorder, expert psychiatric and psychological evidence, the defence of mental illness, and diminished criminal capacity is also included.

Chapter six contains a concise comparative analysis of the salient points of this study as per the current legal stance in South Africa, the Netherlands, and the USA. The research questions are answered and, in so doing, the viability of TBS and MHCs is explored. Lastly, the study is ended with the recommendations and conclusion.

## **1.6 CONCLUSION**

Bipolar disorder is largely uncanvassed within the landscape of South African criminal law in terms of both complete lack of and diminished criminal capacity despite its high prevalence. It is trite that South Africa lags behind a number of its contemporaries in the management of mentally ill offenders. Complicating this undesirable situation is the legal quandary that is often created by the lack of a compendious definition of insanity which is compounded by the fact that no definitive test exists to diagnose bipolar disorder. This can have far-reaching implications for an offender who suffers from bipolar disorder and, as such, this thesis seeks to answer critical questions regarding criminal justice and criminal capacity for offenders who have bipolar disorder. The incipency herein is an examination of the clinical aspects of bipolar disorder which provides context to the rest of the study, and which follows in chapter two.

## CHAPTER TWO: CLINICAL ASPECTS OF BIPOLAR DISORDER

### 2.1 INTRODUCTION

Despite the advent of the so-called information age, mental illness is fraught with negative stereotypes and stigma and parochial attitudes still persist. Bipolar disorder is no exception,<sup>75</sup> undoubtedly encouraged by a raft of damaging and inaccurate pop culture depictions wherein the sufferer is variously portrayed as deeply troubled, violent and unpredictable.<sup>76</sup> Whilst the episodic occurrence of both mania and depression in the same patients was already recorded in the mid-nineteenth century, as noted in chapter one, bipolar disorder remains a misunderstood<sup>77</sup> and maligned illness. Negative connotations notwithstanding, misdiagnosis is rife;<sup>78</sup> treatment is challenging as there is no one-size-fits-all approach, no cure-all or wonder drug exists<sup>79</sup> and, as discussed in paragraph 1.1 of chapter one, there is no objective test with which to diagnose bipolar disorder.

It is not improbable nor implausible that these factors conspire to deny the defence of criminal incapacity and criminal justice to an offender with bipolar disorder. The medical community grapples with correctly and timeously diagnosing bipolar disorder.<sup>80</sup> It therefore stands to reason that the challenges posed both to the accused who has bipolar disorder and the criminal justice system, to law enforcement and to the courts when dealing with an accused who has bipolar disorder, are accordingly amplified. Given the inherently complex nature of bipolar disorder and its relationship with the criminal justice system, this chapter seeks to provide a lens through which the chapters that follow can be more contextually viewed.

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<sup>75</sup> Lazowski *et al.* "Stigma and Discrimination in People Suffering with a Mood Disorder: A Cross- Sectional Study", <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3328894/> (accessed 7 January 2020).

<sup>76</sup> Anonymous. "Lingering Myths About Bipolar Disorder", <https://psychcentral.com/lib/5-myths-about-bipolar-disorder-that-boost-stigma/> (accessed 7 January 2020).

<sup>77</sup> The South African Depression and Anxiety Group. "Ups and Downs of Bipolar Disorder", [https://www.sadag.org/index.php?option=com\\_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#](https://www.sadag.org/index.php?option=com_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#) (accessed 7 November 2022).

<sup>78</sup> Noonan & Johnson 2002: 7.

<sup>79</sup> Strakowski *et al.* 2001: 702.

<sup>80</sup> Singh & Rajput 2006: 58.

In this chapter, bipolar disorder is defined and described and its primary subtypes, bipolar I and II disorder, are discussed. This is followed by an overview of symptomology typical of bipolar disorder and the DSM-5-TR diagnostic criteria for bipolar disorder. The chapter also contains a synopsis of treatment options for bipolar disorder and the concomitant side-effects of treatment. Included is a discussion of mood stabilisers, antipsychotics, antidepressants, and electroconvulsive therapy. Lastly, the contention that bipolar disorder augments the proclivity towards criminal behaviour is explored and serves as a prelude to the thesis.

## **2.2 DEFINITIONS AND DESCRIPTIONS OF BIPOLAR DISORDER(S)**

Although, as stated in paragraph 2.2.1 to follow, bipolar disorder is a severe illness characterised by episodic mania or hypomania and depression, no definition can exhaustively capture both the conspicuous and nuanced nature of the illness. In this light, an appreciation of and distinction between its subtypes is imperative within the context of this thesis. As alluded to in chapter one, bipolar disorder is a complex illness to diagnose, treat and manage, whilst also being fraught with misconceptions. One such misconception is that there is only one type of bipolar disorder.<sup>81</sup> It accordingly follows that to understand bipolar disorder is to understand its subtypes, and to appreciate its subtypes, informs a greater understanding of the link between criminality and bipolar disorder.

### **2.2.1 Defining bipolar disorder**

The DSM-5-TR states that “[a] mental disorder is a syndrome characterized by clinically significant disturbance in an individual’s cognition, emotion regulation, or behaviour that reflects a dysfunction in the psychological, biological, or developmental processes underlying mental functioning. Mental disorders are usually associated with significant distress or disability in social, occupational, or other important activities.” Furthermore, it must contain these elements to be classified as such.<sup>82</sup>

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<sup>81</sup> Anonymous. “Bipolar disorder myths”, <https://www.mindpathcare.com/bipolar-disorder-myths/> (accessed 7 January 2020).

<sup>82</sup> DSM-5-TR 2022: 20.

Bipolar disorder is a “severe psychiatric disease characterized by recurrent alternating episodes of mania or hypomania and depression separated by euthymic periods that are variably affected by residual symptoms and dysfunction.”<sup>83</sup> It is “episodic, yet lifelong... and clinically severe affective (or mood) disorder”.<sup>84</sup>

### **2.2.2 Describing bipolar disorder**

Bipolar disorder has two main subtypes: bipolar I and bipolar II.<sup>85</sup> Bipolar I disorder is characterised by at least one lifetime manic episode and depressive episodes.<sup>86</sup> Bipolar II disorder is characterised by at least one depressive episode and hypomanic episode<sup>87</sup> but with no mania.<sup>88</sup> Other subtypes include *inter alia* cyclothymic disorder and substance/medication-induced bipolar and related disorder<sup>89</sup> which are not relevant for the present purposes as this chapter aims to give a brief contextual overview for this thesis.

Bipolar disorder is thought to be an amalgamation of biochemical, genetic and psychological factors<sup>90</sup> and commonly manifests in early adulthood.<sup>91</sup> In psychiatry, bipolar disorder, along with depression, is the most frequently diagnosed condition.<sup>92</sup> As well as being distinguished by mania or hypomania and major depressive episodes, it is associated with a high prevalence of comorbidity.<sup>93</sup> Comorbidities include *inter alia* anxiety disorders, conduct disorder, and substance use disorders.<sup>94</sup> Substance abuse presents acutely in patients with bipolar disorder<sup>95</sup> and is often an attempt to self-medicate or as a result of impulsivity and risk taking behaviour.<sup>96</sup>

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<sup>83</sup> Fovet *et al.* 2015: 349.

<sup>84</sup> Pini *et al.* 2005: 425.

<sup>85</sup> Kessler *et al.* 2010: 1.

<sup>86</sup> Rodseth 2011: 549.

<sup>87</sup> Motlana. “Medication Use in Bipolar Disorder”, <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>88</sup> Rodseth 2011: 549.

<sup>89</sup> DSM-5-TR 2022: 123.

<sup>90</sup> The South African Depression and Anxiety Group. “Ups and Downs of Bipolar Disorder”, [https://www.sadag.org/index.php?option=com\\_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#](https://www.sadag.org/index.php?option=com_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#) (accessed 7 November 2022).

<sup>91</sup> Rodseth 2011: 549.

<sup>92</sup> DSM-5-TR 2022: Xlii.

<sup>93</sup> Yatham & Maj 2010: 31.

<sup>94</sup> DSM-5-TR 2022: 132.

<sup>95</sup> Barnhill 2013: 70.

<sup>96</sup> Rodseth 2011: 551-552.

Bipolar disorder is also associated with an increased suicide risk.<sup>97</sup> Approximately one-third of bipolar disorder sufferers have attempted suicide; furthermore, the rate of suicide amongst bipolar disorder sufferers is the highest in all psychiatric disorders standing at approximately 25 per cent.<sup>98</sup> In addition hereto, bipolar disorder sufferers who have a comorbid alcohol abuse disorder are at an even higher suicide risk.<sup>99</sup>

Bipolar disorder normally requires lifelong treatment and, as such, treatment adherence is imperative,<sup>100</sup> although treatment adherence is notoriously problematic.<sup>101</sup> In addition, it can have an immensely disruptive influence on family life, socially and occupationally.<sup>102</sup> Concomitant herein are diminished insight into general and mental health.<sup>103</sup> It is contended that sufferers seldom regain complete psychosocial functioning between episodes and, as such, bipolar disorder can have a substantial impact on not only a sufferer's quality of life but also that of those around them.<sup>104</sup> Rodseth<sup>105</sup> describes bipolar disorder as either a slave or a master – and a cruel master at that.

## 2.3 SYMPTOMS AND DIAGNOSTIC CRITERIA OF BIPOLAR DISORDER

### 2.3.1 Background

It is averred that although psychiatric illnesses are often misdiagnosed, none is misdiagnosed more than bipolar disorder.<sup>106</sup> Bipolar disorder shares a number of symptoms with other psychiatric illnesses,<sup>107</sup> including conduct disorders, impulse control disorders, and antisocial personality disorders.<sup>108</sup> The high comorbidity rate of bipolar disorder with other mental disorders and substance abuse makes the diagnosis

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<sup>97</sup> Pini *et al.* 2005: 430.

<sup>98</sup> Barnhill 2013: 52.

<sup>99</sup> DSM-5-TR 2022: 132.

<sup>100</sup> Rodseth 2011: 551.

<sup>101</sup> Pini *et al.* 2005: 432.

<sup>102</sup> The South African Depression and Anxiety Group. "Ups and Downs of Bipolar Disorder", [https://www.sadag.org/index.php?option=com\\_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#](https://www.sadag.org/index.php?option=com_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#) (accessed 7 November 2022).

<sup>103</sup> Pini *et al.* 2005: 430.

<sup>104</sup> Renes *et al* 2014: 5.

<sup>105</sup> Rodseth 2011: 553.

<sup>106</sup> Noonan & Johnson 2002: 7.

<sup>107</sup> Goldstein 2012: 364-365.

<sup>108</sup> Noonan & Johnson 2002: 7.

of bipolar disorder even more challenging. Complicating matters further is the fact that some experts consider the DSM-5-TR diagnostic criteria for bipolar disorder to be excessively rigid.<sup>109</sup> Furthermore, the DSM-5-TR expressly discourages its use for legal purposes.<sup>110</sup> Thus, in addition to the aforementioned diagnostic criteria, a diagnostic and symptomatic overview of the episodes characteristic of bipolar disorder is included below.

### **2.3.2 Diagnostic overview and symptoms of bipolar disorder**

As stated in paragraph 2.2.2, bipolar disorder is characterised by both depression and mania or hypomania.<sup>111</sup> Familial history remains one of the greatest and most consistent risk factors for bipolar disorder, with the risk said to increase by a mean of ten-fold amongst family members of individuals who have bipolar I or bipolar II disorder.<sup>112</sup>

A diagnosis of bipolar I disorder does not require a history of depression.<sup>113</sup> It does, however, require at least one lifetime manic episode<sup>114</sup> and that social and occupational function are manifestly impaired.<sup>115</sup>

Conversely, with a diagnosis of bipolar II disorder, there must never have been a manic episode.<sup>116</sup> A diagnosis of bipolar II disorder does require at least one major depressive episode<sup>117</sup> and a hypomanic episode.<sup>118</sup> A diagnosis of hypomania requires a change in “baseline” which is noticeable to others.<sup>119</sup>

Bipolar II disorder has in the past been thought of as a milder form of bipolar I disorder which is incorrect.<sup>120</sup> Individuals with bipolar II disorder typically spend longer periods

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<sup>109</sup> Singh & Rajput 2006: 58.

<sup>110</sup> Kaliski 2012: 13.

<sup>111</sup> Motlana. “Medication Use in Bipolar Disorder”, <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>112</sup> DSM-5-TR 2022: 130.

<sup>113</sup> Barnhill 2013: 42.

<sup>114</sup> DSM-5-TR 2022: 124.

<sup>115</sup> Barnhill 2013: 42.

<sup>116</sup> DSM-5-TR 2022: 134.

<sup>117</sup> Barnhill 2013: 42.

<sup>118</sup> DSM-5-TR 2022: 132.

<sup>119</sup> Barnhill 2013: 42.

<sup>120</sup> DSM-5-TR 2022: 123.

in the depressed phase of the illness which can be debilitating. Additionally, the chronicity of bipolar II disorder is higher than that of bipolar I disorder.<sup>121</sup>

Literature variously describes symptoms of a depressive episode and a manic episode respectively, as outlined to follow.

### 2.3.2.1 Symptoms of a depressive episode

Symptoms of a depressive episode include:

- Depressed mood or anhedonia;<sup>122</sup>
- Sleep disturbances – insomnia or hyper-somnolence;<sup>123</sup>
- Change in appetite – no or reduced appetite or overeating;<sup>124</sup>
- Psychomotor slowness;
- Poor concentration and memory;<sup>125</sup>
- Low energy or tiredness;<sup>126</sup>
- Low self-esteem and feelings of worthlessness and guilt;
- Sense of hopelessness;<sup>127</sup>
- Loss of interest in appearance;<sup>128</sup>
- Suicidal ideation.<sup>129</sup>

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<sup>121</sup> DSM-5-TR 2022: 136.

<sup>122</sup> Anonymous. "Anhedonia", <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3181880/> (accessed 24 October 2019). The reduced ability to experience pleasure.

<sup>123</sup> Excessive and chronic daytime sleepiness. Anonymous. "Hyper somnolence", (<https://www.psychologytoday.com/za/conditions/hypersomnolence> (accessed 24 October 2019)).

<sup>124</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>125</sup> Rodseth 2011: 551.

<sup>126</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>127</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>128</sup> Rodseth 2011: 551.

<sup>129</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

### 2.3.2.2 Symptoms of a manic episode

Symptoms of a manic episode include:

- Euphoric or irritable mood;<sup>130</sup>
- Increased energy and decreased need for sleep;<sup>131</sup>
- Poor judgment<sup>132</sup> and insight,<sup>133</sup> planning and reasoning;<sup>134</sup>
- Pressured speech;<sup>135</sup>
- Flight of ideas;<sup>136</sup>
- Restlessness;<sup>137</sup>
- Grandiosity;<sup>138</sup>
- Expansiveness<sup>139</sup> and exaggerated self-confidence;
- Distractibility;<sup>140</sup>
- Impulsivity;<sup>141</sup>
- Antisocial behaviour;<sup>142</sup>
- Psychosis.<sup>143</sup>

### 2.3.3 The DSM-5-TR diagnostic criteria for bipolar disorder

The diagnostic criteria per the DSM-5-TR describes a manic episode as:

- A. A distinct period of abnormally and persistently elevated, expansive, or irritable mood and abnormally and persistently increased **goal-directed** activity or energy, **lasting at least 1**

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<sup>130</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>131</sup> Rodseth 2011: 551.

<sup>132</sup> Yoon *et al.* 2012: 113.

<sup>133</sup> Quanbeck *et al.* 2004: 198.

<sup>134</sup> Rodseth 2011: 551.

<sup>135</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>136</sup> Noonan & Johnson 2002: 5.

<sup>137</sup> Rodseth 2011: 551.

<sup>138</sup> Yoon *et al.* 2012: 113.

<sup>139</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>140</sup> Rodseth 2011: 551.

<sup>141</sup> Yoon *et al.* 2012: 113.

<sup>142</sup> Quanbeck *et al.* 2004: 198.

<sup>143</sup> Yoon *et al.* 2012: 113.

***week and present most of the day, nearly every day (or any duration if hospitalization is necessary)*** (emphasis supplied).

- B. During the period of mood disturbance and increased energy or activity, three (or more) of the [symptoms listed below] (four if the mood is only irritable) are present to a significant degree and represent a noticeable change from usual behaviour.
- C. The mood disturbance is ***sufficiently severe to cause marked impairment in social or occupational functioning*** or to necessitate hospitalization to prevent harm to self or others, or there are psychotic features (emphasis supplied).
- D. The episode is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication, other treatment) ***or to another medical condition***<sup>144</sup> (emphasis supplied).

It describes a hypomanic episode<sup>145</sup> as:

- A. A distinct period of abnormally and persistently elevated, expansive, or irritable mood and abnormally and persistently increased activity or energy, ***lasting at least 4 consecutive days and present most of the day, nearly every day*** (emphasis supplied).
- B. During the period of mood disturbance and increased energy and activity three (or more) of the [symptoms listed below] (four if the mood is only irritable) represent a noticeable change from usual behaviour and have been present to a significant degree.
- C. The episode is associated with an unequivocal change in functioning that is uncharacteristic of the individual when not symptomatic (emphasis supplied).
- D. The disturbance in mood and the change in functioning are observable by others (emphasis supplied).
- E. The episode is ***not severe enough to cause marked impairment in social or occupational functioning*** or to necessitate hospitalization. If there are psychotic features, the episode is, by definition, manic (emphasis supplied).
- F. The episode is not attributable to the physiological effects of a substance (e.g., a drug of abuse, a medication, other treatment).

The differences herein are in bold italics.

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<sup>144</sup> DSM-5-TR 2022: 124.

<sup>145</sup> DSM-5-TR 2022: 132-133.

The symptoms per the abovementioned criteria are:

1. Inflated self-esteem or grandiosity.
2. Decreased need for sleep (e.g., feels rested after only 3 hours of sleep).
3. More talkative than usual or pressure to keep talking.
4. Flight of ideas or subjective experience that thoughts are racing.
5. Distractibility (i.e., attention too easily drawn to unimportant or irrelevant external stimuli), as reported or observed.
6. Increase in goal-directed activity (either socially, at work or school, or sexually) or psychomotor agitation.
7. Excessive involvement in activities that have a high potential for painful consequences (e.g., engaging in unrestrained buying sprees, sexual indiscretions, or foolish business investments).<sup>146</sup>

The symptoms of a major depressive episode per the DSM-5-TR are:

1. Depressed mood most of the day, nearly every day, as indicated by either subjective report (e.g., feels sad, empty, or hopeless) or observation made by others (e.g., appears tearful). (Note: In children and adolescents, can be irritable mood.)
2. Markedly diminished interest or pleasure in all, or almost all, activities most of the day, nearly every day (as indicated by either subjective account or observation).
3. Significant weight loss when not dieting or weight gain (e.g., a change of more than 5% of body weight in a month) or decrease or increase in appetite nearly every day. (Note: In children, consider failure to make expected weight gain.)
4. Insomnia or hypersomnia nearly every day.
5. Psychomotor agitation or retardation nearly every day (observable by others; not merely subjective feelings of restlessness or being slowed down).
6. Fatigue or loss of energy nearly every day.
7. Feelings of worthlessness or excessive or inappropriate guilt (which may be delusional) nearly every day (not merely self-reproach or guilt about being sick).

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<sup>146</sup> DSM-5-TR 2022: 124-125; 132-133.

8. Diminished ability to think or concentrate, or indecisiveness, nearly every day (either by subjective account or as observed by others).
9. Recurrent thoughts of death (not just fear of dying), recurrent suicidal ideation without a specific plan, or a suicide attempt or a specific plan for committing suicide.<sup>147</sup>

For a diagnosis of bipolar I disorder, the criteria of a manic episode per above must be met.<sup>148</sup> The episode may be preceded or followed by a hypomanic or major depressive episodes.<sup>149</sup> There must be at least one lifetime manic episode.<sup>150</sup> While hypomania and major depressive episodes are common in bipolar I disorder, a hypomanic or major depressive episode is not required for the diagnosis of bipolar I disorder.<sup>151</sup>

For a diagnosis of bipolar II disorder, the criteria for a current or past hypomanic episode and a current or past major depressive episode per abovementioned criteria must be met.<sup>152</sup> Additionally, there must never have been a manic episode and the depressive symptoms or capricious fluctuations between hypomania and depression must cause “clinically significant distress.”<sup>153</sup>

## 2.4 TREATMENT OPTIONS FOR BIPOLAR DISORDER

Bipolar disorder is considered a complex disorder not only in terms of diagnosis and management<sup>154</sup> but also in terms of treatment.<sup>155</sup> Notably, monotherapy is generally insufficient with combination therapies being preferable.<sup>156</sup> No mood stabiliser is considered superior in the treatment of both depressive and manic/hypomanic

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<sup>147</sup> DSM-5-TR 2022: 125; 133.

<sup>148</sup> DSM-5-TR 2022: 123.

<sup>149</sup> DSM-5-TR 2022: 123.

<sup>150</sup> DSM-5-TR 2022: 124.

<sup>151</sup> DSM-5-TR 2022: 125.

<sup>152</sup> DSM-5-TR 2022: 132.

<sup>153</sup> DSM-5-TR 2022: 134.

<sup>154</sup> Rodseth 2011: 549.

<sup>155</sup> Motlana. “Medication Use in Bipolar Disorder”, <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>156</sup> Fovet *et al.* 2015: 351.

episodes and as such combination treatment is usually better suited to treatment needs.<sup>157</sup>

So-called mood stabilisers form the core treatment of both bipolar I and II disorder<sup>158</sup> and include lithium and anticonvulsants.<sup>159</sup> Various, lithium<sup>160</sup> or either lithium or anticonvulsants are considered the first line of treatment for acute mania.<sup>161</sup> More recently, however, a number of other medications have also demonstrated efficacy in the treatment of bipolar disorder. These include anticonvulsant drugs such as valproate, carbamazepine and lamotrigine, and antipsychotic drugs such as olanzapine, clozapine, risperidone,<sup>162</sup> chlorpromazine<sup>163</sup> and quetiapine<sup>164</sup> which are discussed below. While a detailed examination of the aforementioned medication is not warranted, context necessitates a brief explanation.

#### **2.4.1 Mood stabilisers**

Lithium has for decades been considered the cornerstone medication for treating bipolar disorder.<sup>165</sup> For patients that are suicidal, lithium remains the gold standard because of its efficacy.<sup>166</sup> Furthermore, a wealth of data supports lithium's effectiveness as a maintenance treatment.<sup>167</sup> Lithium is considered to be unsurpassed in the treatment of acute mania<sup>168</sup> but has demonstrated less efficacy when mania presents with depressive symptoms<sup>169</sup> or when a patient has experienced numerous prior affective episodes.<sup>170</sup> The antipsychotic quetiapine is, for example, considered

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<sup>157</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>158</sup> Rodseth 2011: 552.

<sup>159</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>160</sup> Strakowski *et al.* 2001:713-714.

<sup>161</sup> Mohan *et al.* 2009: 127.

<sup>162</sup> Strakowski *et al.* 2001:702.

<sup>163</sup> Strakowski *et al.* 2001:710.

<sup>164</sup> Strakowski *et al.* 2001:712.

<sup>165</sup> Strakowski *et al.* 2001:702.

<sup>166</sup> Fovet *et al.* 2015: 351.

<sup>167</sup> Strakowski *et al.* 2001:714.

<sup>168</sup> Strakowski *et al.* 2001:702.

<sup>169</sup> Kessler *et al.* 2010: 1.

<sup>170</sup> Strakowski *et al.* 2001:703.

more effective than lithium in the treatment of bipolar depression.<sup>171</sup> Lithium's side-effects include *inter alia* tremor, bodyweight gain, and gastrointestinal disturbances.<sup>172</sup>

Anticonvulsant medication includes lamotrigine which is used as a mono- or adjunct-therapy for bipolar depression and mild to moderate mania and, while effective herein, it is not as effective in controlling the symptoms of severe mania.<sup>173</sup> Side-effects of lamotrigine include *inter alia* dizziness, gastrointestinal disturbances, and headaches.<sup>174</sup> Carbamazepine has been found to have similar effectiveness to lithium in the treatment of acute mania.<sup>175</sup> Carbamazepine's side-effects include *inter alia* fatigue, dizziness, headaches, and gastrointestinal disturbances.<sup>176</sup> Valproate is indicated for the treatment of acute mania.<sup>177</sup> Side-effects include *inter alia* gastrointestinal disturbances, sedation, and bodyweight gain.<sup>178</sup>

None of the medications or treatments listed herein has demonstrated greater efficacy over another and, as such, the medication or combination of medication prescribed to a patient is largely determined by the patient's tolerability of the medication and their reaction to its adverse effects.<sup>179</sup> Meta-analysis, however, indicates that lithium is a more effective antimanic therapy than typical antipsychotic medication and that valproate, olanzapine and lithium are the first line treatments for acute mania.<sup>180</sup>

#### **2.4.2 Antipsychotics**

Conventional antipsychotics such as chlorpromazine are frequently used as a maintenance therapy or an adjunct therapy for acute mania. Side-effects commonly associated with conventional antipsychotics include *inter alia* bodyweight gain, skin rash, and dry mouth.<sup>181</sup>

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<sup>171</sup> Motlana. "Medication Use in Bipolar Disorder", <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>172</sup> Strakowski *et al.* 2001:703.

<sup>173</sup> Strakowski *et al.* 2001:709.

<sup>174</sup> Strakowski *et al.* 2001:703.

<sup>175</sup> Strakowski *et al.* 2001:707.

<sup>176</sup> Strakowski *et al.* 2001:703.

<sup>177</sup> Strakowski *et al.* 2001:707.

<sup>178</sup> Strakowski *et al.* 2001:703.

<sup>179</sup> Strakowski *et al.* 2001:702.

<sup>180</sup> Strakowski *et al.* 2001:713-714.

<sup>181</sup> Strakowski *et al.* 2001:710.

Atypical antipsychotics include olanzapine which has proven efficacy as a monotherapy in the treatment of acute mania.<sup>182</sup> Side-effects herein include *inter alia* dry mouth, dizziness, and bodyweight gain.<sup>183</sup> Clozapine is an effective treatment for acute mania particularly in patients with treatment resistant symptoms.<sup>184</sup> Side-effects include *inter alia* dizziness, gastrointestinal disturbances, and hypotension.<sup>185</sup> Risperidone is indicated for the treatment of acute mania both as a mono- or adjunct-therapy.<sup>186</sup> Its side-effects include *inter alia* drowsiness and dizziness.<sup>187</sup>

### **2.4.3 Antidepressants**

While there is a wide and effective range of treatment options for the manic phase of bipolar disorder<sup>188</sup> and some antipsychotics do have some effect on bipolar depression, treatment options for the depressive phase of bipolar disorder are generally poor.<sup>189</sup> Antidepressants are widely used in the treatment of bipolar depression but, per Strakowski *et al.*,<sup>190</sup> no antidepressant has the proven efficacy of lithium. On a similar note, Kessler *et al.*<sup>191</sup> describe their efficacy as questionable. In addition hereto, a risk exists that antidepressants may induce rapid cycling<sup>192</sup> or mania.<sup>193</sup> As such, antidepressants in treating bipolar disorder are best indicated for short-term use<sup>194</sup> and with caution.<sup>195</sup>

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<sup>182</sup> Strakowski *et al.* 2001:711.

<sup>183</sup> Strakowski *et al.* 2001:703.

<sup>184</sup> Strakowski *et al.* 2001:712.

<sup>185</sup> Strakowski *et al.* 2001:703.

<sup>186</sup> Strakowski *et al.* 2001:711-712.

<sup>187</sup> Strakowski *et al.* 2001:703.

<sup>188</sup> Kessler *et al.* 2010: 1.

<sup>189</sup> Kessler *et al.* 2010: 1.

<sup>190</sup> Strakowski *et al.* 2001:703.

<sup>191</sup> Kessler *et al.* 2010: 1.

<sup>192</sup> Rapid cycling is a “variant of bipolar disorder... characterized by an occurrence of at least four affective episodes of different polarities during a period of 12 months”. Zavorotnyy *et al.* 2009: 987.

<sup>193</sup> Zavorotnyy *et al.* 2009: 987.

<sup>194</sup> Strakowski *et al.* 2001:703.

<sup>195</sup> Motlana. “Medication Use in Bipolar Disorder”, <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

## 2.4.4 Electroconvulsive therapy

While historically controversial<sup>196</sup> and still sometimes considered to be a fringe treatment,<sup>197</sup> electroconvulsive therapy (ECT)<sup>198</sup> is indicated as a treatment for both treatment resistant bipolar depression<sup>199</sup> and for severe and treatment resistant acute mania.<sup>200</sup> Side-effects include memory loss.<sup>201</sup> It works rapidly and has limited side-effects.<sup>202</sup> It is widely considered to be not only safe but the most efficacious therapy for treatment resistant bipolar depression.<sup>203</sup>

## 2.5 BIPOLAR DISORDER AND CRIMINALITY

As detailed in paragraph 2.1 bipolar disorder remains a tremendously stigmatised and misunderstood illness.<sup>204</sup> Making matters more complex still, it is posited that bipolar disorder may be the most incorrectly diagnosed, and indeed misused, mental illness in a forensic setting.<sup>205</sup> The literature that charts the relationship between crime and mental illness and indeed between crime and bipolar disorder is often fraught with contradictions. Peay<sup>206</sup> offers an interesting perspective herein, stating that there may be a limited connection between mental illness and criminal behaviour and in other instances the two may be unquestionably intertwined, but very often the two exist in the same individual, separately, and with one having no bearing on the other. As such,

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<sup>196</sup> Kessler *et al.* 2010: 1.

<sup>197</sup> Kellner “Electroconvulsive therapy: The second most controversial medical procedure”, [http://www.sadag.org/index.php?option=com\\_content&view=article&id=1170:electroconvulsive-therapy-the-second-most-controversial-medical-procedure&catid=24&Itemid=132](http://www.sadag.org/index.php?option=com_content&view=article&id=1170:electroconvulsive-therapy-the-second-most-controversial-medical-procedure&catid=24&Itemid=132) (accessed 24 October 2019).

<sup>198</sup> “Electroconvulsive therapy is a procedure, done under general anesthesia, in which small electric currents are passed through the brain, intentionally triggering a brief seizure.” Mayo Clinic. <https://www.mayoclinic.org/tests-procedures/electroconvulsive-therapy/about/pac-20393894> (accessed 24 October 2019).

<sup>199</sup> Zavorotnyy *et al.* 2009: 987.

<sup>200</sup> Mohan *et al.* 2009: 127.

<sup>201</sup> Kellner “Electroconvulsive therapy: The second most controversial medical procedure”, [http://www.sadag.org/index.php?option=com\\_content&view=article&id=1170:electroconvulsive-therapy-the-second-most-controversial-medical-procedure&catid=24&Itemid=132](http://www.sadag.org/index.php?option=com_content&view=article&id=1170:electroconvulsive-therapy-the-second-most-controversial-medical-procedure&catid=24&Itemid=132) (accessed 24 October 2019).

<sup>202</sup> Mohammadbeigi *et al.* 2011: 57.

<sup>203</sup> Kessler *et al.* 2010: 1.

<sup>204</sup> The South African Depression and Anxiety Group. “Ups and Downs of Bipolar Disorder”, [https://www.sadag.org/index.php?option=com\\_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#](https://www.sadag.org/index.php?option=com_content&view=article&id=3031:ups-and-downs-of-bipolar-disorder&catid=57&Itemid=149#) (accessed 7 November 2022).

<sup>205</sup> Noonan & Johnson 2002: 5.

<sup>206</sup> Peay 2011: 159.

this is not and does not purport to be a cut-and-dried analysis into the relationship between crime and bipolar disorder as it is unclear if such a relationship truly does exist. It does, however, seek to consider the ostensible relationship by contemplating *inter alia* the influence of treatment nonadherence and substance abuse, the assertion that manic and depressive episodes have different criminal manifestations, the symptoms that potentially amplify the proclivity towards criminal behaviour, and the suitability of a conventional prison environment for offenders who have bipolar disorder.

### **2.5.1 The relationship between bipolar disorder and a crime or crimes**

In medieval times, mental illness was thought to be the product of possession and was regarded with suspicion and fear. Indeed, the *status quo* does not reflect a vast change in societal attitudes and mental illness is still regarded with suspicion and fear; the trope that “crazy” people are best avoided still persists.<sup>207</sup> Criminal acts committed by a small percentage of the mentally ill populace serve to further perpetuate prejudice and stigmatise an already maligned population.<sup>208</sup>

Contrary to this widely held belief, it is contended that serious mental illness in and of itself does not incline someone towards violent behaviour.<sup>209</sup> Yet, it is also contended that while most people who have a serious mental illness like bipolar disorder are not inclined towards violent behaviour, the sufferer of a serious mental illness has a higher likelihood of committing acts of violence than someone who does not suffer from a serious mental illness.<sup>210</sup>

Many reasons have been put forth to elucidate this phenomenon. Quanbeck *et al.*<sup>211</sup> contend that acts of violence committed by mentally ill patients are typically as a result of treatment nonadherence, psychosis and substance abuse. Yoon *et al.*<sup>212</sup> aver “historical, dispositional, and contextual factors” are more likely predictors of violent

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<sup>207</sup> Slobogin 2000: 667.

<sup>208</sup> Quanbeck *et al.* 2005: 480.

<sup>209</sup> Yoon *et al.* 2012: 116.

<sup>210</sup> Peay 2011: 92.

<sup>211</sup> Quanbeck *et al.* 2005: 478.

<sup>212</sup> Yoon *et al.* 2012: 116.

behaviour. A study by Daff and Stuart<sup>213</sup> further found that the predisposition towards crime also extends to nonviolent and intermediate level crime. Peay,<sup>214</sup> however, asserts that the knee-jerk association of mental illness with violence is lamentable given that it only serves to further stigmatise mental illness.

Negative outcomes of bipolar disorder are a high prevalence of criminal activity and a high recidivism rate<sup>215</sup> coupled with a high rate of arrest and subsequent incarceration.<sup>216</sup> Gómez *et al.*<sup>217</sup> terms these as medical legal complications. Fovet *et al.*<sup>218</sup> found that the patients with bipolar disorder have a higher predisposition to committing violent crimes than that of the general populace<sup>219</sup> and this predisposition presents more acutely in patients who have a comorbid substance use disorder.<sup>220</sup> Quanbeck *et al.*<sup>221</sup> found too that this elevated risk is augmented by substance abuse. Swann *et al.*<sup>222</sup> suggest that criminal behaviour in offenders with bipolar disorder is related to or perhaps hinges on substance abuse.<sup>223</sup> It is estimated that 50 per cent of bipolar disorder patients abuse illicit substances.<sup>224</sup>

Swann *et al.*<sup>225</sup> posit that impulsivity which is symptomatic of bipolar disorder amplifies the risk of arrest and incarceration. Not dissimilarly, Noonan and Johnson<sup>226</sup> make the assertion that criminality in sufferers of bipolar disorder is enabled by mania, as increased energy leads to impulsivity and grandiosity leads to impaired judgment. It is estimated that 50 per cent of patients who suffer from bipolar disorder lack insight into their condition.<sup>227</sup> Insight is described as having three parts:

- 1) a realization that one is mentally ill;
- 2) an attribution of one's symptoms as part of the illness; and

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<sup>213</sup> Daff & Stuart 2014: 1985.

<sup>214</sup> Peay 2011: 45.

<sup>215</sup> Fovet *et al.* 2015: 348.

<sup>216</sup> Swann *et al.* 2011: 173.

<sup>217</sup> Gómez *et al.* 2010: 374.

<sup>218</sup> Fovet *et al.* 2015: 348.

<sup>219</sup> Yoon *et al.* 2012: 113.

<sup>220</sup> Fovet *et al.* 2015: 348.

<sup>221</sup> Quanbeck *et al.* 2005: 478.

<sup>222</sup> Swann *et al.* 2011: 174.

<sup>223</sup> Swann *et al.* 2011: 174.

<sup>224</sup> Barnhill 2013: 41.

<sup>225</sup> Swann *et al.* 2011: 173-174.

<sup>226</sup> Noonan & Johnson 2002: 6.

<sup>227</sup> Quanbeck *et al.* 2005: 478.

3) acknowledging a need for treatment.<sup>228</sup>

Criminal acts are normally committed during manic episodes.<sup>229</sup> A study conducted by Yoon *et al.*<sup>230</sup> substantiates this assertion finding that the incidence of offences committed was higher when offenders were in a manic phase. Literature indicates that offenders with bipolar disorder are most commonly charged with *inter alia* assault, vandalism, threats to commit acts of violence, theft and arson.<sup>231</sup> Quanbeck *et al.*<sup>232</sup> assert that manic symptoms in patients with bipolar disorder substantially increase the likelihood of criminal offending and arrest. Yoon *et al.*<sup>233</sup> have found that archetypal mania symptoms including *inter alia* impulsivity, poor judgment, and psychosis, contribute to or incline patients to “assaultive and threatening behaviour” which they assert thus raises the risk of criminal offending.

Herein, however, Yoon *et al.*<sup>234</sup> aver that patients who display manic symptoms are more likely to commit petty crimes whilst patients who display depressive bipolar symptoms are more likely to commit violent crimes, including homicide. Peay<sup>235</sup> conversely states that while bipolar disorder augments the predisposition to violence, there exists no commensurate increase in a predisposition to committing homicide.

All of the above notwithstanding, the fact remains that patients with bipolar disorder, and indeed people who are mentally ill, tend to more likely be victims of violence as opposed to perpetrating it.<sup>236</sup> Prison is an already stressful environment and has the natural propensity to further compromise the mental health of an offender who suffers from bipolar disorder.<sup>237</sup> Peay<sup>238</sup> describes this environment from the perspective of a mentally ill prisoner as being potentially “violent, intimidating and frightening”. Furthermore, and as asserted above, mentally ill prisoners are more likely to be victimised.

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<sup>228</sup> Quanbeck *et al.* 2005: 478.

<sup>229</sup> Fovet *et al.* 2015: 348.

<sup>230</sup> Yoon *et al.* 2012: 113.

<sup>231</sup> Quanbeck *et al.* 2005: 478.

<sup>232</sup> Quanbeck *et al.* 2004: 198.

<sup>233</sup> Yoon *et al.* 2012: 113.

<sup>234</sup> Yoon *et al.* 2012: 113.

<sup>235</sup> Peay 2011: 75-76.

<sup>236</sup> Fovet *et al.* 2015: 348.

<sup>237</sup> Fovet *et al.* 2015: 351.

<sup>238</sup> Peay 2011: 121.

Swann *et al.*<sup>239</sup> found that offenders with bipolar disorder had a higher illness recurrence rate with predominantly manic episodes and impaired response inhibition. This, coupled with archetypal prison environment which is largely ill-suited to mentally ill offenders, only serves to perpetuate the revolving door of mental illness. This, in turn, lends substantial weight to alternative options to the conventional criminal justice system as discussed in the chapters that follow.

## **2.6 CONCLUSION**

This chapter has endeavoured to provide a comprehensive synopsis of the most pertinent aspects of bipolar disorder through which the rest of the thesis can be better appreciated. In so doing, the symptoms, DSM-5-TR diagnostic criteria and treatment options for bipolar disorder, as well as the purported relationship between bipolar disorder and criminal behaviour have been discussed. In examining the different sections, the chapter has also sought to highlight the inherently complex nature of bipolar disorder. As illustrated, a definitive answer as to the link between criminality and bipolar disorder is difficult to discern given the raft of contradictory literature on the subject.

As alluded to in chapter one, the management and treatment of mentally ill offenders in South Africa does not compare favourably to several of its contemporaries. It is not an improbable presupposition that this is exacerbated by the antithetical nature of the literature in respect of criminality, the narrow diagnostic criteria, the lack of objective and definitive diagnostic tools, and not least the stigma and stereotypes that surround bipolar disorder. Perhaps, partially or to an extent, this is why bipolar disorder has not received its due within South African jurisprudence or the South African legal discourse. Accordingly, the following chapter will study the legal position regarding offenders with bipolar disorder in South Africa. This study will also serve as the basis for the subsequent comparative studies contained in chapters four and five of the thesis.

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<sup>239</sup> Swann *et al.* 2011: 179.

## CHAPTER THREE: THE PRESENT LEGAL POSITION IN SOUTH AFRICA

### 3.1 INTRODUCTION

In South Africa, prior to the Rumpff Commission,<sup>240</sup> the M’Naghten Rules<sup>241</sup> were followed. These rules subscribed to the “right-wrong” test wherein the question of insanity (mental illness) was based on whether an accused knew what he or she was doing when the crime was committed and whether the accused understood that his or her actions were wrong.<sup>242</sup> In South Africa, these rules were followed with the extension of the so-called “irresistible impulse” test.<sup>243</sup> The crux hereof is that, notwithstanding the understanding by an accused that the act and the commission of such an act is wrong, when committing the criminal act the accused acts on an “irresistible and uncontrollable impulse”.<sup>244</sup>

The Rumpff Commission found the variation of the M’Naghten rules used in South Africa to be untenable and recommended that the law be amended so that “an accused who in respect of an alleged crime was not capable on account of mental disease or mental defect of appreciating the unlawfulness of his act, or of acting in accordance with such appreciation, shall be held not to be responsible”.<sup>245</sup> This provision was in turn formalised by its inclusion into the CPA<sup>246</sup> as the test for pathological incapacity and is contained in section 78(1).

It states that:

[a] person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable

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<sup>240</sup> The Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters chaired by Judge FL Rumpff was established in 1967 after Dimitrios Tsafendas, who killed HF Verwoerd the erstwhile prime minister of South Africa, was found to be incapable of standing trial by virtue of a mental defect. Burchell 2016: 276.

<sup>241</sup> So named after Daniel M’Naghten who, attempting to kill the erstwhile prime minister of England Sir Robert Peel, mistook his private secretary Edward Drummond for the prime minister and killed him. Shea 2001: 350.

<sup>242</sup> Aitken & Aitken 2010: 55.

<sup>243</sup> Burchell 2016: 276.

<sup>244</sup> Burchell 2016: 276.

<sup>245</sup> Burchell 2016: 276-277.

<sup>246</sup> Burchell 2016: 277.

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

In terms of section 78(1A) of the CPA, an accused must prove, on the balance of probabilities, that he or she suffers from a mental illness or intellectual disability when raising a defence of criminal incapacity. While not the subject of this thesis, it is worth noting the constitutionality of the reverse onus, with reference to the presumption of innocence contained in section 35(3)h and the right to equality before the law, and the equal protection of the law per section 9(1) of the *Constitution of the Republic of South Africa, 1996* (hereafter the “*Constitution*”), is questionable.<sup>247</sup>

In respect of the above, there is no formal definition for mental illness.<sup>248</sup> It is averred that the behaviour of an accused holds higher persuasive value to a court than a specified label of a particular illness.<sup>249</sup> Indeed, in *Mahlinza*<sup>250</sup> the court observed that attempting to define the concept of mental illness was unwise. While not wholly satisfactory, it is averred that the closest, codified definition lies in *Stellmacher*<sup>251</sup> wherein the court held that a mental illness is “a pathological disturbance of the accused's mental capacity, and not a mere temporary mental confusion which was attributable, not to a mental abnormality, but external stimuli such as, *inter alia*, alcohol”.

Mental illness and pathological incapacity are not precise, scientific terms but rather legal terms that connote mental states that absolve completely or in part an accused from criminal accountability. Per Burchell,<sup>252</sup> “what constitutes a mental illness or defect for purposes of the defence of pathological incapacity is essentially a question of law and evidence, not only psychiatric classification”. Thus, it is left to the courts, albeit often with the assistance of expert medical evidence, to decide in this regard.

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<sup>247</sup> Burchell 2016: 296.

<sup>248</sup> Burchell 2016: 280.

<sup>249</sup> Swanepoel 2009: 112.

<sup>250</sup> *S v Mahlinza* 1967 (1) SA 408 (A): 418.

<sup>251</sup> *S v Stellmacher* 1983 (2) SA 181 (SWA): 182.

<sup>252</sup> Burchell 2016: 279.

Mood disorders, of which bipolar disorder is one,<sup>253</sup> have been advanced both as a defence and in mitigation of sentence in South African courts with mixed success, as illustrated in paragraph 3.5 below. Bipolar disorder is, in this regard, striking in two respects: first, it barely features judicial proceedings and, secondly, when it is advanced, it is met with largely limited success. Depression, which is likewise a mood disorder, has conversely found success in South African courts both as a defence of pathological incapacity<sup>254</sup> and in mitigation of sentence.<sup>255</sup>

The state must prove, beyond a reasonable doubt, that an accused has committed an unlawful, voluntary act which, when coupled with criminal capacity and fault, results in criminal liability.<sup>256</sup> Burchell<sup>257</sup> sets forth the elements of crime as the unlawful act, causation, criminal capacity, and fault. Not dissimilarly, Snyman<sup>258</sup> lists the elements as the unlawful act, meeting the definitional elements of the crime, criminal capacity, and culpability. Accordingly, a defence of pathological incapacity based on bipolar disorder could, theoretically at least, exclude the act and culpability (capacity) elements of crime.

Unlike pathological incapacity, diminished capacity is not a defence, it is only germane to matters of sentencing.<sup>259</sup> Mental illness is a continuum of wide variation and, as such, while an accused with a mental condition might be found to be criminally liable and accordingly the conviction does not justify an acquittal on the basis of mental illness, a court may impose lesser punishment by virtue of section 78(7) of the CPA.<sup>260</sup>

In this chapter, and in line with the concepts briefly discussed in this introduction, South African legislation as it pertains to offenders who suffer from mental illness and consequently those who suffer from bipolar disorder, are discussed. In addition hereto, the chapter sets out the fundamental aspects pertaining to expert medical evidence with particular reference to psychiatric and psychological expert evidence. This is followed by a discussion of sentencing options available to courts both in terms of

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<sup>253</sup> Anonymous. "Mood disorder", <https://www.hopkinsmedicine.org/health/conditions-and-diseases/mood-disorders> (accessed 9 March 2020).

<sup>254</sup> *S v Kavin* 1978 (2) SA 731 (W).

<sup>255</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD).

<sup>256</sup> Burchell 2016: 51.

<sup>257</sup> Burchell 2016: 51-53.

<sup>258</sup> Snyman 2020: 127.

<sup>259</sup> *S v Mnisi* 2009 (2) SACR 227 (SCA): 231.

<sup>260</sup> Burchell 2016: 304.

pathological incapacity and diminished capacity. Lastly, a collation of case law specific to the topics discussed in this chapter including both bipolar disorder and mental illness is included.

## 3.2 LEGISLATION

South Africa's *Constitution* is the supreme law of the Republic and, as such, any law contrary to it is invalid.<sup>261</sup> Its fundamental values centre on *inter alia* human dignity and equality.<sup>262</sup> Crucially, the *Constitution* contains a number of inalienable rights which are discussed below, and which are of particular importance in respect of offenders who are mentally ill or intellectually disabled.

Also of cardinal importance and arguably the most fundamental statutory provisions concerning mentally ill or intellectually disabled offenders, are secs. 77, 78 and 79 of the CPA.<sup>263</sup> As such, this legislation is studied in greater detail below. Lastly, the *Mental Health Care Act* (hereinafter referred to as the "MHCA"),<sup>264</sup> which is also expanded upon below, reaffirms the rights generally of those who suffer mental illness or intellectual disabilities and contains a number of practical arrangements in respect of orders envisaged in secs. 77 and 78 of the CPA.

### 3.2.1 *The Constitution of the Republic of South Africa, 1996*

Section 1(a) of the *Constitution* states that:

[t]he Republic of South Africa is one, sovereign, democratic state founded on the following values: *Human dignity* (emphasis supplied), the *achievement of equality* (emphasis supplied) and the *advancement of human rights* (emphasis supplied) and freedoms.

In addition hereto, section 2 holds that the *Constitution* is the supreme law of South Africa and that any conduct or law contrary to the *Constitution*, with the exception of a narrow range of limitations to the rights contained in section 36, is invalid.

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<sup>261</sup> *Constitution of the Republic of South Africa, 1996: sec. 2.*

<sup>262</sup> *Constitution of the Republic of South Africa, 1996: sec. 1.*

<sup>263</sup> *Criminal Procedure Act 51 of 1977.*

<sup>264</sup> *Mental Health Care Act 17 of 2002.*

The preamble highlights *inter alia* the societal imperative of fundamental human rights and equal protection of the law. Accordingly, while the sections discussed below are of course relevant to everyone, they take on particular significance in relation to and when dealing with mentally ill offenders.

Section 9(1) reiterates equality before the law and equal protection of the law. As the court pointedly noted in *S v Ferreira and Others*<sup>265</sup> “only by judging [a] case on [the] basis” of putting itself into the position of the accused can the right to equality as embodied in section 9(1) of the *Constitution* be ventilated. Section 9(3) states that no one may be unfairly discriminated against by the state based on *inter alia disability* (emphasis supplied) which, given that bipolar disorder is the sixth most prevalent disability globally,<sup>266</sup> is particularly pertinent herein.

Section 12 deals with freedom and security of the person. Of particular relevance is section 12(1)(e) in which the right “not to be treated or punished in a cruel, inhuman or degrading way” is enshrined.

In respect of the abovementioned, and with particular reference to secs. 9(2), 9(3), 10,<sup>267</sup> and 12(1) (e), it could be further argued that an accused cannot be blamed for having a mental disorder or defect and, accordingly, cannot be punished for a crime committed under the influence of such a disorder or defect.<sup>268</sup> Ultimately, by punishing an accused or an offender who suffers from mental illness at the time of committing crime, they are being punished for a condition from which they suffer through no fault of their own. The line of thought follows that an accused who is mentally ill and who, accordingly, does not fulfil the cognitive or conative requirements as per section 78(1) of the CPA at the time of committing crime, cannot or indeed should not be found guilty of a crime.

Section 27 deals with basic necessities such as healthcare, food, water and social security which guarantees the right to *inter alia* health care services in section 27(1).

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<sup>265</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA): 467-468.

<sup>266</sup> Motlana. “Medication Use in Bipolar Disorder”, <https://hdl.handle.net/10520/EJC162019> (accessed 7 January 2020).

<sup>267</sup> The right to human dignity is enshrined in sec. 10 of the *Constitution* wherein it is stated that “[e]veryone has inherent dignity and the right to have their dignity respected and protected”.

<sup>268</sup> Burchell 2016: 280.

This is therefore likewise imperative when considering the extensive treatment requirements of bipolar disorder.

Lastly, section 35 deals with due process rights and, more specifically, the rights of accused, detained and arrested persons. These rights are axiomatic and do not warrant further discussion as section 35 does not fall within the scope of this thesis. It must, however, be noted that the rights extended in this section and the provisions herein contained are of particular relevance and significance given the well-founded perception of the vulnerability of mentally ill accused or offenders.

### **3.2.2 *The Criminal Procedure Act 51 of 1977***

Section 77 deals with an accused's capacity to understand proceedings. Section 77(1) states that

[i]f it appears to the court at any stage of criminal proceedings that the accused is by reason of mental illness or intellectual disability not capable of understanding the proceedings so as to make a proper defence, the court shall direct that the matter be enquired into and be reported on in accordance with the provisions of section 79.

Section 77(2) holds that if the finding in the section 79 report, contemplated in section 77(1) by the persons entrusted with enquiring into the mental condition of the accused, is unanimous and is not contested by the prosecution or accused, no further evidence needs to be led. In terms of section 77(3), should the findings in the report not be unanimous or should the findings be unanimous but contested by the prosecution or the accused, the matter will be decided by the court after evidence is led and to this extent the prosecution and the accused may lead evidence which may include that of the persons who compiled the report. In accordance with section 77(5), should a "court find that the accused is capable of understanding the proceedings so as to make a proper defence, the proceedings shall be continued in the ordinary way".

As alluded to in paragraph 3.2, and undoubtedly the most fundamental piece of South African legislation that deals with the mentally ill offender, is section 78 of the CPA<sup>269</sup>

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<sup>269</sup> *Criminal Procedure Act 51 of 1977.*

with particular reference to section 78(1) which deals with pathological incapacity. It holds that:

[a] person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

As such, an accused is only said to have “acted with culpability” if he or she has the requisite criminal capacity.<sup>270</sup> Pertinently herein, the court in *van der Westhuizen* quoting Burchell<sup>271</sup> held *obiter* that “[t]he formulation of this test of insanity in South African law requires that the mental illness or defect should have caused the accused to be incapable of acting in accordance with an appreciation of the [unlawfulness] of his act”.<sup>272</sup> Burchell<sup>273</sup> succinctly states that “[t]he test for pathological incapacity is whether an accused at the time of the offence suffered from a mental illness or defect that deprived him or her of capacity for insight or self-control....” Whether the mental illness is of a transient or permanent nature is irrelevant.<sup>274</sup> The fundamental nature of this section lies in the two-stage enquiry and specifically the nature of enquiry which is either cognitive or conative.<sup>275</sup>

The fact that an offender suffers from a mental illness or mental disability is of no consequence in terms of lacking criminal capacity if either the cognitive or conative elements of the test are not fulfilled.<sup>276</sup> The cognitive element denotes that the mental illness that an accused suffered from at the time of the commission of the crime must have affected his or her insight as to the unlawfulness of the act and the conative element denotes that an accused must have lacked the “capacity to control” his or her

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<sup>270</sup>     Snyman 2020: 136.

<sup>271</sup>     Burchell 2005: 382.

<sup>272</sup>     *S v van der Westhuizen* 2011 (2) SACR 26 (SCA): 51.

<sup>273</sup>     Burchell 2016: 278-279.

<sup>274</sup>     Chetty 2008: 131.

<sup>275</sup>     Burchell 2016: 280.

<sup>276</sup>     Burchell 2016: 287.

actions in accordance with the aforementioned insight at the time of the commission of the crime.<sup>277</sup> The cognitive test is biological or pathological in nature and the conative test is psychological.<sup>278</sup> It is asserted that the basis upon which the majority of so-called 'insanity' cases are decided is the second test.<sup>279</sup>

Further hereto, section 78(1A) states that “[e]very person is presumed not to suffer from a mental illness or intellectual disability so as not to be criminally responsible in terms of section 78(1), until the contrary is proved on a balance of probabilities.” In this regard, it must be further noted that in accordance with section 78(1B), “the burden of proof of criminal responsibility of the accused shall be on the party who raises the issue”. Section 78(2) empowers the court to “direct that the matter be enquired into and be reported on in accordance with the provisions of section 79” of the CPA.

Ancillary to section 78(1) is section 78(6) which deals with the correctional aspect of the former. It requires that, should a court find that an accused is found to have committed the offence in question but at the time of the commission thereof “was by reason of mental illness or intellectual disability not criminally responsible for such act”, it must in abeyance with section 78(6)(a) “find the accused not guilty” or in abeyance with section 78(6)(b), if an accused has been convicted of the offence in question, the court shall, prior to sentencing, “set the conviction aside and find the accused not guilty, by reason of mental illness or intellectual disability, as the case may be...” If the latter is the case, options available to the court are as follows:

- (i) in a case where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be-
  - (aa) detained in a psychiatric hospital;
  - (bb) temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary

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<sup>277</sup> Burchell 2016: 280.

<sup>278</sup> Chetty 2008: 131.

<sup>279</sup> Chetty 2008: 132.

to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public,

pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

(cc) admitted to and detained in a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(cc) ...;

(dd) released subject to such conditions as the court considers appropriate;

(ee) released unconditionally; or

(ff) referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005; or

(ii) in any other case than a case contemplated in subparagraph (i), that the accused be-

(aa) admitted to and detained in a designated health establishment stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(bb) ...;

(cc) released subject to such conditions as the court considers appropriate;

(dd) released unconditionally; or

(ee) referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005.

Section 78(7) deals with diminished criminal capacity in sentencing an offender and permits the court to take the accused's mental illness or intellectual disability into account in this regard. This section will be dealt with in more detail in paragraph 3.4.2 below. Section 78(8) deals with appeals of findings made in terms of section 78(6) if no allegation was made by an accused in terms of section 78(2). Lastly, and also in this regard, if an appeal is successful regarding a finding under section 78(6), section

78(9) states that the case must be remitted to the court *a quo* that made the finding and that “the relevant proceedings shall be continued in the ordinary course”.

Section 79 contains the directives for panel enquiries and reports per secs. 77 and 78. In accordance with enquires contemplated in secs. 77(1) or 78(2), section 79(1)(a) holds that when a court issues such a directive, it must “be conducted and reported on where the accused is charged with an offence<sup>280</sup>... by the head of the designated health establishment designated by the court, or by another psychiatrist delegated by the head concerned”. Section 79(2)(a) holds that the court may, for the purposes of the enquiry, direct that the accused be committed to a psychiatric hospital or “to any other place designated by the court, for [a] period not exceeding thirty days at a time....” This period can, however, be extended in terms of section 79(2)(b).

The report must be filed with the registrar or clerk of the court with copies being made available to both the prosecutor and the accused per section 79(3). In section 79(4)(a-d), it is stated that the report must contain *inter alia* the diagnosis and finding in terms of section 77(1) or section 78(2). Section 79(5) holds that if the findings in the report are not unanimous, each member of the panel of enquiry must state their own findings.

### **3.2.3 Mental Health Care Act 17 of 2002**

The preamble to the MHCA recognises the constitutional imperative of the prohibition of “unfair discrimination of people with mental or other disabilities”. Further, it states that persons or property of a person with mental disorders or mental disabilities may require protection and, conversely, that the public or their property may require protection from persons with mental disorders or mental disabilities. It further acknowledges the need to provide mental health care services which promote the well-being of both the people who require them and their communities.

Section 10 of the MHCA deals specifically with unfair discrimination and states *inter alia* that:

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<sup>280</sup> Sec. 79(1)(b) contains a list of serious offences, including rape and murder, to which 79(1)(a) is not applicable. More options are available to the court herein including the *ex officio* appointment of a psychiatrist per sec. 79(1)(b)(i) or clinical psychologist per sec. 79(1)(b)(iv).

(1) [a] mental health care user may not be unfairly discriminated against on the grounds of his or her mental health status; [and]

(2) [e]very mental health care user must receive care, treatment and rehabilitation services according to standards equivalent to those applicable to any other health care user.

Section 11 concerns the prevention of exploitation and the protection of the so-called mental health care user (as per the Act) with section 11(1)(a) holding that any organisation *inter alia* that provides treatment and rehabilitation services must ensure that mental health care users are protected against abuse and degrading treatment.

Section 15(1) concerns the right of a mental health care users to representation, including legal representation, when:

(a) submitting an application;

(b) lodging an appeal; or

(c) appearing before a magistrate, judge or a Review Board, subject to the laws governing rights of appearances at a court of law.

Ancillary and complimentary to the general provisions above, and set out in the Act, are the sections that deal specifically with state patients and mentally ill prisoners contained in Chapters six and seven, respectively.

Section 42 in Chapter six deals specifically with the admission of state patients with section 42(1)(a)-(b) holding that when a state patient is to be admitted per the CPA for “mental health care, treatment or rehabilitation” by an order of the court, the Registrar or the Clerk of the court must issue a copy of the order to both the *curator ad litem* and the officer who is in charge of the detention centre where the state patient is or will be held.

Section 42(2) requires that the officer who oversees the detention centre send a copy of the order within fourteen days to the national department to arrange transfer to the designated health facility. Section 42(3)(a) states that the head of the national department must identify the health facility and section 42(3)(b) mandates that the arrangements for the transfer must be arranged within fourteen days and such transfer must also be effected no more than fourteen days thereafter per section 42(4).

Section 47 deals extensively with application for the discharge of state patients. Any of the following persons may apply to a judge in chambers for the discharge of a state patient per section 47(1):

- a) The State patient;
- b) an official *curator ad litem*;
- c) an administrator, if appointed;
- d) the head of the health establishment at which a State patient is admitted;
- e) the medical practitioner responsible for administering care, treatment and rehabilitation services to a State patient;
- f) a spouse, an associate or a next of kin of a State patient; or
- g) any other person authorised to act on behalf of a State patient.

Section 47(2) contains the provisions which must be met before an application for discharge can be made and must include the following:

- (a) reasons for the application;
- (b) a report by a psychologist, if the State patient has been assessed by such a person;
- (c) where the applicant is an official *curator ad litem* or an administrator, a report containing a history and a prognosis of a mental health status of the State patient from:
  - (i) the head of the health establishment where the State patient is admitted; and
  - (ii) two mental health practitioners and one of whom must be a psychiatrist;
- (d) details of any application made for the discharge of the State patient within twelve months before the application in question;
- (e) in the case where the applicant is not an official *curator ad litem* or administrator, an indication of whether the current curators may have a conflict of interest with the State patient and supply proof that a copy of the application has been given to the curators concerned;
- (f) in the case where the applicant is an associate or the person referred to in paragraph (e), the nature of the substantial or material interest or the nature of the conflict, if any; and
- (g) any information relevant to the application held by the applicant.

Section 47(4) lists what a judge in chambers must consider when dealing with an application for discharge. The judge:

- a) must establish whether another application for the discharge of the State patient concerned is pending or had been considered within a period of 12 months, in which case, the application referred to in subsection (3) must be dismissed;
- b) must establish whether the official *curator ad litem* has a conflict of interest with the State patient, in which case a legal practitioner must be appointed to assist in the processing of the present application; and
- c) may call for further information and assistance from the applicant, mental health practitioner or a relevant curator, as may be necessary to process the application.

According to section 47(5), the legal practitioner appointed in terms of subsection 4(b) must:

- a) adduce any available evidence relevant to the application;
- b) perform the functions and duties as required by the judge in chambers concerned to process the application; and
- c) be remunerated by the national department responsible for justice and constitutional development according to the tariffs and scale of benefits and allowances determined for this purpose by the member of Cabinet responsible for justice and constitutional development.

Lastly, section 47(6) lists the options available to the judge in determining the application for discharge. The judge can order that the state patient:

- a) remain a State patient;
- b) be reclassified and dealt with as a voluntary, assisted or involuntary mental health care user in terms of Chapter 5 of the Act;
- c) be discharged unconditionally; or
- d) be discharged conditionally.

Section 49 in Chapter seven specifically deals with mentally ill prisoners and designates that “[t]he head of the national department must, with the concurrence of the heads of the provincial departments, designate health establishments, which may admit, care for, treat and provide rehabilitation services to mentally ill prisoners”.

With reference to orders made where a prisoner is to be detained pending the decision of a judge in chambers, section 55(1) directs that “[t]he head of a health establishment in which a mentally ill prisoner is detained must cause the mental health status of that mentally ill prisoner to be reviewed every six months from the date on which the prisoner was received in that health establishment”. It must also be noted that section 46 concerns the periodic review of state patients and largely mirrors section 55 in content.

Section 55(2) holds that the review must:

- (a) specify the mental health status of the mentally ill prisoner; and
- (b) set out recommendations regarding:
  - (i) a plan for further care, treatment and rehabilitation services for the mentally ill prisoner; and
  - (ii) the merits of returning the mentally ill prisoner to the prison from which the prisoner was initially transferred.

Section 55(3) stipulates that:

[t]he head of the health establishment must submit a summary report of the review to the:

- (a) Review Board;
- (b) relevant magistrate;
- (c) administrator, if appointed; and
- (d) head of the relevant prison.

Section 55(4) states that:

within thirty days after receipt of the report, the Review Board:

- (a) may consult with any person who may have information concerning the mental status of the prisoner concerned;
- (b) must make recommendations regarding:
  - (i) a plan for further care, treatment and rehabilitation of the mentally ill prisoner concerned; and
  - (ii) the return of that prisoner to the prison from which the prisoner was initially transferred; and

(c) must send a written notice of its recommendation and the reasons for such recommendation to the mentally ill prisoner, the administrator if appointed, the head of the relevant health establishment, the head of the national department and the magistrate concerned.”

Section 56 makes provision for mentally ill prisoners who have recovered holding that, should the head of the health establishment where the prisoner is held observe or be informed that the prisoner has recovered to the extent that care and treatment can be ceased, or has recovered to the degree that care and treatment can be continued in prison, the head of the establishment must:

- a) compile an appropriate discharge report;
- b) inform the head of the prison that the prisoner is ready for discharge and collection by the prison officials; and
- c) inform the relevant magistrate in writing.

### **3.3 EXPERT EVIDENCE**

The need for expert evidence within the sphere of criminal litigation can be traced back to the 14<sup>th</sup> century.<sup>281</sup> It has as its core function, first and foremost, a duty to assist a court. While the relationship between the court and the expert is often fraught in light of the phenomenon of the ‘hired-gun’, expert evidence is indispensable in matters where a court is tasked with deciding an issue which falls outside the scope of its “ordinary judgment and practical experience”.<sup>282</sup> In *S v Mabena*,<sup>283</sup> the court also cited the Rumpff Commission’s report,<sup>284</sup> holding that “[m]ental illness” and “mental defect” are morbid disorders that are not capable of being diagnosed by a lay court without the guidance of expert psychiatric evidence. An inquiry into the mental state of an accused person that is embarked upon without such guidance is bound to be directionless and futile”.<sup>285</sup>

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<sup>281</sup> Van der Hoven 2006: 152.

<sup>282</sup> Stevens & Lubaale 2016: 94.

<sup>283</sup> *S v Mabena and Another* 2007 (1) SACR 482 (SCA): 488.

<sup>284</sup> Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (RP 69/1967).

<sup>285</sup> *S v Mabena and Another* 2007 (1) SACR 482 (SCA): 489.

It must be noted, however, that when faced with the task of venturing a diagnosis in a legal setting, “practitioners should be mindful of the tentative nature of psychiatric diagnoses and that courts require that such a diagnosis must have scientific credibility”.<sup>286</sup> In the fields of psychiatry and psychology, outcomes are often measured subjectively rather than objectively when compared to radiology or surgery, for example. Indeed, the court in *Ferreira*<sup>287</sup> held that the actions of an accused cannot be viewed objectively by the court but must rather be observed from the perspective of the accused. In doing so, only then can a court give effect to an accused’s constitutional right to equality.<sup>288</sup>

To follow, some of the fundamental aspects of expert evidence in South Africa are discussed. As a point of departure, a brief overview of expert evidence within a South African context is provided. It is against this background that the qualifications that are required of an expert by a court when expert evidence is required, and the value of expert evidence provided to a court, is examined. This is followed by a discussion of the admissibility of expert evidence, the rules regarding expert evidence, and the duties of an expert to the court. Following on this, the principle that the court is the final arbiter of a dispute before a court is expanded on. Lastly, the phenomenon of the ‘hired gun’ is analysed.

### **3.3.1 The imperative of expert evidence in South Africa within the South African criminal justice system**

In South Africa, there exists no hard and fast rule regarding the force and indeed persuasive value of expert evidence.<sup>289</sup> The evidence of expert witnesses may be led “by reason of their special knowledge and skill, they are better qualified to draw inferences than the trier of fact”.<sup>290</sup> Expert evidence can serve to fortify and bolster the creditability of a narrative that is spun at trial; it can supplement other evidence or be used to assail the opponent’s evidence or expert evidence.<sup>291</sup>

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<sup>286</sup> Swanepoel 2015: 3246.

<sup>287</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA): 467.

<sup>288</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA): 467-468.

<sup>289</sup> Visser *et al.* 2014: 870-871.

<sup>290</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 772.

<sup>291</sup> Meintjes-Van der Walt 2003: 357.

While courts in South Africa are not bound by expert evidence,<sup>292</sup> they are often “mercifully dependant” on it.<sup>293</sup> By way of example, the CPA does not distinguish between mental illness and mental disability and, as such, the answer often comes from expert psychiatric evidence.<sup>294</sup> In addition hereto, a court cannot reach a decision about criminal incapacity without expert psychiatric or psychological evidence per section 78(2), read with section 79(1) of the CPA.

### **3.3.2 Admissibility of expert evidence**

Expert evidence is opinion evidence. As a general rule, opinion evidence is disallowed in South African courts as courts must form their own opinions in deciding a matter before them.<sup>295</sup> However, expert evidence, if relevant, is an exception.<sup>296</sup>

South African courts have also variously formulated criteria upon which expert evidence should be based. In *Roodt*,<sup>297</sup> the court outlined the following principles applicable to the admissibility of expert opinion evidence in the given case:

1. [T]he witness must be called to give evidence on matters calling for specialised skill or knowledge. It is therefore necessary for [the] court to determine whether the subject of the enquiry does raise issues calling for specialised skill or knowledge. Evidence of opinion on matters which do not call for expertise is excluded because it does not help the court. At best, it is superfluous and, at worst, it could be a cause of confusion.
2. [Courts] are accustomed to receiving the evidence of psychologists and psychiatrists, particularly in our criminal courts. However, we should not elevate the expertise of the witness to such heights that we lose sight of the court's own capabilities and responsibilities.
3. [T]he witness must be a qualified expert. It is for the Judge to determine whether the witness has undergone a course of special study or has experience or skill as will render him or her an expert in a particular subject. It is certainly not necessary for the expertise to have been acquired professionally.

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<sup>292</sup> Meintjes-Van der Walt 2003: 371.

<sup>293</sup> Lerm 2015: 37.

<sup>294</sup> Snyman 2020: 151.

<sup>295</sup> Van der Hoven 2006: 158.

<sup>296</sup> *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für Schädlingbekämpfung MBH* 1976 (3) SA 352 (A): 370.

<sup>297</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 772-773.

4. [T]he facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others. If the expert has observed them, then the expert must testify as to their existence... Obviously the expert must furnish criteria for testing the accuracy and objectivity of his or her conclusion. The court must be told of the premises upon which the opinion is based. Since the testimony of an expert is likely to carry more weight, it is thus understandable that higher standards of accuracy and objectivity should be required.
5. [T]he guidance offered by the expert must be sufficiently relevant to the matter in issue which is to be determined by the court.
6. [O]pinion evidence must not usurp the function of the court. The witness is not permitted to give opinion on the legal or the general merits of the case. The evidence of the opinion of the expert should not be proffered on the ultimate issue. The expert must not be asked or answer questions which the court has to decide.

Not dissimilarly, in *Engelbrecht*,<sup>298</sup> the court outlined the following principles applicable to expert evidence:

1. The matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge;
2. the witness must be a person with experience or skill to render her or him an expert in a particular subject;
3. the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the court;
4. the expertise of any witness should not be elevated to such heights that the court's own capabilities and responsibilities are abrogated;
5. the opinion offered to the court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others; and
6. the opinion of such a witness must not usurp the function of the court.

### **3.3.3 Rules of expert evidence**

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<sup>298</sup> *S v Engelbrecht* 2005 (2) SACR 41 (W): 54-55.

A party that intends on calling on expert testimony does not have to inform the other party of the content of the evidence that will be called, nor does the latter have to avail the former of the identity of the experts who will be called.<sup>299</sup> If expert witnesses are called, however, the party who calls the witness must do so in accordance with the notice period contemplated in Rule 36(9) of the Uniform Rules of Court so as to negate so-called trial by ambush.<sup>300</sup>

The rule states that:

[n]o person shall, save with the leave of the court or the consent of all parties to the suit, be entitled to call as a witness any person to give evidence as an expert upon any matter upon which the evidence of expert witnesses may be received unless he shall-

- (a) not less than fifteen days before the hearing, have delivered notice of his intention so to do; and
- (b) not less than ten days before the trial, have delivered a summary of such expert's opinion and his reasons therefor.

A court will only be in a position to use expert evidence when it has been illuminated by the evidence in question when adjudicating a matter.<sup>301</sup> The court in *Jacobs*<sup>302</sup> held that “it is of the great importance that the value of the opinion should be capable of being tested; and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it”.

### **3.3.4 Duties and qualifications of an expert**

It is for a court to decide if an expert who testifies before it is indeed an expert. An expert does not need academic qualifications<sup>303</sup> or to be professionally trained<sup>304</sup> or to have gained their expertise professionally to be regarded as an expert. When a purported expert is “better qualified to draw inferences than the trier of fact” by virtue

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<sup>299</sup> Van den Heever & Lawrenson 2015: 31.

<sup>300</sup> Van den Heever & Lawrenson 2015: 31.

<sup>301</sup> Meintjes-Van der Walt 2003: 365.

<sup>302</sup> *Rex v Jacobs* 1940 TPD 142: 146.

<sup>303</sup> Schwikkard 2010: 970.

<sup>304</sup> Meintjes-Van der Walt 2003: 362.

of “their special knowledge and skill”,<sup>305</sup> their evidence will be admissible. Section 210 of the CPA states that “[n]o evidence as to any fact, matter or thing shall be admissible which is irrelevant or immaterial and which cannot conduce to prove or disprove any point or fact at issue in criminal proceedings”.

An expert must accordingly assist the court. If the court can decide an issue without the assistance of an expert, the expert evidence is quite simply inadmissible on the basis of relevancy.<sup>306</sup> As such, an expert witness must convince the court of his or her “special knowledge and skill”<sup>307</sup> that he or she may speak authoritatively on a matter.<sup>308</sup> The court in *Kalogoropoulos*<sup>309</sup> held that “drawing inferences as to the state of a normal man's mind from the objective facts relating to his conduct is an exercise which is not unique to the psychiatric or psychological professions. Courts of law perform the exercise daily, constantly”.

An expert, when giving evidence, must inform the court if a matter to be addressed falls outside the ambit of their expertise<sup>310</sup> and must accordingly adhere to their area of expertise without deviation, irrespective “of description or title of qualification”.<sup>311</sup> This is deemed to be the proverbial golden rule of expert evidence.<sup>312</sup> A court must, however, be alive to the danger of overemphasis on qualifications.<sup>313</sup> In this regard, it is pertinent to note that an expert witness – a retired academic, for example – could be eminently qualified but lack professional or recent professional experience.<sup>314</sup>

Hypotheses put forward by expert witnesses to a court must be factually and theoretically based, they must directly address the matter at hand, and must provide “evidence and an opinion on specialised fields of medicine and other scientific and professional disciplines....”<sup>315</sup> Additionally, an expert must be able to substantiate their

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<sup>305</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 772.

<sup>306</sup> Van den Heever & Lawrenson 2015: 15-16.

<sup>307</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 777.

<sup>308</sup> Van den Heever & Lawrenson 2015: 16.

<sup>309</sup> *S v Kalogoropoulos* 1993 (1) SACR 12 (A): 22.

<sup>310</sup> *S v Rohde* 2019 (1) All SA 740 (WCC): 804.

<sup>311</sup> Van der Heever 2015: 57. See also Meintjes-van der Walt 2003: 362. Van den Heever & Lawrenson 2015: 57. See also Meintjes-Van der Walt 2003: 362.

<sup>312</sup> Visser *et al.* 2014: 870-871.

<sup>313</sup> Van den Heever & Lawrenson 2015: 39.

<sup>314</sup> Van den Heever & Lawrenson 2015: 46.

<sup>315</sup> Lotz and Knobel 2009: 2.

reasoning<sup>316</sup> and present their opinions in a cogent and rational manner.<sup>317</sup> As such, the expert must be able to tell the court why he or she reached the conclusion in question and what methods were used in reaching the conclusion.<sup>318</sup>

Van den Heever and Lawrenson<sup>319</sup> list the following duties of an expert witness to ensure that his or her duty to the court can be appropriately and efficiently executed:

1. The expert owes a paramount duty to assist the trier of fact by providing an independent and unbiased opinion on matters within the expert's own expertise that will enable the trier of fact to reach a decision.
2. This duty involves the production of well-balanced, well-reasoned and honestly held opinion.
3. The expert opinion must meet the requirements of truth, independence and impartiality.
4. The expert opinion involves a duty to limit contentious issues.
5. The expert must avoid a conflict of interest.
6. The expert opinion must be kept within the permitted scope of expertise.
7. The expert has a duty to act with reasonable care towards the instructing party [and] the expert is required to consult with the instructing party prior to his or her appointment to ensure all the terms of the appointment are agreed, and that the area of expertise and the opinion sought are clarified by the parties.

In *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (The Ikarian Reefer),<sup>320</sup> the duties of an expert were as elucidated and included *inter alia* that:

1. Expert evidence presented to the court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.
2. An expert witness should provide independent assistance to the court by way of objective, unbiased opinion in relation to matters within his/her expertise. An expert witness in the High Court should never assume the role of an advocate.

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<sup>316</sup> Van der Hoven 2006: 159.

<sup>317</sup> Lerm 2015: 37.

<sup>318</sup> Meintjes-Van der Walt 2003: 365.

<sup>319</sup> Van der Heever & Lawrenson 2015: 109.

<sup>320</sup> *National Justice Compania Naviera SA v Prudential Assurance Co Ltd* (The Ikarian Reefer) [1993] 2 Lloyd's Rep. 68 [QBD CC]: 81.

3. An expert witness should state the facts or assumptions upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion.
4. An expert witness should make it clear when a particular question or issue falls outside his/her expertise.
5. If an expert's opinion is not properly researched because he/she considers that insufficient data is available, then this must be stated with an indication that the opinion is no more than a provisional one. In cases where an expert witness, who has prepared a report, could not assert that the report contained the truth, the whole truth and nothing but the truth without some qualification, that qualification should be stated in the report.
6. If, after exchange of reports, an expert witness changes his/her view on a material matter having read the other side's expert's report or for any other reason, such change of view should be communicated (through legal representatives) to the other side without delay and when appropriate to the court.

### **3.3.5 The court as the final arbiter of dispute**

South African jurisprudence is replete with case law that substantiates the principle that the court is the final arbiter in cases where expert evidence is led. Although expert evidence can illuminate a court, the court and not the expert witness remains the ultimate arbiter of a dispute before it.<sup>321</sup> In *Holtzhausen*,<sup>322</sup> it was held that the opinion evidence given by an expert should not be offered on the matter of the ultimate issue. This principle was later affirmed and expounded on in *Rohde*<sup>323</sup> wherein the court stated that an expert may not provide an opinion on the merits or legal probabilities of the matter at hand. Indeed, literature offers strong support for the assertion that courts should decide the ultimate issue of whether an accused's mental state at the time of the commission of the offence offers sufficient grounds for a successful defence of mental illness.<sup>324</sup> Accordingly, psychiatrists should not deviate or stray from the ambit of psychiatric evidence and assessment and should not provide conclusory opinions on criminal capacity<sup>325</sup> as this remains the ultimate responsibility of the courts.

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<sup>321</sup> *Buthelezi v Ndaba* 2013 (5) SA 437 (SCA): 442.

<sup>322</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 768.

<sup>323</sup> *S v Rohde* 2019 (1) All SA 740 (WCC): 806.

<sup>324</sup> Kaliski 2009: 4.

<sup>325</sup> Le Roux & Stevens 2012: 66.

It is for the court to weigh up and assess conflicting expert testimony and to make a finding herein on the basis of probability.<sup>326</sup> A court can, of course, reject an expert's evidence if it has material grounds on which to do so and can appreciably explain the reasons for dismissing the evidence.<sup>327</sup> A court may conceivably, in the absence of other compelling reasons, prefer the expert testimony of one expert over another because one expert is "better qualified to give such an opinion".<sup>328</sup> A court must, however, in the presence of conflicting expert opinion, test the expert evidence against all other admissible evidence when deciding which expert evidence to prefer. In *Volkman*,<sup>329</sup> the court remarked that, in terms of expert evidence, it was preferable to "access to a balanced view" as opposed to preferring either the psychiatric evidence led by the defence or the state.

Expert evidence does not take preference over other evidence.<sup>330</sup> For example, direct eyewitness testimony can, dependent on the facts of the case, carry more weight than expert evidence.<sup>331</sup> Expert evidence should, of course, not be looked at in isolation but within the context of all of the facts of a case before a court<sup>332</sup> and must "always be tested against known facts [as] primary factual evidence is of the greatest importance".<sup>333</sup> Even in instances where an expert report, as per secs. 77(2) and 78(3) of the CPA, is unanimous and both the defence and prosecution take no objection to the contents thereof, the court still, as elucidated in *Mabena*,<sup>334</sup> has the discretion to decide the matter solely on the basis of the expert report or to decide the matter on the conspectus of all of the evidence before it.

In *Roodt*,<sup>335</sup> it was emphasised that a court should welcome the opportunity to learn from an expert where an expert is in a better-informed position than the court to "draw inferences", but that proportional weight must be given to expert evidence in light of

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<sup>326</sup> *Blyth v Van Den Heever* 1980 (1) SA 191 (A): 220.

<sup>327</sup> Van der Heever 2015: 13. Van den Heever & Lawrenson 2015: 13.

<sup>328</sup> Van der Heever 2015: 39. Van den Heever & Lawrenson 2015: 39.

<sup>329</sup> *S v Volkman* 2005 (2) SACR 402 (C): 407.

<sup>330</sup> Van der Heever 2015: 13. Van den Heever & Lawrenson 2015: 13.

<sup>331</sup> Schwikkard 2010: 969.

<sup>332</sup> Meintjes-Van der Walt 2003: 371. See also van der Heever 2015: 13. See also Van den Heever & Lawrenson 2015: 13.

<sup>333</sup> Van den Heever & Lawrenson 2015: 13.

<sup>334</sup> *S v Mabena and Another* 2007 (1) SACR 482 (SCA): 488.

<sup>335</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 778.

all other evidence presented. Fundamentally, in *Harris*<sup>336</sup> the court affirmed that while due regard must be given to all evidence, including expert evidence, the issue of criminal capacity is one to be decided not by psychiatrists but by the courts. It was also affirmed in *Roodt*<sup>337</sup> that litigants are entitled to the benefit of having a court, and not witnesses, decide their dispute. Were the opinions of experts on the subject of litigation appended, a disproportionate amount of weight – the onus of deciding a case – would shift from the court to the witness box.<sup>338</sup>

### **3.3.6 The pitfalls of expert evidence and the ‘hired gun’ phenomenon**

The court in *Schneider*<sup>339</sup> stated that “[a]n expert is not a hired gun who dispenses his or her expertise for the purposes of a particular case. An expert does not assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess”. This starkly illustrates that an expert witness’s duty is to assist the court and not the instructing party. As discussed throughout paragraph 3.3, expert evidence unquestionably offers invaluable assistance<sup>340</sup> to courts in matters that fall outside the scope of their knowledge but, as expounded on further, this notion – whilst honourable – is somewhat chimerical.

Whilst it is trite that the expert called must assist the court, the reality is far more complex. South Africa’s system of adversarial litigation serves to elucidate why expert witnesses often serve the interest of the party that has instructed them as opposed to the wider interests of the court and, thus, the wider interests of justice.<sup>341</sup> It is furthermore asserted that adversarial litigation begets evidence being led selectively insofar as favourable evidence is heard by the court and unfavourable evidence is withheld.<sup>342</sup>

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<sup>336</sup> *S v Harris* 1965 (2) SA 340 (A): 365.

<sup>337</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 778.

<sup>338</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 768-769.

<sup>339</sup> *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC): 211-212.

<sup>340</sup> Lotz & Knobel 2009: 2.

<sup>341</sup> Meintjes-Van der Walt 2002: 25.

<sup>342</sup> Lotz and Knobel 2009: 5.

An expert does not go to court to win a case, this is the duty of the legal representatives of the party.<sup>343</sup> The expectation that the expert must assist the court, and not the party that has called the witness, is potentially idealistic given that the adversarial system is illustrative of the dramatic “power play between law and science”.<sup>344</sup> Indeed, in *Van der Westhuizen*,<sup>345</sup> the court held that “it is regrettable that [legal] professionals, in conducting a trial, should perceive the need for gratuitous attacks on the integrity of a professional expert witness who properly performs a vital function in the interests of the administration of justice”.

The adverse consequences for impartiality lie at the heart of this contention.<sup>346</sup> While it has been asserted that this is inexorable under the adversarial system of litigation,<sup>347</sup> it has likewise been asserted that this is not only lying but akin to perjury.<sup>348</sup> An ethical duty towards the court is juxtaposed with the desire for derivation of benefit.<sup>349</sup> Lack of impartiality in the arena of expert witnesses has potentially dire ramifications for the manner in which the current system of adversarial litigation functions in South Africa.<sup>350</sup> The adage of fruit from the poisoned tree rings true given that issues decided in favour of parties on the basis of selective or indeed questionable expert evidence set an unhealthy precedent for any subsequent litigation in a similar vein.

A partisan state thus exists – a partisan state, it has been lamented, that is unavoidable and an inevitable consequence of the South Africa’s adversarial system of litigation. A party will naturally acquire the services of an expert witness that will advance his or her case.<sup>351</sup> This stance was reiterated by the court in *Schneider*<sup>352</sup> wherein it acknowledged that a party will be inclined to call an expert who, in line with their expertise, supports the argument of that party. The court did, however, state explicitly that this does not free the expert from the responsibility of providing “as objective and unbiased an opinion, based on [their] expertise, as possible”.

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<sup>343</sup> Van der Hoven 2006: 169.

<sup>344</sup> Meintjes-Van der Walt 2002: 25.

<sup>345</sup> *S v Van der Westhuizen* 2011 (2) SACR 26 (SCA): 55.

<sup>346</sup> Meintjes-Van der Walt 2003: 366.

<sup>347</sup> Van der Heever 2015: 45. Van den Heever & Lawrenson 2015: 45.

<sup>348</sup> Lotz and Knobel 2009: 5.

<sup>349</sup> Lerm 2015: 38.

<sup>350</sup> Meintjes-Van der Walt 2002: 28.

<sup>351</sup> Meintjes-Van der Walt 2002: 24.

<sup>352</sup> *Schneider NO and Others v AA and Another* 2010 (5) SA 203 (WCC): 212.

The court was, however, also at pains to caution against an expert witness who assumes the guise of a ‘hired gun’, holding that:

... an expert comes to court to give the court the benefit of [their] expertise... [a]n expert is not a hired gun who dispenses [their] expertise for the purposes of a particular case [nor does the] expert ... assume the role of an advocate, nor gives evidence which goes beyond the logic which is dictated by the scientific knowledge which that expert claims to possess.

It has been contended that the adversarial system lends itself to the natural propensity to lead favourable evidence.<sup>353</sup> The fact that expert witnesses are ordinarily paid for their services is often at the heart of the contention of the ‘hired gun’ phenomenon. The payment of expert witnesses is not regulated in South Africa.<sup>354</sup> While payment does not automatically denote partisanship, it does exacerbate the potential for partisanship.<sup>355</sup>

Ideally, and indeed one would hope, opinion should not follow payment although it has been averred that certain expert witnesses have gained a reputation as being ‘hired guns’ because of their willingness to provide opinions favourable to the instructing party.<sup>356</sup> Lotz and Knobel<sup>357</sup> assert that, in a career spanning four decades in forensic medicine, they have been privy to questionable expert evidence. On the more extreme end of this contention, Van den Heever and Lawrenson<sup>358</sup> argues that many scholars regard expert witnesses as “plaintiff whores and jukebox experts... who sing the songs they are paid for”.

Once again, although the danger of an expert witness lies primarily within the sphere of the ‘hired gun’, the issue is also mired in complexity for a plethora of non-financial reasons. Expert evidence, it has been argued, effectuates trial by ambush.<sup>359</sup> It also has the potential to be used as collegial one-upmanship or point-scoring.<sup>360</sup> A potential conflict of interest or bias can arise where a psychiatrist or psychologist who ordinarily

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353 Meintjes-Van der Walt 2002: 25.

354 Van der Hoven 2006: 169.

355 Meintjes-Van der Walt 2002: 25.

356 Van der Hoven 2006: 169.

357 Lotz and Knobel 2009: 2.

358 Van den Heever & Lawrenson 2015: 17.

359 Meintjes-Van der Walt 2002: 26.

360 Van den Heever & Lawrenson 2015: 46.

treats an accused is called to provide expert testimony.<sup>361</sup> In *di Blasi*,<sup>362</sup> the court found that the expert testimony for the accused was based merely on the presumption of the truthfulness of the accused's version in contradiction to the objective facts. As the court in *Huma*<sup>363</sup> succinctly stated, "[a]n expert witness who espouses the cause of his particular client to such an extent that he loses objectivity in fact undermines his client's case... [and puts his own credibility at stake]".

### 3.4 SENTENCING

It has been argued that South Africa's minimum sentencing laws are too rigid and unduly restrict the powers of judges when handing down sentence.<sup>364</sup> Section 51(1) of the *Criminal Law Amendment Act* (hereinafter referred to as "CLAA")<sup>365</sup> holds that serious offences listed in Part I of Schedule 2, which include premeditated murder and rape of a person below the age of eighteen years, must carry mandatory life sentences. While this provides uniformity in sentencing, it restricts a judge's discretion in determining sentence length<sup>366</sup> as a judge may only deviate from the prescribed sentences if substantial and compelling circumstances exist<sup>367</sup> or if the accused was below the age of sixteen years when the offence was committed.<sup>368</sup>

Cloete JA in a dissenting judgement in *Venter*,<sup>369</sup> however, noted that:

legislation does not require a 'severe, standardised and consistent' response from [c]ourts, in the imposition of sentences for crimes it specifies, where substantial and compelling circumstances are present... although the sentence to be imposed in lieu of the prescribed sentence must be assessed paying due regard to the bench mark which the [l]egislature has provided....

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<sup>361</sup> Lerm 2015: 38.

<sup>362</sup> *S v Di Blasi* 1996 (1) SACR 1 (A): 7.

<sup>363</sup> *S v Huma and Another* (1) 1995 (2) SACR 407 (W): 410.

<sup>364</sup> Anonymous. "Imprisoning the nation", <https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf> (accessed 3 March 2020).

<sup>365</sup> Criminal Law Amendment Act 105 of 1997.

<sup>366</sup> Anonymous. "Imprisoning the nation", <https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf> (accessed 3 March 2020).

<sup>367</sup> *Criminal Law Amendment Act* 105 of 1997: sec. 3(a).

<sup>368</sup> *Criminal Law Amendment Act* 105 of 1997: sec. 6.

<sup>369</sup> *Director of Public Prosecutions: Transvaal v Venter* 2009 (1) SACR 165 (SCA): 185.

While sentencing options for mentally ill offenders are generally devoid of the rigidity of minimum sentences, the CPA was amended<sup>370</sup> to provide more scope to courts *inter alia* “in respect of orders to be issued in cases of findings that accused persons are not capable of understanding criminal proceedings so as to make a proper defence; or that accused persons are by reason of mental illness or intellectual disability not criminally responsible and to provide for matters connected therewith”.<sup>371</sup>

These amendments to the CPA<sup>372</sup> have given courts a broader range of options in terms of orders that can be issued concerning offenders in terms of secs. 77, 78 and 79 of the CPA. Some of the most notable inclusions and exclusions are highlighted in the footnotes below.

#### **3.4.1 Section 78(6): Orders in case of lack of criminal capacity**

Section 78(6) enumerates the orders that can be issued should a court find an accused lacked criminal capacity at the time of committing an offence by virtue of mental illness or intellectual disability per the test contained in section 78(1). The court may, “...where the accused is charged with murder or culpable homicide or rape or compelled rape as contemplated in section 3 or 4 of the *Criminal Law (Sexual Offences and Related Matters) Amendment Act, 2007*, respectively, or another charge involving serious violence, or if the court considers it to be necessary in the public interest that the accused be:<sup>373</sup>

(aa) detained in a psychiatric hospital;<sup>374</sup>

(bb) temporarily detained in a correctional health facility of a prison where a bed is not immediately available in a psychiatric hospital and be transferred where a bed becomes available, if the court is of the opinion that it is necessary to do so on the grounds that the accused poses a serious danger or threat to himself or herself or to members of the public,<sup>375</sup> pending the decision of a judge in chambers in terms of section 47 of the Mental Health Care Act, 2002;

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<sup>370</sup> GK 624 *Government Gazette* 2017: 2 (40946).

<sup>371</sup> GK 624 *Government Gazette* 2017: 2 (40946).

<sup>372</sup> GK 624 *Government Gazette* 2017: 2 (40946).

<sup>373</sup> *Criminal Procedure Act* 51 of 1977: sec. 6(i).

<sup>374</sup> The words “or prison” were excluded with the 2017 enactment.

<sup>375</sup> Subparagraph (bb) is a new inclusion in the 2017 enactment.

(cc) admitted to and detained in a designated health establishment<sup>376</sup> stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(dd) released subject to such conditions as the court considers appropriate;

(ee) released unconditionally; or

(ff) referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005;<sup>377</sup> or"

in all other instances other than those considered in subsection 6(i) of the CPA an accused may be:<sup>378</sup>

(aa) admitted to and detained in a designated health establishment<sup>379</sup> stated in the order and treated as if he or she were an involuntary mental health care user contemplated in section 37 of the Mental Health Care Act, 2002;

(bb) ...;

(cc) released subject to such conditions as the court considers appropriate;

(dd) released unconditionally; or

(ee) referred to a Children's Court as contemplated in section 64 of the Child Justice Act, 2008, and pending such referral be placed in the care of a parent, guardian or other appropriate adult or, failing that, placed in temporary safe care as defined in section 1 of the Children's Act, 2005.<sup>380</sup>

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<sup>376</sup> The words "an institution" were replaced by "a designated health establishment" in the 2017 enactment.

<sup>377</sup> Subparagraph (ff) is a new inclusion in the 2017 enactment.

<sup>378</sup> *Criminal Procedure Act* 51 of 1977: sec. 6(ii).

<sup>379</sup> The words "an institution" were replaced by "a designated health establishment" in the 2017 enactment.

<sup>380</sup> Subparagraph (ee) is a new inclusion in the 2017 enactment.

### 3.4.2 Section 78(7): Diminished criminal capacity

The court in *Engelbrecht*<sup>381</sup> reiterated that “diminution of (criminal) capacity... does not excuse criminal capacity but *is* (emphasis supplied) relevant to sentencing”.

Section 78(7) of the CPA states that:

[i]f the court finds that the accused at the time of the commission of the act in question was criminally responsible for the act but that his capacity to appreciate the [unlawfulness] of the act or to act in accordance with an appreciation of the [unlawfulness] of the act was diminished by reason of mental illness or intellectual disability, the court may take the fact of such diminished [capacity] into account when sentencing the accused.

The question of criminal capacity is one of degree; an accused who suffers from a mental illness can of course be found guilty of a crime.<sup>382</sup> In this regard, if an accused can act in accordance with the appreciation of right and wrong but finds it more difficult to do so by virtue of his or her mental illness or intellectual disability, this can be taken into account during sentencing and might warrant lesser punishment. The fact that an accused suffers from a mental illness or intellectual disability can thus temper the severity of punishment. Herein, Chetty<sup>383</sup> argues that if an accused’s volitional or indeed conative functioning is “weak”, this would allow for conviction with a tempered penal aspect.

The court in *Venter*<sup>384</sup> held that diminished criminal capacity is not an unambiguous condition. Section 78(7) makes it clear that there is no clear-cut, objective test to determine the degree of diminution of criminal capacity. As such, Snyman<sup>385</sup> asserts that, should an accused, despite their criminal capacity, ostensibly:

[find] it more difficult than a normal person to act in accordance with his appreciation of right and wrong, because his ability to resist temptation is less than that of a normal person, he must be convicted of the crime (assuming that the other requirements for liability are also met), but these psychological factors may be taken into account and may then warrant the imposition of a less severe punishment.

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<sup>381</sup> *S v Engelbrecht* 2005 (2) SACR 41 (W): 160.

<sup>382</sup> Chetty 2008: 132.

<sup>383</sup> Chetty 2008: 133.

<sup>384</sup> *Director of Public Prosecutions: Transvaal v Venter* 2009 (1) SACR 165 (SCA): 191.

<sup>385</sup> Snyman 2020: 154.

The question of diminution of criminal capacity is one of degree and entirely at a court's discretion.<sup>386</sup> A multitude of factors give rise to both diminished criminal capacity and the degree of diminishment.<sup>387</sup> In *Mnisi*,<sup>388</sup> the court found that the court *a quo* did not append sufficient weight to the accused's diminished criminal capacity when sentencing the accused and reduced his sentence accordingly. The court, however, was at pains to emphasise that each case must be decided on its own merits.

Evidence and the weight given thereto is another pertinent consideration when deciding matters of diminished criminal capacity – and one to which courts have taken slightly varying approaches. In *McBride*,<sup>389</sup> the court stated that whilst the decisions of matters of diminished criminal capacity must take all evidence into account, a court would be “guided” by expert medical evidence. This sentiment was echoed in *Seroba*.<sup>390</sup>

In *Mnisi*,<sup>391</sup> however, it was held that the decision of diminished criminal capacity must be arrived at by the court only once it has given due regard to all evidence presented, both expert and otherwise. It was also held in *Mnisi* that the scrutiny of such evidence must be done regarding both “all the circumstances and the alleged criminal conduct viewed objectively”.<sup>392</sup> Indeed, section 274(1) of the CPA states 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”. Burchell<sup>393</sup> contends that the notion of diminished criminal capacity flows from failed defences of pathological capacity. Expert evidence led for the defence of pathological incapacity will ultimately demonstrate the circumstances which are adequate to serve as factors in mitigation concerning sentence.

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<sup>386</sup> Burchell 2016: 302.

<sup>387</sup> *S v Mnisi* 2009 (2) SACR 227 (SCA): 238.

<sup>388</sup> *S v Mnisi* 2009 (2) SACR 227 (SCA): 228.

<sup>389</sup> *S v McBride* 1979 (4) SA 313 (W): 320.

<sup>390</sup> *S v Seroba* 2015 (2) SACR 429 (GJ): 444.

<sup>391</sup> *S v Mnisi* 2009 (2) SACR 227 (SCA): 237.

<sup>392</sup> *S v Mnisi* 2009 (2) SACR 227 (SCA): 231.

<sup>393</sup> Burchell 2016: 305.

### 3.5 CASE LAW

A plethora of case law abounds in South Africa regarding diminished criminal capacity for both pathological and non-pathological reasons. The waters are, however, muddied when bipolar disorder enters the fray, not least because there is comparatively little case law that deals exclusively with bipolar disorder as a defence or as a factor in mitigation of sentence in criminal proceedings.

The issue at stake with bipolar disorder, particularly in its manic incarnation, is that it is difficult to prove that an accused might have been in a manic state when a crime was committed. Bipolar disorder, as well as being characterised by mania, is of course also characterised by depressive episodes. Depression has, however, been accorded weight in South African jurisprudence and, thus, it is not a stretch that bipolar disorder could likewise be afforded similar weight in its depressive phase. In this regard, *Kavin*,<sup>394</sup> *McBride*<sup>395</sup> and *Mtshali*<sup>396</sup> in the paragraphs to follow are of particular significance.

Whilst this will not be extensively covered in this thesis, it is worth noting herein that non-pathological incapacity has been successfully invoked as a complete defence and in mitigation of sentence in South African courts on numerous occasions.<sup>397</sup> It was held *obiter* in *Gesualdo*<sup>398</sup> that:

[f]or many years the [c]ourts of this country and of others have accepted that a sane individual (... one free from mental illness), who can distinguish between right and wrong, may be subjected to such *mental or emotional pressures* (emphasis supplied) that he may not be able to control his actions. *He is unable*, in other words, *to act in accordance with the distinction which he can draw* (emphasis supplied).

This serves to juxtapose the replete support non-pathological incapacity enjoys compared with the almost scant regard to bipolar disorder, which is a mood disorder and not an ephemeral, transient state of diminished capacity by virtue of emotional stress *inter alia*. Whilst not the focus of this thesis, it must be mentioned that non-

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<sup>394</sup> *S v Kavin* 1978 (2) SA 731 (W).

<sup>395</sup> *S v McBride* 1979 (4) SA 313 (W).

<sup>396</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD).

<sup>397</sup> *Inter alia S v Ramdass* 2017 (1) SACR 30 (KZD); *S v Shapiro* 1994 (1) SACR 112 (A); *S v Ingram* 1995 (1) SACR 1 (A); *S v Gesualdo* 1997 (2) SACR 68 (W); and *S v Nursingh* 1995 (2) SACR 331 (D); *S v Moses* 1996 (1) SACR 701 (C).

<sup>398</sup> *S v Gesualdo* 1997 (2) SACR 68 (W): 77.

pathological incapacity enjoys an advantage over mental illness in that the onus of proving the presence of criminal capacity in cases of non-pathological incapacity rests on the state whilst the onus of proving mental illness lies with the accused.<sup>399</sup>

While mood disorders are not uncommon in courts hearing matters concerning pathological incapacity and diminished criminal capacity, there are only a handful of cases that touch on bipolar disorder, rendering it largely uncanvassed and untested, juridically. The cases that are covered in paragraphs 3.5.1 to 3.5.7 below primarily deal with pathological incapacity or diminished criminal capacity due to mood disorders. It is thus not inconceivable that these decisions could serve as a template or indeed a barometer of how cases where bipolar disorder serves to diminish criminal capacity or render an offender criminally unaccountable would, theoretically at least, be dealt with. It is against the backdrop of mental illness that case law in respect of criminal incapacity and diminished capacity, expert evidence and sentencing is analysed in the following paragraphs.

### **3.5.1 *S v Kavin***<sup>400</sup>

The facts insofar as relevant in *Kavin* are as follows: the accused murdered his wife, son, and one of his daughters and attempted to murder his other daughter.<sup>401</sup> He did so systematically and methodically, going from bedroom to bedroom and killing his family. The accused was charged with three counts of murder and one of attempted murder.<sup>402</sup> The accused pled not guilty to all four charges although he did not deny the commission of the crimes.<sup>403</sup> On the version of the accused, he had planned to kill his family and then kill himself that they may be reunited in heaven. The court accepted as common cause that the accused did not commit these crimes out of malice but in fact out of love for the victims.<sup>404</sup> The accused was in financial difficulty at the time of the commission of the crimes.<sup>405</sup>

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<sup>399</sup> Burchell 2016: 296.

<sup>400</sup> *S v Kavin* 1978 (2) SA 731 (W).

<sup>401</sup> *S v Kavin* 1978 (2) SA 731 (W): 732.

<sup>402</sup> *S v Kavin* 1978 (2) SA 731 (W): 737.

<sup>403</sup> *S v Kavin* 1978 (2) SA 731 (W): 735.

<sup>404</sup> *S v Kavin* 1978 (2) SA 731 (W): 736.

<sup>405</sup> *S v Kavin* 1978 (2) SA 731 (W): 738.

The accused was sent for psychiatric evaluation in terms of section 79(2) of the CPA for a period of just over twelve weeks.<sup>406</sup> Herein a report was compiled by the psychiatrist who examined the accused during the period of observation, as well as two other psychiatrists who had examined the accused for a period of mere hours. The accused was found to be able to make proper defence and to understand proceedings. In terms of the two-stage enquiry contained in section 78(1) of the CPA, two of the psychiatrists found that the accused could appreciate the unlawfulness of his act while the third psychiatrist was unsure. They were, however, unanimous in their opinion that the accused could not act in accordance with the appreciation of the unlawfulness of his act and thus lacked criminal capacity at the time of committing the murders.<sup>407</sup>

The accused was unanimously found to be suffering from “[s]evere reactive depression super-imposed on a type of personality disorder displaying immature and unreflective behaviour”.<sup>408</sup> They also found the accused’s depression to be “progressive”.<sup>409</sup> Additionally, two of the panel psychiatrists felt that the accused displayed a state of disassociation.<sup>410</sup> In addition hereto, one of the panel psychiatrists found that the reactive depression contemplated herein could lead to neurosis.<sup>411</sup>

The state disputed the contents of the report compiled by the panel of psychiatrists and asserted that the accused was indeed guilty of murder and attempted murder. The state’s averments were *inter alia* that “the accused was fully aware during the acts and that there was only a post-repressive amnesia”; “the accused generally showed planning, foresight and rational thinking stated that he remembered shooting the family”; the accused “had fostered this intention” for months prior to the commission of the crimes, “and that intention remained constant and unchanged and no delusional thinking was superimposed”; the accused’s “obsessional desire to protect his family might be a deviation from the normal but fell short of psychosis”; “the psychiatrists purported to interpret section 78(1)(b), which is not their function but which is the function of the court”, and lastly, that the nature of the crimes was so heinous that the

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406     *S v Kavin* 1978 (2) SA 731 (W): 735.  
407     *S v Kavin* 1978 (2) SA 731 (W): 733.  
408     *S v Kavin* 1978 (2) SA 731 (W): 733.  
409     *S v Kavin* 1978 (2) SA 731 (W): 739.  
410     *S v Kavin* 1978 (2) SA 731 (W): 733.  
411     *S v Kavin* 1978 (2) SA 731 (W): 738.

psychiatrists had sought justification in the mental illness as it was contended that a sane person could not commit such acts.<sup>412</sup>

In addition to the psychiatric report, the court also took cognisance of all of the other evidence, as well as the circumambient circumstances of the case in deciding whether or not it would accept or reject the unanimous findings contained in the psychiatric report. The court ultimately found that it could not reject the experts' findings<sup>413</sup> and, as such, the court was largely led in deciding this matter by the aforementioned psychiatric report.<sup>414</sup>

Much was made of the so-called 'irresistible impulse' and its correlation to mental illness. Ultimately, the court decided that based on the psychiatric report, there was a "gradual disintegration of the personality of the accused" and thus there was no 'irresistible impulse'. It also based this conclusion on the fact that the accused had systematically gone to each bedroom and murdered the deceased. He had also purposefully lied to his sister who was in the house at the time of the murders regarding the origin of the noise of the gunshots and as to why he was fully clothed so late in the evening.<sup>415</sup> The court found the accused's conduct to be purposeful and deliberate.<sup>416</sup> In the *McBride* case<sup>417</sup> in paragraph 3.5.2 below, one of the same psychiatrists made the observation that "[e]ither a man is crazy or he isn't", which does not seem to accord with the sentiments expressed herein.

The psychiatrists maintained their view after the state had led its evidence suffice to concur that the accused was, in their opinion, "more distressed and depressed" during their interviews with him than he conceivably was when he committed the offences.<sup>418</sup> Interestingly and despite this, the court concurred with the psychiatric report and found that the accused could not act in accordance with the appreciation of the unlawfulness of his act and that the state had not advanced sufficient argument to contradict the report. The court found the accused not guilty in accordance with section 78(6) of the

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<sup>412</sup> *S v Kavin* 1978 (2) SA 731 (W): 738-739.

<sup>413</sup> *S v Kavin* 1978 (2) SA 731 (W): 741.

<sup>414</sup> *S v Kavin* 1978 (2) SA 731 (W): 737.

<sup>415</sup> *S v Kavin* 1978 (2) SA 731 (W): 737-738.

<sup>416</sup> *S v Kavin* 1978 (2) SA 731 (W): 737.

<sup>417</sup> *S v McBride* 1979 (4) SA 313 (W): 319.

<sup>418</sup> *S v Kavin* 1978 (2) SA 731 (W): 741.

CPA. The court directed that he be detained in a mental hospital or prison “pending the signification of the decision of the State President”.<sup>419</sup>

### 3.5.2 *S v McBride*<sup>420</sup>

The facts in *S v McBride* were briefly as follows: the accused shot and killed his wife<sup>421</sup> in what was presented to the court by the accused as *inter alia* an act of mercy<sup>422</sup> and one in which the accused also planned to kill himself. In this respect, as well as the financial circumstances of the accused, the facts bear a striking similarity to those in *Kavin*.<sup>423</sup> The deceased was ill and believed herself to be suffering from cancer.<sup>424</sup> Expert medical evidence was led to the extent that it is “...not uncommon for a person suffering from endogenous depression to regard the taking of the life of another, particularly of a person whom [they] love, as an act of altruism”.<sup>425</sup>

Additionally, the accused and deceased found themselves to be in severe financial difficulty and the shooting was preceded by an accident in which the accused collided with a pedestrian with his car. With the additional financial stresses of an insurance excess for which the accused did not have funds, he shot and killed his wife and resolved to also kill himself.<sup>426</sup>

The accused was in the interim arraigned, charged with the murder of the deceased, and was ordered to undergo psychiatric observation in terms of section 78(2) read with section 79 of the CPA wherein the accused was observed by a panel of three psychiatrists over a period of just over two months. The psychiatrists found unanimously that the accused was suffering from endogenous depression. In accordance with the two-part test as per section 78(1)(a) and (b) of the CPA, it was likewise found unanimously by the panel of psychiatrists that although the accused

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<sup>419</sup> *S v Kavin* 1978 (2) SA 731 (W): 741.

<sup>420</sup> *S v McBride* 1979 (4) SA 313 (W).

<sup>421</sup> *S v McBride* 1979 (4) SA 313 (W): 315.

<sup>422</sup> *S v McBride* 1979 (4) SA 313 (W): 322.

<sup>423</sup> *S v Kavin* 1978 (2) SA 731 (W).

<sup>424</sup> *S v McBride* 1979 (4) SA 313 (W): 321.

<sup>425</sup> *S v McBride* 1979 (4) SA 313 (W): 322.

<sup>426</sup> *S v McBride* 1979 (4) SA 313 (W): 321.

was indeed capable of appreciating the unlawfulness of his actions, he was not able to act in accordance herewith.<sup>427</sup>

The accused could thus understand proceedings and make proper defence.<sup>428</sup> Counsel for the accused argued that a finding in terms of section 78(7) should be made but, ultimately, the court found that in order for such a finding to be made, the accused would have to satisfy both legs of the test contained in section 78(1) and would therefore have to have been found guilty of murder.<sup>429</sup> The court stated that as it is not an expert in psychiatric matters, it would not lightly reject such expert evidence and would only do so if the expert in question had disregarded the facts or indeed did not have the requisite knowledge of said facts, or if the expert had made a technically incorrect finding as a result of misinterpreting an act or its attendant subsections.<sup>430</sup> The court ultimately concurred with the psychiatrists and the accused was found to be not guilty by virtue of mental illness and was ordered to be “detained in a mental hospital or prison pending the signification of the decision of the State President”.<sup>431</sup>

What is noteworthy about this case is twofold: first, it was found that the accused could not act in accordance with the appreciation of the unlawfulness of his act as a result of his endogenous depression.<sup>432</sup> The court rightly asserted that although it would be led by expert medical evidence, it would also take other evidence into account.<sup>433</sup> It is worth noting here that two of the psychiatrists that examined the accused during the period of psychiatric observation asserted that depression is a state of “psychosis” that lasts between six to nine months if untreated and is more common in those of advancing age.<sup>434</sup>

Furthermore, the psychiatrists expressed difficulty in stating the circumstances and degree to which the accused’s mental illness could diminish his capability of appreciating the unlawfulness of his act. Additionally, they stated that the concept of diminishment in this context was a theoretical possibility that might have existed in the

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<sup>427</sup> *S v McBride* 1979 (4) SA 313 (W): 315-316.  
<sup>428</sup> *S v McBride* 1979 (4) SA 313 (W): 316.  
<sup>429</sup> *S v McBride* 1979 (4) SA 313 (W): 314.  
<sup>430</sup> *S v McBride* 1979 (4) SA 313 (W): 317.  
<sup>431</sup> *S v McBride* 1979 (4) SA 313 (W): 324.  
<sup>432</sup> *S v McBride* 1979 (4) SA 313 (W): 314.  
<sup>433</sup> *S v McBride* 1979 (4) SA 313 (W): 320.  
<sup>434</sup> *S v McBride* 1979 (4) SA 313 (W): 316.

minds of the drafters of the legislation but one that was unlikely to hold water in the realm of medical science. The court, however, took the view that the legislature had indeed intended to ascertain the degree of diminished criminal capacity and the circumstances in which it could be applicable.<sup>435</sup>

In respect of the rather black and white line that was drawn by the members of the psychiatric panel, the consensus was that endogenous depression is a mental illness and, accordingly, there could be no degree of appreciation of the unlawfulness of the act; either it could be appreciated, or it could not. One of the psychiatrists made an outlandish observation herein and coarsely stated that “[e]ither a man is crazy or he isn’t”.<sup>436</sup> This quite succinctly illustrates the improved and more nuanced level of the understanding of both mental illness and the degrees thereof since the hearing of this case in 1979.

Secondly, even though the accused had recovered from the depression,<sup>437</sup> and evidence led that should the accused be held in a mental hospital it might bring on the aforementioned depression once again,<sup>438</sup> he was still committed to a psychiatric institution as the court found that while ostensibly nonsensical, the legislation at the time did not make provision for an alternative.<sup>439</sup>

Curiously, counsel for the defence led the argument that “the general principles [state that the] court must attempt to give effect to the intention of the Legislature and that it may alter the wording of a statute if its literal interpretation leads to a manifest absurdity which could not have been intended”.<sup>440</sup> The court rejected this discretionary argument on the basis that there was no evidence that the legislature had indeed intended otherwise.<sup>441</sup> Therefore, according to the court, it did not fall to the court to formulate suitable measures merely because the legislature did not entertain such a case where an accused had recovered from mental illness.<sup>442</sup> It is trite that the High Court is not a creature of statute but strangely and despite this, the court found it was not for it “to fill

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<sup>435</sup> *S v McBride* 1979 (4) SA 313 (W): 319.

<sup>436</sup> *S v McBride* 1979 (4) SA 313 (W): 319.

<sup>437</sup> *S v McBride* 1979 (4) SA 313 (W): 316.

<sup>438</sup> *S v McBride* 1979 (4) SA 313 (W): 317.

<sup>439</sup> *S v McBride* 1979 (4) SA 313 (W): 324.

<sup>440</sup> *S v McBride* 1979 (4) SA 313 (W): 323.

<sup>441</sup> *S v McBride* 1979 (4) SA 313 (W): 324.

<sup>442</sup> *S v McBride* 1979 (4) SA 313 (W): 323.

any such possible gap by inventing its own procedure to meet the case". The court, however, appended a proviso to the judgment directing that a copy of the judgement be furnished to the relevant authorities herein to secure the earliest possible release for the accused.<sup>443</sup>

### **3.5.3 S v Landau<sup>444</sup>**

At the heart of the appeal in the case of *Landau*, lay the sentence imposed on the appellant by the regional court on 48 counts of fraud.<sup>445</sup> In this matter, the court was seized with the decision of whether a sentence of correctional supervision or one of imprisonment was most suitable for the appellant. The crux of the appellant's fraudulent activities had been his claiming of commissions from his employer, Liberty Life, from policies which he had 'sold' to fictitious persons. At trial, bipolar disorder was advanced as a factor in support of correctional supervision as opposed to a custodial sentence.<sup>446</sup>

Evidence was led at trial that the appellant suffered from bipolar disorder and had allegedly displayed suicidal tendencies which the court accepted. At trial, a criminologist testifying for defence and an official from the Department of Correctional Supervision recommended a period of correctional supervision as contemplated in terms of section 276(1)(h) of the CPA. An official from the Department of Corrections testified that the Department would be unable to provide the appellant with the required psychiatric care in prison.<sup>447</sup>

The appellant alleged that the fraud was committed in a moment of weakness.<sup>448</sup> The appellant also claimed that during the commission of his crimes, he was not on any medication for bipolar disorder which, he averred, made imprisonment inappropriate. Whilst the court accepted the veracity and gravity of the accused's mental state, it did not deem this sufficient to warrant correctional supervision in the light of the severity of the fraud committed and the period over which it was committed. The court stated

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<sup>443</sup> S v *McBride* 1979 (4) SA 313 (W): 324.

<sup>444</sup> S v *Landau* 2000 (2) SACR 673 (W).

<sup>445</sup> S v *Landau* 2000 (2) SACR 673 (W): 674.

<sup>446</sup> S v *Landau* 2000 (2) SACR 673 (W): 673.

<sup>447</sup> S v *Landau* 2000 (2) SACR 673 (W): 675.

<sup>448</sup> S v *Landau* 2000 (2) SACR 673 (W): 676.

that “the fact that appellant suffered from bipolar mood disorder does not... account for or mitigate the conduct of which he was admittedly guilty”.<sup>449</sup>

Additionally, and particularly pertinently herein, the court found that the appellant could, at all times, appreciate the unlawfulness of his actions and act in accordance therewith. The appellant’s purported moment of weakness amounted to 48 counts of fraud committed over a period of approximately six months and, as such, the court rejected this argument outright.<sup>450</sup> The court also found that the crimes had been committed to fund the appellant’s luxurious lifestyle.<sup>451</sup> Moreover, the appellant had made no attempt to repay any of the money.<sup>452</sup> The court held that the “[i]nterests of the wider community and of deterrence weighed more heavily than those of appellant”.<sup>453</sup> The court found that the factors advanced by the accused did not find in favour of correctional supervision and upheld the sentence imposed by the court *a quo* of five years imprisonment.<sup>454</sup>

### **3.5.4 S v Gouws<sup>455</sup>**

Whilst not dealing with bipolar disorder *per se*, there are numerous cases that deal with mental illness which could also conceivably find application in cases where an accused suffers from bipolar disorder. In *Gouws*, the court *a quo* found the accused guilty of murder and remitted the matter to the High Court for sentencing. The High Court, however, expressed reservations regarding the mental state of the accused and ordered that the accused undergo psychiatric observation in accordance with section 78(2) read with secs. 78(7) and 79 of the CPA.<sup>456</sup> The accused was unanimously found to be suffering from untreated schizophreniform psychosis and was thus found to be unfit to stand trial.<sup>457</sup>

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449 S v Landau 2000 (2) SACR 673 (W): 675-676.

450 S v Landau 2000 (2) SACR 673 (W): 676.

451 S v Landau 2000 (2) SACR 673 (W): 680.

452 S v Landau 2000 (2) SACR 673 (W): 677.

453 S v Landau 2000 (2) SACR 673 (W): 679.

454 S v Landau 2000 (2) SACR 673 (W): 681.

455 S v Gouws 2004 (2) SACR 512 (W).

456 S v Gouws 2004 (2) SACR 512 (W): 512-513.

457 S v Gouws 2004 (2) SACR 512 (W): 514.

Upon treatment with anti-psychotic medication, the accused's illness was diagnosed as being in remission and he was accordingly found to be fit to stand trial with the caveat that it could not be "excluded, that, at the time of the alleged offence, he was unable to appreciate the [unlawfulness] of the act and unable to act in accordance with appreciation of its [unlawfulness]".<sup>458</sup> Having due regard to the accused's "bizarre"..., senseless and irrational conduct... at the time of the commission of the offence", the conclusions drawn by the psychiatrists and the testimony of the accused, the court found the accused to be not guilty by virtue of mental illness. The court thus directed that the accused be "detained in a psychiatric hospital or a prison pending the signification of the decision of a Judge in Chambers".<sup>459</sup>

In reaching its finding, the court, as is the norm and as stated in the foregoing paragraphs, took the psychiatric report into account. This case is, however, noteworthy in that the psychiatric report encompassed information provided by family members regarding the accused's mental state.<sup>460</sup> On this point, it is pertinent to note that, in diagnosing bipolar disorder, anecdotal information from family members of the person said to be suffering from bipolar disorder is taken into account when diagnosing a patient<sup>461</sup> as they often lack insight into their own condition.<sup>462</sup>

While courts must naturally be alive to the danger of bias, information obtained from acquaintances and family members of a mentally ill offender could prove helpful to courts deciding criminal case matters that concern offenders who suffer from bipolar disorder. Indeed, this could prove particularly advantageous to a court when it is averred that an accused committed an offence during a depressive episode or, more significantly, during a manic episode.

Albeit not a topic covered in this thesis, another interesting aspect of this case is that of antecedent responsibility or, indeed, the glaring omission of antecedent responsibility. This case counters the argument for antecedent responsibility as the

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<sup>458</sup> *S v Gouws* 2004 (2) SACR 512 (W): 514.

<sup>459</sup> *S v Gouws* 2001 (1) SACR 192 (W): 516-517.

<sup>460</sup> *S v Gouws* 2004 (2) SACR 512 (W): 516.

<sup>461</sup> Singh & Rajput 2006: 60.

<sup>462</sup> Quanbeck *et al.* 2005: 478.

accused was not on medication for his mental illness at the time of the commission of the offence and was still found to be not guilty by reason of mental illness.<sup>463</sup>

### **3.5.5 *S v Petersen*<sup>464</sup>**

#### **3.5.5.1 Background**

The most high-profile of these cases is undoubtedly that of *Petersen*.<sup>465</sup> At the core, and central to the bail application, trial and sentencing of the wife of the deceased discussed below in paragraphs 3.5.5.2 to 3.5.5.4, lay the murder of Abdul Mutaliep “Taliep” Petersen. It is therefore salient at this juncture to briefly consider the facts.

Accused number one (the wife of the deceased) stood accused of *inter alia* plotting the murder of the deceased under the auspices of an armed robbery.<sup>466</sup> Whilst the motive for the murder was not proven by the state to be beyond a reasonable doubt,<sup>467</sup> the court accepted that as accused number one and the deceased were married in community of property, accused number one, as the more financially sound of the partners, had much to lose if she and the deceased had divorced.<sup>468</sup>

The court ultimately found accused nos. one, two and three guilty of murder.<sup>469</sup> In sentencing,<sup>470</sup> and whilst accepting that expert evidence as to the diagnosis of bipolar disorder was insufficient, the court held that the long-term use of mind-altering medication must have affected accused number one adversely and subsequently contributed to circumstances permitting the court to deviate from the prescribed minimum sentence.<sup>471</sup>

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<sup>463</sup> *S v Gouws* 2004 (2) SACR 512 (W): 515.

<sup>464</sup> *S v Petersen* 2008 JDR 1447 (C).

<sup>465</sup> *S v Petersen* 2008 JDR 1447 (C).

<sup>466</sup> *S v Petersen* 2008 JDR 1447 (C): 194.

<sup>467</sup> *S v Petersen* 2008 JDR 1447 (C): 193.

<sup>468</sup> *S v Petersen* 2008 JDR 1447 (C): 75.

<sup>469</sup> *S v Petersen* 2008 JDR 1447 (C): 209.

<sup>470</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC 70.

<sup>471</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC 70: 3.

### 3.5.5.2 Bail application

Accused number one's bail appeal largely relied on the same narrative of mental illness and attendant emotional instability that was advanced at trial with additional arguments put forward by counsel for the defence that accused number one *inter alia* would receive insufficient treatment for her mental conditions in prison.<sup>472</sup> The similarities of the arguments led at trial notwithstanding, a few aspects do warrant discussion herein.

On cross examination of accused number one's psychiatrist, it was established that accused number one had not seen a psychiatrist from 30 September 2006 until her arrest on 18 June 2007, the murder of the deceased on 16 of December 2006 notwithstanding. Additionally, and despite the psychiatrist's assertions that accused number one had not relapsed as a result of "a perpetuation of the beneficial effects of the ECT that stabilised her", he did concede upon further questioning by the magistrate that it was unusual that accused number one did not suffer a relapse.<sup>473</sup>

Testimony of a psychiatrist working at the forensic unit at Valkenberg Hospital indeed confirmed that the behaviour of accused number one and the content of her bail application were anomalous and at odds with someone who suffers from severe bipolar disorder.

The psychiatrist stated that:

[i]t is odd that if her condition was so severe she did not require to see [her psychiatrist]... That's all I can say with certainty. And it is odd that if someone has such a severe bipolar mood disorder that they can't be held in a standard place where people awaiting trial are held, that the death of her husband in front of her eyes wasn't sufficient to cause relapse.<sup>474</sup>

Accused number one had also consulted with a doctor regarding a cosmetic procedure prior to being arrested and less than three months after the murder of the deceased. This, in the opinion of the psychiatrist from Valkenberg Hospital, further strengthened the inference that accused number one was not as ill as she alleged.<sup>475</sup> The court found that accused number one had not sufficiently proven the precariousness of her

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<sup>472</sup> *S v Petersen* 2007 JDR 0955 (C): 6.

<sup>473</sup> *S v Petersen* 2007 JDR 0955 (C): 7.

<sup>474</sup> *S v Petersen* 2007 JDR 0955 (C): 8.

<sup>475</sup> *S v Petersen* 2007 JDR 0955 (C): 8.

mental state, at the time the bail application was brought, was an exceptional circumstance<sup>476</sup> nor had she proven that her need for continued psychiatric treatment also constituted an exceptional circumstance.<sup>477</sup> The appeal was accordingly dismissed.<sup>478</sup> A subsequent appeal wherein the merits as discussed herein were largely repeated was also dismissed.<sup>479</sup>

### 3.5.5.3 The trial

Accused number one solicited her co-accused and plotted to stage an armed robbery wherein the deceased would be killed. She had at this juncture, as was to be revealed during trial, already organised a so-called 'hit'<sup>480</sup> under the auspices of a hi-jacking. This plan, the details of which are not relevant hereto, had subsequently gone awry and accused number one planned once again in earnest to have the deceased killed.<sup>481</sup>

In addition to murder, accused number one faced ancillary charges for possession of an illegal firearm and ammunition. The alternative charge was conspiracy to commit the antecedent charges.<sup>482</sup> The deceased and accused were married in community of property<sup>483</sup> and whilst a motive for the murder was not established beyond a reasonable doubt at trial,<sup>484</sup> the court drew the inference that as accused number one was the wealthier spouse by a substantial margin, she would have to relinquish a large portion of her estate were she and the deceased to have divorced.<sup>485</sup>

Evidence was led to the extent that the deceased had been involved in business deals which had soured, and the deceased had, as a result, lost a substantial amount of money.<sup>486</sup> Additionally, accused number one and the deceased had a daughter who, at the time, was a minor. A policy to the value of R5,3 million had been taken out with

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<sup>476</sup> *S v Petersen* 2007 JDR 0955 (C): 10-11.

<sup>477</sup> *S v Petersen* 2007 JDR 0955 (C): 14.

<sup>478</sup> *S v Petersen* 2007 JDR 0955 (C): 32.

<sup>479</sup> *S v Petersen* 2008 (2) SACR 355 (C).

<sup>480</sup> *S v Petersen* 2008 JDR 1447 (C): 17.

<sup>481</sup> *S v Petersen* 2008 JDR 1447 (C): 19-20.

<sup>482</sup> *S v Petersen* 2008 JDR 1447 (C): 2.

<sup>483</sup> *S v Petersen* 2008 JDR 1447 (C): 75.

<sup>484</sup> *S v Petersen* 2008 JDR 1447 (C): 193.

<sup>485</sup> *S v Petersen* 2008 JDR 1447 (C): 75.

<sup>486</sup> *S v Petersen* 2008 JDR 1447 (C): 75.

the minor daughter as the beneficiary.<sup>487</sup> Accused number one directed that the proceeds of the policy be paid into a Namibian bank account in her (accused number one's) name.<sup>488</sup>

When interviewed by the police for a witness statement after the murder, it was accused number one's version that she and her family had been the victims of a robbery and that the robbers had murdered the deceased.<sup>489</sup> At trial, accused number one alleged that she had been confused on the day of making the witness statement as a result of the medication she took which, it must be noted, was no different to the medication she normally took. She also claimed that she took more medication than normal on this particular day when it was put to her that her normal dosage of medication did not make her confused.<sup>490</sup>

The court rejected this argument as accused number one's son from a previous relationship testified that, if the deceased was not available, he was tasked with administering accused number one's medication. He did so by dividing the medication into three containers so that accused number one could correctly administer the medication when her son was at work.<sup>491</sup> Additionally, and somewhat peculiarly, during her witness statement to police, she made averments as to her mental condition and details regarding her hospitalisation herein which the officer who took the statement found to be strange.<sup>492</sup>

The court, in the summary of the facts stated that accused number one suffered "from a bipolar mood disorder or some such illness for which she is on prescribed medication".<sup>493</sup> Indeed, accused number one's defence leaned heavily on her mental condition, the attendant medication she used for the treatment, and the side-effects thereof including 'confusion'.<sup>494</sup> The weight that accused number one placed on the fact that she was medicated as a result of various mental maladies, including bipolar

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487 *S v Petersen* 2008 JDR 1447 (C): 5.

488 *S v Petersen* 2008 JDR 1447 (C): 104.

489 *S v Petersen* 2008 JDR 1447 (C): 58.

490 *S v Petersen* 2008 JDR 1447 (C): 97-98.

491 *S v Petersen* 2008 JDR 1447 (C): 97-98.

492 *S v Petersen* 2008 JDR 1447 (C): 58.

493 *S v Petersen* 2008 JDR 1447 (C): 5.

494 *S v Petersen* 2008 JDR 1447 (C): 97.

disorder, she allegedly suffered from at the time that the deceased was murdered was substantial.<sup>495</sup>

During the trial, it was noted that accused number one had suffered from depression for which she had received treatment for approximately five years and for which she had been hospitalised in the past. She also had a history of seizures but had not suffered a seizure in approximately two years prior to the murder.<sup>496</sup> An earlier incident wherein accused number one stabbed the deceased, the details of which are not relevant hereto, had occurred eight months prior to the murder of the deceased.<sup>497</sup> Accused number one had told her psychiatrist that she had no memory of the stabbing incident, suffice to say she had heard voices which had made her stab the deceased. She speculated to her psychiatrist that her medication might have caused her memory loss.<sup>498</sup>

It was also alleged that the medication accused number one had been taking and the ECT<sup>499</sup> she had received for the treatment of her psychiatric problems, of which bipolar disorder was one, would cause acute memory loss at the time of the murder.<sup>500</sup> The defence called a pharmacist as an expert witness. His testimony centred on the analysis of the psychiatric medications accused number one was taking at the time the deceased was murdered. On the day of the murder, accused number one was prescribed, and by assumption took, the following medication: two anti-depressants in the morning (Prohexal 20 mg); a tranquiliser three times per day (Alzam 0.5 mg), and two sleeping tablets at night (Z-dorm). While the milligram strength is not indicated in the trial record, this was twice the recommended dose per the manufacturer, and most significantly, an antipsychotic drug at night<sup>501</sup> indicated for the treatment of bipolar disorder<sup>502</sup> (Seroquel 500 mg).<sup>503</sup>

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<sup>495</sup> *S v Petersen* 2008 JDR 1447 (C): 120-121.

<sup>496</sup> *S v Petersen* 2008 JDR 1447 (C): 65-66.

<sup>497</sup> *S v Petersen* 2008 JDR 1447 (C): 37.

<sup>498</sup> *S v Petersen* 2008 JDR 1447 (C): 89.

<sup>499</sup> Anonymous. "Effects of ECT on bipolar and control brain cells - Research summary and plan" <https://medicine.umich.edu/dept/prechter-program/news/archive/201803/effects-ect-bipolar-control-brain-cells-research-summary-plan> (accessed 25 April 2020).

<sup>500</sup> *S v Petersen* 2008 JDR 1447 (C): 122.

<sup>501</sup> *S v Petersen* 2008 JDR 1447 (C): 120-121.

<sup>502</sup> Strakowski *et al.* 2001: 712.

<sup>503</sup> Anonymous. "Quetiapine", <https://www.ncbi.nlm.nih.gov/books/NBK548616/> Seroquel is the brand name of quetiapine referred to in chapter two (accessed 25 April 2020).

He testified that, *inter alia*, Alzam would cause “[t]he patient [to] become less worried about life... distanced from reality, show vagueness and memory lapses”. He testified additionally that Seroquel could amplify the effects of Alzam.<sup>504</sup> The crux of his testimony was that if accused number one had taken the cocktail of medication as prescribed, she would quite conceivably have been disorientated and confused had she been woken in the middle of the night. This in addition to the ECT, the side effects of which include memory loss<sup>505</sup> which, in the opinion of the expert, could persist for months, made accused number one’s alleged memory loss on the night the deceased was murdered entirely likely. The court however noted “[t]his may be so but we must take into account that [a]ccused no. 1 suffered her worst memory lapses, according to her own evidence when being cross-examined, not during the night of 16 December 2006, but later the next day”.<sup>506</sup>

Under cross examination, however, the witness admitted to having drawn up two reports for the defence; an initial report and a second report, the latter of which was before the court. The draft report differed materially to the final report with respect to memory loss and the role that ECT played in this regard. In the draft report, it was stated that the ECT, and not the medication, had led to accused number one’s memory loss. In the final report, however, the report stated that both the ECT and medication had been responsible for the memory loss. The witness conceded to having made the amendments to the final report after having done research on the internet. Significantly, the witness also conceded that he could not disagree with experts who have rejected the theory that ECT causes memory loss.<sup>507</sup>

Accused number one’s version of her alleged memory loss was contradicted by a panel report from Valkenburg where accused number one was sent for psychiatric evaluation in terms of section 79(2) of the CPA. The report stated that “[s]he was able to give good account of herself at all times. Her thoughts were clear, rational and logical. Although she declined to give an account [of the events surrounding the

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<sup>504</sup> *S v Petersen* 2008 JDR 1447 (C): 121.

<sup>505</sup> Kellner “Electroconvulsive therapy: The second most controversial medical procedure”, [http://www.sadag.org/index.php?option=com\\_content&view=article&id=1170:electroconvulsive-therapy-the-second-most-controversial-medical-procedure&catid=24&Itemid=132](http://www.sadag.org/index.php?option=com_content&view=article&id=1170:electroconvulsive-therapy-the-second-most-controversial-medical-procedure&catid=24&Itemid=132) (accessed 24 October 2019).

<sup>506</sup> *S v Petersen* 2008 JDR 1447 (C): 121-122.

<sup>507</sup> *S v Petersen* 2008 JDR 1447 (C): 122-123.

deceased's death], she insisted that she had a vivid memory of the events during the alleged offence".<sup>508</sup> Evidence was also led that on the evening of the murder, accused number one seemed to be lucid and did not appear to slur her speech which would have been the case had she been medicated.<sup>509</sup>

During cross examination, accused number three testified that accused number one was of normal demeanour and lucid the night of the murder, albeit agitated as she felt he was taking too long to shoot the deceased.<sup>510</sup> Additionally, accused number one's own psychiatrist, who was called to testify, made no mention of the alleged memory lapses and could accordingly not comment, least of all contradict, the observations contained in the report of one Dr Bredenkamp who interviewed the accused in prison. The report stated that accused number one's "attention and concentration as well as short- and long-term memory was within normal parameters".<sup>511</sup> The court found accused number one to be an "abysmally poor" witness<sup>512</sup> and found her memory on the evening of the murder to be "clearer than otherwise".<sup>513</sup>

The court remarked that the facts surrounding the putative robbery and the subsequent murder mitigated against the finding that the events that transpired on the night in question were in fact a real robbery.<sup>514</sup> During the course of the trial, while much was made of who ultimately fired the fatal shot, the court could not reach a decisive conclusion herein.<sup>515</sup> This, however, proved to be of little consequence as accused nos. one, two and three were found guilty of murder.<sup>516</sup> The court found that accused number one had not only played a fundamental role in the murder of the deceased,<sup>517</sup> she was a "... patently... appalling witness. Her evidence, especially under cross-examination..., was neither logical nor consistent. It [festered] with lies".<sup>518</sup>

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508 *S v Petersen* 2008 JDR 1447 (C): 123.

509 *S v Petersen* 2008 JDR 1447 (C): 43.

510 *S v Petersen* 2008 JDR 1447 (C): 159.

511 *S v Petersen* 2008 JDR 1447 (C): 125. My own translation of the Afrikaans text.

512 *S v Petersen* 2008 JDR 1447 (C): 209.

513 *S v Petersen* 2008 JDR 1447 (C): 201.

514 *S v Petersen* 2008 JDR 1447 (C): 194.

515 *S v Petersen* 2008 JDR 1447 (C): 207.

516 *S v Petersen* 2008 JDR 1447 (C): 209.

517 *S v Petersen* 2008 JDR 1447 (C): 209.

518 *S v Petersen* 2008 JDR 1447 (C): 196.

### 3.5.5.4 Sentencing<sup>519</sup>

In sentencing, the court re-iterated that it found no reason to believe, nor did evidence presented to the court bolster, accused number one's endeavours "to paint herself as an emotionally unstable and timid woman". Counsel for the state put it to the court that accused number one was a malingerer who used purported mental illness to emotionally manipulate the deceased.<sup>520</sup>

Interestingly, although the court found expert evidence as to accused number one's mental conditions to be lacking, it was conceded that:

[a]lthough there was insufficient expert evidence on record as to her mental health – the earlier evidence at the time of the bail application is somewhat contradictory – I shall accept that the long term use of mind-altering medication must have affected her adversely. In my view these factors viewed cumulatively, permit the Court to deviate from the prescribed minimum sentence.<sup>521</sup>

The Judge went further and rejected the state's assertion that accused number one was a malingerer but went on to state that "it is patently clear that the offences committed by her were the product of a rational but wicked mind".<sup>522</sup> Further hereto, and tellingly, accused number one's expert witness "fairly and properly conceded that the deceased was killed in an extremely callous manner".<sup>523</sup> Accused number one was ultimately sentenced to 28 years imprisonment for the murder and an additional ten years imprisonment for the robbery, the latter running concurrently to the sentence for the murder with the effective sentence being 28 years imprisonment.<sup>524</sup> Leave to appeal against the convictions was subsequently denied by the court<sup>525</sup> and again refused by the Supreme Court of Appeal.<sup>526</sup>

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<sup>519</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC.

<sup>520</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC: 6-7.

<sup>521</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC: 3.

<sup>522</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC: 3.

<sup>523</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC: 9.

<sup>524</sup> *S v Petersen and Others* (SS02/2008) [2009] ZAWCHC: 10.

<sup>525</sup> *S v Petersen and Others* (CC02/2008) [2009] ZAWCHC: 76.

<sup>526</sup> Anonymous. "Law update", [http://www.lawlibrary.co.za/professionalupdate/2009/07\\_05/recentjudgments\\_sca.htm](http://www.lawlibrary.co.za/professionalupdate/2009/07_05/recentjudgments_sca.htm) (accessed 16 February 2020).

### 3.5.6 *S v Mtshali*<sup>527</sup>

In the case of *Mtshali*, the accused pled guilty to and was subsequently convicted of murdering her two minor children.<sup>528</sup> She had attempted suicide by taking a cocktail of pills and then strangled her two children.<sup>529</sup> Notwithstanding the severity of the crimes for which the accused had been convicted, the court stated that although “[m]urder, in any form remains a serious crime which usually calls for severe punishment... [c]ircumstances... vary and the punishment must ultimately fit the true nature and seriousness of the crime”.<sup>530</sup>

For the purposes of sentencing, the court requested a probation officer’s report. The defence and state procured their own expert reports which were both compiled by clinical psychologists. The gist of both experts’ reports and their evidence largely overlapped with both psychologists agreeing that the accused had suffered from depression immediately prior to and after the killings.<sup>531</sup>

Regarding the accused’s depressed state, the defence’s expert argued that “[the] combination of severe depression and severe helplessness constricts one’s thinking and one cannot see a way out. The more one thinks about it the deeper the state of despair. In the end it is not so much death that one wishes for, but an end to the suffering”. The expert also averred that the accused suffered from battered woman syndrome<sup>532</sup> which the expert for the state rejected. The court ultimately preferred the evidence of the defence herein and concurred.<sup>533</sup>

The state and the defence did, however, agree that the accused required continued psychiatric and psychological treatment and supervision.<sup>534</sup> Additionally and pertinently, the court agreed with the expert for the defence in that the accused killed her children as an act of love and as an act of mercy borne out of the hopelessness of

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<sup>527</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD).  
<sup>528</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 256.  
<sup>529</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 257.  
<sup>530</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 261.  
<sup>531</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 255.  
<sup>532</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 258.  
<sup>533</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 260.  
<sup>534</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 255.

her domestic circumstances and, by extension, those of her children.<sup>535</sup> The expert deemed this “altruistic fili-suicidal behaviour...”<sup>536</sup>

The court ultimately found that there were substantial and compelling circumstances to deviate from the prescribed minimum sentence, most significantly the criminal capacity of the accused was diminished by virtue of her depressed and emotionally fraught state. Other circumstances the court took into account were *inter alia* the low likelihood of re-offence; that fact that the murders were not premeditated; that the murders were borne out of desperation and deemed an act of love for her children, and that the element of deterrence contained in imprisonment would serve no purpose.<sup>537</sup>

The court sentenced the accused to *inter alia* ten years imprisonment, wholly suspended for a period of five years on the condition of no conviction for assault to be served; correctional supervision for a period of three years under house arrest; free community service for sixteen hours a month, and to consult with a state psychiatrist and psychologist as directed by the Commissioner.<sup>538</sup>

### **3.5.7 S v Seroba<sup>539</sup>**

Not dissimilarly and far more recently, in *S v Seroba*,<sup>540</sup> the accused shot and killed his wife and sister-in-law.<sup>541</sup> After arraignment, the accused was sent for psychiatric observation and pled not guilty to all counts by virtue of pathological incapacity. The accused was found to be suffering from major depressive disorder, but he was unanimously found to be fit to stand trial and to appreciate the unlawfulness of his actions. Expert evidence for the state was led to the extent that the accused was able to act in accordance with such appreciation.<sup>542</sup>

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<sup>535</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 261-262.

<sup>536</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 258.

<sup>537</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 261-262.

<sup>538</sup> *S v Mtshali* 2012 (2) SACR 255 (KZD): 262-263.

<sup>539</sup> *S v Seroba* 2015 (2) SACR 429 (GJ).

<sup>540</sup> The trial citation, *S v Seroba* 2015 (2) SACR 429 (GJ) and the sentencing citation *S v Frans* JDR 1526 (GJ) refer to the defendant by different surnames. The former reference is correct as the latter is the defendant's first name. They do, however, pertain to the same matter.

<sup>541</sup> *S v Seroba* 2015 (2) SACR 429 (GJ): 451.

<sup>542</sup> *S v Seroba* 2015 (2) SACR 429 (GJ): 429.

It was, however, also stated that the accused suffered from major depressive disorder which, to a mild degree, likely affected his ability to appreciate the unlawfulness of his act.<sup>543</sup> Counsel for the defence led evidence that the accused was afflicted by a “delusional disorder” when the offences were committed, which would have rendered him unable to act in accordance with said appreciation.<sup>544</sup> The court ultimately concurred with the state and the accused was found guilty of murdering his wife and sister-in-law.<sup>545</sup>

In sentencing, the court found that the accused had acted with diminished criminal capacity, albeit to mild degree, as a result of the depressive disorder from which he suffered. For this reason, *inter alia*, the court deviated from the prescribed minimum sentence of life imprisonment.<sup>546</sup> The accused was sentenced to eighteen years imprisonment each on both counts of murder with nine years imprisonment on the second count to run concurrently with the first count. The accused was, accordingly, sentenced to an effective term of 27 years imprisonment.<sup>547</sup>

### 3.6 CONCLUSION

This chapter has endeavoured to illustrate the current legal stance of the South African criminal justice system in respect of mentally ill offenders by examining several subjects which are pertinent therein. This has included a discussion of apposite legislation and the role of expert testimony in a South African context with particular regard to mental illness. Sentencing options in respect of mentally ill offenders that are available to courts and case law that serves to highlight points of discussion that have been canvassed in this chapter have also been expatiated on.

That the South African criminal justice system does not adequately provide for mentally ill or intellectually disabled offenders is lamentably an axiom. Mental health care in South Africa is plagued by chronic underfunding<sup>548</sup> which Szabo<sup>549</sup> terms

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<sup>543</sup> *S v Seroba* 2015 (2) SACR 429 (GJ): 437.

<sup>544</sup> *S v Seroba* 2015 (2) SACR 429 (GJ): 430.

<sup>545</sup> *S v Seroba* 2015 (2) SACR 429 (GJ): 451.

<sup>546</sup> *S v Frans* 2015 JDR 1526 (GJ): 7.

<sup>547</sup> *S v Frans* 2015 JDR 1526 (GJ): 10.

<sup>548</sup> Ramlall 2019: 1.

<sup>549</sup> Szabo 2013: 391.

“institutional stigma.” Worse still, a 2013 study found that over 78 per cent of offenders serving sentences in excess of 25 years in South African prisons had a diagnosable mental condition<sup>550</sup> and, per a report by JICS for the period 2015/16, bipolar disorder was found to be one of the most prevalent mental illnesses among prisoners.<sup>551</sup>

From the discussion in this chapter, while it is evident that some positive strides have been made, particularly in respect of legislation, the devil lies in the detail and often the detail, to an extent at least, nullifies these gains. A raft of problems confront mentally ill offenders in South Africa, which include the ongoing stigma which mental illness attracts;<sup>552</sup> overcrowded prisons with insufficient mental health care,<sup>553</sup> and the onus which is placed on the accused to prove mental illness or intellectual disability on the balance of probabilities in respect of criminal capacity.<sup>554</sup> Furthermore, secs. 77(6)(a) and 78(6)(a) or (b) of the CPA read with section 47 of the MHCA essentially permit longer or indefinite custodial sentences for mentally ill offenders who lack criminal capacity as their release is solely at the discretion of a judge in chambers.

Against this background, and with the Netherlands’ often Promethean approach in the treatment of mentally ill offenders<sup>555</sup> serving as a juxtaposition to South Africa’s own approach, chapter four examines the legal position in the Netherlands as it pertains to this class of offender. In so doing, a comparative perspective of many of the same themes and subjects covered in this chapter is set out, including legislation, expert testimony, case law, and sentencing options available in respect of mentally ill offenders with particular emphasis on entrustment orders and *terbeschikkingstelling*.

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<sup>550</sup> Bantjes *et al.* 2017: 3.

<sup>551</sup> Gasa. “Horror stories of mental illness in SA prisons”, <https://www.news24.com/health24/Mental-Health/News/horror-stories-of-mental-illness-in-sa-prisons-20180802> (accessed 7 November 2022).

<sup>552</sup> Szabo 2013: 389.

<sup>553</sup> Bantjes *et al.* 2017: 2.

<sup>554</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(1A).

<sup>555</sup> Bal & Koenraadt 2000: 220.

## CHAPTER FOUR: THE PRESENT LEGAL POSITION IN THE NETHERLANDS

### 4.1 INTRODUCTION

The Dutch legal approach to the treatment of mentally ill offenders is highly regarded and often considered to be at the forefront and a model for the treatment of mentally ill offenders.<sup>556</sup> In a comparative study between this class of offender in the United Kingdom and the same group in the Netherlands, the latter fared more favourably and enjoyed what the study deemed to be a higher quality of life than their British counterparts. This was ascribed to “more extensive therapeutic activity and greater therapeutic optimism” in the Netherlands.<sup>557</sup>

In addition hereto, the Netherlands is often regarded as one of the most progressive countries in terms of its practices and facilities for mentally ill offenders.<sup>558</sup> The Netherlands has a two-track system known as *terbeschikkingstelling* (hereinafter referred to as “TBS”), further unpacked in paragraph 4.4.3.<sup>559</sup> This system was introduced as “neither [a] prison sentence nor general psychiatry of the time [were] able to adequately respond to this offender category”.<sup>560</sup> There are two variations of TBS, but both entail a prison sentence which is served first.<sup>561</sup>

The first variation entails a period served in a designated forensic psychiatric hospital.<sup>562</sup> These hospitals are specifically designated for psychiatric treatment and offer “optimal conditions for a socio-therapeutic approach”.<sup>563</sup> The second variation entails conditions that the offender must abide by and that are set by the court where the requirements for TBS are met but hospitalisation is not necessary.<sup>564</sup> The prison

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<sup>556</sup> Bal & Koenraadt 2000: 220.

<sup>557</sup> Swinton *et al.* 2001: 131.

<sup>558</sup> Bal & Koenraadt 2000: 220.

<sup>559</sup> Bal & Koenraadt 2000: 229. “[TBS] is a provision in the *Dutch Criminal Code* that allows for a period of treatment following a prison sentence for mentally disordered offenders” (van Marle & Erasmus 2002: 83). Its primary aim is the “protection of society and treatment of the offender, in order to rehabilitate patients into the community” (de Boer & Gerrits 2007: 459).

<sup>560</sup> Struijk & Mevis 2016: 98.

<sup>561</sup> de Ruiter & Petrila 2018: 833.

<sup>562</sup> Bal & Koenraadt 2000: 229.

<sup>563</sup> Bal & Koenraadt 2000: 234.

<sup>564</sup> Tak 2003: 78.

sentence is proportional to the level of criminal capacity, as will be elaborated on below.<sup>565</sup>

The basic canons of the Dutch criminal justice system are “no competence without a sound statutory basis... no competence without responsibility and... no responsibility without accountability”.<sup>566</sup> It has a longstanding criminological tradition with the 50 years after the Second World War being characterised by liberality amongst western countries.<sup>567</sup> The Dutch criminal justice system is still largely regarded as being progressive, legally tolerant regarding morally divisive issues,<sup>568</sup> and one that has historically been characterised by its temperateness.<sup>569</sup>

This chapter has as its focus an investigation into the Dutch definition of criminal capacity, the place and effect of bipolar disorder on criminal capacity and liability, applicable legislation, expert evidence in cases dealing with bipolar disorder/mental illness and the sentencing of the mentally ill in the Netherlands. De Boer and Gerrits<sup>570</sup> assert that TBS is both “a pragmatic and successful way of reducing recidivism of high-risk offenders”. Indeed, it is possible that South African legislators could learn a great deal from the Netherlands.

#### **4.1.1 Overview of the criminal justice system in the Netherlands**

A brief overview of the criminal justice system in the Netherlands is contextually necessary for this chapter. The Netherlands is a constitutional monarchy and a parliamentary democracy.<sup>571</sup> There is, as in South Africa, a separation of powers between the judiciary, administration and legislature.<sup>572</sup> The Netherlands has eleven districts and each of these districts has their own court which deals with *inter alia*

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<sup>565</sup> de Ruiter & Petrila 2018: 833.

<sup>566</sup> Tak 2008: 5. Tonry & Bijleveld 2007: 1.

<sup>567</sup> Tonry & Bijleveld 2007: 1.

<sup>568</sup> Tak 2008: 11.

<sup>569</sup> Tak 2008: 7.

<sup>570</sup> de Boer & Gerrits 2007: 459.

<sup>571</sup> Tak 2008: 1.

<sup>572</sup> Tak 2008: 12.

criminal, civil and administrative law issues.<sup>573</sup> An appeal against a district court decision regarding criminal law must be lodged at one of the four Courts of Appeal.<sup>574</sup>

Appeals in cassation,<sup>575</sup> namely the ascertainment of whether the law has correctly been applied by lower courts,<sup>576</sup> are heard by the criminal chamber of the Supreme Court (*Hoge Raad*).<sup>577</sup> Courts of first instance are ordinarily the district courts (*rechtbanken*).<sup>578</sup> There are Courts of Appeal (*gerechtshof*) and at the apex of the court structure is the Supreme Court (*Hoge Raad*).<sup>579</sup> The *Hoge Raad* reviews the proceedings and judgments of lower courts but does not hear the facts *de novo*.<sup>580</sup>

The *dossier* is of fundamental importance in Dutch criminal law. It contains statements from the accused and witnesses, as well as record of previous convictions of the accused if relevant.<sup>581</sup> The *dossier* is sent to the prosecutor who can direct further police investigation, indict the accused, or direct the matter to the examining magistrate for judicial inquiry.<sup>582</sup> The examining magistrate supervises and oversees the criminal investigation at this stage<sup>583</sup> and will request expert testimony and question the expert(s) and request psychiatric reports if necessary. The examining magistrate will then submit a report which forms part of the *dossier* and based on which the prosecutor will decide whether to proceed with trial or withdraw criminal charges against the accused.<sup>584</sup> The decision to prosecute in the Netherlands vests with

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573 De Rechtspraak. "Judicial system Netherlands", <https://www.rechtspraak.nl/English/Pages/default.aspx> (accessed 23 March 2022).

574 De Rechtspraak. "Judicial system Netherlands", <https://www.rechtspraak.nl/English/Pages/default.aspx> (accessed 23 March 2022).

575 Cassation "is a check on the quality of contested judgments given by the courts of appeal as regards both the application of law and the legal reasoning behind it." Per the title of the article, it is regarded as the most important task that the Supreme Court is seized with. Anonymous. "Cassation: the main task of the Supreme Court", <https://www.hogeraad.nl/english/cassation-the-main/> (accessed 23 March 2022).

576 Tak 2008: 104.

577 De Rechtspraak. "Judicial system Netherlands", <https://www.rechtspraak.nl/English/Pages/default.aspx> (accessed 23 March 2022).

578 Tak 2003: 33.

579 Tak 2003: 33.

580 Tak 2008:55-56.

581 Meintjes-Van der Walt 2001: 53.

582 Meintjes-Van der Walt 2001: 53.

583 *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III: art. 170(2).

584 Meintjes-Van der Walt 2001: 53.

prosecutors.<sup>585</sup> If the prosecutor decides to initiate prosecution, a summons must be served on the accused.<sup>586</sup>

Courts are independent and not bound by prior decisions even by higher courts, thus there is no system of legal precedent.<sup>587</sup> There is no constitutional court in the Netherlands and courts are specifically prohibited from ruling on the constitutionality of acts of parliament as per the *Dutch Constitution*<sup>588</sup> with the exception of the review of Dutch legislation where it pertains to the compatibility of international treaties concluded by the Netherlands with other countries.<sup>589</sup> Article 120 of the *Dutch Constitution* forbids judicial review of law and treaties against the *Constitution*.<sup>590</sup> Herein it is explicitly stated that “[the] constitutionality of Acts of Parliament and treaties shall not be reviewed by the courts”. As such, there exists no possibility for constitutional review.<sup>591</sup> The *Hoge Raad* is the apex court in respect of civil, criminal and tax law.<sup>592</sup>

There are no juries in the Netherlands<sup>593</sup> and there is no cross-examination in Dutch courts.<sup>594</sup> The trial phase is described as having an accusatorial character. A wholly adversarial system is not adhered to as discovery of truth lies at the heart of the trial phase. In addition, and to a large degree, there exists an equality of arms between the public prosecutor and the defendant.<sup>595</sup> Likewise, as in South Africa, opinion evidence is considered inadmissible apart from expert evidence which is considered to be opinion evidence.<sup>596</sup>

During a trial, the charge is read in court and the accused, the witnesses and experts for both the defence and the prosecution are questioned by the court, but the defence and the state may ask questions hereafter.<sup>597</sup> In many instances, however, the trial is

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<sup>585</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title I. sec. 1: arts. 148 and 149.

<sup>586</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title V: art. 258.

<sup>587</sup> Tak 2008: 58-59.

<sup>588</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 120.

<sup>589</sup> Tak 2003: 21.

<sup>590</sup> de Poorter 2013: 89.

<sup>591</sup> de Poorter 2013: 92.

<sup>592</sup> de Poorter 2013: 98.

<sup>593</sup> Tonry & Bijleveld 2007: 9.

<sup>594</sup> Meintjes-Van der Walt 2001: 54

<sup>595</sup> Tak 2003: 63.

<sup>596</sup> Tak 2008: 106.

<sup>597</sup> Tak 2003: 61. See also arts. 272(2); 286(1); 286(4); 292(5) of the CCP.

a verification process of the *dossier* without any additional evidence being led or witnesses called and, on this basis, the court will make its decision.<sup>598</sup> The practical implication herein is that oral testimony by witnesses is more the exception than the rule.<sup>599</sup>

Procedurally a court may declare a summons invalid; in terms of the case at hand, it may hold that it lacks competency to try it and it may dismiss the case or it may cease further prosecution.<sup>600</sup> Once the court has satisfied itself that none of the aforementioned instances are applicable, it may proceed to try the case. The court must then satisfy itself in four substantive respects: are the facts mentioned in the charge proven; do the facts constitute a criminal offence; is the accused criminally accountable; and what sentence shall be imposed.<sup>601</sup> The standard of proof for criminal cases is, as with South Africa, beyond a reasonable doubt.<sup>602</sup>

#### **4.1.2 Criminal capacity and mental illness**

The test for criminal capacity is contained in the *Criminal Code* (hereinafter referred to as the “CC”) and holds that “[a]ny person who commits an offence for which he cannot be held responsible by virtue of mental disease or illness shall not be criminally accountable”.<sup>603</sup> In practice, a person is deemed to lack criminal capacity if at the time of the commission of the crime, and as a result of mental illness or defect, he/she lacks the capacity to appreciate the unlawfulness of his/her conduct or to bring his/her conduct into conformity with the requirements of the law.<sup>604</sup> The Dutch test for criminal capacity is largely comparable to the South African test for criminal capacity.

Mental illness is an excuse defence.<sup>605</sup> As in South Africa, the Netherlands affords full exculpation for crimes committed by offenders who are criminally unaccountable because they suffered from a mental illness or defect at the time of committing a

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<sup>598</sup> Franken 2008: 220.

<sup>599</sup> Meintjes-Van der Walt 2001: 54.

<sup>600</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title VI. sec. 3: art. 348.

<sup>601</sup> Tak 2008: 102.

<sup>602</sup> Tak 2008: 103.

<sup>603</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title III: art. 39.

<sup>604</sup> Tak 2008: 74.

<sup>605</sup> Tak 2008: 72.

crime.<sup>606</sup> The Netherlands has a dualistic penal system. This, in effect, means that an offender must both be found to be guilty of the crime for which they are accused as well as being deemed mentally culpable for the crime in question.<sup>607</sup>

While no legislation directly references diminished criminal capacity, article 37a of the CC<sup>608</sup> provides the legislative framework herein. On the basis hereof, there are five degrees of criminal capacity: full criminal capacity, slightly diminished criminal capacity, diminished criminal capacity, severely diminished criminal capacity, and complete absence of criminal capacity.<sup>609</sup> It is also important to note that diminished criminal capacity is not restricted to a list of sanctioned mental illnesses or disorders.<sup>610</sup> Bipolar disorder is accordingly a mental illness that finds application as a complete or partial defence, as illustrated in case law below.

As noted in the foregoing paragraphs, the degree to which the mental illness contributed to the lack of criminal capacity of the offender in the commission of the offence is proportionate to his/her culpability.<sup>611</sup> As such, the greater the degree of culpability, the longer the offender will spend in jail. When an offender is partially criminally accountable and considered to be a risk to others or property, generally, the court may impose TBS. The court will be guided by expert reports regarding the extent to which the mental illness or defect the offender suffers from contributed to the commission of the offence. As stated earlier in paragraph 4.1, the term of imprisonment will always be served first.<sup>612</sup>

Each crime has its own statutorily defined elements in the CC. The CC does not define criminal offences but rather the conditions that must be met for an offender to be found guilty. The so-called mental element in an offence, namely intent or negligence, must be present for an offender to be held criminally liable.<sup>613</sup>

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<sup>606</sup> Bal & Koenraadt 2000: 242.

<sup>607</sup> de Ruiter & Petrila 2018: 833.

<sup>608</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a.

<sup>609</sup> de Ruiter & Petrila 2018: 833.

<sup>610</sup> de Ruiter & Petrila. 2018: 834.

<sup>611</sup> Tak 2008: 132.

<sup>612</sup> de Ruiter & Petrila 2018: 833.

<sup>613</sup> Tak 2008: 71.

## 4.2 LEGISLATION<sup>614</sup>

Like South Africa, the Netherlands has a *Constitution*<sup>615</sup> which, although fundamentally different in that it is not the supreme law of the country, echoes many of the ideologies contained in the *South African Constitution*. Indeed, Chapter 1 of the *Dutch Constitution* is dedicated solely to fundamental rights.

While the *Dutch Constitution* is less explicitly worded than its South African counterpart, provision is implicitly made for people who suffer from mental illness or defect and, by implication, for mentally ill offenders. Article 1 of Chapter 1 holds that all people must be “treated equally in equal circumstances” and holds further that no one may be discriminated against on the basis of “belief, political opinion, race or sex *or on any other grounds whatsoever*” (emphasis supplied).<sup>616</sup>

The Dutch criminal justice system has at its nexus two pieces of legislation, namely the *Dutch Criminal Code* (“CC”) and the *Dutch Code of Criminal Procedure* (hereinafter referred to as the “CCP”). The latter insofar as is relevant to the topic at hand regulates the exclusion of criminal capacity and contains the various punishments and measures. The former contains general provisions for criminal liability and legal remedies. These provisions are analysed in greater detail in the paragraphs that follow.

Lastly, the *Forensic Care Act*<sup>617</sup> (hereinafter referred to as the “FCA”) and its adjunct, the *Mandatory Mental Health Care Act*<sup>618</sup> (hereinafter referred to as the “MMHCA”), are also examined. The latter has as its primary objective strengthening the link between forensic care and additional forms of mental health care through criminal law to reduce recidivism and increase public safety.<sup>619</sup>

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<sup>614</sup> The legislation referred to herein can be consulted at <https://wetten.overheid.nl>.

<sup>615</sup> *The Constitution of the Kingdom of the Netherlands* 2008.

<sup>616</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 1.

<sup>617</sup> *The Forensic Care Act* BWBR0040634/2020-01-01.

<sup>618</sup> *The Mandatory Mental Health Care Act* BWBR0040635/2022-01-01.

<sup>619</sup> This is in the ‘Prelude’ to the Act.

#### **4.2.1 The Constitution of the Kingdom of the Netherlands 2008**

*The Constitution of the Kingdom of the Netherlands 2008* (hereinafter referred to as “the *Dutch Constitution*”) in Chapter 1, as briefly mentioned in paragraph 4.2, sets out fundamental rights crucially holding that all people must be “treated equally in equal circumstances” and that no one may be discriminated against on the basis of “belief, political opinion, race or sex or on any other grounds whatsoever”.<sup>620</sup> It also includes the right of freedom of religion,<sup>621</sup> the right of association, although this right is tempered legislatively in the interests of public order,<sup>622</sup> and the right to privacy which is likewise tempered by legislative restrictions.<sup>623</sup> A person is granted the right to inviolability<sup>624</sup> and may furthermore only be deprived of his or her liberty legislatively<sup>625</sup> or by order of a court.<sup>626</sup> Should a person be deprived of his or her liberty whilst awaiting trial, the trial must take place within a reasonable time.<sup>627</sup>

In addition hereto, Chapter 1 directs that an offence may only be classified as such if it was an offence in law at the time the offence was committed,<sup>628</sup> and that the right to legal representation must be afforded to everyone in both legal and administrative proceedings.<sup>629</sup> Lastly and particularly, material to the subject at hand, Chapter 1 holds that the government must take steps to foster the health of the population.<sup>630</sup>

Chapter 2 sets out the structure of government which comprises both the King and Ministers,<sup>631</sup> the latter being solely responsible for acts of government as the King is inviolable.<sup>632</sup> All acts of Parliament and Royal Decrees must be signed by both the King and by at least one Minister or State Secretary.<sup>633</sup>

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<sup>620</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 1.

<sup>621</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 6(1).

<sup>622</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 8.

<sup>623</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 10(1).

<sup>624</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 11.

<sup>625</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 15(1).

<sup>626</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 15(2).

<sup>627</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 15(3).

<sup>628</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 16.

<sup>629</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 18(1).

<sup>630</sup> *The Constitution of the Kingdom of the Netherlands 2008*: art. 22(1).

<sup>631</sup> *The Constitution of the Kingdom of the Netherlands 2008*: sec. 2, art. 42(1).

<sup>632</sup> *The Constitution of the Kingdom of the Netherlands 2008*: sec. 2, art. 42(2).

<sup>633</sup> *The Constitution of the Kingdom of the Netherlands 2008*: sec. 2, art. 47.

Chapter 3 holds that the States General represents the entire population of the Netherlands.<sup>634</sup> The States General is composed of the Lower House (*Tweede Kamer*) and the Upper House (*Eerste Kamer*)<sup>635</sup> with both being deemed a single entity when meeting in joint sessions.<sup>636</sup> *Algemene maatregelen van bestuur* (hereinafter referred to as “AMvBs”), in effect, elaborate on legislation by way of governmental decree<sup>637</sup> and are decided by Royal Decree.<sup>638</sup> For the purposes of expediency, the States General<sup>639</sup> often provide the outline or framework of legislation which can be further developed at a later stage<sup>640</sup> by the legislator.<sup>641</sup> To create an AMvB, the draft is submitted to the Council of Ministers; advice from the Council of State on the draft must be obtained and the AMvB must be published in the Official Gazette.<sup>642</sup> They must be published in order to take effect.<sup>643</sup>

Chapter 5 contains the provisions that pertain to acts of Parliament and other regulations. Acts of Parliament must be jointly enacted by the government and Houses of Parliament.<sup>644</sup> A bill becomes an Act of Parliament once it has been passed by the States General and is ratified by the King.<sup>645</sup> The *Dutch Constitution* also holds that AMvBs may only be established by Royal Decree.<sup>646</sup>

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<sup>634</sup> *The Constitution of the Kingdom of the Netherlands* 2008: sec. 1, art. 50.

<sup>635</sup> *The Constitution of the Kingdom of the Netherlands* 2008: sec. 1, art. 51(1).

<sup>636</sup> *The Constitution of the Kingdom of the Netherlands* 2008: sec. 1, art. 51(4).

<sup>637</sup> Eerste Kamer der Staten-Generaal. “Algemene Maatregel van Bestuur”, [https://www.eerstekamer.nl/begrip/algemene\\_maatregel\\_van\\_bestuur](https://www.eerstekamer.nl/begrip/algemene_maatregel_van_bestuur) (accessed 23 March 2022).

<sup>638</sup> *The Constitution of the Kingdom of the Netherlands* 2008: Art. 89(1).

<sup>639</sup> Tweede Kamer der Staten-Generaal. “Democracy in the Netherlands”, <https://www.houseofrepresentatives.nl/how-parliament-works/democracy-netherlands> (accessed 23 March 2022).

<sup>640</sup> Parlement.com. “Ministeriële regeling”, [https://www.parlement.com/id/vhcsnwfe8qa3/ministeriele\\_regeling\\_minreg](https://www.parlement.com/id/vhcsnwfe8qa3/ministeriele_regeling_minreg) (accessed 23 March 2022).

<sup>641</sup> Parlement.com. “Ministeriële regeling”, [https://www.parlement.com/id/vhcsnwfe8qa3/ministeriele\\_regeling\\_minreg](https://www.parlement.com/id/vhcsnwfe8qa3/ministeriele_regeling_minreg) (accessed 23 March 2022).

<sup>642</sup> Nederland Rechtsstaat. “Commentaar - artikel 89”, <https://www.nederlandrechtsstaat.nl/module/nlrs/script/viewer.asp?soort=commentaar&artikel=89> (accessed 29 June 2019).

<sup>643</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 89(3).

<sup>644</sup> *The Constitution of the Kingdom of the Netherlands* 2008: sec. 1, art. 81.

<sup>645</sup> *The Constitution of the Kingdom of the Netherlands* 2008: sec. 1, art. 87(1).

<sup>646</sup> *The Constitution of the Kingdom of the Netherlands* 2008: sec. 1, art. 89(1).

Chapter 6 regulates the administration of justice. It holds that the trial of offences and sentences that warrant a deprivation of liberty are the sole preserve of the judiciary.<sup>647</sup> Furthermore, capital punishment is expressly prohibited.<sup>648</sup>

Regarding the administration of justice, some constitutional provisions bear noting. Only the *Hoge Raad* may overturn matters that pertain to errors of subject to the limitations of acts of Parliament.<sup>649</sup> The constitutionality of treaties and acts of Parliament cannot, however, be reviewed by any court in the Netherlands.<sup>650</sup>

Chapter 8 of the *Dutch Constitution* deals with its revision. Article 137(1) herein stipulates that a bill may be proposed that would amend the *Constitution*.<sup>651</sup> The amendment in question can be passed if it garners two-thirds of the vote of the States General.<sup>652</sup> Once the proposed amendments have been ratified by the King and published, the amendments will become law.<sup>653</sup> In instances where an amendment to the *Dutch Constitution* and existing decrees and acts of Parliament are incongruent, the former must remain in force until such amendments that bring them in line with the *Dutch Constitution* are made.<sup>654</sup>

#### **4.2.2 The Criminal Code**

The provisions relevant to criminal capacity and punishment of mentally ill offenders contained in the CC will be discussed below.

Article 39 in the CC<sup>655</sup> delineates the exclusion of criminal capacity and holds that someone who commits an offence for which he or she cannot be held liable by virtue of a mental illness or defect shall not be held criminally liable for such offence. As noted in paragraph 4.1.2, diminished criminal responsibility is not unambiguously stated in Dutch law but it can be inferred from 37a(2) wherein a judge may decide not

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<sup>647</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 113(1; 3).

<sup>648</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 114.

<sup>649</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 118(2).

<sup>650</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 120.

<sup>651</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 137(1).

<sup>652</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 137(4).

<sup>653</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 139.

<sup>654</sup> *The Constitution of the Kingdom of the Netherlands* 2008: art. 120.

<sup>655</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title III: art. 39.

to impose a prison sentence on an offender even though such offender is deemed to be criminally accountable, his or her mental illness or defect notwithstanding.<sup>656</sup>

Punishments in general are delineated as either primary or additional. Primary punishments are:

- a) imprisonment;<sup>657</sup>
- b) detention;<sup>658</sup>
- c) community service; and<sup>659</sup>
- d) fines.<sup>660</sup>

Additional punishments are:

- a) disqualification from certain rights;<sup>661</sup>
- b) confiscation; and<sup>662</sup>
- c) publication of judgment.<sup>663</sup>

If the court, with due regard to the minor seriousness of the offence, the personality of the offender or the circumstances under which the offence was committed, or the circumstances thereafter, considers it prudent, it may hold that no penalty or measure will be imposed.<sup>664</sup>

Imprisonment may be either one of determined length, or a life sentence.<sup>665</sup> A sentence of determined length is deemed as being a sentence which may vary from one day up until a period of eighteen years.<sup>666</sup> A sentence of 30 consecutive years may be imposed when the offence is punishable by life imprisonment.<sup>667</sup>

Relevant to this study, a court may order that a convicted offender who has been sentenced to a term of imprisonment can be admitted to a custodial institution wherein

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<sup>656</sup> Bal & Koenraadt 2000: 226-227.

<sup>657</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(1)(a)(1).

<sup>658</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(1)(a)(2).

<sup>659</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(1)(a)(3).

<sup>660</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(1)(a)(4).

<sup>661</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(1)(b)(1).

<sup>662</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(1)(b)(2).

<sup>663</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(1)(b)(3).

<sup>664</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 9(a).

<sup>665</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 10(1).

<sup>666</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 10(2).

<sup>667</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 10(3).

offenders held under a TBS order are treated if the offender has the requisite eligibility by virtue of mental illness or defect.<sup>668</sup> The admission and discharge herein shall be directed by the Minister of Safety and Justice (hereinafter referred to as the “Minister”), in an AMvB, and such an order may only be issued by a dated, signed and reasoned opinion given jointly or separately by two behavioural experts both of whom must have examined the accused and one of whom must be a psychiatrist.<sup>669</sup>

A measure can be imposed as a means to protect society or to negate criminal offence<sup>670</sup> in the following instances:

- a) where someone is convicted of a criminal offence;<sup>671</sup>
- b) where no penalty will be imposed per article 9a of the CC.<sup>672</sup>

The measures may include ordering the offender:<sup>673</sup>

- a) not to live in a certain area;<sup>674</sup>
- b) to refrain from contacting specific persons;<sup>675</sup>
- c) to be at a specific place at a specified time;<sup>676</sup>
- d) to report to an investigating officer at specified times.<sup>677</sup>

For the protection of others or for the protection of society or property generally, a court may, *ex officio* or at the request of the public prosecution services, impose a measure aimed at restricting the liberty of the offender if:<sup>678</sup>

- a) the offender is ordered to undergo TBS per Article 37a; 37b or 38 of the CC;<sup>679</sup> or
- b) the offender has been sentenced to a term of imprisonment or a sentence of imprisonment wherein the sentence or a portion thereof will not be

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<sup>668</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 13(1).

<sup>669</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title II: art. 13(3).

<sup>670</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(1).

<sup>671</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(1)(1).

<sup>672</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(2)(a).

<sup>673</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(2).

<sup>674</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(2)(a).

<sup>675</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(2)(b).

<sup>676</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(2)(c).

<sup>677</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(2)(d).

<sup>678</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38z(1).

<sup>679</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38z(1)(a).

enforced or an offence which concerns bodily inviolability which carries a prison sentence of four years or more.<sup>680</sup>

Measures can be imposed concurrently with other measures or penalties.<sup>681</sup>

If the safety of others or the safety of persons or property generally demands it, a court may order TBS if:<sup>682</sup>

- a) an accused suffered from a morbid mental disorder or defective mental development at the time that the offence was committed; and<sup>683</sup>
- b) the offence in question is punishable with a prison sentence of at least four years or is a criminal offence *inter alia* per articles 132, 285(1), 285b and 395 of the CC.<sup>684</sup>

The order referred to in article 37a(1) cannot be issued unless the court has been furnished with a reasoned, dated and signed opinion by two behavioural experts who have examined the accused, one of whom must be a psychiatrist. The report must be issued jointly or both experts can issue reports separately. If the aforementioned reports were issued more than a year prior to the start of the trial, the court may only make use thereof with permission from both the accused and the public prosecution services. Additional rules herein may be issued by way of AMvB.<sup>685</sup>

Section 37a(3) will not find application should an accused refuse to cooperate with the psychological evaluation for the purpose of the opinion. Insofar as is possible, the experts must report, either individually or jointly, on the reason the accused has refused to submit to the examination.<sup>686</sup> The court may procure additional advice as to the desirability or necessity of making an order per article 37a(1) and to the extent to which the accused is willing to cooperate.<sup>687</sup>

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<sup>680</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38z(1)(b).  
<sup>681</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38v(5).  
<sup>682</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(1).  
<sup>683</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(1)(1).  
<sup>684</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(1)(2).  
<sup>685</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(3).  
<sup>686</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(4).  
<sup>687</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(4).

The court will, as far as is possible, accrue and consider other advice or reports that can inform it as to the desirability and exigency of the order contemplated in section 37(1) of the CC. When handing down this order, the court must take both the seriousness of the offence or the number of prior convictions, as well as the reports of the behavioural experts into account.<sup>688</sup>

If the offence with which the accused has been arraigned is aimed at or poses a threat to the inviolability of the body per section 38e of the CC and the accused does not cooperate with the evaluation per section 37a(4), the public prosecutor may direct that the chairman of the multidisciplinary committee<sup>689</sup> provide advice on the usefulness of the accused's personal health data from doctors and behavioural experts insofar as it may indicate a morbid disturbance of the accused's mental capacity.<sup>690</sup>

The public prosecutor must first obtain written authorisation from the penitentiary chamber.<sup>691</sup> The committee is then permitted to request the aforementioned data and the doctor or behavioural expert are obliged to provide the data to the committee. The committee must, within a period of 30 days after the public prosecutor's request, provide the motivated advice in respect of the usefulness of the accused's personal health data from doctors and behavioural experts insofar as it may indicate a morbid disturbance of the accused's mental capacity. The public prosecutor must inform the accused of the request and the subsequent advice.<sup>692</sup>

As discussed in the TBS section, should the safety of others or the safety of persons or property generally demand it, the court may also direct that a person ordered to undergo TBS must do so with government nursing.<sup>693</sup>

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<sup>688</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(5).

<sup>689</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(9) holds that "[t]he [M]inister will establish a multidisciplinary committee comprising of two doctors, one of whom must be a psychiatrist, a behavioural expert and two lawyers. The purpose of the committee is to advise on the usefulness and feasibility of personal information concerning/relating to health. The chairman of the committee must be a psychiatrist. Rules in respect of *inter alia* confidentiality, working methods and decision making of the committee are made by way of AMvB."

<sup>690</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(7). A penitentiary chamber is a cohort of three judges as set out in art. 67 of *the Judicial Organization Act* BWBR0001830/2021-07-01.

<sup>691</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(6).

<sup>692</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(6).

<sup>693</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37b(1).

If the court has imposed TBS with government nursing, the court may include a recommendation for the date on which the TBS portion should commence in its judgment.<sup>694</sup> If the TBS order is one with conditions, the court must set the conditions in respect of the behaviour of the offender to protect the safety of others or the safety of persons or property in general.<sup>695</sup>

The period of detention in a TBS order is two years<sup>696</sup> but may be extended on the application of the public prosecution service for a period of between one and two years if it is in the interest of the safety of both general property and the public or others to do so.<sup>697</sup> The total period of the TBS order with government nursing/compulsory care may not exceed a period of four years unless the TBS imposed is in respect of a crime that is aimed at or threatens bodily integrity.<sup>698</sup> In this case, TBS must not exceed a period of nine years with the exception of the instances per arts. 37b of the CC and 16:6:10(1) of the CCP.<sup>699</sup>

TBS with government nursing can be terminated after one or two years on request of the court *ex officio*, the public prosecutor or the offender.<sup>700</sup> If TBS is terminated herein the court must set conditions in respect of the behaviour of the offender to protect the safety of others or the safety of persons or property generally.<sup>701</sup>

### **4.2.3 Criminal Code of Procedure**

Provisions of the CCP that are relevant to the focus areas of this study, namely criminal capacity, expert evidence and the sentencing of offenders who suffered from mental illness at the time of committing the offence, will be discussed in the paragraphs to follow.

An accused may not be convicted on a guilty plea, which is not recognised in Dutch law, nor on the evidence of a single witness.<sup>702</sup> Also, as the presumption of innocence

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<sup>694</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 37b(2).

<sup>695</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 38(1).

<sup>696</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 38d(1).

<sup>697</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 38d(2).

<sup>698</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 38e(1).

<sup>699</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 38e(2).

<sup>700</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 38g(1).

<sup>701</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. Sec. 2: art. 38g(2).

<sup>702</sup> Tak 2008: 65.

is a fundamental pillar of Dutch criminal law, a court may not draw any adverse conclusions from an accused who exercises his/her right to silence and does not make a statement during their trial.<sup>703</sup> If the offence in question has been committed, the district court is further seized with deciding whether the accused has the requisite criminal capacity and what punishment or measure would be fitting.<sup>704</sup>

If the district court has found that the accused has committed the offence but lacks criminal capacity or lacked criminal capacity at the time of committing the offence and, accordingly, cannot be found guilty of the offence by reason of mental illness or defect, the court will dismiss the charge.<sup>705</sup> When read with FCA Chapter 1, article 1.1(2) and article 38z(1)(a) of the CC, a court may also order a measure to be served.

The prosecution of an accused who suffers from a mental illness or defect, to the extent that they do not possess the requisite capacity to understand why they are being prosecuted, must be halted, the stage of the prosecution notwithstanding.<sup>706</sup> This suspension must, however, be withdrawn if the accused has recovered.<sup>707</sup> This decision can be taken *ex officio* by the court or on application of the prosecution or the defence.<sup>708</sup>

In cases involving mentally ill offenders, expert evidence is of the utmost importance. An expert must report truthfully, completely, and to the best of their knowledge.<sup>709</sup> Qualifications that an expert must possess and how expertise is to be determined and tested are to be laid down by AMvB.<sup>710</sup> Experts are paid by the treasury for their services.<sup>711</sup> There is a national register of expert witnesses, the management of which is determined by AMvB.<sup>712</sup> An expert who is not on the national register may be

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<sup>703</sup> Tak 2008: 106.

<sup>704</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4: art. 350.

<sup>705</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4: art. 352(2).

<sup>706</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title I. sec. 5: art. 16(1).

<sup>707</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title I. sec. 5: art. 16(2).

<sup>708</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title I. sec. 5: art. 19(1).

<sup>709</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51i(3).

<sup>710</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51i(3).

<sup>711</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51j(4).

<sup>712</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k(1).

admitted as such by the court if sound reasons are given to the court as to what qualifies the expert as such by the party calling the expert.<sup>713</sup>

A report submitted by the expert must be reasoned and, if possible, the expert must indicate which methods were used, to what extent the method and its results can be considered to be reliable, and what competency the expert holds in using said method.<sup>714</sup> The report must be in writing unless the court has determined that the expert can be heard.<sup>715</sup> Additionally, the expert must declare that the report has been drawn up truthfully, completely and to the best of the expert's knowledge. The basis hereof must be what science and knowledge the expert has gained in respect of the subject in question.<sup>716</sup> An expert may be heard by the court either *ex officio* or at the request of the public prosecutor or the accused.<sup>717</sup>

If an accused has been remanded in pre-trial custody and an assessment of their mental state is necessary, it may be so ordered that the accused be transferred to a psychiatric hospital or institution intended for psychiatric observation as designated in article 509f of the CCP if no other alternative is available to carry out the assessment. This may be ordered by the examining magistrate *ex officio* or on application by the accused or public prosecutor.<sup>718</sup>

An order per article 196 cannot be issued unless it is reasoned, the opinion of at least one expert has been obtained, and the offender has been given the chance to make representations on the matter. The examining magistrate must also invite the public prosecutor to attend the hearing.<sup>719</sup> The assessment may not exceed a period of seven weeks and is deemed as part of the pre-trial detention.<sup>720</sup>

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<sup>713</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k(2).

<sup>714</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k l(1).

<sup>715</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k l(2).

<sup>716</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k l(3).

<sup>717</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51m(2).

<sup>718</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. Sec. 2: art. 196.

<sup>719</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. Sec. 2: art. 197(1).

<sup>720</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. Sec. 2: art. 198(1).

The order per article 196 may be extended once for a further period not exceeding seven weeks by the examining magistrate *ex officio*, the public prosecution or the accused.<sup>721</sup> Likewise, the examining magistrate *ex officio*, or at the request of the public prosecution or the accused, may also direct that the order be terminated.<sup>722</sup> The Minister designates the institutions contemplated herein.<sup>723</sup>

The examining magistrate may, in the interests of investigation, appoint one or more experts *ex officio* or at the request of the public prosecutor or at the request of the accused.<sup>724</sup> After the expert report has been received by the examining magistrate, he/she must in turn supply a copy thereof to both the public prosecutor and the accused.<sup>725</sup> The accused may appoint his/her own expert to investigate the contents of the report.<sup>726</sup> The examining magistrate may *ex officio* or at the request of public prosecutor or the accused, order further investigations if the expert report gives rise to the need thereof.<sup>727</sup>

The CCP also has very specific prescriptions when it comes to sentencing. The procedural requirements for sentencing are that:

- a) the verdict sets forth the reasons determining the sentence;<sup>728</sup>
- b) that the court must give the specific reasons that led to the choice of a custodial sentence as well as the circumstances that were considered in assessing the appropriate length of the sentence;<sup>729</sup> and
- c) that the court must give specific reasoning when a TBS order is imposed for a crime involving a risk to bodily integrity.<sup>730</sup>

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<sup>721</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. Sec. 2: art. 198(2).

<sup>722</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. Sec. 2: art. 198(4).

<sup>723</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. Sec. 2: art. 198(5).

<sup>724</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: sec. 5: art. 227(1).

<sup>725</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: sec. 5: art. 230(1).

<sup>726</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: sec. 5: art. 230(2).

<sup>727</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: sec. 5: art. 231(1).

<sup>728</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4. art. 359(5).

<sup>729</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4. art. 359(6).

<sup>730</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4. art. 359(7).

An offender sentenced to imprisonment can, by virtue of a mental disorder, psychogeriatric disorder, or mental disability, be placed in an institution for government nursing for the *ter beschikking gestelden* by a TBS order in which case article 6:2:16 above applies *mutatis mutandis*.<sup>731</sup> The offender can lodge an appeal against the placement or the decision to terminate the placement per article 37b(2) of the CC within four weeks of the decision.<sup>732</sup>

Rules regarding offenders who are sentenced to a period of imprisonment and a TBS order by virtue of a mental disorder, psychogeriatric disorder or mental disability are to be laid down per AMvB. The rules regarding the termination of the TBS order herein are also to be laid down per AMvB.<sup>733</sup> Any additional rules which pertain to the frequency of the assessments and the procedure of the assessments, which includes advice from behavioural experts, and also the manner in which the assessments should take place in respect of an offender who has been sentenced to both a period of imprisonment and a TBS order and thus placed in an institution for the purposes of government nursing, are also to be laid down per AMvB.<sup>734</sup>

According to article 6:2:12(1) conditional release<sup>735</sup> may be postponed or withheld<sup>736</sup> if an offender by virtue of psychological disorder, psychogeriatric disorder or mental disability has been placed in an institution under a TBS order with government nursing and this order must be continued.<sup>737</sup>

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<sup>731</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two. Title I: art. 6:2:8(1).

<sup>732</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two. Title I: art. 6:2:8(4).

<sup>733</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two Title I: art. 6:2:9(2).

<sup>734</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two. Title I: art. 6:2:9(4).

<sup>735</sup> “Conditional release is generally granted after two thirds of the prison sentence have been served. Prisoners serving a prison sentence of more than one year, but less than two years will be released after having served one year and one third of the remaining term.” Federal Public Service Justice.

“[https://www.euprobationproject.eu/national\\_detail.php?c=NL#:~:text=%2D%20Conditional%20release%20is%20generally%20granted,third%20of%20the%20remaining%20term.](https://www.euprobationproject.eu/national_detail.php?c=NL#:~:text=%2D%20Conditional%20release%20is%20generally%20granted,third%20of%20the%20remaining%20term.) Accessed 16 September 2023.

<sup>736</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two: Title II: art. 6:2:12(1).

<sup>737</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two: Title II: art. 6:2:12(1)(a).

The Minister must ensure that an offender detained under a TBS order receives the necessary treatment; the safety of society is taken into consideration, and the interests of the victim are served. The Minister may also give specific instructions apropos certain offenders to the head of the institution where they are held in the interests of both the safety of others; the safety of persons or property in general, or in the interest of the victim.<sup>738</sup>

A court may terminate a TBS order if the order has been conditionally terminated for a period of at least one year.<sup>739</sup> This does not apply if the court does not extend a TBS order per article 2.3 of the FCA or Part A of the MMHCA.<sup>740</sup> A TBS order lapses if the court hands down a subsequent TBS order to the same offender.<sup>741</sup>

It is the responsibility of public prosecution services to enforce compliance with conditions set in respect of suspension of pre-trial detention;<sup>742</sup> a conviction wherein a court has ordered that a sentence or measure or part thereof will not be executed;<sup>743</sup> the suspension or conditional termination of a measure or term of imprisonment;<sup>744</sup> TBS orders,<sup>745</sup> and pardons.<sup>746</sup>

If a reasonable suspicion exists that a condition per article 6:3:15 is not being adhered to or the general safety of persons or property demands and it is conceivable that a court would order the deprivation of liberty, the public prosecution service may order the arrest of the offender.<sup>747</sup> If an arrest contemplated herein concerns an offender who is on probation in respect of a TBS order, the Minister shall immediately be

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<sup>738</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two: Title III: art. 6:2:16.

<sup>739</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two: Title III: art. 6:2:17(1).

<sup>740</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two: Title III: art. 6:2:17(2).

<sup>741</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Two: Title III: art. 6:2:17(3).

<sup>742</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:3:14(1)(a)(3).

<sup>743</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:3:14(1)(a)(4).

<sup>744</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:3:14(1)(a)(5).

<sup>745</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:3:14(1)(a)(6).

<sup>746</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:3:14(1)(a)(7).

<sup>747</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:3:15(1).

informed and make a decision regarding the termination of probation or the release of the offender.<sup>748</sup>

Should an offender who has been detained under a TBS order not comply with any conditions imposed or pose a danger to either themselves or others or property, the court, with due regard to the second section of Title IIA of the first book of the CC can<sup>749</sup> extend detainment under the TBS order by a period of one or two years without<sup>750</sup> or with the inclusion of conditions which may or may not be subject to amendment, addition, or cancellation.<sup>751</sup> The conditions of the original TBS order may also be amended, supplemented, or cancelled.<sup>752</sup>

If an offender detained under a TBS order has not observed a condition specified in the order, or the welfare of other persons or property demands it, the examining magistrate, at the request of the public prosecution service, may grant a temporary TBS order not exceeding a period of seven weeks in an institution of its designation.<sup>753</sup> This order may be extended by a maximum period of seven weeks at the request of the public prosecution service.<sup>754</sup> The orders contemplated in arts. 6:6:10(a)(1) and (2) must be granted within 72 hours of the request and are immediately enforceable.<sup>755</sup>

If the probationary leave of an offender serving a TBS order has continued for a period of no less than twelve months without extension, the court may conditionally terminate the order.<sup>756</sup> A request for an extension of the TBS order must be made no later than one month and no more than two months before the expiry of the order.<sup>757</sup>

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<sup>748</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:3:15(4).

<sup>749</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Title II: art. 6:6:10(1).

<sup>750</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:10(1)(b).

<sup>751</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:10(1)(a).

<sup>752</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:10(1)(f).

<sup>753</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:10(a)(1).

<sup>754</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:10(a)(2).

<sup>755</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:10(a)(3).

<sup>756</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:10(3).

<sup>757</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:11(1).

A request by the public prosecution services may, however, be submitted up to four months prior to the expiry of the order.<sup>758</sup> Nonetheless, if special circumstances warrant it, a request for extension may be considered less than a month prior to expiry of the order within a “reasonable” time period. Special circumstances in this respect pertain to the safety of others or the general security of persons or goods.<sup>759</sup> A request for the provisional continuation of the order may also be made by the public prosecution services, the expiration of the order notwithstanding, if the aforementioned special circumstances exist.<sup>760</sup>

Any application for an extension of a TBS order must be accompanied by the following:<sup>761</sup>

- a) a recent dated, signed and reasoned opinion of the head of the institution;<sup>762</sup>
- b) any notes regarding the physical and mental health of the offender.<sup>763</sup>

If an extension of a TBS order of more than four years or a multiple of four years is sought by the public prosecution services, a recent jointly compiled report by two behavioural experts, one of whom must be a psychiatrist, or advice procured separately must be procured. These experts must have no affiliation to the institution where the offender is held. If an offender refuses to cooperate with the examination contemplated in this subsection, the behavioural experts must, jointly or separately, provide an opinion as to why they are of the opinion that the accused has refused to submit to examination.<sup>764</sup>

Decisions by the court in respect of arts. 6: 6:11 and 6: 6:12 must be made within a period of no longer than two months from the application or at the conclusion of the

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<sup>758</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:11(2).

<sup>759</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:11(3).

<sup>760</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:11(5).

<sup>761</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:12(1).

<sup>762</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:12(1)(a).

<sup>763</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:12(1)(b).

<sup>764</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:12(3).

prosecution. Decisions by the court in respect of article 6:6:10(1)(f) must be made within a period of one month.<sup>765</sup> Should a TBS order be extended and the court is to consider a conditional termination of the order, it may deem it necessary to obtain further information apropos the manner in which and the conditions under which the return of the offender can take place with due regard to the benefit of society. The court may reserve its decision for a maximum period of three months whereupon the order may be simultaneously extended.<sup>766</sup>

Similarly, if the court is to consider an application in terms of article 2.3 of the FCA and deems it necessary to obtain further information regarding the manner in which and the conditions under which the offender detained under a TBS order will return to society, it may reserve its decision for a maximum of three months.<sup>767</sup>

The public prosecuting services or the offender may lodge an appeal to the Arnhem-Leeuwarden Court of Appeal in respect of:<sup>768</sup>

- a) an extension of a TBS order;<sup>769</sup>
- b) the decision to conditionally terminate a TBS order;<sup>770</sup>
- c) the decision to resume a TBS order; or<sup>771</sup>
- d) an order to extend a TBS order.<sup>772</sup>

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<sup>765</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:13(1).

<sup>766</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:13(5).

<sup>767</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:13(6).

<sup>768</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:15(1).

<sup>769</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:15(1)(a).

<sup>770</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:15(1)(b).

<sup>771</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:15(1)(c).

<sup>772</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:15(1)(d).

The public prosecution may appeal the decision within fourteen days of the court's decision and the offender may appeal the decision within fourteen days of the service thereof.<sup>773</sup>

If the Court of Appeal is of the opinion that the appeal is patently inadmissible or unsubstantiated it may, after having examined the case documentation and heard the Advocate General, as well as having heard the offender detained under the TBS order and his/her counsel, decide the appeal with no further investigation.<sup>774</sup>

If a probationary period is attached to a sentence or a measure imposed, or the enforcement thereof under the CCP or the CC, the court may:<sup>775</sup>

- a) extend or reduce the probationary period;<sup>776</sup>
- b) amend and cancel or impose special conditions attached to the period of probation or during a suspension of probation; or<sup>777</sup>
- c) instruct a so-called probation institution to monitor compliance of the conditions imposed as well as amend, cancel or issue additional conditions.<sup>778</sup>

Sub-articles 6:6:19(1)(b-c) above apply *mutatis mutandis* to the time period apropos of conditions and provisional conditions attached to a government nursing order.<sup>779</sup> In respect of sub-article 38(4) of the CC, the court may, if it deems it necessary, reinstate conditions six months prior to the offender's release.<sup>780</sup>

A measure which seeks to influence an offender's behaviour or restricts their freedom lapses if:

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<sup>773</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:15(2).

<sup>774</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title II: art. 6:6:16(1).

<sup>775</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title III: art. 6:6:19(1).

<sup>776</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title III: art. 6:6:19(1)(a).

<sup>777</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Title III: art. 6:6:19(1)(b).

<sup>778</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Title III: art. 6:6:19(1)(c).

<sup>779</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title III: art. 6:6:19(3).

<sup>780</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title III: art. 6:6:19(4).

- a) an order is granted by which the same offender is *ter beschikking gesteld*/declared a forensic patient for the purposes of government nursing;<sup>781</sup> or
- b) the same offender is sentenced to imprisonment and a measure which seeks to influence the offender's behaviour or restricts the offender's freedom.<sup>782</sup>

Should the aforementioned measure end by operation of law, the offender must be informed of same as soon as is reasonably possible.<sup>783</sup>

#### **4.2.4 Mandatory Mental Health Care Act and the Forensic Care Act**

As with the MMHCA, the area to which the FCA is relevant to the focus of the study is the sentencing of offenders who were mentally ill at time of commission of crime.

The replacement of parts of the CC<sup>784</sup> were contemplated in *Staatsblad* (Government Gazette) 38 of 2018 where the stated intention was, through criminal law, to strengthen the link between forensic care and other forms of mental health care with the objective of reducing the rate of recidivism and thus increasing public safety.

This intention was crystallised with the enactment of the FCA in 2020.<sup>785</sup> The FCA defines forensic care as care provided to persons who suffer from a psychiatric disorder or disability, addiction, or intellectual disability.<sup>786</sup> The FCA holds that, with due regard to the nature of the custodial sentence or measure, the execution thereof must be utilised so as to maximise the recovery of the forensic patient and thus decrease the chance of recidivism while promoting the safety of the public.<sup>787</sup>

Mandatory care is defined as being care that is provided on the basis of a care authorisation,<sup>788</sup> a crisis measure,<sup>789</sup> and for the authorisation of the continuation of

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<sup>781</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title III: art. 6:6:23e(1)(a).

<sup>782</sup> *Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title III: art. 6:6:23e(1)(b).

<sup>783</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Six: Chapter Six. Title III: art. 6:6:23e(2).

<sup>784</sup> *The Criminal Code* BWBR0001854/2023-10-01.

<sup>785</sup> *The Forensic Care Act* BWBR0040634/2020-01-01.

<sup>786</sup> *Forensic Care Act* BWBR0040634/2020-01-01: Chapter 1: art. 1.1(2).

<sup>787</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.1(1).

<sup>788</sup> *Mandatory Mental Health Care Act* BWBR0040635/2022-01-01: Chapter 3: art. 3:1(a).

<sup>789</sup> *Mandatory Mental Health Care Act* BWBR0040635/2022-01-01: Chapter 3: art. 3:1(b).

said crisis measure.<sup>790</sup> Mandatory care per article 3.1 as a means of last resort may also be necessitated when a person's behaviour, by virtue of mental illness, may lead to grave harm (the MMHCA does not specify who this harm or damage may befall).<sup>791</sup> Mandatory care herein is, however, conditional.<sup>792</sup>

A judge must grant the mandatory care order.<sup>793</sup> The public prosecutor may *ex officio*, or at the request of *inter alia* the municipal executive, a medical director, a person who provides care on a professional basis to the person concerned or a police officer, decide to prepare a petition for a care authorisation.<sup>794</sup>

The forensic care in question must also link with and incorporate other forms of mental health care.<sup>795</sup> The Minister, and not the patient,<sup>796</sup> is financially responsible for the provision of forensic care.<sup>797</sup> The forensic care contemplated can form part of a measure or punishment and it also includes the definition of forensic care contained in article 3:2(1) of the MMHCA.<sup>798</sup>

A court may also issue a care authorisation in terms of the enforcement of legal orders<sup>799</sup> when it convicts someone of a criminal offence;<sup>800</sup> makes a decision in terms

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<sup>790</sup> *Mandatory Mental Health Care Act* BWBR0040635/2022-01-01: Chapter 3: art. 3:1(c).

<sup>791</sup> *Mandatory Mental Health Care Act* BWBR0040635/2022-01-01: Chapter 3: art. 3:3.

<sup>792</sup> *The Mandatory Mental Health Care Act* BWBR0040635/2022-01-01: Chapter 3:3 stipulates the following conditions:

- a. there are no options for voluntary care;
- b. no less onerous alternatives exist that give effect to the intended clinical outcome for the person concerned;
- c. the provision of mandatory care, given the intended purpose of mandatory care, is proportionate; and
- d. there exists a reasonable expectation in respect of the provision of mandatory care that it will be effective.

<sup>793</sup> *Mandatory Mental Health Care Act* BWBR0040635/2022-01-01: Chapter 5: art. 5:3.

<sup>794</sup> *Mandatory Mental Health Care Act* BWBR0040635/2022-01-01: Chapter 6: art. 6:2(1).

<sup>795</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.1(2).

<sup>796</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.2(3).

<sup>797</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.2(2).

<sup>798</sup> Forensic care herein is deemed to encompass care provided by the care provider to the person concerned by way of care, nursing, treatment, guidance, protection, security and mandatory care as referred to in art. 3:2(2) of the same act which includes *inter alia* the administration of medication, medical procedures and treatment (art. 3:2(2)(a)); the restriction of freedom of movement (art. 3:2(2)(b)); physical examination (art. 3:2(2)(e)); checking for the presence of behavioural agents (art. 3:2(2)(g)); and limiting the right to receive visitors (art. 3:2(2)(i)).

<sup>799</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.3(1).

<sup>800</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.3(1)(1).

of article 9a of the CC<sup>801</sup> wherein no penalty is to be imposed;<sup>802</sup> where an accused is acquitted;<sup>803</sup> at the request of the public prosecutor;<sup>804</sup> if the court does not extend a TBS order, or if the conditions referred to in article 2.4(1)<sup>805</sup> of FCA have expired.<sup>806</sup>

The aforementioned instances relevant to the current discussion contained in article 2.4<sup>807</sup> are, respectively, arts. 38,<sup>808</sup> 38g<sup>809</sup> and 38p<sup>810</sup> of the CC. Lastly, other forms of care can be designated as forensic care or be excluded from what constitutes forensic care by way of an AMvB.<sup>811</sup>

The responsibility of designating government institutions vested with providing forensic care<sup>812</sup> and the overall management thereof lies with the Minister<sup>813</sup> while the day-to-day management rests with the head of the institution duly designated by the Minister.<sup>814</sup> The Minister also determines which private institutions may provide forensic care to those detained under a TBS order.<sup>815</sup>

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<sup>801</sup> *The Criminal Code* BWBR0001854/2023-10-01: First book: Title II: art. 9a. If a court determines that by virtue of the relatively minor nature of the offence; the personality of the offender or the circumstances under which the offence was committed or subsequent thereto, that no punishment or measure be imposed.

<sup>802</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.3(1)(2).

<sup>803</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.3(1)(3).

<sup>804</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.3(1)(5).

<sup>805</sup> Conditions pursuant to *inter alia* arts. 38, 38g and 38p of the CC.

<sup>806</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.3(1)(11).

<sup>807</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.4(1)(Referring to arts. 38; 38g and 38p of the CC).

<sup>808</sup> *The Criminal Code* BWBR0001854/2023-10-01: First book: Title IIA: Second sec. Art. 38. Art. 38 deals *inter alia* with conditions in respect of the conduct of the person detained under the entrustment order; (art. 38(1)) the appointment of an institution by the court to support and assist the person detained under the entrustment order in compliance with the stipulated conditions; (art. 38(2)) and also holds that additional rules concerning entrustment orders may be set by AMvB (art. 38(8)).

<sup>809</sup> *The Criminal Code* BWBR0001854/2023-10-01: First book: Title IIA: Second sec. art. 38g. art. 38g, insofar as is relevant to the current discussion, pertains to the conditional termination of an entrustment order.

<sup>810</sup> *The Criminal Code* BWBR0001854/2023-10-01: First book: Title IIA: Third sec. art. 38p. art. 38p. concerns measures (art. 38p(1)); probation on the suspension thereof (art. 38p(2)) and conditions imposed on the offender concerning their conduct on probation in respect of the protection of the safety of persons or property (art. 38p(4)).

<sup>811</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 1: art. 1.1(2).

<sup>812</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 3: art. 3.1(1).

<sup>813</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 3: art. 3.1(3).

<sup>814</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 3: art. 3.1(4).

<sup>815</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 3: art. 3.3(1).

A forensic patient is a person who is eligible for forensic care.<sup>816</sup> An *indicatiestelling* (assessment)<sup>817</sup> is a reasoned, dated and signed expert opinion compiled on the basis of an investigation of a suspect, detainee, or a convicted person wherein both the requisite security level and forensic care needs are delineated. In terms of article 5.1(1) of the FCA, an *indicatiestelling* must be carried out for the purposes of the placement, the provision of care, and the declaration of a *strafrechtelijke titel* (criminal title).<sup>818</sup>

A *ter beschikking gestelde* is a forensic patient in respect of whom an order of government nursing by the government in terms of arts. 37b and 38c<sup>819</sup> of the CC has been imposed.<sup>820</sup> The court *ex officio*, the public prosecutor or the Minister decide upon which basis the forensic care must be provided.<sup>821</sup> The assessment herein must be provided by a body designated by the Minister.<sup>822</sup> The provisions herein apply *mutatis mutandis* to arts. 196, 197, 198, 317, 509g and 509h of the CC.<sup>823</sup> In urgent cases, the public prosecutor may order the provision of forensic care prior to the assessment and issuance of the criminal title.<sup>824</sup>

The placement of forensic patients with a care provider is undertaken by the Minister or on the Minister's behalf.<sup>825</sup> In this regard, the following must be taken into account; the protection of society weighed against the dangerousness of the forensic patient;<sup>826</sup> the type of forensic care required by the patient in view of the nature of the psychological disorder or mental disability with which they have been diagnosed,<sup>827</sup> and the forensic care needs and level of security put forward in the assessment.<sup>828</sup>

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<sup>816</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 1: art. 1.1(1)(b).

<sup>817</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 1: art. 1.1(1)(e).

<sup>818</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 1: art. 1.1(k). A criminal title is a decision taken by the court *ex officio*, the public prosecutor or the Minister which includes the provision of mental health care.

<sup>819</sup> In its most current iteration, the *Forensic Care Act* BWBR0040634/2020-01-01 still refers to art.38c of the CC. Art. 38c expired when a new version of the CC came into force on 25-07-2020. As nothing in the aforementioned legislation mentions anything to the contrary, I infer that for the purposes of the FCA, is still valid.

<sup>820</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 1: art. 1.1(1)(m).

<sup>821</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 5: art. 5.1(2).

<sup>822</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 5: art. 5.2(1).

<sup>823</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 5: art. 5.2(3).

<sup>824</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 5: art. 5.2(4).

<sup>825</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.1.

<sup>826</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.2(a).

<sup>827</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.2(b).

<sup>828</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.2(c).

Placement, per article 6.1 of the FCA, of an offender detained in an institution under a TBS order must be done within a period of four months from the effective date of the placement and may be extended by a period of four months at a time. Failure to extend the period leads to an automatic extension.<sup>829</sup> If an offender cannot be timeously placed in a suitable institution, the Minister may place the offender in an institution which is part of a penitentiary institution<sup>830</sup> for a period not exceeding one year.<sup>831</sup>

The treatment of a forensic patient may be terminated and the patient discharged on instruction by the Minister<sup>832</sup> if, for example, the term of a criminal title has ended;<sup>833</sup> if the forensic patient was not forcibly admitted and has requested release;<sup>834</sup> if the termination of treatment and dismissal concerns a person detained under TBS order subject to a condition imposed by the court per article 38(1) of the CC and persons on whom a condition has been imposed by the court per arts. 38g or 38p of the CC<sup>835</sup> if one of the following circumstances are present:

- a) if an improvement of the psychological disorder or mental disability in the forensic patient is such, taking patient and general safety of persons or goods into account, that it warrants the patient's return to society;<sup>836</sup>
- b) the continued stay of the forensic patient in the institution threatens the preservation of order or the treatment of other patients and placement can be provided elsewhere;<sup>837</sup>
- c) it is in the interests of the forensic patient to continue treatment elsewhere;<sup>838</sup> and
- d) the forensic treatment does not yield satisfactory results and placement elsewhere can be provided.<sup>839</sup>

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<sup>829</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.3(1).

<sup>830</sup> "Prison sentences or measures depriving someone's liberty are to be served in a penitentiary institution or through participation in a penitentiary program." A penitentiary program is described as being "a back-door variant of community sanctions... [wherein] part of the sentence is not served in prison but outside prison, e.g. at home, in a drug rehab centre et cetera" (Tak 2008: 142).

<sup>831</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.3(2).

<sup>832</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3).

<sup>833</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3)(a).

<sup>834</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3)(b).

<sup>835</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3)(c).

<sup>836</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3)(c)(1).

<sup>837</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3)(c)(2).

<sup>838</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3)(c)(3).

<sup>839</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.4(3)(c)(4).

If the safety of other forensic patients, or the general safety of persons or goods so demands, the Minister may place the forensic patient in another institution for a period not exceeding seven weeks with the objective of determining whether a transfer for security reasons is warranted.<sup>840</sup>

### 4.3 EXPERT EVIDENCE

The Netherlands regards experts not with mistrust but with an inherent trust thematic of the Dutch juridical system.<sup>841</sup> Franken goes so far as to assert that in deciding a matter before a court, the rules of evidence play second fiddle to a judge's own convictions.<sup>842</sup> Expert evidence in the Netherlands was codified in the *Dutch Code of Criminal Procedure* in 1926.<sup>843</sup>

This section of the thesis contains a brief overview of the Dutch legal system and examines the Dutch criminal standard of proof. Hearsay evidence, the lack of strict rules of admissibility, and the instances when an expert is called to testify in court are discussed. In addition hereto, the duties of the expert, qualifications of the expert and what constitutes expertise and expert evidence are also canvassed. The exponential prominence that neuroscientific evidence is gaining in Dutch courtrooms is also examined.

#### 4.3.1 *Continental and inquisitorial legal systems*

The Dutch system of litigation is an inquisitorial one<sup>844</sup> which is characterised by its ultimate quest for the truth by both the prosecution and the judge.<sup>845</sup> As is characteristic of continental legal jurisdictions of which the Netherlands is one, courts procure information from experts when faced with questions that fall out of the realm of the court's knowledge.<sup>846</sup>

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<sup>840</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 6: art. 6.5(1).

<sup>841</sup> Meintjes-Van der Walt 2001: 140.

<sup>842</sup> Franken 2008: 220.

<sup>843</sup> Meintjes-Van der Walt 2001: 29.

<sup>844</sup> Römkens 2000: 356.

<sup>845</sup> Meintjes-Van der Walt 2001:40.

<sup>846</sup> Verkerk 2009: 167.

Continental experts, including those in the Netherlands, are not examined by the court with the thoroughness that is inherent in adversarial litigation traditions.<sup>847</sup> Indeed, there is no cross-examination in the Netherlands<sup>848</sup> and experts largely provide written reports,<sup>849</sup> and while it is the exception rather than the rule,<sup>850</sup> the CCP does make provision for a court to hear verbal testimony by an expert either *ex officio* or on application of the prosecution or defence.<sup>851</sup>

Meintjes-Van der Walt<sup>852</sup> lists judicial activity; the preference of written evidence over oral evidence; the absence of *stare decisis*; the court's prerogative to obtain evidence; the importance of legislation over case law; full disclosure by parties to litigation before the commencement of trial; the trial verifying the *dossier*; and control of the investigation by the court as per criminal procedure as *indicia* of the inquisitorial system.

#### **4.3.2 The criminal standard of proof and the rules of admissibility**

The criminal standard of proof in the Netherlands is one of *de rechterlijke overtuiging* which Meintjes-Van der Walt contends is commensurate to the criminal standard of proof of beyond a reasonable doubt.<sup>853</sup> It is the presiding judge, and not the prosecution, who bears the onus of proving a case beyond a reasonable doubt.<sup>854</sup> The acceptance or repudiation of expert evidence and the weight which is appended thereto is at the discretion of the judge as long as sufficient reasoning is given.<sup>855</sup> A judge may too disregard expert evidence if such evidence is deemed unreliable.<sup>856</sup> As such, courts in the Netherlands have wide ranging discretion in deciding the admissibility of expert evidence.<sup>857</sup>

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<sup>847</sup> Verkerk 2009: 186.

<sup>848</sup> Meintjes-Van der Walt 2001:42.

<sup>849</sup> Verkerk 2009: 190.

<sup>850</sup> Franken 2008: 219.

<sup>851</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51m(1).

<sup>852</sup> Meintjes-Van der Walt 2001:47.

<sup>853</sup> Meintjes-Van der Walt 2001: 197.

<sup>854</sup> Franken 2008: 291.

<sup>855</sup> Broeders 2006: 155.

<sup>856</sup> Meintjes-Van der Walt 2001: 171.

<sup>857</sup> Römken 2000: 357.

As the Dutch system of evidence is one that is distinguished by its distinct lack of elaborate and cumbersome rules of admissibility,<sup>858</sup> far greater prominence is afforded to the weight of evidence as opposed to its admissibility. The tendency is thus one “towards free evaluation of evidence”.<sup>859</sup> Accordingly, rules of evidence in the Netherlands are comparatively exiguous.<sup>860</sup> The emphasis in respect of expert evidence in the Netherlands therefore lies not so much on the merit of its admissibility but rather on its value. The assessment of the admissibility of expert evidence is substantially less rigorous when compared with countries who use the jury system as opposed to career judges.<sup>861</sup>

As in South Africa, if the evidence which the expert provides is deemed to fall within the realm of common knowledge, an expert is thus deemed superfluous and unnecessary. Thus, facts and circumstances which fall within the ambit of common knowledge do not necessitate evidence.<sup>862</sup> Necessity, and indeed helpfulness, ultimately beget the call for expert evidence by trial courts.<sup>863</sup> Accordingly, while expert witnesses appear largely on the order of the court, the power to appoint expert witnesses and to summons witnesses is afforded exclusively to the prosecution and the court and only to the defence on a request to the prosecution.<sup>864</sup>

In the Netherlands, hearsay is defined as “... a statement in which a declarant relates information that was provided to him by another person” and encompasses too “the evidence of ordinary witnesses' statements made by experts”.<sup>865</sup> While Dutch legislation effectively deems hearsay evidence as inadmissible, the impracticality of this was recognised as far back as 1940 when the *Hoge Raad*<sup>866</sup> held that the evidence of a policeman who conveyed the evidence of a doctor to the court was admissible and this principle has been substantiated in further decisions.<sup>867</sup> Relevant

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<sup>858</sup> Meintjes-Van der Walt 2001: 147.

<sup>859</sup> Meintjes-Van der Walt 2001: 55.

<sup>860</sup> Franken 2008: 220.

<sup>861</sup> Broeders 2006: 155.

<sup>862</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title VI: art. 339(2).

<sup>863</sup> Meintjes-Van der Walt 2001: 162-163.

<sup>864</sup> Meintjes-Van der Walt 2001: 175.

<sup>865</sup> Meintjes-Van der Walt 2001: 72.

<sup>866</sup> HR 17 June 1940, NJ 1940 772.

<sup>867</sup> Meintjes-Van der Walt 2001: 72.

too herein is that most experts in the Netherlands are in the employ of the state and as such are deemed to be permanently under oath.<sup>868</sup>

The relative autonomy contemplated, notwithstanding section 51k(1) of the CCP, holds that a national register of expert witnesses shall be held and that it must be managed in accordance with an AMvB and that a body who shall carry out the duties envisaged herein will likewise be established by said AMvB. Article 51k(2) of the CCP does make provision for expert witnesses who are not in the national register but states that reasons must be proffered as to why the expert contemplated herein is indeed an expert.

#### **4.3.3 Court proceedings and the role of the expert witness**

The *dossier* negates the need to call a plethora of witnesses and as such makes court proceedings more expeditious. Usually, the court verifies the content of the *dossier* in deciding a matter before it without calling witnesses and with a handful of questions being put to the defendant.<sup>869</sup> It is in the *dossier* where expert reports, if procured, would be found.<sup>870</sup> The court is, however, at liberty to call an expert witness to testify as to the content of their report at trial.<sup>871</sup>

Additionally, an accused may, on notification of the court or prosecution's appointment of an expert at the investigative stage, request that his or her own expert be present during these investigations.<sup>872</sup> Once the expert report that has been requested by the court has been completed, a copy must be provided to both the prosecution and the accused<sup>873</sup> whereupon the latter may then appoint their own expert to examine the report.<sup>874</sup>

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<sup>868</sup> Meintjes-Van der Walt 2001: 86.

<sup>869</sup> Franken 2008: 220.

<sup>870</sup> Meintjes-Van der Walt 2001: 122.

<sup>871</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title V. sec. 1: art. 315(3).

<sup>872</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. sec. 5: art. 228(4).

<sup>873</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. sec. 5: art. 230(1).

<sup>874</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. sec. 5: art. 230(2).

This is tempered by three considerations wherein the prosecution may reject the request of the defence:<sup>875</sup>

If it is the opinion of the prosecution that:

- 1) the witness will not timeously appear before the court;<sup>876</sup>
- 2) the witness' health or wellbeing will be jeopardized by appearing in court and this outweighs any envisaged benefit of the testimony;<sup>877</sup> or
- 3) the accused will not be unduly prejudiced in defence if the witness does not appear.<sup>878</sup>

The prosecution, however, may not arbitrarily refuse the request of defence in this respect. Herein it is pertinent to also note that the defence may request an expert witness both at the pre-trial and trial phase. An examining magistrate may therefore direct the appointment of an expert witness either *ex officio* or at the request of the prosecution and/or defence.<sup>879</sup> An accused is also at liberty to supply a list of preferred experts out of which the examining magistrate may make a choice unless this is not in the best interests of the investigation.<sup>880</sup>

#### **4.3.4 What constitutes expert evidence and what qualifies an expert**

The *Hoge Raad* elaborated on what indeed constitutes expertise as per section 343 of the CCP in 1928<sup>881</sup> wherein it held that “knowledge” (*wetenschap*) includes “all special knowledge one possesses or is assumed to possess, even though such knowledge does not qualify as ‘science’ in the more limited sense of the word (which) corresponds with the fact that for a long time, experts have been heard in criminal proceedings whose special knowledge did not make them practitioners of science”. Insofar as what indeed *qualifies* an expert, the CCP itself is relatively vague and simply

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<sup>875</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title V. art. 264(1).

<sup>876</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title V. art. 264(1)(a).

<sup>877</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title V. art. 264(1)(b).

<sup>878</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title V. art. 264(1)(c).

<sup>879</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Sec. 5: art. 227(1).

<sup>880</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Sec. 5: art. 227(2).

<sup>881</sup> Meintjes-Van der Walt translation 2001: 66: referencing HR 24 July 1928, NJ 1929 150.

holds that rules which determine what qualifications certain experts must hold and the way expertise will be determined must be elaborated upon by an AMvB.<sup>882</sup>

Arts. 342 and 343 of the CCP define respectively what statements of witnesses and expert witnesses “mean”. Article 342(1) holds that “[t]he “statement of a witness” shall be understood to mean the information (the witness) gives in court on facts or circumstances he *personally observed or experienced* (emphasis supplied). Article 343 however holds that “[t]he “statement of an expert witness” shall be understood to mean the information (the witness) gives in court on the insights (the expert) has gained from (his or her) own expertise and knowledge *about the subject on which his opinion is sought* (emphasis supplied), whether or not on the basis of an expert witness report prepared by him at the request of the court.<sup>883</sup>

This creates a unique and anomalous legislative position whereby someone who is involved in the sphere of the criminal litigation by virtue of their expert knowledge is not a *witness* but rather an *expert* and may only give their opinion and not state observed facts. This is, however, remedied by two oaths being administered by the trial court – one which permits the *witness* to state facts observed within the sphere of their expertise and one which permits the *expert* to give opinions herein. The administration of the latter and former oaths qualifies the expert as an *expert witness*.<sup>884</sup> Article 51m of the CCP holds that an expert must testify both in good conscience and truthfully.

There is yet another class of opinion experts in the Netherlands known as the *specialised witnesses*. These are, for example, police officers or forensic pathologists who give their opinion gained in their professional capacity and this opinion evidence is deemed to be legal means of proof.<sup>885</sup>

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<sup>882</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51i(4).

<sup>883</sup> Anonymous. “Wetboek van Strafvordering”, [http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering\\_ENG\\_PV.pdf](http://www.ejtn.eu/PageFiles/6533/2014%20seminars/Omsenie/WetboekvanStrafvordering_ENG_PV.pdf) (accessed 23 March 2022).

<sup>884</sup> Meintjes-Van der Walt 2001: 67.

<sup>885</sup> Meintjes-Van der Walt 2001: 67.

#### **4.3.5 Duties of the expert witness**

The expert witness is obliged to provide the court with the services contemplated<sup>886</sup> and must too declare that he or she has prepared the report truthfully, completely and to the best of their knowledge in accordance with what science and knowledge teaches him or her about the subject for which his or her expertise has been sought.<sup>887</sup> An obligation of secrecy may be placed on the expert both by the examining magistrate<sup>888</sup> and by the trial court.<sup>889</sup> For these services contemplated, an expert must be remunerated by the treasury.<sup>890</sup>

An expert witness must also, where possible, furnish the court in their report as to the methodology used, the reliability of the methodology in question, and their own ability and skill in using the methodology.<sup>891</sup> The *Hoge Raad*<sup>892</sup> has in the past, however, been reluctant in overturning lower court rulings regarding the admissibility of expert evidence where reasons for the evidence in question were not advanced.

#### **4.3.6 The increasing prominence of neuroscientific evidence in the Dutch courtroom**

So-called neuroscientific information and techniques have emerged increasingly in Dutch courtrooms<sup>893</sup> and in recent years a number of high profile criminal cases in the Netherlands have hinged on the value of expert forensic evidence.<sup>894</sup> Expert reports serve an important objective in the Netherlands.<sup>895</sup> Pertinently peremptory psychiatric or psychological reports are required when a court must decide on the issue of diminished criminal capacity or mental illness, the attendant treatment herein,<sup>896</sup> and the risk the offender poses to society.<sup>897</sup>

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<sup>886</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51j(1).  
<sup>887</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51l(3).  
<sup>888</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title III. sec. 5. art. 236.  
<sup>889</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. S51j(2).  
<sup>890</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. S51j(4).  
<sup>891</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51l(1).  
<sup>892</sup> HR 26 September 199, NJ 1996, 41.  
<sup>893</sup> de Kogel & Westgeest 2015: 580.  
<sup>894</sup> Broeders 2006: 148.  
<sup>895</sup> Meintjes-Van der Walt 2001: 145.  
<sup>896</sup> Römken 2000: 371.  
<sup>897</sup> de Kogel & Westgeest 2015: 587.

Not dissimilarly, an offender who has committed offences of a violent or sexual nature<sup>898</sup> will ordinarily warrant the request of a psychiatric evaluation by the court and the report of the expert herein will then form part of the evidence at trial.<sup>899</sup> The need for a report containing neuroscientific information pertaining to the criminal capacity of the accused, given the harshness of sentences for these classes of crimes, is self-evident.<sup>900</sup>

In consideration of diminished criminal capacity, Dutch experts view diagnosis and indeed its presence or absence at the time of committing the crime; the type of weapon used in commission of the crime, and whether the accused acted alone in committing the crime.<sup>901</sup> Noteworthy too, and once again illustrative of the trust bestowed in forensic disciplines in the Netherlands, is that there are no legislative guidelines as to how the clinical assessment must be conducted.<sup>902</sup>

Lastly, it is asserted that partisanship is unlikely because legal culture in the Netherlands is such that experts are deemed to serve the court and not the parties to litigation.<sup>903</sup> Furthermore, most experts, namely policeman and forensic pathologists and the like, are in the employ of the state. If a trial court wishes to make use of expert evidence, the defence may challenge the court as to the reliability of the expert's methodology and the adequacy of the expert's qualifications. Courts do not, however, readily assent in this regard as it is felt that because the *dossier* is available to the defence, the need for retesting of expert evidence is very limited.<sup>904</sup>

#### 4.4 SENTENCING

The core aim of sentencing in the Netherlands is individual-based deterrence which has, at its nexus, the intention of protecting society and preventing recidivism.<sup>905</sup> Sentencing, however, ideally serves multiple aims. Rehabilitation is likewise a crucial

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<sup>898</sup> de Kogel & Westgeest 2015: 585.

<sup>899</sup> Römken 2000: 358.

<sup>900</sup> de Kogel & Westgeest 2015: 585.

<sup>901</sup> Barendregt *et al.* 2008: 619.

<sup>902</sup> Römken 2000: 382.

<sup>903</sup> Meintjes-Van der Walt 2001: 69.

<sup>904</sup> Meintjes-Van der Walt 2001: 67.

<sup>905</sup> Struijk & Mevis 2016: 97.

tenet of penal law in the Netherlands<sup>906</sup> as is re-socialisation;<sup>907</sup> redress, and the resolution of conflict.<sup>908</sup> Reducing recidivism has, in Dutch sentencing, been appended priority in recent years.<sup>909</sup> Multiple sentences may not run concurrently<sup>910</sup> and whilst life imprisonment is statutorily allowed, it is very rarely imposed.<sup>911</sup> Herein it is significant that the Netherlands places considerable reliance on diversion and non-custodial sentences.<sup>912</sup> The general principles of sentencing in the Netherlands, as well as measures and penalties which are central in sentencing in the Netherlands, are discussed in this section.

As stated above in paragraph 4.1, TBS was introduced as “neither [a] prison sentence nor general psychiatry of the time [were] able to adequately respond to this offender category” of dangerous, mentally ill or disordered offenders.<sup>913</sup> TBS is for offenders who partially or wholly lack criminal capacity by virtue of mental illness or defect.<sup>914</sup> Additionally, offenders within TBS are typically characterised by having committed particularly severe crimes and thus as being dangerous and posing a threat to society at large.<sup>915</sup> As per van Nieuwenhuizen *et al.*,<sup>916</sup> the majority of offences for which offenders in TBS are found guilty are murder, attempted murder, and manslaughter followed by sexual and violent offences and crimes involving “threat, extortion and deprivation of liberty”. As TBS is the foremost method of preventative detention in the Netherlands, specific attention is given hereto in this section. The pre-eminence of TBS with respect to mentally ill offenders aside, it is not without its disadvantages, therefore these drawbacks of TBS are also examined.

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<sup>906</sup> Struijk & Mevis 2016: 98.  
<sup>907</sup> Subramanian & Shames 2013: 38.  
<sup>908</sup> Tak 2008: 131.  
<sup>909</sup> Struijk & Mevis 2016: 97.  
<sup>910</sup> Tak 2008: 128.  
<sup>911</sup> Tak 2003: 72.  
<sup>912</sup> Subramanian & Shames 2013: 42.  
<sup>913</sup> Struijk & Mevis 2016: 98.  
<sup>914</sup> Petrila & de Rooter 2011: 80-81.  
<sup>915</sup> Struijk & Mevis 2016: 99.  
<sup>916</sup> van Nieuwenhuizen *et al.* 2007: 3.

#### **4.4.1 General principles of sentencing in the Netherlands**

Sentence length is largely determined by case-specific circumstances<sup>917</sup> but is also decided in light of multiple factors including the circumstances of the offender and the circumstances pertaining to the commission of the offence;<sup>918</sup> whether the offence in question is a re-offense, and the seriousness of the offence.<sup>919</sup> A dishonest offender, namely one who fails to take the court into their confidence and denies having committed the crime, or an offender who has committed a hate crime or a recalcitrant offender who has refused to submit to a psychiatric evaluation, may attract a longer sentence.<sup>920</sup> Conversely, an offender who shows remorse or who does not have any prior criminal convictions may attract a lesser sentence.<sup>921</sup>

The autonomy with which sentencing is carried out in the Netherlands is again illustrative of the intrinsic trust the Dutch bestow in their judiciary.<sup>922</sup> The Dutch bench<sup>923</sup> as well as police and prosecutors enjoy wide ranging discretion in matters before them.<sup>924</sup> Interestingly, however, and despite its reputation for and pride it takes in its liberality, Dutch citizens feel that sentences given by courts in the Netherlands are in fact too lenient.<sup>925</sup> Not dissimilarly, and despite a lack of knowledge as to what these entail, the general public in the Netherlands also regards non-custodial sentences such as suspended sentences as too lenient.<sup>926</sup>

This discretion aside, judges are bound first and crucially by the procedural requirements that pertain to sentencing contained in the CCP which state that:

- a) the verdict sets forth the reasons that informed the sentence (punishment or measure);<sup>927</sup>

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<sup>917</sup> Tonry & Bijleveld 2007: 10.

<sup>918</sup> Bijleveld & Smit 2005: 168.

<sup>919</sup> Tonry & Bijleveld 2007: 10.

<sup>920</sup> Tak 2003: 87.

<sup>921</sup> Tak 2008: 133.

<sup>922</sup> Tak 2008: 137.

<sup>923</sup> Tak 2003: 16.

<sup>924</sup> Tonry & Bijleveld 2007: 8.

<sup>925</sup> De Keijser & Elffers 2009: 48.

<sup>926</sup> van Gelder *et al.* 2015: 669.

<sup>927</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4. art. 359(5).

- b) the specific reasoning that led to the choice of a custodial sentence are given, as well as the circumstances that were considered in assessing the appropriate length of the sentence,<sup>928</sup> and
- c) specific reasoning must be given when the court imposes TBS for a crime involving a risk to bodily integrity.<sup>929</sup>

As with South Africa, an appeal may be lodged by an offender or the prosecutor and, naturally, as the principle of *stare decisis* is absent in Dutch criminal law, an appeal court may decide a sentence *de novo*.<sup>930</sup> Offenders found guilty of crimes of a less severe nature are being increasingly sentenced to community service orders<sup>931</sup> and offenders are being sentenced to shorter terms of imprisonment and on a less frequent basis.<sup>932</sup> While life sentences have increasingly been handed down in recent years, they remain rare.<sup>933</sup>

Additionally, and significantly, the need for further treatment<sup>934</sup> and the suitability of the offender for TBS must also be assessed during this period.<sup>935</sup> Struijk asserts that most repeat offenders in the Netherlands suffer from some type of mental disorder or from addiction and, thus, judges try to incorporate as much treatment as possible into conventional detention.<sup>936</sup> By the same token, however, compulsory treatment is considered pervasively coercive and, as such, restraint is called for when making such an order.<sup>937</sup>

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<sup>928</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4. art. 359(6).

<sup>929</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two. Title VI. sec. 4. art. 359(7).

<sup>930</sup> Tak 2008: 133.

<sup>931</sup> Bijleveld & Smit 2005: 181.

<sup>932</sup> Subramanian & Shames 2013: 42.

<sup>933</sup> Tonry & Bijleveld 2007: 10.

<sup>934</sup> Bal & Koenraadt 2000: 236.

<sup>935</sup> McInerney 2000: 217.

<sup>936</sup> Struijk 2015: 148.

<sup>937</sup> Bal & Koenraadt 2000: 243.

#### 4.4.2 Penalties and measures

Penalties and measures are the two cornerstones of sentencing in the Netherlands. Penalties have prevention and punishment as their objective whilst measures seek to restore the *status quo* or to promote the safety and protection of persons or property.<sup>938</sup> Penalties include imprisonment;<sup>939</sup> detention; a task penalty which is a type of community service, and fines.<sup>940</sup> Imprisonment is seen as the most severe restriction of liberty.<sup>941</sup>

Measures, however, have at their core the objective of protecting and safeguarding a society against the dangers an offender poses or the risk posed by re-offence.<sup>942</sup> Two examples of measures germane to this section are TBS orders<sup>943</sup> and out of hospital orders.<sup>944</sup> If an offender is deemed to be partially criminally liable, a TBS order wherein a term of imprisonment and a period with government nursing is served custodially in a designated TBS facility, may be ordered by the court.<sup>945</sup> Alternatively, the court can order a TBS with conditions where the conditions for TBS are met but hospitalisation is not necessary.<sup>946</sup> Measures and penalties can, unlike conventional sentences, largely be imposed concurrently.<sup>947</sup> The level of blameworthiness and indeed the presence of blameworthiness has no proportionate bearing on the form a measure takes, unlike it does with penalties.<sup>948</sup>

Yet another fundamental difference between penalties and measures lies in the matter of suffering. The objective of a penalty is one of retribution and, thus, the offender 'suffers' for the crime that he or she committed.<sup>949</sup> Once again, the matter of suffering is perceived and accordingly one cannot objectively state that an offender who has been given a measure as opposed to being sentenced to a penalty 'suffers' less.<sup>950</sup>

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<sup>938</sup> Tak 2003: 71.

<sup>939</sup> Struijk & Mevis 2016: 97.

<sup>940</sup> Tak 2003: 72-73.

<sup>941</sup> Tak 2003: 72.

<sup>942</sup> Struijk & Mevis 2016: 97.

<sup>943</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37b(1).

<sup>944</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38(1).

<sup>945</sup> Struijk & Mevis 2016: 98.

<sup>946</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38.

<sup>947</sup> Struijk & Mevis 2016: 97.

<sup>948</sup> Tak 2003: 71.

<sup>949</sup> Tak 2003: 71.

<sup>950</sup> Struijk & Mevis 2016: 97.

Whilst the intention of treatment is not punitive, as with the case of conventional imprisonment, and thus not that the offender should suffer *per se*, suffering is ultimately subjective and thus it cannot be said that an offender in treatment does not *suffer* from a moral standpoint.<sup>951</sup> It has been asserted that it is ludicrous for an offender to feel differently and thus to suffer less in an environment of preventative detention as opposed to one of conventional imprisonment.<sup>952</sup> But whilst the considerations of morality and subjective experience are surely well-intentioned, the fact that offenders are receiving mental health care is irrefutable as is the fact that this would not be the case with conventional imprisonment so purported and felt suffering does carry the considerable advantage of psychiatric treatment.

Pertinent herein too is the issue of proportionality which has an inseparable relationship to a penalty in that the punishment must be proportionate to the offence.<sup>953</sup> Accordingly, the element of revenge dictates that blameworthiness and punishment must be proportionate.<sup>954</sup> It must stem from the notions of “guilt, criminal responsibility and just deserts” that underscore penalties in the Netherlands. Proportionality does not so fundamentally factor in with a measure in that it should extend for however long it takes for the objective of the measure, for example, reduction of the offender’s risk to society to be met.<sup>955</sup> Likewise, in accordance with the tenets of sentencing in the Netherlands, it has been asserted that proportionality of a measure is served only if, along with public interest, individual interest or at least a modicum thereof, is also served.<sup>956</sup>

The element of retribution is naturally not met or indeed meant to be met when committing a mentally ill offender to a psychiatric facility.<sup>957</sup> However, committing a mentally ill offender to a psychiatric facility does fulfil the traditional penal aspect of prevention when keeping the offender out of society for the safety of the general public

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951 Struijk 2015: 149.

952 van der Wolf 2016: 46.

953 Struijk & Mevis 2016: 97.

954 Tak 2003: 71.

955 Struijk & Mevis 2016: 97.

956 Struijk & Mevis 2016: 102.

957 Bal & Koenraadt 2000: 220.

when it is necessary to do so.<sup>958</sup> This does, however, also fulfil the function of treating the mentally ill offender.<sup>959</sup>

#### **4.4.3 Terbeschikkingstelling**

TBS which roughly translated means “at her majesty’s pleasure”<sup>960</sup> or “disposal to be treated on behalf of the state”<sup>961</sup> is a measure contained in the CC to provide treatment to offenders with mental illnesses or defects.<sup>962</sup> The authoritarian period of the 1920s and 1930s in the Netherlands hailed the inception of so-called ‘preventative detention’ as a method of dealing with offenders who were found to have had diminished criminal capacity.<sup>963</sup> This in turn led to the predecessor of TBS in 1928 which was TBR (*terbeschikkingstelling van de Regering*) and was contained in the ‘*Psychopath Act*’.<sup>964</sup>

TBS is the preeminent method of so-called preventative detention within the criminal justice system in the Netherlands as it attempts to serve the dual objectives of protecting society at large from dangerous, mentally ill or disordered offenders and treating this class of offender.<sup>965</sup> It also strives to reintegrate these offenders back into society<sup>966</sup> if reintegration is indeed possible. Ultimately, the offender’s risk of recidivism must be eliminated or substantially reduced<sup>967</sup> and TBS is ostensibly primed to do this through forensic psychiatric treatment.<sup>968</sup> The Dutch Ministry of Justice claims the validity of TBS lies in society’s “right... to protect itself against the unacceptable risks of criminal behaviour”.<sup>969</sup> Some TBS facilities are state run whilst others are owned privately. They are ordinarily quite small, which facilitates and is conducive to the ‘socio-therapeutic approach’ for which the institutions are intended.<sup>970</sup>

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<sup>958</sup> Bal & Koenraadt 2000: 220.

<sup>959</sup> Bal & Koenraadt 2000: 220.

<sup>960</sup> Swinton *et al.* 2001: 131.

<sup>961</sup> McInerny 2000: 215.

<sup>962</sup> de Ruiter & Kaser-Boyd 2015: 166.

<sup>963</sup> van der Wolf 2016: 46.

<sup>964</sup> de Boer *et al.* 2009: 150. *Psychopath Act* of 1928. de Boer *et al.* 2008: 150. *Psychopath Act* of 1928.

<sup>965</sup> Struijk & Mevis 2016: 98

<sup>966</sup> de Boer *et al.* 2008: 151.

<sup>967</sup> McInerny 2000: 215.

<sup>968</sup> de Ruiter & Kaser-Boyd 2015: 166.

<sup>969</sup> McInerny 2000: 215 quoting a memo from the Dutch Government, 1994 at 7.

<sup>970</sup> Bal & Koenraadt 2000: 234.

As discussed above in paragraph 4.2.2, article 37 of the CC holds that

[i]f the safety of others or the safety of persons or property generally demands it, a court may order TBS if:<sup>971</sup>

- a) an accused who suffered from a morbid mental disorder or defective mental development at the time that the offence was committed; and<sup>972</sup>
- b) the offence in question is punishable with a prison sentence of at least four years or is a criminal offence per articles 132, 285(1), 285b and 395 of the CC.<sup>973</sup>

As stated above, there are two types of TBS: one with nursing from the government and one with conditions. In respect of government nursing, the offender is placed and treated in a clinic.<sup>974</sup> Whilst admission into a TBS facility is involuntary, participation in treatment programs is not. TBS is aimed at providing the motivation to offenders to participate in treatment programs.<sup>975</sup> Treatment has rehabilitation as its objective and, accordingly, if the offender refuses treatment, they do not lower their risk of recidivism and the risk to society remains the same. As such, the court can extend the TBS with the possibility that the offender will be committed to a long-stay ward.<sup>976</sup> Involuntary treatment in the form of medication, for example, is only considered when an offender poses a risk to themselves or others in the TBS facility.<sup>977</sup>

The offender bears the ultimate responsibility for the risk presented to society and thus has the attendant responsibility of taking advantage of the therapeutic services made available for reintegration into society.<sup>978</sup> Therapy in TBS is predominantly cognitive behavioural<sup>979</sup> and whilst there are variations in treatment methods in the various TBS institutions, the ethos of the treatment framework is, as de Ruiter and Kaser-Boyd<sup>980</sup>

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<sup>971</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(1).

<sup>972</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(1)(1).

<sup>973</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a(1)(2).

<sup>974</sup> Dienst Justitiële Inrichtingen. “Straffen en maatregelen”, <https://www.dji.nl/justitiabelen/justitiabelen-in-forensische-zorg/straffen-en-maatregelen> (accessed 15 April 2022).

<sup>975</sup> de Ruiter & Petrila 2018: 833.

<sup>976</sup> Dienst Justitiële Inrichtingen. “Straffen en maatregelen”, <https://www.dji.nl/justitiabelen/justitiabelen-in-forensische-zorg/straffen-en-maatregelen> (accessed 15 April 2022).

<sup>977</sup> de Ruiter & Petrila 2018: 833.

<sup>978</sup> de Boer *et al.* 2008: 152.

<sup>979</sup> de Boer *et al.* 2008: 153.

<sup>980</sup> de Ruiter & Kaser-Boyd 2015: 167.

describe, one of “enduring psychological and behavioural change ... results in a reduction in violence risk”.

Whilst TBS with government nursing must take place at a clinic or hospital, TBS with conditions does not.<sup>981</sup> This order may be granted if the conditions for TBS are met but the court is of the opinion that hospitalisation is not necessary and thus the offender can be treated on an outpatient basis.<sup>982</sup> In this regard the court sets conditions that the offender must comply with. For example, an offender could be ordered to submit to psychiatric medication regimen or weekly drug testing.<sup>983</sup> The probation service oversees compliance herein and violation of any of the imposed conditions could mean a conversion from supervisory TBS to conventional custodial TBS.<sup>984</sup>

When a court orders both a prison sentence and a period in a TBS facility, the prison sentence must be served before the TBS, whereupon the prisoner becomes a patient.<sup>985</sup> TBS is often given for violent and sexual offences. A TBS order may be given for crimes that are punishable with at least a maximum sentence of four years imprisonment, where other people, property and public generally need to be protected and if full criminal capacity cannot be imputed to the accused.<sup>986</sup>

At first, TBS will be granted for a period of two years but it may be extended annually or biennially based on the risk the offender still poses,<sup>987</sup> as determined by the court on re-evaluation of the offender.<sup>988</sup> TBS lasts an average of eight years<sup>989</sup> but as it is a measure for particularly violent and serious crimes, it can theoretically be prolonged by a judge for an indefinite period of time<sup>990</sup> if the judge holds the opinion that more treatment for the offender is necessary because of the continued danger that the

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<sup>981</sup> Dienst Justitiële Inrichtingen. “Straffen en maatregelen”, <https://www.dji.nl/justitiabelen/justitiabelen-in-forensische-zorg/straffen-en-maatregelen> (accessed 15 April 2022).

<sup>982</sup> Tak 2003: 78.

<sup>983</sup> Dienst Justitiële Inrichtingen. “Straffen en maatregelen”, <https://www.dji.nl/justitiabelen/justitiabelen-in-forensische-zorg/straffen-en-maatregelen> (accessed 15 April 2022).

<sup>984</sup> Struijk & Mevis 2016: 98.

<sup>985</sup> Petrila & de Ruiter 2011: 80.

<sup>986</sup> Tonry & Bijleveld 2007: 10.

<sup>987</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 38d(2).

<sup>988</sup> de Ruiter & Petrila 2018: 833.

<sup>989</sup> van der Wolf 2016: 51.

<sup>990</sup> de Ruiter & Kaser-Boyd 2015: 167.

offender would pose to society.<sup>991</sup> This indeterminate detention is of course based upon the risk an offender poses.<sup>992</sup> A TBS order can conceivably be lifelong if there is little chance for rehabilitation and a high chance of recidivism.<sup>993</sup>

If, as noted above, an offender under a TBS order, despite treatment,<sup>994</sup> is deemed a permanent risk to society rendering societal integration unfeasible, the offender will be committed to a long-stay facility. Security and psychological and medical care are fundamental to long-stay whilst intensive treatment and rehabilitation in respect of the offender's mental disorder is no longer provided.<sup>995</sup> In effect, long-stay denotes acceptance by the court and behavioural experts that detention in this regard will be lifelong.<sup>996</sup>

All *terbeschikkingstelling* treatment programs offer (or at least should offer):<sup>997</sup>

- a) structured, systematic, multidisciplinary risk assessment, with special emphasis on historical, clinical, and criminogenic factors in the patient and the patient's environment;
- b) comprehensive psychiatric, psychological, and physical assessment couched in terms of strengths and weaknesses; and
- c) a multidisciplinary approach to risk management aimed at reducing potential risk factors while developing protective factors.

The length of the prison sentence in a TBS order is determined by the level of criminal capacity the offender is deemed to have had when committing the offence.<sup>998</sup> Also as explained above in paragraph 4.2.2, the concept of diminished criminal capacity is not explicitly stated in statute, but the possibility thereof finds its genesis in article 37a of the CC. In terms hereof, the notion of 'degrees' of criminal capacity has become more nuanced since its induction via Dutch jurisprudence. In addition hereto, the Supreme

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991 Struijk & Mevis 2016: 98.

992 Swinton *et al.* 2001: 132.

993 Bijleveld & Smit 2005: 168.

994 Dienst Justitiële Inrichtingen. "Straffen en maatregelen", <https://www.dji.nl/justitiabelen/justitiabelen-in-forensische-zorg/straffen-en-maatregelen> (accessed 15 April 2022).

995 de Ruiter & Petrila 2018: 836.

996 Tak 2008: 121.

997 de Boer *et al.* 2008: 153.

998 de Boer *et al.* 2008: 150.

Court holds that a causal connection between the mental disturbance and the offence must exist.

Both the mental disorder and its connection to the offence must be ascertained by two experts, one being a psychiatrist prior to the court handing down sentence. The report must state to what extent the accused can be held responsible for the offences. The greater the link between the offence and mental disorder, the lesser the criminal capacity that can be imputed to the offender. The expert behavioural reports will inform the court as to what extent the mental disorder led to the offending behaviour.<sup>999</sup>

Once offenders no longer pose an escape risk, they are allowed what is known as escorted leave.<sup>1000</sup> Permission for leave must be granted by the Dutch Ministry of Defence.<sup>1001</sup> The leave is initially supervised, then unsupervised and, ultimately, overnight leave is permitted<sup>1002</sup> which precedes gradual and eventual reintegration.<sup>1003</sup> Leave is seen as cardinally important to rehabilitation<sup>1004</sup> and as a vital step in preventing institutionalisation.<sup>1005</sup>

It is of particular importance to note that TBS is not retributive, nor is it aimed at making the offender suffer but serves rather as a method whereby treatment for the offender is facilitated.<sup>1006</sup> Indeed, the Dutch feel it is both a humane and fundamental method for an offender's reintegration back into society.<sup>1007</sup> Thus, it stands to reason that TBS relies on societal integration and a society that is accepting of offenders and that allows their reintegration. The Netherlands, unlike many of its European counterparts, does not have a sex offender registration roll.<sup>1008</sup>

The general consensus among a largely sympathetic public and the media in the Netherlands is one of support for forensic services of which TBS is a part. The public seems to feel further that this class of offenders needs help and that forensic hospitals

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999 De Ruiter & Petrila 2018: 833.  
1000 De Boer *et al.* 2008: 154.  
1001 McNerny 2000: 222.  
1002 McNerny 2000: 222.  
1003 De Boer *et al.* 2008: 154.  
1004 McNerny 2000: 222.  
1005 De Boer *et al.* 2008: 154.  
1006 McNerny 2000: 215.  
1007 De Boer *et al.* 2008: 158.  
1008 Struijk & Mevis 2016: 96.

are primed to offer assistance.<sup>1009</sup> Conversely, South African society and indeed prisoners seem to share the same abhorrence of paedophiles to the extent that, in South African prisons, it is not unknown that paedophiles are kept in solitary confinement for their own safety.<sup>1010</sup>

This does not resonate with the Dutch ethos as the objective with offenders in TBS is preventing recidivism and is aimed at their reintroduction into society. In a South African context, actively encouraging this class of offender back into society with the aim of becoming a productive member of society seems almost counterintuitive but, in the Netherlands, public discord is generally rare and short-lived when sex offenders are reintroduced back into society.<sup>1011</sup>

Controversially, van der Wolf asserts that sex offenders, by virtue of the inherent stigma that surrounds them, suffer augmented levels of “negative emotions, traumatic experiences, mental health issues, and emotion [dysregulation]”.<sup>1012</sup> Pertinently herein, journalistic coverage in the Netherlands is largely respectful when reporting offences committed by mentally ill offenders or in instances where TBS has failed insofar as patients re-offending. This is felt to be conducive to more successful reintegration for the TBS patient. Likewise, supported employment and community placement does not attract public resistance and indeed fear.<sup>1013</sup>

Judges in the Netherlands generally do prefer to impose the least onerous type of punishment first.<sup>1014</sup> Further hereto, with regard to TBS and the legal requirement of provisional release after a year, if an offender is not deemed to be dangerous, the judiciary will impose the least onerous of restrictions that an offender must abide by.<sup>1015</sup> Conceptually, this staggered integration, although pragmatic, is not without issue. The Lower House of Parliament decided to institute a parliamentary inquiry (the Visser commission) to look into the working of the TBS system after several grave incidences where TBS patients were on unsupervised leave.<sup>1016</sup> Whilst not the subject

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<sup>1009</sup> McInerny 2000: 227.

<sup>1010</sup> Swanepoel & van der Spuy 2017: 207.

<sup>1011</sup> Struijk & Mevis 2016: 102.

<sup>1012</sup> van der Wolf 2016: 42.

<sup>1013</sup> McInerny 2000: 227.

<sup>1014</sup> Struijk 2015: 160.

<sup>1015</sup> van der Wolf 2016: 52.

<sup>1016</sup> van Nieuwenhuizen *et al.* 2007: 3.

of this thesis but included herein for completeness, the commission ultimately found TBS to be satisfactory in terms of its objectives, but that it should modernise the way in which TBS is executed.<sup>1017</sup>

An unconditional release from a TBS institution has been done away with and, since 2013, can only be granted after a year of conditional termination.<sup>1018</sup> If an offender is in custodial TBS and has been granted conditional termination, a maximum period of nine years of probation may follow.<sup>1019</sup> This onerous period is justified from a legislative point of view by the fact that offenders who have committed crimes of a serious nature, particularly those of a sexual nature, have a heightened chance of recidivism long after release from a TBS facility.<sup>1020</sup> The objective, or indeed hope, of the probationary period is that it will decrease the risk of recidivism.<sup>1021</sup>

#### **4.4.4 The disadvantages of *terbeschikkingstelling***

As is so often the case when a judge is tasked with making a decision that best neutralises or simply manages risk, as Struijk and Mevis<sup>1022</sup> succinctly put it, it "... must be resolved by the judiciary who remain the unenviable arbiters of predicted dangerousness". Predicting risk is by and large an inexact science. Predicting long term risk in the realm of TBS patients is even more problematic as the inevitable element of some guesswork could mean a patient who has no risk of reoffending is kept in TBS for lengthy periods of time.<sup>1023</sup>

Ostensibly, it appears that the Netherlands treats the problem far more organically and addresses the psychiatric issues at hand as opposed to mere imprisonment. Whilst conceptually, and indeed from a legislative point of view, the imposition of both imprisonment and treatment is practical as it fulfils both the penal aspect of the crime whilst imposing a measure of treatment to prevent recidivism, this pragmatism does not pay enough credence to the perspective and experience of the offender.

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<sup>1017</sup> van Nieuwenhuizen *et al.* 2007: 3.

<sup>1018</sup> Struijk & Mevis 2016: 96.

<sup>1019</sup> Struijk & Mevis 2016: 100.

<sup>1020</sup> Struijk & Mevis 2016: 100-101.

<sup>1021</sup> Struijk & Mevis 2016: 101.

<sup>1022</sup> Struijk & Mevis 2016: 102.

<sup>1023</sup> Petrla & de Ruiter 2011: 81-82.

The average length of a TBS order is over eight years and thus offenders who are found to have diminished or lack of criminal capacity would often rather serve their sentence in conventional imprisonment as it is likely to be shorter. This is preceded by offenders refusing to submit to the requisite personality assessment which, in turn, jeopardises and naturally neutralises the system of TBS and, as such, TBS orders are on the decline as offenders who should be in TBS fall within the general prison population.<sup>1024</sup>

As such, TBS is not a magic bullet. The often fraught relationship and interface between law and medicine makes the adjustment of criminal law policy to accommodate forensic care all the more challenging.<sup>1025</sup> TBS facilities also typically have long admission waiting lists.<sup>1026</sup> Ideally, as is the case with Dutch prisons, the approach of one patient (or prisoner) to one cell is the gold standard but, as is likewise the case with Dutch prisons, it has been bedevilled by overcrowding and in respect of TBS to correspondingly too few beds.<sup>1027</sup> This is exacerbated by a reluctance on the part of the staff who treat an offender to state unequivocally that the offender is cured. The consequence hereof is that once an offender is given TBS, they often wait for an inordinately long time before they can be admitted and treatment can commence.<sup>1028</sup> In addition hereto, and as desirable and practical as this may sound, a TBS order may result in a longer sentence as a TBS order may be extended.<sup>1029</sup>

A further stark example of the shortcomings of TBS is that the recidivism rate in the Netherlands is up to 90 per cent in offenders suffering from mental disorders and/or drug addiction<sup>1030</sup> and, thus, the risk is high that offenders who are dangerous and who pose an immense recidivism risk are let back into society. In 2017, a TBS patient of some fifteen years stabbed and killed a TBS staff member in a TBS facility where he was receiving treatment.<sup>1031</sup> In 2018, a TBS patient was convicted of murder and rape and the assault of five members of forensic staff whilst undergoing psychiatric

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<sup>1024</sup> van der Wolf 2016: 51.

<sup>1025</sup> Struijk 2015: 163.

<sup>1026</sup> Petrila & de Ruiter 2011: 81.

<sup>1027</sup> Bal & Koenraadt 2000: 234.

<sup>1028</sup> Bijleveld & Smit 2005: 168.

<sup>1029</sup> De Kogel & Westgeest 2015: 600.

<sup>1030</sup> Struijk 2015: 148.

<sup>1031</sup> Dutch News. "Tbs staff member dies after being stabbed by patient in clinic", <http://www.dutchnews.nl/news/archives/2017/10/questions-mount-about-anne-faber-suspect-and-the-clinic-which-treats-him/> (accessed 15 May 2022).

evaluation and sentenced to 28 years imprisonment with yet more TBS.<sup>1032</sup> He had raped and killed a woman whilst on leave from a TBS facility where he was being treated after having been convicted on two counts of rape and multiple convictions of robbery.<sup>1033</sup> Once again, as alluded to above, TBS is by no stretch a one-stop panacea.

#### 4.5 CASE LAW

As expounded upon above in section 4.4.1, courts in the Netherlands are not bound by the judgments and sentences of higher courts. The law-making function in the Netherlands is thus not the exclusive preserve of the superior courts. Every court, irrespective of its place in the hierarchy of the Dutch judiciary, is entitled to hand down whatever sentence it sees fit within the prescribed framework.<sup>1034</sup> This being said, however, in practise, lower Dutch courts seldom if ever deviate from the decisions of higher courts and in particular the *Hoge Raad*.<sup>1035</sup>

The relative absence of legal precedent notwithstanding, I have chosen cases to be outlined in paragraphs 4.5.1 to 4.5.6 that highlight some of the fundamental principles elucidated in and which are relevant to the subjects at hand in this chapter. It is trite that genetic or endogenous mental illnesses and defects could, if these were present at the time that the offence was committed, serve as a factor in diminishing criminal capacity and could also serve as the basis for a complete lack of criminal capacity. What is however particularly noteworthy in some of the cases outlined, is the extent to which Dutch courts apply this.

The sympathetic stance which Dutch courts seem to take when confronted with defences of mental illness or defect, often stands in stark contrast to that of South African courts. This is especially evident when courts make a finding of diminished

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<sup>1032</sup> NL Times. “Anne Faber’s killer sentenced to 28 years in prison”, <https://nltimes.nl/2018/07/17/anne-fabers-killer-sentenced-28-years-prison> (accessed 15 May 2022).

<sup>1033</sup> Dutch News. “Questions mount about Anne Faber suspect and the clinic which treats him”, <http://www.dutchnews.nl/news/archives/2017/10/questions-mount-about-anne-faber-suspect-and-the-clinic-which-treats-him/> (accessed 15 May 2022).

<sup>1034</sup> Tak 2008: 58-59.

<sup>1035</sup> Meintjes-Van der Walt 2001: 56.

criminal capacity for particularly serious crimes. In respect hereof, the following paragraphs canvass Dutch case law which examines the complete exclusion of criminal capacity,<sup>1036</sup> diminished criminal capacity,<sup>1037</sup> and extension of TBS<sup>1038</sup> by virtue of bipolar disorder, as well as the courts' own discretion when deciding if an accused suffers from a mental disorder or illness.<sup>1039</sup>

#### **4.5.1 ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B)**

In this case, the accused was charged with violent theft and dealing of cocaine,<sup>1040</sup> but was subsequently acquitted of the drug related charges.<sup>1041</sup> The offender was, however, found guilty on the charge of violent theft.<sup>1042</sup> While the act herein was punishable by law,<sup>1043</sup> the offender was found to have lacked criminal capacity. To this end, the court took cognisance of the reports drawn up by the appointed psychiatrist and psychologist.<sup>1044</sup>

Per psychiatric report, the offender was found to have suffered from bipolar I disorder and various substance abuse disorders and was found to have been in a state of mania and suffering from psychotic symptoms at the time that the offence was committed. As such, the psychiatrist found that the offender's criminal act was largely or completely driven by his bipolar disorder and the use of various substances. As a consequence hereof, the psychiatrist advised that the offender had diminished criminal capacity. The psychologist likewise found that the offender suffered from bipolar I disorder but that the offender lacked criminal capacity. Additionally, the offender

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<sup>1036</sup> ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B).

<sup>1037</sup> ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P).

<sup>1038</sup> ECLI:NL:RBOBR:2014:1200 - Rechtbank Oost-Brabant, 18-03-2014 / 01/825047-08.

<sup>1039</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09.

<sup>1040</sup> ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 2. Indictment.

<sup>1041</sup> ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 3.1 Acquittal.

<sup>1042</sup> ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 3.2.3 The court's verdict.

<sup>1043</sup> ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 6. The criminality of the act.

<sup>1044</sup> ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 7. The criminality of the suspect.

averred in his statement that he was not well at the time of the offence, as well as being confused and under the influence of drugs.<sup>1045</sup>

On the basis of the expert reports, and with due regard to the offender's own statement, the court found that the offender completely lacked criminal capacity.<sup>1046</sup> The public prosecutor argued for TBS with government nursing<sup>1047</sup> to which the defence did not object.<sup>1048</sup> The court considered the seriousness of the offence<sup>1049</sup> and the personality of the offender<sup>1050</sup> when considering TBS with government nursing as a suitable sanction. The court found that the physical integrity of the victim was infringed and that similar crimes disrupt the legal order and cause societal insecurity and unrest.<sup>1051</sup> Insofar as the personality of the offender was concerned, the offender had prior criminal convictions for violent crimes.<sup>1052</sup>

The court noted that a TBS order with government nursing may only be imposed if the requirements set out in article 37 of the CC (namely that the offender must have suffered from *inter alia* a pathological disorder of his or her mental faculties at the time of the commission of the crime and the crime for which the offender is being tried must attract a prison sentence of no less than four years) have been met. Furthermore, the

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<sup>1045</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 7. The criminality of the suspect.*

<sup>1046</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 7. The criminality of the suspect.*

<sup>1047</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.1 The position of the public prosecutor.*

<sup>1048</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.2 The position of the public defence.*

<sup>1049</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.3 The position of the court.*

<sup>1050</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.3 The position of the court. The seriousness of the offence.*

<sup>1051</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.3 The position of the court. The personality of the offender.*

<sup>1052</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.3 The position of the court. The seriousness of the offence.*

safety of others or persons or property generally must be endangered to the extent that the imposition of the measure is warranted.<sup>1053</sup>

When contemplating such an order, the court must obtain two written reports from two different behavioural experts, one of whom must be a psychiatrist. On the basis hereof, and of the evidence presented at the hearing, the court found that the offender suffered from bipolar I disorder at the time of the commission of the offence; that the offence in question met the requirements per article 37a(1) CC, and that the imposition of the TBS was necessary for the protection of persons and property generally.<sup>1054</sup>

In addition hereto, and in accordance with the psychiatric and psychological reports, the court found that government nursing with the TBS was necessitated. The court reasoned that the safety of persons or property generally demanded it as the risk of recidivism was high and thus treatment was indicated in accordance with article 37b(1) of the CC; prior, less onerous treatment that the offender had received had not yielded any positive change and the long-term treatment was necessitated so that the offender did not return to society untreated.<sup>1055</sup> The court ultimately found that it was proven that the offender had committed violent theft but that the offender lacked criminal capacity by virtue of mental illness and ordered the offender to undergo TBS with government nursing.<sup>1056</sup> The court additionally held that as the TBS imposed herein was for a crime that caused a danger to inviolability of the body, the TBS order *could* last for a period of longer than four years.<sup>1057</sup>

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<sup>1053</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.3 The position of the court. Requirements for imposing a TBS measure.*

<sup>1054</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para 8.3 The position of the court. Requirements for imposing a TBS measure.*

<sup>1055</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.3 The position of the court. Requirements for imposing a TBS measure.*

<sup>1056</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 11. Decision.*

<sup>1057</sup> *ECLI:NL:RBAMS:2021:6669 - Rechtbank Amsterdam, 12-05-2021 / 13-233848-20 (zaak A) en 13-157441-20 (zaak B): para. 8. Justification for penalties and measures. 8.3 The position of the court. TBS for an unlimited period.*

#### **4.5.2 ECLI:NL:RBOBR:2014:1200 - Rechtbank Oost-Brabant, 18-03-2014 / 01/825047-08**

In this case, TBS with compulsory nursing with no period herein specified by the court was ordered in respect of an offender who was charged with attempted manslaughter but was found to lack criminal capacity.<sup>1058</sup> The court *a quo*<sup>1059</sup> again found that the crime was directed against or boldly endangered the integrity of one or more persons and that the safety of others and persons and property generally demanded the imposition of TBS. TBS was subsequently extended by a period of one year.<sup>1060</sup> With respect to the case at hand, the public prosecutor requested an additional two-year extension.<sup>1061</sup>

In a report prepared by the head of the institution where the offender was held, it was stated that the offender suffered from a chronic psychotic disorder in the context of a schizoaffective disorder (bipolar type) and had an extensive history of substance abuse which, it was postulated by the head of the institution, had an aggravating effect in respect of the offender's psychoses. At the time of the commission of the offence, the offender was found to be in a psychotic state characterised by *inter alia* delusional and incoherent thinking and acting; frustration intolerance; inadequate aggression regulation, and poor impulse control.<sup>1062</sup>

It was furthermore stated that the offender had to undergo a number of important steps in the rehabilitation process and would accordingly require a treatment team at the envisaged clinic that could actively guide the offender and monitor and support his progress. As such, it was felt that an extension of the TBS for a period of two years with government nursing would be prudent.<sup>1063</sup>

In deciding this matter, the court also sought expert opinion, as well as that of the public prosecutor and the offender and his defence counsel. The offender averred that

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<sup>1058</sup> ECLI:NL:RBSHE:2008:BD1168 *Rechtbank 's-Hertogenbosch*, 09-05-2008, 01/825047-08.

<sup>1059</sup> ECLI:NL:RBOBR:2013:BZ5248 - *Rechtbank Oost-Brabant*, 25-03-2013 / 01/825047-08.

<sup>1060</sup> ECLI:NL:RBOBR:2013:BZ5248 - *Rechtbank Oost-Brabant*, 25-03-2013 / 01/825047-08. np. The decision.

<sup>1061</sup> ECLI:NL:RBOBR:2014:1200 - *Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np The investigation of the case.

<sup>1062</sup> ECLI:NL:RBOBR:2014:1200 - *Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np The investigation of the case.

<sup>1063</sup> ECLI:NL:RBOBR:2014:1200 - *Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np The assessment.

he had made progress. He also stated that he had done all he could to contribute to his progress including taking his medications and that he had started working in an activity centre located in the clinic.<sup>1064</sup> However, the expert, acting on behalf of the institution where the offender was held, stated that a period of one year would be insufficient for the aforementioned rehabilitation and was of the opinion that a two year period was more suitable. In addition hereto, the offender also still had to complete a relapse prevention program.<sup>1065</sup>

Counsel for the defence argued that the offender wanted an extension of one and not two years. In support hereof, counsel stated he too believed an extension of two years was inappropriate as his client had been under a TBS order for five years and had responded well to medication. In addition hereto, the end goal in respect of the offender was conditional termination of the TBS and, as such, placement in an assisted living facility would be more appropriate.<sup>1066</sup> It must be noted, however, that none of the reports presented found that conditional termination of the TBS with government nursing would be prudent.<sup>1067</sup>

The court went on to extend the TBS by a period of one year.<sup>1068</sup> It held that whilst this was necessary to protect the safety of others or the safety of persons generally per arts. 38d and 38e of the CC, it was important to support and not stymie the positive progress the offender had made.<sup>1069</sup>

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<sup>1064</sup> *ECLI:NL:RBOBR:2014:1200 - Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np The assessment.

<sup>1065</sup> *ECLI:NL:RBOBR:2014:1200 - Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np The assessment.

<sup>1066</sup> *ECLI:NL:RBOBR:2014:1200 - Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np Advice on the extension of the TBS order.

<sup>1067</sup> *ECLI:NL:RBOBR:2014:1200 - Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np The assessment.

<sup>1068</sup> *ECLI:NL:RBOBR:2014:1200 - Rechtbank Oost-Brabant*, 18-03-2014 / 01/825047-08. np The decision.

<sup>1069</sup> *ECLI:NL:GHLEE:2011:BQ0867 - Gerechtshof Leeuwarden*, 11-04-2011 / 24-001689-10. np. The assessment.

#### **4.5.3 ECLI:NL:GHLEE:2011:BQ0867 - Gerechtshof Leeuwarden, 11-04-2011 / 24-001689-10**

The offender in this case was charged with arson. The court *a quo* found the offender to be completely lacking criminal capacity and sentenced him to TBS with government nursing with no period specified by the court herein.<sup>1070</sup> The offender appealed in the present case.<sup>1071</sup>

At trial, both experts led evidence to the extent that they had examined the offender and found that he suffered from bipolar disorder and Asperger's syndrome. This, it was averred, existed at the time of the commission of the crime and that the criminal behaviour could be attributed to the offender's mental disorders. On the basis hereof, the experts found the accused completely lacking criminal capacity. The court accepted the experts' view and found that the offender lacked criminal capacity.<sup>1072</sup> The court *a quo*, as a result hereof, imposed TBS with government nursing.<sup>1073</sup>

At the request of the defence in respect of the present appeal, an examination of the offender's mental faculties was carried out at a forensic institute. The report herein stated that the offender suffered from severe bipolar I. Additionally, it was advised, once again, that the court make a finding that the offender completely lacked criminal capacity. The risk of recidivism would be high if the offender were not treated. The risk was almost solely based on the presence of bipolar disorder combined with exposure to potentially upsetting or stress causing circumstances.<sup>1074</sup>

The experts who conducted the examination in respect of the appeal also noted that the offender was alive to the need for treatment and was open to assistance herein and, that while bipolar disorder is chronic, it is easily treatable. In addition hereto, they expected the offender to make good progress and for the risk of recidivism to drop accordingly. The offender was also a first-time offender who had not undergone any

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<sup>1070</sup> ECLI:NL:GHLEE:2011:BQ0867 - Gerechtshof Leeuwarden, 11-04-2011 / 24-001689-10. np. The verdict from which the appeal originates.

<sup>1071</sup> ECLI:NL:GHLEE:2011:BQ0867 - Gerechtshof Leeuwarden, 11-04-2011 / 24-001689-10. np. Use of remedy.

<sup>1072</sup> ECLI:NL:GHLEE:2011:BQ0867 - Gerechtshof Leeuwarden, 11-04-2011 / 24-001689-10. np. Punishably of the accused.

<sup>1073</sup> ECLI:NL:GHLEE:2011:BQ0867 - Gerechtshof Leeuwarden, 11-04-2011 / 24-001689-10. np. Justification of the measure to be imposed.

<sup>1074</sup> ECLI:NL:GHLEE:2011:BQ0867 - Gerechtshof Leeuwarden, 11-04-2011 / 24-001689-10. np. Justification of the measure to be imposed.

prior compulsory psychiatric treatment and, thus, TBS with government nursing was deemed too drastic a measure.<sup>1075</sup>

The experts went on to state that, at the time of the commission of the crime, the offender was in a state of manic disinhibition bordering psychosis. This, it was asserted, completely influenced the offender's behaviour at the time that the offence was committed and, accordingly, rendered the offender completely devoid of free will and unable to control his behaviour. The experts concluded that the offender was indeed completely lacking in criminal capacity. In light of the foregoing, the experts recommended that the offender be placed in a psychiatric hospital for one year, as he was a first-time offender, pursuant to the erstwhile article 37 of the CC. This period, it was averred, was sufficient to reduce the risk of recidivism to adequate levels. The appeal court herein adopted these recommendations.<sup>1076</sup>

#### **4.5.4 ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P)**

The accused in this case was also found guilty of the arson.<sup>1077</sup> The public prosecution service sought a sentence of nine months' imprisonment and TBS with conditions based on diminished criminal capacity.<sup>1078</sup>

In making its findings, the court took *inter alia* expert reports from both a psychiatrist and psychologist into consideration. The psychiatrist found that the accused suffered from bipolar disorder and had a history of hypo-manic and depressive episodes, the latter being present at the time of the commission of the crime. The accused was in a psychiatric hospital on a temporary authorisation and is said to have started the fire as he was aggrieved about his involuntary admission to the psychiatric hospital.<sup>1079</sup>

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<sup>1075</sup> ECLI:NL:GHLEE:2011:BQ0867 - *Gerechtshof Leeuwarden*, 11-04-2011 / 24-001689-10. np. Justification of the measure to be imposed.

<sup>1076</sup> ECLI:NL:GHLEE:2011:BQ0867 - *Gerechtshof Leeuwarden*, 11-04-2011 / 24-001689-10. np. Justification of the measure to be imposed.

<sup>1077</sup> ECLI:NL:RBOVE:2014:4006 - *Rechtbank Overijssel*, 24-06-2014 / 08/760206-13 (P). np. The court's verdict.

<sup>1078</sup> ECLI:NL:RBOVE:2014:4006 - *Rechtbank Overijssel*, 24-06-2014 / 08/760206-13 (P). np. Justification for penalty or measure. Position of the public prosecution service.

<sup>1079</sup> ECLI:NL:RBOVE:2014:4006 - *Rechtbank Overijssel*, 24-06-2014 / 08/760206-13 (P). np. The court's verdict.

It was averred that even though the accused was not in the midst of any bipolar related mania, bipolar disorder had played a significant role in the commission of the crime. It was reasoned herein that the illness had caused a fundamental lack of impulse control and self-reflection. Thus, although the accused knew his actions were criminal, his insight was impaired in that he felt justified in carrying out these criminal acts. For this reason, he was considered to have a diminished level of criminal capacity.<sup>1080</sup>

The psychiatrist also stated that the risk of recidivism was high if the accused was left untreated. Additionally, the accused had limited therapeutic compliance, lack of insight into his mental disease, lack of empathy, and had only a limited support structure. Considering the above, TBS with conditions was recommended.<sup>1081</sup>

The psychologist, however, held a divergent view. In this report, it was stated that the accused suffered from bipolar I with manic episodes. These episodes were said to be the primary cause of the accused's criminal actions. While the psychologist also felt that treatment should be provided in a secure environment and that TBS with conditions was suitable, he held the opinion that the accused completely lacked criminal capacity.<sup>1082</sup>

The court adopted the recommendations contained in the psychiatrist's report that the accused suffered from diminished criminal capacity and the critical need for clinical admission and treatment to reduce risk of recidivism. Furthermore, the court held that TBS with conditions was warranted as there was a high risk to the safety of others and to people and property generally.<sup>1083</sup>

The court also held that in addition to the aforementioned TBS, and due to the nature and seriousness of offence, a term of imprisonment was necessitated. A relatively short sentence of nine months was handed down. The court justified this as it believed the accused was urgently in need of psychiatric treatment.<sup>1084</sup> Conditions included

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<sup>1080</sup> *ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P).* np The court's verdict.

<sup>1081</sup> *ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P).* np The court's verdict.

<sup>1082</sup> *ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P).* np The court's verdict.

<sup>1083</sup> *ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P).* np The court's verdict.

<sup>1084</sup> *ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P).* np The court's verdict.

cooperation with probationary supervision<sup>1085</sup> and cooperation with clinical treatment at a specified facility for as long as was deemed necessary by the facility in consultation with probation services.<sup>1086</sup>

#### **4.5.5 ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09**

Although not dealing with bipolar disorder specifically, the accused in this matter stabbed and killed an eight-year-old child and was found guilty of manslaughter.<sup>1087</sup> At trial, the accused was sentenced to twelve years imprisonment and TBS with government nursing. On appeal, he was sentenced to life imprisonment. On yet a subsequent appeal, the *Hoge Raad* quashed the latter judgment and ordered that the matter be re-heard by the Court of Appeal Arnhem.<sup>1088</sup> Both the accused and the public prosecutor appealed the decision of the court *a quo* herein. The accused was found guilty of manslaughter<sup>1089</sup> by virtue of diminished criminal capacity because of a mental disorder that could not be ascertained as he did not cooperate with psychological assessment. Accordingly, mental health professionals could not assess his criminal capacity at the time the crimes were committed.<sup>1090</sup>

As the accused did not cooperate with the psychiatric evaluation, the defence argued that TBS could not be ordered because the mental state of the accused was not ascertained at the time the offence was committed per article 37a of the CC.<sup>1091</sup> The observations made by the psychiatric team tasked with assessing his criminal capacity for a previous case in 2004 were able to make limited observations and this combined with the large volume of entries in the *dossier* regarding the accused's mental state

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<sup>1085</sup> ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P). np Conditions.

<sup>1086</sup> ECLI:NL:RBOVE:2014:4006 - Rechtbank Overijssel, 24-06-2014 / 08/760206-13 (P). np Special conditions.

<sup>1087</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. The indictment.

<sup>1088</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. Process.

<sup>1089</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. Murder or manslaughter?

<sup>1090</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. Punishability of the suspect and imposition of punishment and/or measure.

<sup>1091</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. Punishability of the suspect and imposition of punishment and/or measure.

led the court to find that it was not inconceivable that the accused had indeed been suffering from a mental disorder at the time of the commission of the crimes.<sup>1092</sup>

The psychiatric observation in 2004 found that the accused displayed antisocial and narcissistic personality traits and found on this basis that the accused's criminal capacity was diminished, and the chance of recidivism was present. The court also observed that, on the basis of the accused's behaviour, a disorder on the schizophrenic spectrum could not be discounted.<sup>1093</sup> The court did add that in order for TBS to be handed down, the mental state of the accused at the time that the offence was committed must be ascertained but it is for the judge to make this decision.<sup>1094</sup>

The court, however, further stated that the mental disorder that an accused suffers from does not have to, by law, be classified per the DSM or be diagnosed by a behavioural expert.<sup>1095</sup> A court may, provided the court exercises the utmost prudence and there is support for this decision from behavioural experts (as in the present case where an expert alluded to mental illness in a previous psychiatric assessment), decide if an accused suffers from a mental disorder.<sup>1096</sup>

The court also took the aforementioned 'strange' behaviour of the accused and the *dossier* entries regarding this behaviour into account in reaching its decision that the accused suffered from a mental disorder when the offence was committed.<sup>1097</sup> The accused was thus found to have diminished criminal capacity.<sup>1098</sup>

The court further supported its decision herein by holding that it would be irresponsible from the perspective of the safety of the general population if the accused did not receive treatment before he re-entered society.<sup>1099</sup> The court took the severity of the

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<sup>1092</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Index.

<sup>1093</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Punishability of the suspect and imposition of punishment and/or measure.

<sup>1094</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1095</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1096</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1097</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1098</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1099</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

crime, the societal shock, the fact that the accused had not offered any explanation as to why he committed the crime, and his lack of remorse in aggravation of sentence.<sup>1100</sup> It deviated from the maximum sentence of fifteen years imprisonment because the accused was found to have had diminished criminal capacity<sup>1101</sup> and sentenced him to twelve years imprisonment and TBS with government nursing.<sup>1102</sup>

This is a pertinent case in that courts in the Netherlands are increasingly faced with the dilemma of the public prosecutor requesting TBS but an accused refusing to accede to the requisite psychiatric evaluation.<sup>1103</sup> The *Hoge Raad*<sup>1104</sup> substantiated the court's view herein that it could indeed order TBS without an accused cooperating with the psychiatric evaluation if the disorder can be otherwise ascertained as in the present case. Struijk and Mevis do state, however, that offenders routinely refuse cooperation which has resulted in a highly undesirable trend of a decreasing number of TBS orders.<sup>1105</sup> The view that TBS may be imposed on an offender who expressly does not want TBS was subsequently substantiated by the *Hoge Raad* at a subsequent appeal.<sup>1106</sup>

#### **4.5.6 ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden, 11-10-2012 / 24-000973-11i**

While not dealing with bipolar disorder but mental illness in general, the appellant (defendant) herein was charged with murder (manslaughter in the alternative)<sup>1107</sup> and was subsequently found guilty of three counts of murder and one count of manslaughter and sentenced to twelve years imprisonment with no measure of TBS by the court *a quo*.<sup>1108</sup>

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<sup>1100</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1101</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1102</sup> ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem, 18-05-2011 / 21-004515-09. np. Index.

<sup>1103</sup> Struijk *et al.* 2016: 103.

<sup>1104</sup> ECLI:NL:HR:2012:BW6184 - Hoge Raad, 22-05-2012 / 11/02623.

<sup>1105</sup> Struijk & Mevis 2016: 103.

<sup>1106</sup> ECLI:NL:HR:2012:BW6184 - Hoge Raad, 22-05-2012 / 11/02623.

<sup>1107</sup> ECLI:NL:GHLEE:2011:BU6436 Gerechtshof Leeuwarden, 01-12-2011, 24-000973-11. np. Investigation of the case.

<sup>1108</sup> ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden, 11-10-2012 / 24-000973-11i. np. Index.

She had suffocated four of her new-born babies.<sup>1109</sup> She did so over a period of approximately six years and had always concealed her pregnancies.<sup>1110</sup> The first time she killed one of her babies was when she was eighteen years of age.<sup>1111</sup> Once she had killed her babies, she hid the bodies in suitcases which she kept in her attic.<sup>1112</sup> The appellant stated that because the children had all shown sign of life after birth, she was compelled to kill them.<sup>1113</sup> The court ordered the appellant to undergo psychiatric evaluation.<sup>1114</sup>

The behavioural experts found that the appellant suffered from a personality disorder related to an organic brain disorder which she had suffered from at the times of the commission of the crimes<sup>1115</sup> and which resulted in poor problem-solving abilities<sup>1116</sup> and thus the appellant was found to have diminished criminal capacity.<sup>1117</sup> Indeed, the appellant argued that she herself felt she required treatment.<sup>1118</sup>

The behavioural experts who compiled the report into the psychiatric evaluation of the appellant were of the opinion that the risk of recidivism in general was low generally but was deemed to be high in that the appellant could conceivably fall pregnant and commit the same crimes again.<sup>1119</sup> The risk of recidivism in terms of the same crimes

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<sup>1109</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Investigation of the case.

<sup>1110</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

<sup>1111</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

<sup>1112</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

<sup>1113</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Investigation of the case.

<sup>1114</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1115</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1116</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1117</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1118</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

<sup>1119</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

was extremely high which warranted an intensive treatment regimen and, accordingly, a long TBS measure was suitable.<sup>1120</sup>

On appeal, the court found that it could not agree with the conclusion of the court *a quo* that the instances of infanticide had been premeditated.<sup>1121</sup> When handing down sentence in aggravation the court looked at the severity of the crimes, the fact that the appellant gave no insight into why she had committed the crimes, and that she had initially refused to cooperate with psychiatric evaluation<sup>1122</sup> and only consented hereto on the appeal which she brought.<sup>1123</sup> The court held too that the safety of others also warranted a measure of TBS.<sup>1124</sup>

In mitigation, the court primarily took the appellant's diminished criminal capacity into consideration – the fact that she had not been convicted of any crimes prior and acknowledged that the appellant would have to live with the gravity of what she had done for the rest of her life.<sup>1125</sup> Although the court did temper these considerations with the level of societal shock the case had caused as well as the severity of the crimes, they opined that imprisonment was unavoidable.<sup>1126</sup> The court sentenced the appellant to three years imprisonment and a measure of TBS with government nursing.<sup>1127</sup>

#### 4.6 CONCLUSION

This chapter has sought to provide an extensive illustration of legal position in the Netherlands as it relates to mentally ill offenders and specifically offenders who suffer

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<sup>1120</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

<sup>1121</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Index.

<sup>1122</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1123</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1124</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

<sup>1125</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1126</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Punishment of the suspect.

<sup>1127</sup> *ECLI:NL:GHLEE:2012:BX9891 - Gerechtshof Leeuwarden*, 11-10-2012 / 24-000973-11i. np. Imposition of punishment/measure.

from bipolar disorder. In respect hereof, several pivotal topics have been analysed, which has included a conspectus of legislation pertinent to mentally ill offenders; the role of expert evidence in the Dutch courtroom; sentencing options as they relate to mentally ill offenders with particular focus on TBS, and applicable case law.

As noted previously in this chapter, the Netherlands has a stellar reputation in respect of its contemporary practises and facilities in the treatment of mental illness and criminality.<sup>1128</sup> In respect hereof, the accepting attitude of the Dutch towards mentally ill offenders,<sup>1129</sup> the FCA which prioritises utilising a custodial sentence or measure to maximise the recovery of forensic patients,<sup>1130</sup> and the large budget appended to mental health care cannot be overlooked. The Netherlands has universal healthcare. The mandatory benefits package includes basic ambulatory mental health care for mild-to-moderate mental disorders and specialised outpatient and inpatient mental care for complicated and severe mental disorders.<sup>1131</sup>

A study of Organisation for Economic Co-operation and Development (OECD) countries found that the Netherlands spent more money on short-term admission for mental and behavioural disorders than any other OECD country. Expenditure on cardiovascular disease and cancer treatment were second and third, respectively.<sup>1132</sup> In 2016, the Netherlands spent 10.5 per cent of its gross domestic product on health care.<sup>1133</sup> In 2017, the Netherlands spent €25.1 billion on the treatment of mental and behavioural disorders which amounted to almost one-third of total Dutch health care expenditure, the latter being €87.8 billion.<sup>1134</sup> In addition hereto, and despite its drawbacks, TBS is an ostensibly pragmatic approach towards mentally ill offenders with its strong emphasis on preventing recidivism. Moreover, as noted above in

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<sup>1128</sup> Bal & Koenraadt 2000: 220.

<sup>1129</sup> McInerny 2000: 227.

<sup>1130</sup> *The Forensic Care Act* BWBR0040634/2020-01-01: Chapter 2: art. 2.1(1).

<sup>1131</sup> Wammes *et al.* "International Health Care System Profiles - Netherlands", <https://www.commonwealthfund.org/international-health-policy-center/countries/netherlands> (accessed 15 May 2022).

<sup>1132</sup> Statistics Netherlands. "Relatively high budget for mental health care services", <https://www.cbs.nl/en-gb/news/2015/49/relatively-high-budget-for-mental-health-care-services> (accessed 15 May 2022).

<sup>1133</sup> Wammes *et al.* "International Health Care System Profiles - Netherlands", <https://www.commonwealthfund.org/international-health-policy-center/countries/netherlands> (accessed 15 May 2022).

<sup>1134</sup> National Institute for Public Health and the Environment. "More than 25 billion spent on mental disorders in 2017", <https://www.rivm.nl/en/news/more-than-25-billion-spent-on-mental-disorders-in-2017> Accessed (15 May 2022).

paragraph 4.1.2, bipolar disorder finds juridical acceptance as a complete<sup>1135</sup> or partial defence<sup>1136</sup> in the Netherlands.

The next chapter focuses on the criminal justice system in the USA insofar as it relates to mentally ill offenders, with specific focus on offenders who suffer from bipolar disorder. In this regard, legislation and case law germane to mentally ill offenders and, by extension, offenders who suffer from bipolar disorder will be examined. Federal sentencing and expert testimony with particular attention to the *Daubert* test will also be discussed. Most pertinently to this chapter, MHCs are extensively analysed.

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<sup>1135</sup> *ECLI:NL:GHLEE:2011:BQ0867*.  
<sup>1136</sup> de Ruiter & Petrila 2018: 834.

## CHAPTER FIVE: THE PRESENT LEGAL POSITION IN THE UNITED STATES OF AMERICA

### 5.1 INTRODUCTION

Federal law in the USA takes a similar stance to that of South Africa in respect of mental illness that completely excludes criminal capacity by virtue of a mental disease or illness in the form of a defence of mental illness (colloquially referred to as the insanity defence in the USA).<sup>1137</sup> While not explicitly, federal law also permits the defence of diminished criminal capacity by allowing courts to depart from minimum sentences by virtue of mental illness.<sup>1138</sup> The USA has also seen rapid proliferation of MHCs throughout the country in part due to the allocation of federal funding.<sup>1139</sup>

The criminal justice system is composed of three parts in the USA: law enforcement, courts, and corrections.<sup>1140</sup> On a federal level, which is the focus of this chapter, the court system is composed of three tiers: district courts which are trial courts of first instance that handle both criminal and civil matters; circuit courts which are courts of first appeal, and the Supreme Court of the USA which is the final court of appeal. These courts are limited in jurisdiction and may only hear cases sanctioned by federal statute or the *United States Constitution* (hereinafter referred to as “the *Constitution*”).<sup>1141</sup> The *Constitution* is the supreme law.<sup>1142</sup> When variance between state law and federal law exists, the latter trumps the former under the supremacy clause in the *Constitution*.<sup>1143</sup>

The USA’s criminal justice system is an adversarial one and the prosecution is constitutionally obliged to prove every element of a crime beyond a reasonable

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<sup>1137</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17.

<sup>1138</sup> United States Sentencing Commission Guidelines Manual. sec. 5K2.13.

<sup>1139</sup> Honegger 2015: 485

<sup>1140</sup> Criminal Justices Program. “Components of the US Criminal Justice System”, <https://www.criminaljusticeprograms.com/articles/three-components-of-criminal-justice/> (accessed 10 September 2022).

<sup>1141</sup> Offices of the United States Attorneys. “Introduction to the Federal Court System”, <https://www.justice.gov/usao/justice-101/federal-courts> (accessed 21 September 2022).

<sup>1142</sup> United States Courts. “Comparing Federal & State Courts”, <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (accessed 10 September 2022).

<sup>1143</sup> *U.S. Constitution*. Art. VI Clause II.

doubt.<sup>1144</sup> The statute that establishes an offence also contains the elements of the offence. In general, however, every federal crime contains the following elements:<sup>1145</sup> the act or conduct; the mental state of the offender at the time of the act; the concurrence between the act and effect; and the effect (the causation of harm) which will ordinarily be ‘but-for’ causation.<sup>1146</sup> When a statute is silent on a specific mental state, the court will infer that “[criminal capacity] which is necessary to separate wrongful from innocent conduct is required”.<sup>1147</sup>

According to the Supreme Court in *Elonis v U.S.*, 575 U.S. (2015), when a statute does not prescribe a specific mental state, a court will infer the “mens rea which is necessary to separate wrongful from innocent conduct”.

Mental illness is defined as “... a diagnosable mental, behavioral, or emotional disorder of sufficient duration to meet diagnostic criteria within the most recent edition of the DSM-5-TR; and that has resulted in functional impairment that substantially interferes with or limits 1 or more major life activities”.<sup>1148</sup>

The test for criminal incapacity, and accordingly the defence of insanity, may be invoked under any federal statute if the defendant “at the time of the commission of the acts constituting the [offence]... as a result of a severe mental disease or defect, was unable to appreciate the nature; and quality or the [unlawfulness] of his acts”.<sup>1149</sup>

The *United States Code* (hereinafter referred to as the “USC”) states explicitly that neither mental disease nor defect otherwise constitutes a defence.<sup>1150</sup> With regard to the requirement of severity contained in section 17(a), behaviour disorders of a non-

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<sup>1144</sup> Grachek 2006: 1480.

<sup>1145</sup> Legal Information Institute. “Criminal Law”, [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) (accessed 10 September 2022).

<sup>1146</sup> “The but-for test is a test commonly used in both tort law and criminal law to determine actual causation. The test asks, “but for the existence of X, would Y have occurred?” (Legal Information Institute. “But-for-test”, [https://www.law.cornell.edu/wex/but-for\\_test](https://www.law.cornell.edu/wex/but-for_test) (accessed 1 November 2023).

<sup>1147</sup> Legal Information Institute. “Criminal Law”, [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) (accessed 10 September 2022).

<sup>1148</sup> *United States Code*. Title 34. Subtitle I. Chapter 101. Subchapter XXI. sec. 10472(1).

<sup>1149</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17(a).

<sup>1150</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17(a).

psychotic nature and neuroses *including* "inadequate personality, immature personality, or a pattern of antisocial tendencies" do not constitute a defence.<sup>1151</sup>

Expert psychiatric and psychological testimony may be utilised<sup>1152</sup> in order to satisfy the burden of proof embodied in section 17(b).<sup>1153</sup> The *Daubert* standard<sup>1154</sup> is pertinent herein given that both South Africa and the USA make use of expert medical testimony in legal proceedings and, as such, this study will also comprise an examination of the *Daubert* standard. The *Daubert* standard was formulated in the US Supreme Court and is accordingly federal in nature.

Expert evidence used to ascertain lack of criminal capacity by virtue of mental disease or illness is not constitutionally obligatory.<sup>1155</sup> This, by default, substantially limits the defence of diminished criminal capacity as most evidence that would serve to prove diminished criminal capacity may only be presented for the defence of insanity.<sup>1156</sup>

As noted above, federal law in the USA takes a similar stance to that of South Africa in the respect of mental illness that completely excludes criminal capacity by virtue of a mental disease or illness in the form of a defence of insanity.<sup>1157</sup> While not explicitly, federal law also permits the defence of diminished criminal capacity by allowing courts to depart from minimum sentences by virtue of mental illness.<sup>1158</sup>

Three considerations are pertinent when considering sentencing regarding mentally ill offenders in the USA: first, because there is no universal or all-encompassing definition of mental impairment, courts have considerable liberty in determining what indeed constitutes mental impairment for the purposes of sentencing; secondly, the presence of a mental disorder(s) can influence sentencing in two instances, at the time of the offence and if the disorder in question will endure post sentencing; a mental disorder that was present at the time of the offence and that causally has contributed

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<sup>1151</sup> US Department of Justice. "Insanity—present statutory test—18 U.S.C. § 17(a)", <https://www.justice.gov/jm/criminal-resource-manual-637-insanity-present-statutory-test-18-usc-17a> (accessed 3 October 2022).

<sup>1152</sup> Torry & Billick 2010: 254.

<sup>1153</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17.

<sup>1154</sup> As noted in paragraph 1.1 the rules formulated in *Daubert*, known as the *Daubert* standard, determine whether expert medical evidence "meets the standards of reliability and relevance" and is thus "evidence-based". Kaliski 2012: 319.

<sup>1155</sup> Robinson 2014: 238.

<sup>1156</sup> Brown 2012: 109.

<sup>1157</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17.

<sup>1158</sup> United States Sentencing Commission Guidelines Manual. sec. 5K2.13.

to the commission of the offence should, theoretically at least, serve to mitigate the sentence and, lastly, there is no predetermined or set reduction in sentence when sentencing an offender with a mental disorder.<sup>1159</sup>

Section 3553 of the USC<sup>1160</sup> deals with the imposition of a sentence and delineates all considerations pertaining to federal sentencing<sup>1161</sup> as elaborated in the legislation section below. The United States Sentencing Commission Guidelines Manual (hereinafter referred to as the “Guidelines”), which is examined below, is used exclusively for federal sentencing.<sup>1162</sup> Diminished criminal culpability is dealt with in section 5K2.13 of the Guidelines which permits a downward departure from a minimum sentence by a federal court by virtue of mental illness. Diminished criminal culpability does not expunge a guilty verdict but rather sees the offender convicted of a lesser offence.<sup>1163</sup>

Bipolar disorder finds judicial acceptance as both a partial<sup>1164</sup> and complete<sup>1165</sup> defence, as illustrated in the case law section below. Insanity is a complete and affirmative<sup>1166</sup> defence which will result in an offender being committed to a mental institution.<sup>1167</sup> It stands naturally to reason that if there is a nexus between mental illness and a crime, and if an offender succeeds in pursuing the insanity defence, the conventional goals of deterrence, retribution, and rehabilitation cannot be served.<sup>1168</sup>

This chapter has as its focus an investigation into the federal USA definition of criminal capacity, the place and effect of bipolar disorder on criminal capacity and liability, applicable legislation, expert evidence in cases dealing with bipolar disorder/mental illness, MHCs, and the sentencing of the mentally ill in the USA.

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<sup>1159</sup> Bagaric 2016: 32.

<sup>1160</sup> *United States Code*. Title 18. Part I. Chapter 1. sec. 17.

<sup>1161</sup> Avila 2013: 411.

<sup>1162</sup> Bagaric 2016: 15.

<sup>1163</sup> Legal Information Institute. “Double Jeopardy”, [https://www.law.cornell.edu/wex/double\\_jeopardy](https://www.law.cornell.edu/wex/double_jeopardy) (accessed 21 September 2022).

<sup>1164</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004); *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002).

<sup>1165</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004).

<sup>1166</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17. See also Grachek 2006: 1480.

<sup>1167</sup> Legal Information Institute. “Diminished capacity”, [https://www.law.cornell.edu/wex/diminished\\_capacity](https://www.law.cornell.edu/wex/diminished_capacity) (accessed 21 September 2022).

<sup>1168</sup> Grachek 2006: 1482.

## 5.2 LEGISLATION

As in South Africa, in the USA, the *Constitution* is the supreme law.<sup>1169</sup> Fundamental herein is the Bill of Rights (contained in the first ten amendments of the *Constitution*) which includes the ban on cruel and unusual punishment and equal protection before the law.

The USC, with specific reference to Title 18 is, legislatively, at the heart of the federal criminal justice system. It contains regulations pertaining to the hospitalisation of mentally ill offenders, the death sentence, and the insanity defence and, by extension, the test for criminal capacity.

The Federal Rules for Criminal Procedure and the Federal Rules of Evidence regulate the procedures for the insanity defence and expert testimony respectively which, along with other pertinent provisions pertaining to mentally ill offenders, will be elaborated on in paragraphs 5.2.3 and 5.2.4 to follow, as well as paragraph 5.2.5 apposite to mentally ill offenders in the United States Sentencing Commission Guidelines Manual,<sup>1170</sup> including deviations from sentences and diminished mental capacity.

### 5.2.1 *The Constitution of the United States*

Constitutional rights, insofar as they pertain to mentally ill offenders, are highlighted below. Included herein is the ban of cruel and unusual punishment which, in the present context, is pertinent to mentally ill offenders. The right to life is also protected but with the caveat that the right thereto may be deprived but not arbitrarily so and not without due legal process.<sup>1171</sup>

The Fourth Amendment<sup>1172</sup> secures the rights of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.

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<sup>1169</sup> United States Courts. "Comparing Federal & State Courts", <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (accessed 10 September 2022).

<sup>1170</sup> "[The] Federal sentencing Guidelines and accompanying commentary [are] developed by the U.S. Sentencing Commission. US Department of Justice. Office of Justice Programs. "United States Sentencing Commission Guidelines Manual" <https://www.ojp.gov/ncjrs/virtual-library/abstracts/united-states-sentencing-commission-Guidelines-manual> (accessed 21 September 2022).

<sup>1171</sup> *The Constitution of the United States*. Amendment XIV.

<sup>1172</sup> *The Constitution of the United States*. Amendment IV.

Additionally, this amendment holds that a warrant may only be issued on probable cause, it must be supported by an oath or affirmation, and it must contain the description of the place that must be searched and the persons or items that must be seized.

The Fifth Amendment<sup>1173</sup> holds that no one may be held to answer for a crime, capital or otherwise, without a Grand Jury indictment. The double-jeopardy defence<sup>1174</sup> is enshrined in this amendment and self-incrimination is prohibited as it is held that no-one in any criminal case shall be compelled “to be a witness against himself.” Lastly, no-one may be arbitrarily deprived of life, liberty, or property, as any said deprivation must be with due legal process.

The Sixth Amendment<sup>1175</sup> guarantees a defendant the “right to a speedy and public trial... by an impartial jury”, as well the right to be informed of the charges against them; the right to question witnesses, the right to call their own witnesses, and the right to counsel.

The Eighth Amendment<sup>1176</sup> pertains to proportionality. It prohibits cruel and unusual punishment and excessive bail and fines. Herein, and with particular reference to the subject matter at hand, in *Brown v Plata*,<sup>1177</sup> the Supreme Court held that refusing offenders access to medical care, and particularly mental health care, constituted cruel and unusual punishment per the Eighth Amendment.<sup>1178</sup>

Section 1 of the Fourteenth Amendment<sup>1179</sup> disallows the curtailment by any state of the privileges or immunities of US citizens and the deprivation of equal protection of law and the arbitrary deprivation of life, liberty or property without due legal process. This amendment is pertinent as the implication in the current context is that mentally ill offenders must enjoy equal protection of the law.

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<sup>1173</sup> *The Constitution of the United States*. Amendment V.

<sup>1174</sup> The Double Jeopardy Clause in the Fifth Amendment to the *American Constitution* prohibits anyone from being prosecuted twice for substantially the same crime. The relevant part of the Fifth Amendment states, “No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb....” Legal Information Institute. “Double Jeopardy”, [https://www.law.cornell.edu/wex/double\\_jeopardy](https://www.law.cornell.edu/wex/double_jeopardy) (accessed 21 September 2022).

<sup>1175</sup> *The Constitution of the United States*. Amendment VI.

<sup>1176</sup> *The Constitution of the United States*. Amendment VIII.

<sup>1177</sup> *Brown v Plata* 563 U.S. 493 (2011).

<sup>1178</sup> Bagaric 2016: 21.

<sup>1179</sup> *The Constitution of the United States*. sec. 1. Amendment XIV.

It is a constitutional imperative<sup>1180</sup> that a court must largely consider any aspect of a defendant's character, record, or circumstance pertaining to the offence in question which could potentially serve in mitigation when the death penalty is at stake. This broad stroke approach applies to an offender's mental condition at the time of the commission of the offence(s).<sup>1181</sup>

This protection is limited in its application as no state within the USA specifically outlaws the execution of offenders who were mentally ill at the time of the commission of an offence which stands in contravention to both this and the Eighth Amendment.<sup>1182</sup> Indeed, this violation is tantamount to treating defendants with mental illness both separately and differently.<sup>1183</sup>

### **5.2.2 United States Code**

The *United States Code* (hereinafter referred to as the "USC") is "a consolidation and codification ... of the general and permanent laws of the United States".<sup>1184</sup> Provisions relevant to this study, namely the insanity defence and, by extension, the test for criminal incapacity, the determination of mental competency to stand trial, imposition of a sentence, and hospitalisation of offenders with mental illness, are examined herein.

Insanity is an affirmative defence.<sup>1185</sup> It may be invoked under any federal statute if the defendant "at the time of the commission of the acts constituting the [offence]... as a result of a severe mental disease or defect, was unable to appreciate; the nature; and the quality or the [unlawfulness] of his acts".<sup>1186</sup>

The statute states explicitly that neither mental disease nor defect otherwise constitutes a defence.<sup>1187</sup> With regard to the requirement of severity contained in

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1180 *Lockett v Ohio* 438 U.S. 586 (1978).

1181 Slobogin 2000: 669.

1182 Slobogin 2000: 668.

1183 Bazelon Centre for Mental Health Law. "The role of mental health courts in system reform", <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

1184 Anonymous. "United States Code", <https://uscode.house.gov/> (accessed 10 September 2022).

1185 *United States Code*. Title 18. Part I. Chapter 1. sec. 17(a).

1186 *United States Code*. Title 18. Part I. Chapter 1. sec. 17(a).

1187 *United States Code*. Title 18. Part I. Chapter 1. sec. 17(a).

section 17(a), behaviour disorders of a non-psychotic nature and neuroses including "inadequate personality, immature personality, or a pattern of antisocial tendencies" do not constitute a defence.<sup>1188</sup>

This provision extends to defendants who, by virtue of voluntary intoxication, can neither appreciate the nature and quality or the unlawfulness of the act in question. In essence, voluntary intoxication can never be cloaked in the guise of an insanity defence, nor can it be a valid affirmative defence.<sup>1189</sup> Like South Africa, and with respect to federal criminal cases, the burden of proof in reference to the insanity defence lies with the defendant.<sup>1190</sup>

With the approval of the judicial council of the circuit, every US district court must effect a plan that is operational throughout the district wherein any person who is financially unable is provided with representation, which includes counsel, investigative, expert and other services that are necessary for requisite representation.<sup>1191</sup>

A court may, prior to the imposition of a sentence, request a psychological or psychiatric examination report to provide more information pertaining to the mental state of the offender.<sup>1192</sup> When considering a suitable sentence, a court must ensure that it is sufficient but not greater than what is necessary.<sup>1193</sup> Importantly, regarding an offender who suffers from mental impairment or disease and "the nature and circumstances of the [offence] and the *history and characteristics of the defendant*" (emphasis supplied)<sup>1194</sup> must be taken into account when formulating a sentence. Additionally, the sentence must reflect *inter alia* the need for deterrence and safety of the public;<sup>1195</sup> it must provide medical care or "correctional" treatment in the most efficacious way.<sup>1196</sup> The sentence must also factor in the severity of the offence.<sup>1197</sup>

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<sup>1188</sup> US Department of Justice. "Insanity—present statutory test—18 U.S.C. § 17(a)", <https://www.justice.gov/jm/criminal-resource-manual-637-insanity-present-statutory-test-18-usc-17a> (accessed 3 October 2022).

<sup>1189</sup> US Department of Justice. "Insanity—present statutory test—18 U.S.C. § 17(a)", <https://www.justice.gov/jm/criminal-resource-manual-637-insanity-present-statutory-test-18-usc-17a> (accessed 3 October 2022).

<sup>1190</sup> *United States Code*. Title 18. Part I. Chapter 1. sec. 17(b).

<sup>1191</sup> *United States Code*. Title 18. Part II. Chapter 201. sec. 3006A.

<sup>1192</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3552(c).

<sup>1193</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(a).

<sup>1194</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(a)(1).

<sup>1195</sup> *States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(a)(2)(B) and (C).

<sup>1196</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(a)(2)(D).

<sup>1197</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(a)(2)(A).

A court may, when formulating a sentence, take into account any factor in mitigation or aggravation of sentence if not sufficiently provided for by the Guidelines,<sup>1198</sup> should a sentence that diverges from the Guidelines be warranted.<sup>1199</sup> If a court deviates from a sentence stipulated in the aforementioned Guidelines, it must provide written reasons for doing so.<sup>1200</sup>

When deciding on the imposition of the death penalty, a court must take any mitigating factor into consideration,<sup>1201</sup> including impaired capacity to the extent that “[a] defendant’s capacity to appreciate the [unlawfulness] of the [his or her] conduct or to conform conduct to the requirements of law was significantly impaired, regardless of whether the capacity was so impaired as to constitute a [defence] to the charge”.<sup>1202</sup> Additionally, so-called disturbance, wherein a defendant has committed the offence whilst under severe mental or emotional disturbance, also constitutes a factor in mitigation.<sup>1203</sup>

The defendant or the Attorney for Government may, at any time after prosecution has commenced but prior to sentencing or during supervised release prior to probation but prior to the end of sentence, file a motion to ascertain the mental capacity of the defendant.<sup>1204</sup> A court must permit such a motion if a reasonable basis that the defendant suffers from mental disease or defect exists and which renders the defendant incapable of “[understanding] the nature and consequences of the proceedings against him or [being able] to assist properly in his [defence]”.<sup>1205</sup> Before

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<sup>1198</sup> Federal sentencing Guidelines and accompanying commentary developed by the U.S. Sentencing Commission. U.S. Sentencing Commission. US Department of Justice. Office of Justice Programs. “United States Sentencing Commission Guidelines Manual” <https://www.ojp.gov/ncjrs/virtual-library/abstracts/united-states-sentencing-commission-guidelines-manual> (accessed 21 September 2022).

<sup>1199</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(b)(1).

<sup>1200</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(c)(2).

<sup>1201</sup> *United States Code*. Title 18. Part II. Chapter 228. sec. 3592(a).

<sup>1202</sup> *United States Code*. Title 18. Part II. Chapter 228. sec. 3592(a)(1).

<sup>1203</sup> *United States Code*. Title 18. Part II. Chapter 313: sec. 3592(a)(6).

<sup>1204</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(a).

<sup>1205</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(a).

the hearing, a court may order a psychiatric or psychological examination<sup>1206</sup> of the defendant with the attendant report then lodged with the court.<sup>1207</sup>

If the court finds, after completion of the hearing, that the weight of evidence indicates that the defendant suffers from a mental disease or defect as contemplated in section 4241(a), the court must commit the defendant to the custody of the Attorney General.<sup>1208</sup>

The defendant will then be hospitalised for treatment in a suitable facility:

- a) for a reasonable period not exceeding four months to determine if there exists a substantial probability that he or she will attain the requisite capacity in the foreseeable future to allow proceedings to go forward;<sup>1209</sup> and
- b) for an additional reasonable period of time until:<sup>1210</sup>
  - i. the defendant's mental condition has improved to the extent that the trial may proceed if the court finds that, within the contemplated additional period of time, there exists a substantial probability that the defendant will attain the requisite capacity in the foreseeable future to allow proceedings to go forward;<sup>1211</sup> or

the pending charges which the defendant faces are disposed of according to law.

whichever is earlier.<sup>1212</sup>

If it is determined that the defendant's mental condition has not improved to the extent that proceedings can recommence at the end of the specified period, the defendant will be subject to secs. 4246 and 4248.<sup>1213</sup>

If a defendant who has been hospitalised pursuant to section 4241(d), has been found by the director of the facility to have recovered to the extent that he or she is able to understand the nature and consequences of the proceedings against him or her and

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<sup>1206</sup> Reference is made extensively below to psychiatric and psychological examination and psychiatric and psychological reports. The following must be noted herein; the examinations in question must be performed by *licensed or certified* psychiatrists or psychologists. Sec. 4247 of the USC is discussed below.

<sup>1207</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(b).

<sup>1208</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(d).

<sup>1209</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(d)(1).

<sup>1210</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(d)(2).

<sup>1211</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(d)(2)(A).

<sup>1212</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(d)(2)(B).

<sup>1213</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(d)(2)(B).

to assist properly in his or her defence, the director must file a certificate to this effect with the clerk of the court. The clerk must then inform the defence council and the Attorney for the Government whereupon the court must hold a hearing into the competency of the defendant per 4247(d).<sup>1214</sup>

If the court finds, after completion of the hearing, that the weight of evidence indicates that the defendant has recovered to the extent that he or she is indeed able to understand the nature and consequences of the proceedings against him or her and to assist properly in his or her defence, the court must order a defendant's discharge from the aforementioned facility and set down a date for trial or further proceedings.<sup>1215</sup>

If a defendant intends to rely on a defence of insanity and the requisite motion per Rule 12.2 of the Federal Rules of Criminal Procedure is filed, the court must order a psychiatric or psychological examination of the defendant with the attendant report then lodged with the court pursuant to section 4247(b) and (c).<sup>1216</sup> If the matter of insanity is raised either by the defendant, the court, or by the Attorney for the Government pursuant to Rule 12.2,<sup>1217</sup> the jury or the court – in instances of a non-jury trial – shall find the defendant either guilty;<sup>1218</sup> not guilty,<sup>1219</sup> or not guilty by reason of insanity.<sup>1220</sup>

When a defendant is found not guilty by reason of insanity, he or she will be committed to a suitable facility until he or she is eligible for release.<sup>1221</sup> Prior to the hearing contemplated below in section 4243(c), the court must order a psychiatric or psychological examination of the defendant with the attendant report then lodged with the court pursuant to section 4247(b) and (c).<sup>1222</sup> The hearing must be conducted in accordance with section 4247(d) and must not take place later than 40 days after the special verdict.<sup>1223</sup>

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<sup>1214</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(e).

<sup>1215</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4241(e).

<sup>1216</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4242(a).

<sup>1217</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4242(b).

<sup>1218</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4242(b)(1).

<sup>1219</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4242(b)(2).

<sup>1220</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4242(b)(3).

<sup>1221</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(a).

<sup>1222</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(b).

<sup>1223</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(c).

A person found not guilty by reason of insanity of an offence involving bodily injury to, or serious damage to the property of, another person, or involving a substantial risk of such injury or damage, carries the burden of proving by clear and convincing evidence that his or her release would not give rise to a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect.<sup>1224</sup> In respect of any other offence, the person has the “burden of such proof by a preponderance of the evidence”.<sup>1225</sup>

If, after the hearing, the court finds that release herein would indeed give rise to a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect, the court must commit the person to the custody of the Attorney General. The Attorney General must release the person to the relevant official of the state where the person is domiciled or where the offence was tried if the state will accept responsibility for the custody, care and treatment of that person. The Attorney General must make every reasonable effort to compel such a state to accept such responsibility.<sup>1226</sup>

If, despite the aforementioned efforts, neither state will accept responsibility for the person, the Attorney General, must hospitalise the person in a suitable facility for treatment until such time as:<sup>1227</sup>

- a) such a state will accept such responsibility;<sup>1228</sup> or
- b) the person’s mental condition, through a prescribed regimen of medical, psychiatric, or psychological care or treatment, is such that the person’s release or conditional release would not create a substantial risk of bodily injury to another person or serious damage to property of another;<sup>1229</sup>

whichever is earlier.<sup>1230</sup>

It must be determined by the director of the facility where an acquitted person is hospitalised pursuant to section S4243(e) that the person has recovered from his or

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<sup>1224</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(d).  
<sup>1225</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(d).  
<sup>1226</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(e).  
<sup>1227</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(e).  
<sup>1228</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(e)(1).  
<sup>1229</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(e)(2).  
<sup>1230</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(e).

her mental disease or defect to the extent that his or her release or conditional release, “under a prescribed regimen of medical, psychiatric, or psychological care or treatment”, does not pose a substantial threat to the bodily safety of another person nor to the property of another person.<sup>1231</sup>

Thereafter, the director must file a certificate to this extent with the clerk of the court that ordered the hospitalisation whereupon the clerk must furnish a copy of the certificate to the legal representatives of the person in question, the Attorney for the Government, and the court.<sup>1232</sup> The court must accordingly discharge the person.<sup>1233</sup>

Alternatively, on the motion of the court or the Attorney for the Government, the court may order a hearing per section 4247(d) to determine the contemplated release.<sup>1234</sup> If the court finds that he or she no longer poses a substantial threat to the bodily safety of another person nor to the property of another person, the court may order immediate discharge.<sup>1235</sup> The court may alternatively find that he or she no longer poses a substantial threat to the bodily safety of another person nor to the property of another person contingent upon on conditional release “under a prescribed regimen of medical, psychiatric, or psychological care or treatment...”.<sup>1236</sup> The court is entitled at any time to modify or do away with the aforementioned care or treatment.<sup>1237</sup>

If the acquitted person, conditionally discharged per section 4243(f), fails to comply with the regimen of treatment or care therein contemplated, the director of the facility where the care or treatment in question is administered must inform the Attorney General and the court.<sup>1238</sup> If the court finds that the acquitted person has defaulted on the prescribed regimen of care or treatment, or finds that on probable cause a default herein has occurred, the person may be arrested and taken to court. Here it shall be determined if, after a hearing, the acquitted person should be remanded to a facility if it is determined that, in light of the lack of compliance with the care or treatment

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<sup>1231</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(f).

<sup>1232</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(f).

<sup>1233</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(f).

<sup>1234</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(f).

<sup>1235</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(f)(1).

<sup>1236</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(f)(2).

<sup>1237</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(f)(2)(B).

<sup>1238</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(g).

regimen and of his or her continued release, the person poses a substantial threat to the bodily safety of another person or to the property of another person.<sup>1239</sup>

After conviction but prior to sentencing, a motion may be filed by the defendant, Attorney for Government, or the court *ex officio* within ten days of conviction, if there exists compelling evidence that the defendant suffers from a mental illness or defect which requires admission into a suitable facility or custody for treatment.<sup>1240</sup> In respect hereof, a hearing must be convened,<sup>1241</sup> and prior hereto, the court may request a psychiatric or psychological examination and report of the defendant in which the mental health professional must give their opinion as to whether the defendant suffers from a mental disease or defect and if this warrants the defendant's custody for care or treatment in a suitable facility.<sup>1242</sup>

The report must also contain the opinion of the psychologist or psychiatrist as to sentencing alternatives that would provide the defendant with the care or treatment contemplated herein.<sup>1243</sup> If the court finds on the balance of probabilities that the defendant does indeed suffer from a mental disease or defect which necessitates their admission to a suitable facility for care or treatment in lieu of imprisonment, it will assign custody of the defendant to the Attorney General.<sup>1244</sup> The Attorney General must accordingly arrange for the admission of the defendant.<sup>1245</sup>

If the condition of the defendant, in the opinion of the facility director, has improved to the extent that continued care or treatment are no longer required, the facility director must file a certificate to the court to this effect.<sup>1246</sup> The commitment contemplated in section 4244 "constitutes a provisional sentence of imprisonment to the maximum term authorised by law for the [offence] for which the defendant was found guilty".<sup>1247</sup> In accordance hereto, if, at the time the certificate has been filed, the provisional sentence has not expired, the court may amend the provisional sentence.<sup>1248</sup>

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1239 *United States Code*. Title 18. Part III. Chapter 313: sec. 4243(g).  
1240 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(a).  
1241 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244 (c).  
1242 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244 (b).  
1243 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(b).  
1244 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(d).  
1245 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(d).  
1246 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(e).  
1247 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(d).  
1248 *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(e).

If the release of a defendant who:

- a) is in the custody of the Bureau of Prisons, has been admitted to a facility and is due for imminent release;
- b) has been committed to a facility per section 4241(d); or
- c) has had all charges against him or her expunged by virtue of mental illness or defect,

will “create a substantial risk of bodily injury to another person or serious damage to property of another” by virtue of a mental disease or defect from which the defender currently suffers, the director of a facility in which an offender is admitted must file a certificate to this extent with the court.<sup>1249</sup>

A copy of the certificate must be furnished to the offender,<sup>1250</sup> the Attorney for the Government and, if the offender was committed in terms of section 4241(d) and if the commitment was ordered by a different court, the clerk of that court.<sup>1251</sup> The court must convene a hearing and a certificate staying release until completion of the hearing must be issued by the court.<sup>1252</sup>

The court may, as with the preceding subsections, order a psychiatric or psychological report to be filed with the court.<sup>1253</sup> If the court finds, on the balance of probabilities, that the defendant offender does indeed suffer from a mental disease or defect and, that by this virtue, his or her imminent release would create a substantial risk of bodily injury to another person or serious damage to property of another, it will assign custody of the offender to the Attorney General.<sup>1254</sup> The Attorney General must then release the offender to the relevant official of the state and, if this is not possible, the Attorney General must commit the offender to a suitable facility.<sup>1255</sup>

If the director of the facility where the offender is held is of the opinion that the release of the offender would no longer create a substantial risk of bodily injury to another person or serious damage to property of another, a certificate to this effect must be

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<sup>1249</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(a).

<sup>1250</sup> This section makes reference to the person. From this I infer this encompasses and/or refers to the offender’s legal defence.

<sup>1251</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(a).

<sup>1252</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(a).

<sup>1253</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(b).

<sup>1254</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(d).

<sup>1255</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(d).

filed with the court and furnished to the defendant's counsel and the Attorney for Government.<sup>1256</sup> The court may discharge the offender or, at the request of the Attorney for Government or *ex officio*, order a hearing.<sup>1257</sup> The court may then immediately discharge the defendant,<sup>1258</sup> or order the defendant conditional release.<sup>1259</sup>

As noted above in this paragraph, psychiatric and psychological examination must be performed by *licensed or certified* psychiatrists or psychologists. Should the court deem it appropriate, whether *ex officio* or on request of the defendant, the examinations can be performed by more than one examiner.<sup>1260</sup>

A court may, as discussed above, commit a defendant in terms of secs. 4241, 4244 or 4245 for the purposes of the aforementioned examination which must be of a reasonable period not exceeding 30 days.<sup>1261</sup> An extension may be granted on request of the director of the facility, on good cause insofar as more time is required to observe and evaluate the defendant, but cannot exceed an additional 15 days.<sup>1262</sup>

An examination pursuant to secs. 4242, 4243, 4246, or 4248 must be conducted in an appropriate facility and must likewise be of a reasonable period not exceeding 45 days.<sup>1263</sup> An extension may too be granted on request of the director of the facility, on good cause insofar as more time is required to observe and evaluate the defendant, but cannot exceed an additional 30 days.<sup>1264</sup>

The report herein contemplated shall be prepared by the nominated examiner(s) and shall be filed at the court with copies hereof furnished to the counsel of the person who is the subject of the examination, and the Attorney of the State.<sup>1265</sup> The report must contain the person's history and current symptoms; the tests that were employed

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<sup>1256</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(e).

<sup>1257</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(e).

<sup>1258</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(e)(1).

<sup>1259</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4246(e)(2)(A) and (B).

<sup>1260</sup> *United States Code*. Title 18. Part III. Chapter 313: Sec. 4247(b).

<sup>1261</sup> *United States Code*. Title 18. Part III. Chapter 313: Sec. 4247(b).

<sup>1262</sup> *United States Code*. Title 18. Part III. Chapter 313: Sec. 4247(b).

<sup>1263</sup> *United States Code*. Title 18. Part III. Chapter 313: Sec. 4247(b).

<sup>1264</sup> *United States Code*. Title 18. Part III. Chapter 313: Sec. 4247(b).

<sup>1265</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4247(c).

during the examination, and the examiner's finding and opinion regarding diagnosis and prognosis.<sup>1266</sup>

At a hearing contemplated herein,<sup>1267</sup> the person whose mental condition is under examination must be represented by counsel and, if indigent, counsel must be afforded to him or her per section 3006A of the USC, they must be afforded the opportunity to testify, call witnesses and to cross-examine witnesses.<sup>1268</sup>

In terms of section 4241, the director of the facility where the person is committed must prepare and submit semi-annual reports to the court<sup>1269</sup> or if continued commitment of a person committed pursuant to secs. 4243, 4244, 4245, 4246 or 4248 is necessary, prepare annual reports regarding the mental condition state of the offender as well as recommendations in respect of the need for continued commitment.<sup>1270</sup>

### **5.2.3 Federal Rules of Criminal Procedure**

The Federal Rules for Criminal Procedure (hereinafter referred to as the "FRCP") are a codification of specific procedures that must take place during criminal proceedings.<sup>1271</sup> The FRCP are relevant to the focus of this study insofar as it provides the rules for a motion for the insanity defence and the attendant mental examination.

A defendant who wishes to introduce a defence of insanity must, in writing, inform an Attorney for Government.<sup>1272</sup> This motion must be filed within the designated notice period or no later than a period determined by the court.<sup>1273</sup> A copy of this notice must also be filed with the clerk of the court.<sup>1274</sup> Failure of the defendant herein precludes the presentation of the insanity defence.<sup>1275</sup> A court may, however, on good cause, condone late filing.<sup>1276</sup> A defendant must likewise, within the designated period or no

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<sup>1266</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4247(d).

<sup>1267</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4247(c)(1-4).

<sup>1268</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4247(d).

<sup>1269</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4247(e)(1)(A).

<sup>1270</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4247(e)(1)(B).

<sup>1271</sup> Legal Information Institute. "Federal Rules of Criminal Procedure", [https://www.law.cornell.edu/wex/criminal\\_law](https://www.law.cornell.edu/wex/criminal_law) accessed (3 October 2022).

<sup>1272</sup> Federal Rules of Criminal Procedure. Rule 12.2(a).

<sup>1273</sup> Federal Rules of Criminal Procedure. Rule 12.2(a).

<sup>1274</sup> Federal Rules of Criminal Procedure. Rule 12.2(a).

<sup>1275</sup> Federal Rules of Criminal Procedure. Rule 12.2(a).

<sup>1276</sup> Federal Rules of Criminal Procedure. Rule 12.2(a).

later than determined by the court, inform an Attorney for Government, in writing, of the intention to introduce expert evidence.<sup>1277</sup> This notification must also be filed with the clerk of the court. A court may once again, on good cause, condone late filing.<sup>1278</sup>

The court may order the defendant to undergo a mental competency examination in accordance with Title 18 USC section 4241.<sup>1279</sup> If the defendant has served notice in terms of Rule 12.2(a) herein a court must order a mental examination in accordance with 18 USC section 4242.<sup>1280</sup> If a defendant fails to give notice as contemplated in Rule 12.2(b)<sup>1281</sup> or refuses to submit to a mental examination as contemplated in Rule 12.2(c),<sup>1282</sup> the court may rule such evidence as inadmissible.<sup>1283</sup>

#### **5.2.4 Federal Rules of Evidence**

Provisions of the Federal Rules of Evidence (hereinafter referred to as the “FRE”) that are applicable to the focus areas of this study are the relevance of evidence and general admissibility of relevant evidence and expert testimony.

It is for the court to decide preliminary questions regarding admissibility of evidence, qualification of a witness, and privilege. Apart from matters of privilege, a court is not bound by rules of evidence herein.<sup>1284</sup>

The relevancy of evidence hinges on two factors: first “[if] it has any tendency to make a fact more or less probable than it would be without the evidence”<sup>1285</sup> and, secondly, “[if] the fact is of consequence in determining the action”.<sup>1286</sup> Evidence is admissible if its admission is not prohibited by the *Constitution*; a federal statute; the FRE; other rules prescribed by the Supreme Court or if it is not irrelevant.<sup>1287</sup> A court may prohibit the admission of relevant evidence if the risk of “unfair prejudice, confusing the issues,

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<sup>1277</sup> Federal Rules of Criminal Procedure. Rule 12.2(b).

<sup>1278</sup> Federal Rules of Criminal Procedure. Rule 12.2(b).

<sup>1279</sup> Federal Rules of Criminal Procedure. Rule 12.2 (c)(1)(A).

<sup>1280</sup> Federal Rules of Criminal Procedure. Rule 12.2 (c)(1)(B).

<sup>1281</sup> Federal Rules of Criminal Procedure. Rule 12.2 (d)(1)(A).

<sup>1282</sup> Federal Rules of Criminal Procedure. Rule 12.2 (d)(1)(B).

<sup>1283</sup> Federal Rules of Criminal Procedure. Rule 12.2 (d)(1).

<sup>1284</sup> Federal Rules of Evidence. Art. I. Rule 104.

<sup>1285</sup> Federal Rules of Evidence. Art. IV. Rule 401(a).

<sup>1286</sup> Federal Rules of Evidence. Art. IV. Rule 401(b).

<sup>1287</sup> Federal Rules of Evidence. Art. IV. Rule 402.

misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence” is greater than the probative value of thereof.<sup>1288</sup>

Every person is deemed a competent witness, bar those expressly precluded by the FRE.<sup>1289</sup> A court may call a witness *ex officio* or on the request of a party and all parties have the right to cross-examine the witness.<sup>1290</sup> The court may likewise cross-examine a witness irrespective of which party called the witness.<sup>1291</sup>

A witness who testifies as to an opinion and who is not an expert is limited to the extent that the opinion must be:

- a) rationally based on the witness’s perception;<sup>1292</sup>
- b) helpful to clearly understanding the witness’s testimony or to determining a fact in issue;<sup>1293</sup> and
- c) not based on scientific, technical, or other [specialised] knowledge within the scope of Rule 702.<sup>1294</sup>

This Rule holds that a witness is an expert if he or she possesses the requisite knowledge, skill, experience, training, or education” and may thus testify by way of opinion or if:

- a) the expert’s scientific, technical, or other [specialised] knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.

An expert may provide an opinion as to facts and data pertaining to the case at hand of which he or she has been made aware or which he or she has personally observed. Opinion evidence that an expert provides can be admissible provided it is based on facts and data upon which other experts in the same field would reasonably deduce

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<sup>1288</sup> Federal Rules of Evidence. Art. IV. Rule 403.  
<sup>1289</sup> Federal Rules of Evidence. Art.VI. Rule 601.  
<sup>1290</sup> Federal Rules of Evidence. Art. VI. Rule 614(a).  
<sup>1291</sup> Federal Rules of Evidence. Art. VI. Rule 614(b).  
<sup>1292</sup> Federal Rules of Evidence. Art. VII. Rule 701(a).  
<sup>1293</sup> Federal Rules of Evidence. Art. VII. Rule 701(b).  
<sup>1294</sup> Federal Rules of Evidence. Art. VII. Rule 701(c).

the same opinion even if the facts and data are inadmissible. If the facts and data in question are otherwise inadmissible, the expert can only disclose his or her opinion to the jury if the probative value of the opinion outweighs any potential prejudicial value the opinion might carry.<sup>1295</sup>

Opinion on the ultimate issue is not automatically objectionable,<sup>1296</sup> however, in criminal matters, an expert may not provide an opinion as to a defendant's mental state or condition if it was an element of the crime or the defence as the latter and former rest with the trier of fact alone.<sup>1297</sup> An expert may provide an opinion and give reasons for said opinion but the expert does not first have to be cross-examined regarding the fundamental facts and data unless the court so orders. An expert may be compelled to reveal these facts and data on cross-examination.<sup>1298</sup>

At the motion of a party or in its capacity *ex officio*, the court may instruct the parties to give good cause as to why an expert should not be appointed. The court may also ask parties for their proposals for candidates. The ultimate decision, however, falls to the court but the expert may only be appointed if he or she so consents.<sup>1299</sup> The clerk of the court must inform the expert of their duties<sup>1300</sup> and the expert:

- a) must advise the parties of any findings he or she makes;<sup>1301</sup>
- b) may be deposed by any party;<sup>1302</sup>
- c) may be called to testify by the court or any party;<sup>1303</sup> and
- d) may be cross-examined by any party, including the party that called the expert.<sup>1304</sup>

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1295 Federal Rules of Evidence. Art. VII. Rule 703.  
1296 Federal Rules of Evidence. Art. VII. Rule 704(a).  
1297 Federal Rules of Evidence. Art. VII. Rule 704(b).  
1298 Federal Rules of Evidence. Art. VII. Rule 705.  
1299 Federal Rules of Evidence. Art. VII. Rule 706(a).  
1300 Federal Rules of Evidence. Art. VII. Rule 706(b).  
1301 Federal Rules of Evidence. Art. VII. Rule 706(b)(1).  
1302 Federal Rules of Evidence. Art. VII. Rule 706(b)(2).  
1303 Federal Rules of Evidence. Art. VII. Rule 706(b)(3).  
1304 Federal Rules of Evidence. Art. VII. Rule 706(b)(4).

An expert is entitled to reasonable compensation as determined by the court<sup>1305</sup> and as set forth in the Fifth Amendment of the *Constitution*.<sup>1306</sup> None of the above precludes any party from procuring the services of their own expert.<sup>1307</sup>

Hearsay is inadmissible unless otherwise stipulated by the FRE; the *Constitution*, or any other rules set forth by the Supreme Court.<sup>1308</sup> The following *inter alia* are exceptions to the hearsay rule irrespective of the availability of the witness:

- present sense impression;<sup>1309</sup>
- excited utterance;<sup>1310</sup>
- then-existing mental, emotional, or physical condition;<sup>1311</sup>
- statement made for medical diagnosis or treatment;<sup>1312</sup>
- recorded recollection;<sup>1313</sup>
- records of regularly conducted activity;<sup>1314</sup>
- public records;<sup>1315</sup>
- public records of vital statistics;<sup>1316</sup>
- records of religious organisations concerning personal or family history;<sup>1317</sup>
- certificates of marriage, baptism, and similar ceremonies;<sup>1318</sup>
- statement in ancient documents;<sup>1319</sup>
- market reports and similar commercial publications;<sup>1320</sup>
- a statement in learned treatises, periodicals, or pamphlets;<sup>1321</sup>
- judgment of previous convictions;<sup>1322</sup>

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1305 Federal Rules of Evidence. Art. VII. Rule 706(c).  
1306 Federal Rules of Evidence. Art. VII. Rule 706(c)(1).  
1307 Federal Rules of Evidence. Art. VII. Rule 706(e).  
1308 Federal Rules of Evidence. Art. VIII. Rule 802.  
1309 Federal Rules of Evidence. Art. VIII. Rule 803(1).  
1310 Federal Rules of Evidence. Art. VIII. Rule 803(2).  
1311 Federal Rules of Evidence. Art. VIII. Rule 803(3).  
1312 Federal Rules of Evidence. Art. VIII. Rule 803(4a).  
1313 Federal Rules of Evidence. Art. VIII. Rule 803(5).  
1314 Federal Rules of Evidence. Art. VIII. Rule 803(6).  
1315 Federal Rules of Evidence. Art. VIII. Rule 803(8).  
1316 Federal Rules of Evidence. Art. VIII. Rule 803(9).  
1317 Federal Rules of Evidence. Art. VIII. Rule 803(11).  
1318 Federal Rules of Evidence. Art. VIII. Rule 803(12).  
1319 Federal Rules of Evidence. Art. VIII. Rule 803(16).  
1320 Federal Rules of Evidence. Art. VIII. Rule 803(17).  
1321 Federal Rules of Evidence. Art. VIII. Rule 803(18).  
1322 Federal Rules of Evidence. Art. VIII. Rule 803(22).

- judgments involving personal, family, or
- general history, or a boundary.<sup>1323</sup>

### **5.2.5 United States Sentencing Commission Guidelines Manual**

The area to which the Guidelines are relevant to the focus of the study is the sentencing of offenders who were mentally ill at time of commission of crime. In addition hereto, supervised release and conditions for probation are also discussed, as well as deviation from sentences in terms of diminished criminal capacity.

An upward or downward departure<sup>1324</sup> from the Guidelines may be considered per section 3553(b)(1) of the USC by a court if mitigating or aggravating circumstances exist “of a kind, or to a degree” not adequately provided for by the Guidelines.<sup>1325</sup> A court may take offender characteristics into account which are not ordinarily relevant as per Chapter 5 Part H of the Guidelines with particular reference to section 5H1.3.<sup>1326</sup> There is a caveat: the characteristics must present to what is deemed to be an *exceptional degree* (emphasis supplied).<sup>1327</sup>

A downward departure may be justified if the offence was committed when the defendant had significantly reduced mental capacity and if the significantly reduced mental capacity of the defendant contributed substantially to the commission of the offence. If a downward departure is granted, the extent thereof must be commensurate to how the defendant’s diminished capacity contributed to the commission of the offence.<sup>1328</sup>

The application note for section 5K2.13 of the Guidelines states that “[s]ignificantly reduced mental capacity means that the defendant”, despite conviction, has a considerably diminished ability to:

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<sup>1323</sup> Federal Rules of Evidence. Art. VIII. Rule 803(23).

<sup>1324</sup> Departures are factors which allow a court to more readily impose a sentence that falls outside the relevant Guideline range. (Bagaric 2016: 17).

<sup>1325</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5K2.0(a)(1)(A).

<sup>1326</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5K2.0(a)(4).

<sup>1327</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5K2.0(a)(4).

<sup>1328</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5K2.13(2).

- a) understand the [unlawfulness] of the [behaviour] comprising the [offence] or to exercise the power of reason; or
- b) control [behaviour] that the defendant knows is wrongful.

Section 5K2.13 comprises both a cognitive and a volitional element,<sup>1329</sup> as with South Africa’s test for criminal capacity.

The operation of section 5K2.13 is subject to four caveats; relevant hereto is that section 5K2.13 may only find application in respect of nonviolent offences.<sup>1330</sup> Herein, the court in *U.S. v Cook* held that “[a] court may depart downward from sentencing Guidelines if defendant committed nonviolent offense while suffering from significantly reduced mental capacity and not resulting from voluntary use of drugs or other intoxicants”.<sup>1331</sup>

Section 5K2.0 also deals with departures and can offer expanded grounds for a downward departure of sentencing by virtue of diminished criminal culpability. Additionally, section 5K2.0 is not limited to nonviolent offences,<sup>1332</sup> as elucidated by the court in *U.S. v Green*<sup>1333</sup> who further affirmed that section 5K2.0 could apply to an “extraordinary mental condition”.<sup>1334</sup> Section 5H1.3 of the Guidelines states that “[m]ental and emotional conditions may be relevant in determining whether a departure is warranted, if such conditions, individually or in combination with other offender characteristics, are present to an unusual degree and distinguish the case from the typical cases covered by the Guidelines”. These mental and emotional conditions can also be relevant when a court determines probation and supervised release conditions per secs. 5B1.3(d)(5) and 5D1.3(d)(5).

In respect of mandatory conditions of release which are not relevant for the present purposes, a court may impose a raft of discretionary conditions if they are “reasonably related to<sup>1335</sup> the nature and circumstances of the [offence] and the history and

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<sup>1329</sup> *U.S. v Smith* 330 F.3d 1209 (9th Cir. 2003) at 1213.

<sup>1330</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. Sec. 5K2.13(2).

<sup>1331</sup> *U.S. v Cook* 53 F.3d 1029 (9th Cir. 1995) at 1029.

<sup>1332</sup> Legal Information Institute. “Double Jeopardy”, [https://www.law.cornell.edu/wex/double\\_jeopardy](https://www.law.cornell.edu/wex/double_jeopardy) (accessed 21 September 2022).

<sup>1333</sup> *U.S. v Green* 124 F.3d 213 (9th Cir. 1997).

<sup>1334</sup> *U.S. v Green* 124 F.3d 213 (9th Cir. 1997) at 1.

<sup>1335</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5D1.3(b)(1).

characteristics of the defendant...<sup>1336</sup> and the need to provide the defendant with needed... medical care, or other correctional treatment in the most effective manner...".<sup>1337</sup>

These conditions are case specific. If the court is of the reasonable belief that a defendant requires psychiatric or psychological treatment, a defendant can be compelled to attend mandatory mental health programs approved by the United States Probation Office.<sup>1338</sup>

### 5.3 FEDERAL SENTENCING

There is a disproportionate representation of people with mental illness in jails across the USA. Bagaric goes so far as to label prisons warehouses for mentally ill offenders.<sup>1339</sup> This substantiates the assertion that the mentally ill are particularly vulnerable to punishment.<sup>1340</sup> Alarming, there are more people who suffer from serious mental health issues in prison than in psychiatric hospitals in the USA.<sup>1341</sup> Literature variously estimates the populace of mentally ill offenders or offenders who suffer from mental health problems from one-third of offenders<sup>1342</sup> to an estimated 50 per cent of federal inmates,<sup>1343</sup> to the assertion that the prevalence of mental impairment among offenders is three times that of the general populace.<sup>1344</sup> An additional estimate puts the prevalence of bipolar disorder among inmates at six times that of the general populace.<sup>1345</sup>

A study carried out at the Los Angeles Twin Towers Correctional Facility<sup>1346</sup> found that the arrest and subsequent imprisonment of manic patients after discharge from

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<sup>1336</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5D1.3(b)(1)(A).

<sup>1337</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5D1.3(b)(1)(D).

<sup>1338</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5D1.3(d)(5).

<sup>1339</sup> Bagaric 2016: 1.

<sup>1340</sup> Chua 2011: 435.

<sup>1341</sup> Bagaric 2016: 54.

<sup>1342</sup> Bagaric 2016: 3.

<sup>1343</sup> Sarteschi 2013: 1.

<sup>1344</sup> Davidson & Rosky 2015: 354.

<sup>1345</sup> Quanbeck *et al.* 2003: 1245.

<sup>1346</sup> The psychiatric wing of the Los Angeles County jail.

community hospitals is a common occurrence. Furthermore, 60 per cent of these offenders were hospitalised for mania in the month prior to arrest.<sup>1347</sup> While the aforementioned figures are divergent, together they offer stark insight into the deluge of mental illness in jails. Pertinently in this regard, the American Psychiatric Association (hereinafter referred to as the “APA”) lists schizophrenia, bipolar disorder, and depression as the three most prevalent mental illnesses in prisons across the USA.<sup>1348</sup>

Compounding this egregious state of affairs, mentally ill offenders have a greater likelihood of being detained in solitary confinement,<sup>1349</sup> experience more difficulty obtaining parole and serve sentences that, on average, exceed sentences of inmates who do not suffer from mental illness by five months.<sup>1350</sup> In recent times, there has been an exponential trend towards harsher sentences being handed down to mentally ill offenders.<sup>1351</sup> Quanbeck *et al.*<sup>1352</sup> contend that harsher sentences are not merely the product of stricter sentences, they are symptomatic of both an increased distribution and use of illegal drugs, and the incarceration of the mentally ill which they term the criminalisation of the mentally ill. All the while, the USA holds the dubious distinction of having the highest rate of imprisonment in the world with the prison population standing at 700 per 100,000.<sup>1353</sup>

Provisions of the Guidelines relevant to mentally ill offenders will be examined in the paragraphs below. This includes analyses of the principles, objectives and the overall austerity of federal sentencing, factors that courts consider in aggravation and mitigation of sentence, and the court’s discretion in this regard.

The overarching penal philosophy embodied in this thesis wherein an offender who commits a crime that is due more to mental illness than criminality is less culpable and should be punished accordingly,<sup>1354</sup> extends, notionally at least, to conventional

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<sup>1347</sup> Quanbeck *et al.* 2003: 1247.  
<sup>1348</sup> Sarteschi 2013: 8.  
<sup>1349</sup> Sarteschi 2013: 8.  
<sup>1350</sup> Sarteschi 2013: 7.  
<sup>1351</sup> Bagaric 2016: 13.  
<sup>1352</sup> Quanbeck *et al.* 2003: 1245.  
<sup>1353</sup> Bagaric 2016: 3.  
<sup>1354</sup> Johnston & Flynn 2017: 687.

sentencing within the federal criminal justice system. As will be explicated below, this philosophy does not find enough application within the sphere of sentencing.

### **5.3.1 General principles and objectives of federal sentencing in the USA**

Federal sentencing is both a judicial and legislative exercise.<sup>1355</sup> First and fundamentally, the federal burden of proving criminal liability is only fulfilled if the defendant's criminal conduct satisfies all the elements of the offence.<sup>1356</sup> Proportionality too is ostensibly a fundamental precept of the Guidelines.<sup>1357</sup> In respect of sentencing options available to courts, the Guidelines contains provisions regarding imprisonment, supervised release, and probation.<sup>1358</sup> As stated above in paragraph 5.2.2, when formulating a sentence, a court is permitted to take any factors in mitigation or aggravation of sentence into account if a fit for purpose sentence is not provided for in the Guidelines.<sup>1359</sup>

In imposing a sentence, a court must consider the correctly calculated guideline range, any grounds for departure contained in policy statements, and the factors per section 3553 of the USC. Herein the court must ensure the sentence is sufficient, in compliance with section 3553(2) of the USC, but not greater than necessary.<sup>1360</sup>

In addition hereto, the court, in ascertaining a suitable sentence to be imposed, must consider:

1. both the nature and circumstances of the offence as well as the history and characteristics of the defendant;
2. the need for a sentence to be imposed that:
  - a) reflects the severity of the offence, promotes respect for law and provides fair and just punishment for the offence;

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<sup>1355</sup> Chua 2011: 440.

<sup>1356</sup> Grachek 2006: 1480.

<sup>1357</sup> Bagaric 2016: 49.

<sup>1358</sup> Chua 2011: 442.

<sup>1359</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(b)(1).

<sup>1360</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553.

- b) provides adequate deterrence to criminal conduct, protects the public from any future crimes the offender may commit; and
- c) that the Guidelines must be the point of departure and benchmark.<sup>1361</sup>

Considerations pertinent when considering sentencing regarding mentally ill offenders in the USA include the following:

1. Courts have considerable liberty in determining what constitutes mental impairment for the purposes of sentencing as there is no universal definition of mental impairment;<sup>1362</sup>
2. the presence of a mental disorder can serve to mitigate sentences in two ways;
  - a) if it was present at the time of the offence and;
  - b) if the disorder in question will plausibly persist during the sentencing phase;
3. a mental disorder that was present at the time of the offence and that causally has contributed to the commission of the offence should, theoretically at least, serve to mitigate the sentence;
4. there is no predetermined or set reduction in sentence when sentencing an offender who was mentally impaired at the time the offence was committed; and
5. mental disorders can serve in mitigation of sentence if the offender would find the sanction particularly onerous as a result of his or her mental disorder.<sup>1363</sup>

The Guidelines provides statutory provisions wherein a court may depart from the Guidelines. Courts may also depart from prescribed sentences for reasons not explicitly provided for in the Guidelines.<sup>1364</sup>

### **5.3.2 Non-custodial sanctions and alternatives to conventional imprisonment**

Section 3583 of the USC deals specifically with supervised release. Herein a court must consider a number of factors put forth in section 3553(a) of the USC including deterrence, incapacitation, restitution, rehabilitation and offender and offence

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<sup>1361</sup> *United States Code*. Title 18. Part II. Chapter 227. Subchapter A. sec. 3553(2).  
<sup>1362</sup> Bagaric 2016: 31.  
<sup>1363</sup> Bagaric 2016: 32.  
<sup>1364</sup> Bagaric 2016: 32.

characteristics.<sup>1365</sup> Similarly, and with respect to probation, a court must also give credence to factors per section 3553(a) of the USC to the degree that they are applicable. Courts also have the option of civil commitment orders per section 4246 of the USC both after a prison sentence has been served and in place of a prison sentence; these are pertinent to offenders who pose a danger to others; to themselves or who are incapable of meeting the needs of their own wellbeing.<sup>1366</sup>

Courts also have the option of outpatient treatment orders.<sup>1367</sup> Herein it must be noted that on granting an offender parole or supervised release, courts may append the specific condition that an offender attend mental health programs sanctioned by the US Probation Office. A court may also place occupational restrictions on an offender.<sup>1368</sup> As noted above in paragraph 5.3.1, courts occasionally also consider whether imprisonment of an offender who suffers from a mental disorder would place an unduly onerous burden on and negatively impact an offender's mental wellbeing.<sup>1369</sup>

While far from ideal, particularly given the potentially indefinite deprivation of liberty,<sup>1370</sup> civil commitment per section 4246 of the USC is mooted as a preferable alternative to sentences that breach the Guidelines based on "future dangerousness". The logic herein is twofold: first, during commitment an offender will receive mental health care (or at least they should, although this is not always a reality); secondly, they will remain confined if they are deemed a danger to society.<sup>1371</sup>

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<sup>1365</sup> Avila 2013: 412.

<sup>1366</sup> Chua 2011: 441.

<sup>1367</sup> Chua 2011: 441.

<sup>1368</sup> Chua 2011: 442-443.

<sup>1369</sup> Bagaric 2016: 21.

<sup>1370</sup> Anonymous. "Developments in the law: the law of mental illness", <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

<sup>1371</sup> Anonymous. "Developments in the law: the law of mental illness", <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

### **5.3.3 The Guidelines, aggravation and mitigation of sentence and the court's discretion in sentencing**

Sentences (per the Guidelines) have a range within which a court can set a sentence with reference to two considerations, namely the severity of the offence including the type of the injury to the victim or fiscal considerations when the nature of the offence is of a monetary nature, and the offender's criminal history score per the Guidelines in which length of time between offences and the severity of prior criminal conduct are looked at.<sup>1372</sup> Should a court deviate from a prescribed sentence, it must provide its reasons for doing so.<sup>1373</sup> The two aforementioned considerations are not exhaustive and courts may look to section 3553 of the USC, discussed in paragraph 5.2.2 above, when determining sentence.<sup>1374</sup>

In the USA, there is no generic definition of what mental illness is, thus, theoretically at least, any mental illness or mental disability may be considered by courts.<sup>1375</sup> In addition hereto, courts may also consider several factors in aggravation and mitigation when considering an appropriate sentence. Mental illness may act in aggravation of sentence in respect of perception of future dangerousness and may act in mitigation in respect of diminished criminal culpability.<sup>1376</sup> Theoretically, mental disorders can mitigate a sentence but in reality, mentally ill offenders sometimes receive longer sentences.<sup>1377</sup>

The scope provided in the Guidelines regarding aggravating and mitigating circumstances is non-exhaustive, suffice to say that the invocation of mental impairment is permitted when considering a sentence that falls beyond the scope of the Guidelines. Once again, and with particular reference hereto, when a sentence is handed down that breaches the sentencing range in the Guidelines, the court must provide reasons as to why it was inclined to hand down a sentence which falls outside the Guidelines.<sup>1378</sup>

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<sup>1372</sup> Bagaric 2016: 16.

<sup>1373</sup> Drogin *et al.* 2011: 66-67.

<sup>1374</sup> Chua 2011: 446.

<sup>1375</sup> Bagaric 2016: 10.

<sup>1376</sup> Davidson & Rosky 2015: 353.

<sup>1377</sup> Bagaric 2016: 32.

<sup>1378</sup> Bagaric 2016: 17.

It must be noted herein per the Supreme Court in *Lockett v Ohio*,<sup>1379</sup> that the Eighth and Fourteenth Amendments make it peremptory for a court, in all but the most exceptional of circumstances, to take “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers” in mitigation of sentence when capital punishment is at stake.

The Guidelines offers three avenues by which mental impairment can lead to diminishment of accountability in terms of sentencing.<sup>1380</sup> Briefly and for the sake of completeness, section 5H1.3 is applicable to a departure in sentence when the mental or emotional condition(s) in question present to a far more acute degree in an offender whether said condition(s) present individually or in combination with “other offender characteristics<sup>1381</sup> are present to an “unusual degree” and distinguish the case from the typical cases covered by the Guidelines”. As stated above in paragraph 5.2.5, section 5K2.13 pertains to diminished responsibility by virtue of reduced mental capacity.

Lastly, section 3553(a)(1) provides the most extensive provisions herein providing that both “nature and circumstances of the offense and the history and characteristics of the defendant” may be taken into account when handing down a sentence. Chua<sup>1382</sup> warns, however, that section 5H1.3 may be a double-edged sword in that courts may feel compelled to sentence offenders more harshly due to the aforementioned preconceived notion that mentally ill offenders are more dangerous or require treatment.<sup>1383</sup>

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<sup>1379</sup> *Lockett v Ohio* 438 U.S. 586 (1978) at 438.

<sup>1380</sup> Bagaric 2016: 17.

<sup>1381</sup> United States Sentencing Commission Guidelines Manual. sec. 5H1.3.

<sup>1382</sup> Chua 2011: 445.

<sup>1383</sup> Anonymous. “Developments in the law: the law of mental illness”, <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

### 5.3.4 *The austerity of sentencing in the USA*

The previous *de facto* mandatory nature of the Guidelines was contentious and widely held to have been unjust.<sup>1384</sup> Bowman<sup>1385</sup> described the Guidelines as “a one-way upward ratchet increasingly divorced from considerations of sound public policy and even from the commonsense (sic) judgments of frontline sentencing professionals who apply the rules”. The Supreme Court in *U.S. v Booker*<sup>1386</sup> ultimately put paid to this.<sup>1387</sup> The court held that constitutionality of the Guidelines would only pass muster if the Guidelines were advisory in nature.<sup>1388</sup>

Despite the *Booker* judgment and the discretion it has allowed courts, sentences per the Guidelines are still widely regarded as austere.<sup>1389</sup> This is not happenstance; the Federal Sentencing Commission states that the objective of these penalties is to advance the primary objectives of criminal punishment: deterrence, incapacitation, just punishment, and rehabilitation.<sup>1390</sup>

While the advisory nature of the Guidelines has been criticised, fundamentally, it affords the court’s discretionary prerogative to consider *inter alia* expert testimony and reports on an offender’s mental capacity during sentencing.<sup>1391</sup> This, it has been averred, allows courts to hand down tailored, offender specific sentences.<sup>1392</sup> This contention does not hold water against the critique of harsher sentences in the post *Booker* era, especially as the discretionary flexibility has a more ominous side. In this regard, it has been contended that for mentally ill offenders, the advent of *Booker* has created an additional means for judges to hand down above Guideline sentences.<sup>1393</sup>

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<sup>1384</sup> Anonymous. “Developments in the law: the law of mental illness”, <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

<sup>1385</sup> Bowman 2005: 1319-1320.

<sup>1386</sup> *U.S. v Booker* 543 U.S. 220 (2005).

<sup>1387</sup> Chua 2011: 445.

<sup>1388</sup> Drogin *et al.* 2011: 66.

<sup>1389</sup> Bagaric 2016: 15.

<sup>1390</sup> Bagaric 2016: 13.

<sup>1391</sup> Drogin *et al.* 2011: 66-67

<sup>1392</sup> Drogin *et al.* 2011: 172

<sup>1393</sup> Anonymous. “Developments in the law: the law of mental illness”, <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

Federal courts may hand down the death penalty.<sup>1394</sup> Within the sphere of federal law, offenders with mental retardation may not be sentenced to death.<sup>1395</sup> While the Supreme Court in *Ford v Wainwright*<sup>1396</sup> ruled that executing an offender who cannot understand the import of their condemnation to execution is cruel and usual punishment per the Eighth Amendment of the *Constitution*, a considerable number of death row inmates in the USA are mentally ill.<sup>1397</sup> Indeed, section 3553(a)(2)(C) and (D) of the USC hold, respectively, that when considering a suitable sentence, courts must consider the need “to protect the public from further crimes of the defendant; and to provide the defendant with needed... medical care, or other correctional treatment in the most effective manner”.

In *U.S. v Gillmore*,<sup>1398</sup> the Eighth Circuit upheld the court *a quo*’s decision to deviate substantially upward from the Guidelines sentencing range because, and bewilderingly not in spite of, the defendant’s drug addiction and suffering from depression and post-traumatic stress disorder resulting from sexual abuse and rape.<sup>1399</sup> This, in the court’s view, rendered the defendant a danger to both herself and the public per the provisions of section 3553 of the USC. Accordingly, the Eighth Circuit held that the court *a quo* (trial court) did not abuse its discretion in handing down sentence.<sup>1400</sup>

It has been contended that courts justify harsher sentences on the dubious assumption that mentally ill offenders are dangerous offenders or at the very least more dangerous than offenders who do not suffer from mental illness.<sup>1401</sup> It has been posited that this is due to the perception of future dangerousness.<sup>1402</sup> So much so, it has been asserted

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<sup>1394</sup> Drogin *et al.* 2011: 51-52.

<sup>1395</sup> Slobogin 2000: 667.

<sup>1396</sup> *Ford v Wainwright* 477 U.S. 399 (1986).

<sup>1397</sup> Slobogin 2000: 667.

<sup>1398</sup> *U.S. v Gillmore* 497 F.3d 853 (8th Cir. 2007).

<sup>1399</sup> *U.S. v Gillmore* 497 F.3d 853 (8th Cir. 2007) at 857.

<sup>1400</sup> *U.S. v Gillmore* 497 F.3d 853 (8th Cir. 2007) at 861.

<sup>1401</sup> Anonymous. “Developments in the law: the law of mental illness”, <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

<sup>1402</sup> Johnston & Flynn 2017: 730.

that jurors "...if persuaded that [a defendant is mad] believe that death is the only sure way to prevent... future crimes".<sup>1403</sup>

The concept of future dangerousness is, however, tenuous at best; the APA has consistently argued that these predictions are more often incorrect than correct.<sup>1404</sup> While science informs the APA's assertion,<sup>1405</sup> judges, it is averred, "when confronted with an obviously mentally ill defendant in a courtroom accompanied by the lurid particularities of illness and violent crimes... may react by seeking to remove the frightening person before them from society for as long as possible".

The sentencing objectives in the USA are underscored by the traditional sentencing ethos of retribution, deterrence, incapacitation and rehabilitation.<sup>1406</sup> It is contended that federal courts do not sufficiently balance these sentencing objectives per section 3553 of the USC but rather append undue weight to the objective that affords the most severe sentence.<sup>1407</sup> It is averred that trial courts should always take due cognisance of the mental health of defendants during sentencing.<sup>1408</sup>

Bagaric asserts that clarity concerning the importance of the ramifications to the offender rather than moral accountability is crucial when sentencing offenders who are mentally ill<sup>1409</sup> and, rather than treating mental illness as a factor in mitigation, capital juries also commonly treat it as a factor in *aggravation*. More alarming still is the fact that research alludes to mental illness acting in aggravation when offenders are sentenced to death.<sup>1410</sup> In addition, no statute explicitly forbids mental illness as a factor in aggravation for the death penalty,<sup>1411</sup> but USC 3592(a)(1) permits mental illness in mitigation of sentence.

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<sup>1403</sup> Anonymous. "Developments in the law: the law of mental illness", <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

<sup>1404</sup> Chua 2011: 439.

<sup>1405</sup> American Psychological Association. "U.S. v Fields", <https://www.apa.org/about/offices/ogc/amicus/fields> (accessed 21 September 2022).

<sup>1406</sup> Drogin *et al.* 2011: 49.

<sup>1407</sup> Chua 2011: 447.

<sup>1408</sup> Steinberg *et al.* "When did prisons become acceptable mental healthcare facilities?", <https://law.stanford.edu/publications/when-did-prisons-become-acceptable-mental-healthcare-facilities/> (accessed 10 September 2022).

<sup>1409</sup> Bagaric 2016: 1.

<sup>1410</sup> Slobogin 2000: 667.

<sup>1411</sup> Slobogin 2000: 670.

## 5.4 MENTAL HEALTH COURTS

The USA's adversarial criminal justice system is largely not conducive to mentally ill offenders as its benchmark is criminal capacity.<sup>1412</sup> Such is the rampant extent of mental illness in USA prisons that Los Angeles County Jails, New York City Rikers Island Correctional Facility, and Chicago Cook County Jail are, for all intents and purposes, the biggest psychiatric facilities in the USA.<sup>1413</sup>

MHCs are problem-solving<sup>1414</sup> and treatment-oriented<sup>1415</sup> speciality courts which are, in essence, a diversion program wherein offenders are redirected from the conventional criminal justice system into community-based treatment.<sup>1416</sup> By treating mental illness and accordingly addressing what may be the root cause of criminal behaviour, recidivism could, theoretically at least, also be reduced and public safety improved.<sup>1417</sup>

The aim of MHCs is to both arrest the ever-growing “cycle of worsening mental illness and criminal behaviour that begins with the failure of the community mental health system and is accelerated by the inadequacy of treatment in prisons and jails”, and to provide efficacious treatment options in place of the regular criminal sanctions for offenders who suffer from mental illnesses.<sup>1418</sup> In light hereof, MHCs fulfil an undeniably crucial function in bridging the gap between mental illness and treatment where too often imprisonment is the mid-point between the two.

### 5.4.1 History

The precursor to the establishment of MHCs was the process of deinstitutionalisation that swept across the USA during the latter part of the twentieth century which was

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<sup>1412</sup> Palermo 2010: 214.

<sup>1413</sup> Liebowitz *et al.* “A way forward: Diverting people with mental illness from inhumane expensive jails into community-based treatment that works”, [http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward\\_July-2014.pdf](http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward_July-2014.pdf) (accessed 10 September 2022).

<sup>1414</sup> Johnston & Flynn 2017: 685.

<sup>1415</sup> Kondrat *et al.* 2018: 238.

<sup>1416</sup> Ray *et al.* 2015: 801.

<sup>1417</sup> Kondrat *et al.* 2018: 238.

<sup>1418</sup> Bazelon Centre for Mental Health Law. “The role of mental health courts in system reform”, <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

precipitated by the dire conditions of psychiatric hospitals<sup>1419</sup> and the subsequent closure thereof.<sup>1420</sup> Between 1968 and 1978, the population in state psychiatric hospitals fell by 64 per cent while, conversely, the state prison population grew by 65 per cent.<sup>1421</sup> This ultimately paved the way for the establishment of MHCs. While ostensibly well intentioned, this led to a surge in the number of mentally ill offenders in prisons because the community-based treatment which was envisaged did not materialise.<sup>1422</sup>

The first MHC opened in Broward County in Florida in 1997<sup>1423</sup> and, subsequently, these courts have proliferated exponentially across the USA in large part due to the enactment of the Law Enforcement and Mental Health Project in 2000<sup>1424</sup> and the consequent allocation and availability of federal funding.<sup>1425</sup> In addition, MHCs are “increasingly likely to accept individuals charged with more serious [offences] including felonies and, in some jurisdictions, violent crimes”.<sup>1426</sup>

#### **5.4.2 Premise, purpose and aims of mental health courts**

Fisler<sup>1427</sup> asserts that MHCs are premised on the belief that:

- a) untreated, or inadequately treated, mental illness contributes to criminal behavior;
- b) criminal justice involvement can serve as an opportunity to connect people to appropriate treatment;
- c) appropriate treatment can improve the symptoms of mental illnesses and reduce problematic behavior, especially when
- d) judicial supervision, including the use of graduated incentives and sanctions, helps keep people in treatment; and, thus, e) the combination of treatment and judicial supervision will reduce recidivism and improve public safety.

Therefore, MHCs are described as a collaborative process between mental health and criminal justice systems<sup>1428</sup> and, as such, encompass goals not only for the offender

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<sup>1419</sup> Roberts 2010: 36.

<sup>1420</sup> Palermo 2010: 214.

<sup>1421</sup> Davis & Cates 2017: 251.

<sup>1422</sup> D'Emic 2015: 370.

<sup>1423</sup> D'Emic 2015: 370.

<sup>1424</sup> Erickson *et al.* 2006: 337.

<sup>1425</sup> Honegger 2015: 485. (See also Johnston & Flynn 2017: 685 and Hughes & Peak 2012: 30).

<sup>1426</sup> Almquist & Dodd. “Mental Health Courts: A Guide to Research-Informed Policy and Practice”, <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022).

<sup>1427</sup> Fisler 2015: 8-9.

<sup>1428</sup> Hughes & Peak 2012: 20.

but for a vast range of stakeholders. These include the reduction of the criminalisation of mental illness as well as reducing the number of mentally ill people that are imprisoned; better equipping judicial officers to deal with challenging defendants; utilising criminal justice and mental health resources more efficaciously<sup>1429</sup> and improving treatment compliance and participation and, in doing so, improving the quality of life of MHC participants.<sup>1430</sup>

The notion of therapeutic justice<sup>1431</sup> is one upon which MHCs hinge.<sup>1432</sup> In keeping with the ethos of MHCs, therapeutic justice is premised upon the idea of treatment and not punishment. Accordingly, therapeutic justice acknowledges mental illness as a contributory factor to the criminal act and seeks to address the mental illness to reduce recidivism. In doing so, therapeutic justice further acknowledges that conventional criminal sanctions are both immoral and ineffectual when the criminal act is in significant part due to mental illness.<sup>1433</sup> Thus, if there is a causal connection between a mental illness and offence, treating the illness will negate criminal behaviour.<sup>1434</sup>

### **5.4.3 Essential elements of mental health courts**

While no universality in the elements of an MHC exist, the Council of State Governments' Justice Centre has identified elements crucial to MHCs which include:

- a) a specialized court docket, which employs a problem-solving approach to court processing for criminally defendant individuals suffering from a mental illness as opposed to traditional court procedures;
- b) judicially supervised, community based treatment plans for each defendant, designed by a mental health professional;

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<sup>1429</sup> Fisler 2015: 9.

<sup>1430</sup> Hughes & Peak 2012: 22.

<sup>1431</sup> Therapeutic justice strives to harmonise the mental and physical well-being of the offender as well as the interests of society and as such views the law as a 'healing agent.' (D'Emic 2015: 370); (Palermo 2010: 214).

<sup>1432</sup> Hughes & Peak 2012: 21.

<sup>1433</sup> Bazelon Centre for Mental Health Law. "The role of mental health courts in system reform", <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

<sup>1434</sup> Hughes & Peak 2012: 22.

- c) regular status hearings to update the judge on the defendant's progress and resulting in rewards or sanctions; and
- d) detailed definitions of ultimate success or failure.<sup>1435</sup>

Almquist and Dodd<sup>1436</sup> contend that there are ten essential elements to a MHC. These are planning and administration; a target population; timeous participation identification and being linked to services; terms of participation; informed choice; treatment support and services; confidentiality; a court team; monitoring of adherence to the requirements set by the court, and sustainability.

The Council of State Governments Justice has developed an integrative framework that encompasses both risk-needs-responsivity (risk principle: who to target; need principle: what to target; responsivity principle: how to address) and factors that pertain to behavioural health, and which has been adopted by an exponential number of MHC practitioners as well as both criminal justice and federal mental health agencies.<sup>1437</sup>

The above notwithstanding, MHCs vary from state to state both in terms of construct and operation.<sup>1438</sup> Fisler<sup>1439</sup> describes MHCs as complex and heterogeneous. Indeed, the very nature of MHCs has been described as idiosyncratic<sup>1440</sup> which, coupled with the rate at which MHCs have mushroomed across the USA, renders comparison and research into their efficacy even more challenging.<sup>1441</sup>

As such, there exists a vast amount of variation across MHCs despite sharing some common features.<sup>1442</sup> This exists in terms of the eligibility of offences,<sup>1443</sup> the period of court supervision<sup>1444</sup> and the length of time to complete an MHC program, sanctions for non-compliance with the program<sup>1445</sup> and sentences imposed.<sup>1446</sup> Additionally, the

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<sup>1435</sup> D'Emic 2015: 370.

<sup>1436</sup> Almquist & Dodd. "Mental Health Courts: A Guide to Research-Informed Policy and Practice", <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022).

<sup>1437</sup> Fisler 2015: 11.

<sup>1438</sup> Davis & Cates 2017: 255.

<sup>1439</sup> Fisler 2015: 9.

<sup>1440</sup> Johnston & Flynn 2017: 685.

<sup>1441</sup> Honegger 2015: 478.

<sup>1442</sup> D'Emic 2015: 370.

<sup>1443</sup> Honegger 2015: 485.

<sup>1444</sup> Johnston & Flynn 2017: 685.

<sup>1445</sup> Fisler 2015: 9.

<sup>1446</sup> Johnston & Flynn 2017: 692.

geographical availability of psychiatric services also largely influences the treatment offerings of individual MHCs.<sup>1447</sup>

Although helpful, the guidelines listed in this paragraph are not a universal manual on how MHCs should be run.<sup>1448</sup> There exists a dearth of comparative studies between mentally ill offenders who are subject to the conventional criminal justice system and those who participate in MHCs.<sup>1449</sup> Exacerbating this problem, and despite their proliferation, MHCs are understudied.<sup>1450</sup> Modest budgets mean that data collection and analysis is not prioritised.<sup>1451</sup>

In short, there are as many variations of MHC structures as there are MHCs as they, to a large extent, operate according to their own set of unwritten rules and practices.<sup>1452</sup> Furthermore, similarities that do exist between MHCs are usually coincidental because there seems to be no consensus regarding which elements of an MHC can be attributed to its success.<sup>1453</sup> Erickson *et al*<sup>1454</sup> argue that the single biggest challenge facing MHCs is what they deem as a distinct lack of ‘guiding philosophy’.

#### **5.4.4 The operation of mental health courts**

Offenders are typically referred to MHC by judges, defence attorneys, prison staff, or family members,<sup>1455</sup> and a separate docket is maintained.<sup>1456</sup> An offender who agrees to take part in a MHC program effectively waives his or her right to a fair trial and the MHC must ensure that the offender is entirely aware of the consequences of

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<sup>1447</sup> Honegger 2015: 485.

<sup>1448</sup> Hughes & Peak 2012: 22.

<sup>1449</sup> Fisler 2015: 10.

<sup>1450</sup> Johnston & Flynn 2017: 685.

<sup>1451</sup> Almquist & Dodd. “Mental Health Courts: A Guide to Research-Informed Policy and Practice”, <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> / (accessed 10 September 2022).

<sup>1452</sup> Bazelon Centre for Mental Health Law. “The role of mental health courts in system reform”, <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

<sup>1453</sup> Hughes & Peak 2012: 22.

<sup>1454</sup> Erickson *et al.* 2006: 340.

<sup>1455</sup> Roberts 2010: 37.

<sup>1456</sup> Ray *et al.* 2015: 802.

participation.<sup>1457</sup> As such, participation is wholly voluntary<sup>1458</sup> and only offenders who are mentally fit to stand trial may partake in MHC programs.<sup>1459</sup>

Participants must usually appear before the court as part of the extended judicial review that is typical of MHCs for regular status hearings where progress is assessed.<sup>1460</sup> While participation is voluntary, once a participant is in court, compliance with the conditions imposed by the MHC is compulsory.<sup>1461</sup> The traditional adversarial functions of prosecution and defence are done away with in favour of collaboration to promote a therapeutic and rehabilitative environment for those offenders who would benefit from this.<sup>1462</sup> As such, MHCs are, unlike conventional American courtrooms, non-adversarial<sup>1463</sup> and make use of graduated sanctions and rewards.<sup>1464</sup>

MHCs divert mentally ill offenders from the criminal justice system into community-based treatment.<sup>1465</sup> Individualised facets of the treatment program might include routine drug testing and the use of psychotropic medication,<sup>1466</sup> victim restitution, mandatory counselling and treatment compliance, and regular meetings with mental health professionals.<sup>1467</sup> Sanctions for non-compliance range from the relatively benign to the more serious and may include rebuke from the judge, reinstatement of the original charge(s), or imprisonment.<sup>1468</sup> While some participants complete the program, others are non-compliant and some opt to have their cases transferred back to a criminal court.<sup>1469</sup>

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<sup>1457</sup> Bazelon Centre for Mental Health Law. "The role of mental health courts in system reform", <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

<sup>1458</sup> Kondrat *et al.* 2018: 238.

<sup>1459</sup> Almquist & Dodd. "Mental Health Courts: A Guide to Research-Informed Policy and Practice", <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022).

<sup>1460</sup> Ray *et al.* 2015: 802.

<sup>1461</sup> Kondrat *et al.* 2018: 238.

<sup>1462</sup> Davis & Cates 2017: 252.

<sup>1463</sup> Johnston & Flynn 2017: 685.

<sup>1464</sup> Hughes & Peak 2012: 22.

<sup>1465</sup> Johnston & Flynn 2017: 685.

<sup>1466</sup> Erickson *et al.* 2006: 337.

<sup>1467</sup> Ray 2014: 448.

<sup>1468</sup> Erickson *et al.* 2006: 337.

<sup>1469</sup> Ray 2014: 448.

Rewards and incentives may include praise by the judge, reduced court appearances, and program completion certificates.<sup>1470</sup> Once a participant has successfully complied with court mandated treatment and has successfully completed the MHC program, charges will typically be dropped or reduced. Conversely, if a participant does not complete the program or abide by court mandated conditions, their case can be sent back to the court *a quo* which will result in *inter alia* conviction, imprisonment, or a fine, depending on the nature of the offence.<sup>1471</sup>

#### **5.4.5 Staffing of mental health courts**

MHCs' multi-disciplinary teams usually consists of judges, prosecution and defence attorneys (although the role of the defence attorney in MHCs is unapparent from the literature),<sup>1472</sup> parole officers,<sup>1473</sup> treatment professionals,<sup>1474</sup> and counsellors.<sup>1475</sup> Judges are deemed as being actively involved in the process of problem solving insofar as identifying determinants that lie at the heart of an offender's problems.<sup>1476</sup> Judges, in effect, facilitate treatment<sup>1477</sup> and are not bound by traditional legal convention and thus enjoy substantial autonomy in how individual cases are dealt with.<sup>1478</sup> As MHC judges are afforded a unique standpoint in terms of the level of their involvement in cases, they are in effect the ultimate arbiters of determining an offender's success or failure in the program.<sup>1479</sup>

Treatment professionals serve both the court and the participant in the provision of treatment services. Counsellors equally play a vital role in that they act as both *de facto* experts informing participants' treatment<sup>1480</sup> and outlining to participants their responsibilities within the program.<sup>1481</sup> The team will work together to develop

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<sup>1470</sup> Almquist & Dodd. "Mental Health Courts: A Guide to Research-Informed Policy and Practice", <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022).

<sup>1471</sup> Kondrat *et al.* 2018: 238.

<sup>1472</sup> Hughes & Peak 2012: 24.

<sup>1473</sup> Ray *et al.* 2015: 802.

<sup>1474</sup> Ray 2014: 448.

<sup>1475</sup> Davis & Cates 2017: 255.

<sup>1476</sup> Palermo 2010: 214.

<sup>1477</sup> Davis & Cates 2017: 253.

<sup>1478</sup> Castellano 2017: 399.

<sup>1479</sup> Roberts 2010: 40.

<sup>1480</sup> Davis & Cates 2017: 253.

<sup>1481</sup> Davis & Cates 2017: 255.

treatment programs<sup>1482</sup> for participants, which form the basis or yardstick by which compliance with the program will be monitored.<sup>1483</sup>

#### **5.4.6 Bipolar disorder and mental health courts**

These courts typically deal with offenders who suffer from bipolar mood disorder, major depressive disorder, and schizophrenia.<sup>1484</sup> Whilst the minutia of individual courts is not relevant herein, there are instances at individual MHCs that serve to further underscore how valuable these courts are in treating offenders who suffer from bipolar mood disorder. Between 2006 and 2007, in Washoe County MHC, 48 per cent of participants had a diagnosis of bipolar mood disorder.<sup>1485</sup> Between 2001 and 2013,<sup>1486</sup> at the St. Louis MHC, most offenders (34,69 per cent) presented with a primary diagnosis of bipolar mood disorder.<sup>1487</sup>

A case heard at the Brooklyn MHC strikingly demonstrates how valuable MHCs can be when dealing with offenders who suffer from bipolar disorder. In this instance, a defendant was accused of arson and arrested during a manic episode. Whilst in jail, and during an episode of depression, the defendant attempted suicide. The District Attorney decided, in light hereof, and despite the dangerous nature of his crime, that he was a suitable candidate for MHC.<sup>1488</sup>

He was duly enrolled in a three-year program and a plea was entered that upon successful completion of the program, the charge of arson would be dismissed. If the program was not successfully completed, the defendant would go back to jail. Suffice to say, the defendant successfully completed the program, and the charge was dismissed.<sup>1489</sup>

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<sup>1482</sup> Ray 2014: 448.

<sup>1483</sup> Fisler 2015: 9.

<sup>1484</sup> Fisler 2015: 9. (See also Hughes & Peak 2012: 31).

<sup>1485</sup> Palermo 2010: 216.

<sup>1486</sup> Kondrat *et al.* 2018: 239.

<sup>1487</sup> Kondrat *et al.* 2018: 240.

<sup>1488</sup> D'Emic 2015: 373 (Uncited case. Case mentioned by judge in aforementioned article he authored).

<sup>1489</sup> D'Emic 2015: 373 (Uncited case. Case mentioned by judge in aforementioned article he authored).

Research done at four MHCs<sup>1490</sup> is indicative of how prevalent bipolar mood disorder is and also serves to further highlight the usefulness of MHC as a diversion program for offenders who suffer from bipolar mood disorder.

#### **5.4.7 Disadvantages**

- Simplistic premise

MHCs are premised upon the assumption that the symptoms of mental illness or defect precede criminal behaviour and thus treatment would lead to a reduction in recidivism.<sup>1491</sup> Research into this hypothesis in relation to MHCs, however, is left wanting.<sup>1492</sup> The model of therapeutic justice, namely mental illness begets criminal behaviour, has been criticised as overly simplistic as it ignores the plethora of reasons and motivations behind the criminal behaviour in question.<sup>1493</sup> However, while it can be argued that this notion is reductive, it is in no doubt that mentally ill offenders, because of factors as diverse as lack of access to treatment to unemployment, are at increased risk of offending.<sup>1494</sup>

Nonetheless, the argument that mental illness precipitates or amplifies the likelihood of criminal behaviour is a tenuous one. Research by and large does not support the assumption that mental illness augments the risk of criminal behaviour.<sup>1495</sup> It is further contended that comparatively few criminal offences are committed when a defendant is in a manic or psychotic state. Judge Stephanie Rhoades from the Anchorage MHC echoed these sentiments asserting that the long-held belief that mental illness heightened a proclivity towards criminal behaviour does not find application with most mentally ill offenders, ‘[i]t appears now, from more recent research, that mental illness is a reason why people can’t necessarily change as easily as other people’.<sup>1496</sup>

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<sup>1490</sup> Castellano 2017: 398.

<sup>1491</sup> Honegger 2015: 486.

<sup>1492</sup> Honegger 2015: 486.

<sup>1493</sup> Hughes & Peak 2012: 22.

<sup>1494</sup> Bazelon Centre for Mental Health Law. “The role of mental health courts in system reform”, <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

<sup>1495</sup> Fisler 2015: 11.

<sup>1496</sup> Fisler 2015: 11.

- Ethical issues

In addition hereto, MHCs create a profusion of issues which are, at best, ethically murky, namely the abundant use of psychotropic medication;<sup>1497</sup> the fact that often MHC participants must waive their due process rights as a prerequisite for admission into an MHC program,<sup>1498</sup> and the ambiguous role of defence attorneys who do not fulfil their traditional adversarial role but must work with the MHC team to ensure that his or her client remains compliant with the program which is said to infringe on attorney client privilege and dilute the attorney's role in protecting the best interests of his or her client.<sup>1499</sup> The notion of voluntariness has also been questioned<sup>1500</sup> with critics contending that if participation is not entirely voluntary, it would violate both the guarantee of equal protection per the Fourteenth Amendment and also likely the right to trial by jury per the Sixth Amendment.<sup>1501</sup>

- Inappropriate sanctions

It is argued that some sanctions imposed by MHCs are inappropriate. Imprisoning or sending a participant back into the conventional criminal justice system, it is contended, is ethically questionable.<sup>1502</sup> Indeed, many judges are loath to send participants to jail, and the reasons are twofold: first, the prison environment will likely only serve to exacerbate mental health issues, the symptoms of mental illness and the emotional distress of the participants; secondly, it would be counterintuitive, as I have previously argued herein, to punish someone for something which is no fault of their own.<sup>1503</sup>

Accordingly, and in step with the above, transgression for which a participant might be jailed due to mental illness, cannot or at least should not be punished in line with the conventional criminal justice system. Serious mental illness is after all a journey

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<sup>1497</sup> Hughes & Peak 2012: 22.

<sup>1498</sup> Hughes & Peak 2012: 24.

<sup>1499</sup> Erickson *et al.* 2006: 340.

<sup>1500</sup> Hughes & Peak 2013: 245.

<sup>1501</sup> Bazelon Centre for Mental Health Law. "The role of mental health courts in system reform", <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

<sup>1502</sup> Erickson *et al.* 2006: 336.

<sup>1503</sup> Almquist & Dodd. "Mental Health Courts: A Guide to Research-Informed Policy and Practice", <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022).

replete with obstacles and progress.<sup>1504</sup> The element of coercion regarding psychotropic medication alluded to above is also, from the stance of civil rights, problematic.<sup>1505</sup> In the last fifteen years, MHCs have shifted from being medication-centric to taking a more organic approach where emphasis is placed equally on health, home, purpose, and community.<sup>1506</sup>

- Potential stigmatisation

While ostensibly offender centric, MHCs do court controversy. It is contended that MHC programs serve to further criminalise and stigmatise mental illness. Hughes and Peak<sup>1507</sup> aver long-term participants in MHC programs are potentially subject to increased denigration due to their participation in MHC programs. Ray and Dollar<sup>1508</sup> conversely found that MHC graduates did not encounter 'stigmatising shame' and largely felt their experience at the MHCs to be procedurally fair.

- Longer punishment

While this is undeniably positive, participants in MHC programs are often subject to longer and more onerous punishment and stricter supervision than those in the conventional criminal justice system. More stringent supervision has the potential for harsher sanctions like jail time for minor infractions. The inadvertent consequence hereof is that offenders might be more harshly punished than those who are subject to the conventional criminal justice system.<sup>1509</sup>

Public opinion often veers towards the sentiment that MHCs are overly lenient.<sup>1510</sup> It is, however, asserted that if there is a causal relationship between the offence and mental illness, lenience is appropriate.<sup>1511</sup> Conditions in prisons are infinitely less favourable for offenders who suffer from mental illness.<sup>1512</sup> D'Emic accordingly asserts

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<sup>1504</sup> Almquist & Dodd. "Mental Health Courts: A Guide to Research-Informed Policy and Practice", <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022).

<sup>1505</sup> Hughes & Peak 2012: 24.

<sup>1506</sup> Fidler 2015: 12.

<sup>1507</sup> Hughes & Peak 2012: 26.

<sup>1508</sup> Ray & Dollar 2014: 720.

<sup>1509</sup> Hughes & Peak 2012: 27.

<sup>1510</sup> Johnston & Flynn 2017: 687.

<sup>1511</sup> Johnston & Flynn 2017: 688.

<sup>1512</sup> D'Emic 2015: 369.

that the threat of conventional criminal sanctions will ensure MHC participants adhere to the program.<sup>1513</sup>

#### **5.4.8 Advantages**

MHCs serve to ease the burden of overcrowding in prisons<sup>1514</sup> which has the attendant benefit of cost saving.<sup>1515</sup> The rationale herein is twofold: first, it negates the cost of incarceration and this benefit is amplified by the reduced rate of recidivism of MHC participants, and especially offenders who complete the program.<sup>1516</sup> Additionally, proponents of MHCs claim that they not only reduce recidivism and provide treatment to mentally ill offenders, but also that they provide for more nuanced handling of cases with offenders who suffer from mental illness. In this respect, it is argued that MHCs provide dignity and a 'voice' for the voiceless.<sup>1517</sup> By avoiding criminalisation, MHCs also, to an extent at least, take the sting out of the stigma of mental illness.<sup>1518</sup>

Additionally, it has been found that participants who complete MHC programs are also less likely to reoffend even after several years after no longer being subject to court supervision when compared to other offenders who suffer from mental illness and who do not take part in MHC programs.<sup>1519</sup> MHCs also serve to lessen the case load of conventional courts and overcrowding in prisons.<sup>1520</sup> MHCs have historically tended to exclude more serious or felony offences,<sup>1521</sup> however, the tide herein appears to be turning. Research is increasingly supporting the assertion that felony and violent mentally ill offenders can, with adequate support, be safely accommodated within

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<sup>1513</sup> D'Emic 2015: 370.

<sup>1514</sup> Hughes & Peak 2012: 22.

<sup>1515</sup> Almquist & Dodd. "Mental Health Courts: A Guide to Research-Informed Policy and Practice", <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022).

<sup>1516</sup> Hughes & Peak 2012: 30.

<sup>1517</sup> Johnston & Flynn 2017: 686.

<sup>1518</sup> Palermo 2010: 215.

<sup>1519</sup> Ray 2014: 448.

<sup>1520</sup> Palermo 2010: 215.

<sup>1521</sup> Davis & Cates 2017: 255.

society.<sup>1522</sup> As such, felony crimes<sup>1523</sup> and serious offences are sometimes dealt with by MHCs.<sup>1524</sup>

Fisler<sup>1525</sup> contends that treatment is not only crucial in that it negates the symptoms of mental illness which impact on criminal behaviour, but it also makes the offender more responsive to treatment intervention used to stem criminal behaviour. MHCs do not punish criminal behaviour retrospectively but rather try to positively influence and steer the course of future behaviour.<sup>1526</sup> Pertinently, MHCs provide “judicial, legal, and clinical treatment” to mentally ill offenders in the place of the conventions of the criminal justice system, which include sentencing.<sup>1527</sup> Anecdotally, MHCs are primed to deal with bipolar disorder. Interestingly, and further underscoring the value of MHCs, research indicates that offenders who suffer from bipolar mood disorder and who re-offend typically spend less time in prison after participation in an MHC program than offenders who suffer from schizophrenia and major depressive disorder.<sup>1528</sup>

Whilst the body of literature that exists herein is small, it is both consistent and points to a consensus that MHC participants have lower rates of re-arrest<sup>1529</sup> and recidivism,<sup>1530</sup> go for longer periods without reoffending, display higher levels of participation in community-based treatment, and serve fewer days in prison when compared with their counterparts who are subject to the conventional criminal justice system.<sup>1531</sup> Ray and Dollar<sup>1532</sup> attribute lower levels of recidivism to the perception among participants of MHCs of procedural justice. In addition, hereto participants in MHCs perceive procedural justice to be higher than those subject to the conventional criminal justice system.<sup>1533</sup>

Ray and Dollar assert that relationships of respect between participants and procedural fairness improve compliance with MHC programs. Additionally, they

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<sup>1522</sup> Fisler 2015: 10.  
<sup>1523</sup> Kondrat *et al.* 2018: 238.  
<sup>1524</sup> Honegger 2015: 485.  
<sup>1525</sup> Fisler 2015: 11.  
<sup>1526</sup> Castellano 2017: 400.  
<sup>1527</sup> Castellano 2017: 398-399.  
<sup>1528</sup> Fisler 2015: 10.  
<sup>1529</sup> Kondrat *et al.* 2018: 238.  
<sup>1530</sup> Honegger 2015: 484.  
<sup>1531</sup> Fisler 2015: 10.  
<sup>1532</sup> Ray & Dollar 2014: 722.  
<sup>1533</sup> Redlich & Han 2013: 111.

cogently aver that judges are in a prime position to demonstrate such procedural justice.<sup>1534</sup> Roberts asserts that a judge's personal involvement herein is crucial.<sup>1535</sup>

Judge Matthew D'Emic of the Brooklyn MHC states that “[e]ngagement with the judge is one of the reasons for our participants’ success... [I]f I engage with someone, and that person engages with me, we don’t want to disappoint each other”. This epitomises procedural justice which is “the perceived fairness of court procedures and interpersonal treatment”.<sup>1536</sup>

## 5.5 EXPERT EVIDENCE

The *Frye* standard of general acceptance<sup>1537</sup> was the precursor of the *Daubert* test. The *Daubert* test (hereinafter referred to as “*Daubert*”) ultimately repealed *Frye* as the standard for the admission of expert evidence in federal courts.<sup>1538</sup> The latter merely stated that, to be admissible, the scientific principle or thesis upon which the expert based his or her evidence, had to have general acceptance within its particular scientific community.<sup>1539</sup>

Its critics argued that the weakness of the *Frye* test lay in its inflexibility which precluded potentially reliable novel scientific evidence.<sup>1540</sup> Conversely, it is also claimed that the *Frye* test was conservative and vague which, in turn, allowed a degree of manipulation by courts insofar as what was deemed admissible and what was not which hindered its uniform application.<sup>1541</sup>

The late 1980s and early 1990s marked a period of increasing concern around so-called ‘junk-science’ and the leniency with which expert testimony was admitted per

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1534 Ray & Dollar 2014: 722.

1535 Roberts 2010: 40.

1536 Fidler 2015: 12.

1537 Bernstein & Lasker 2015: 4.

1538 McCarthy & Malcom 2018: 256-257.

1539 Mannucci 2018: 1953.

1540 Peck 2016: 1071.

1541 Thompson 2015: 377.

the *Frye* standard.<sup>1542</sup> Experts only had to be qualified in their respective field with broad interpretation given to what qualification actually entailed.<sup>1543</sup>

### 5.5.1 *Daubert*

In 1993, the *Daubert*<sup>1544</sup> decision heralded a new era in the admissibility standards of expert testimony. The *Daubert* standard is “the standard used by a (federal) trial judge to assess whether an expert witness’s scientific testimony is based on scientifically valid reasoning which can properly be applied to the facts at issue”. There are five ‘pillars’ to *Daubert* which are analysed below in paragraph 5.5.2. The court in *Daubert* was at pains to emphasise that the pillars of *Daubert* do not provide an exhaustive list and that a judge’s discretion is paramount.<sup>1545</sup>

With *Daubert*, two subsequent decisions<sup>1546</sup> which became known as the *Daubert* trilogy laid the foundation for the 2000 amendments to Rule 702 of the FRE. To this end, the *Daubert* trilogy further fortified admissibility standards for expert testimony and expounded on the requirement of reliability.<sup>1547</sup> In *Kumho*,<sup>1548</sup> it was held that a court’s gatekeeping function is applicable not only to scientific expert evidence but to all expert evidence.<sup>1549</sup> In *General Electric*,<sup>1550</sup> the court held that the ‘abuse of discretion’<sup>1551</sup> was the standard which had to apply to a trial court’s exclusion of evidence.<sup>1552</sup>

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<sup>1542</sup> Ryan 2016: 356-357.

<sup>1543</sup> Bernstein & Lasker 2015: 4.

<sup>1544</sup> *Daubert v Merrell Dow Pharmaceuticals, Inc* 509 US 579, 113 S. Ct. 2786 (1993).

<sup>1545</sup> Mannucci 2018: 1954.

<sup>1546</sup> *General Electric Co. v Joiner* 522 U.S. 136 (1997) and *Kumho Tire Co. v Carmichael* 526 U.S. 137 (1999).

<sup>1547</sup> Bernstein & Lasker 2015: 2.

<sup>1548</sup> *Kumho Tire Co. v Carmichael* 526 U.S. 137 (1999).

<sup>1549</sup> McCarthy & Malcom 2018: 257.

<sup>1550</sup> *General Electric Co. v Joiner* 522 U.S. 136 (1997).

<sup>1551</sup> A standard of review used by appellate courts to review decisions of lower courts. The appellate court will typically find that the decision was an abuse of discretion if the discretionary decision was made in plain error. Legal Information Institute. “Abuse of discretion”, [https://www.law.cornell.edu/wex/abuse\\_of\\_discretion](https://www.law.cornell.edu/wex/abuse_of_discretion) (accessed 10 October 2022).

<sup>1552</sup> Epps & Todorow 2018: 1176.

### 5.5.2 What qualifies an expert and what is considered expert testimony

In respect of the amended Rule 702 of the FRE:

a witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- b) the testimony is based on sufficient facts or data;
- c) the testimony is the product of reliable principles and methods; and
- d) the expert has reliably applied the principles and methods to the facts of the case.<sup>1553</sup>

The testimony of an expert hinges on its helpfulness. Testimony is deemed helpful if it falls outside the ambit of common knowledge.<sup>1554</sup> Therefore, *Daubert* is a tool with which judges can determine the helpfulness of expert evidence.<sup>1555</sup>

*Daubert's* five elements are:

- a) whether the theory or methodology the expert uses can or has been tested;
- b) whether the theory or technique has been subjected to peer review and publication;
- c) the known or potential rate of error of the technique or theory that the expert uses;
- d) the existence and maintenance of standards controlling the technique's operation; and
- e) a particular degree of acceptance within the [relevant scientific] community.<sup>1556</sup>

At the heart of *Daubert*, and FRE 702, is the dual standard of reliability and relevance.<sup>1557</sup> *Daubert* ultimately bestows upon the trier of fact the role of gatekeeper in respect of keeping dubious expert testimony out of the courtroom.<sup>1558</sup> The dual standard is to ensure that an expert is both suitably qualified and that the methodology the expert uses is sound.<sup>1559</sup> Reliability herein denotes that the expert "(proposes) to

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<sup>1553</sup> Federal Rules of Evidence. Rule 702.

<sup>1554</sup> Mannucci 2018: 1952.

<sup>1555</sup> Garrett & Mitchell 2018: 910.

<sup>1556</sup> *Daubert v Merrell Dow Pharmaceuticals Inc.* 509 US 579, 113 S. Ct. 2786 (1993) at 2796 - 2797.

<sup>1557</sup> Peck 2016: 1072.

<sup>1558</sup> Ryan 2016: 350.

<sup>1559</sup> Peck 2016: 1072.

testify to scientific knowledge that will” and relevance that will “assist the trier of fact to understand or determine a fact in issue”.<sup>1560</sup> Pertinently, however, it does not confer or expect judges to assume the mantle of ‘amateur scientists’.<sup>1561</sup>

### **5.5.3 The ubiquity and commercial nature of expert services in the USA**

Litigants naturally will have a considerable vested interest and impetus in procuring expert testimony that substantiates or, at the very least, is sympathetic to their case; expert testimony that could as such be questionable and is the product of adversarial bias.<sup>1562</sup> It is contended that a jury will append the most weight to the testimony of the most convincing expert irrespective of the technical and methodological merit of the testimony.<sup>1563</sup>

The USA’s appetite for expert witnesses has undoubtedly begotten the existence of organisations like The Expert Institute. It markets itself as providing “expert witness solutions” by matching cases with experts. It also has medical doctors on its staff<sup>1564</sup> and provides background checks that monitor any *Daubert* challenges.<sup>1565</sup> Indeed, even the American Bar Association states on its website that it “[promotes] networking opportunities for litigators and expert witnesses in commonly encountered substantive areas, such as accounting, engineering, and science”.<sup>1566</sup>

### **5.5.4 Disadvantages**

For all its merit, *Daubert* features fall less in criminal trials than it does in civil trials. Defendants usually do not have the financial resources to counter expert testimony

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<sup>1560</sup> *Daubert v Merrell Dow Pharmaceuticals Inc.* 509 U.S. 579, 113 S. Ct. 2786 (1993) at 2796.

<sup>1561</sup> *Daubert v Merrell Dow Pharmaceuticals Inc.* 509 U.S. 579, 113 S. Ct. 2786 (1993) at 2800.

<sup>1562</sup> Kim 2016: 68.

<sup>1563</sup> Mannucci 2018: 1959.

<sup>1564</sup> <https://www.theexpertinstitute.com/> (accessed 10 September 2022).

<sup>1565</sup> A *Daubert* challenge is a hearing conducted before the judge where the validity and admissibility of expert testimony is challenged by opposing counsel. The expert is required to demonstrate that his/her methodology and reasoning are scientifically valid and can be applied to the facts of the case” US Legal.com. “Daubert Challenge”, <https://definitions.uslegal.com/d/daubert-challenge/> accessed 10 September 2022).

<sup>1566</sup> Anonymous. “Expert Witnesses”, <https://www.americanbar.org/groups/litigation/committees/expert-witnesses/> (accessed 3 October 2022).

led by the prosecution who have forensic laboratories at their disposal which provide a wealth of technical expertise.<sup>1567</sup> Whilst some federal statutes do offer defendants access to expert assistance, it is limited.<sup>1568</sup> Compounding this lamentable state is that both federal and state courts very rarely recognise an indigent defendant's right to expert assistance as a constitutional imperative.<sup>1569</sup> Inevitably, the only instrument available to the defendant to counter expert testimony led by the prosecution is cross-examination by the defendant's attorney which, in and of itself, is questionable because attorneys, like judges, generally do not possess the level technical skill required to decipher scientific evidence.<sup>1570</sup>

In addition hereto, and in spite of FRE 702 governing the federal admission of expert evidence, federal courts have been left wanting in terms of the rule's application. Some blatantly ignore it and refer to outdated case law, whilst others readily admit expert evidence that, even with the most liberal reading of FRE 702, should not be admissible.<sup>1571</sup> Additionally, it is argued that the 'flexibility' of *Daubert* has hindered the consistency with which federal appeal courts enforce principles that safeguard and ensure sound scientific reasoning and methodology in criminal cases as embodied in *Daubert*.<sup>1572</sup>

Indeed, while *Daubert* does not expect nor confer the title of scientist on a judge, it makes the sweeping assumption that judges have the technical knowledge to decipher reliable from unreliable expert testimony.<sup>1573</sup> For its ostensible leniency and flexibility, *Daubert* has, on occasion, been found to make federal judges scrutinise expert evidence more robustly and, as such, render the admission of expert evidence less likely.<sup>1574</sup>

*Daubert* proceedings not only add considerable expense to federal litigation, but they are also time consuming.<sup>1575</sup> Criminal trials are, or at least should be, handled at a substantially quicker rate than civil litigation as the right to a speedy trial is

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<sup>1567</sup> Epps & Todorow 2018: 1177.

<sup>1568</sup> Mannucci 2018: 1961.

<sup>1569</sup> Capra 2018: 1518.

<sup>1570</sup> Mannucci 2018: 1961.

<sup>1571</sup> Bernstein & Lasker 2015: 11.

<sup>1572</sup> Kaye 2018: 1640.

<sup>1573</sup> Mannucci 2018: 1955.

<sup>1574</sup> Jurs & DeVito 2013: 981.

<sup>1575</sup> Capra 2018: 1535.

constitutionally entrenched in the Sixth Amendment of the *Constitution*. This speed, whether actual or merely conceptual, is not conducive to *Daubert* proceedings.<sup>1576</sup>

Also problematic is that whilst *Daubert* challenges quite often succeed in the civil sphere of litigation, there is a general consensus among those familiar with the American criminal justice system that defendants almost always lose challenges that pertain to the reliability of expert evidence led by the prosecution.<sup>1577</sup> It is interesting and telling to note, herein, that in the wake of the *Daubert* judgment, federal legislators mooted a draft bill that would have excluded criminal evidence from the proposed *Daubert* amendment, but it failed to gain traction and was ultimately shelved.<sup>1578</sup>

The question of whether and indeed to what extent *Daubert* should be applied to sentencing has no firm answer.<sup>1579</sup> It is argued that even if *Daubert* were successfully applied at sentencing, Rule 403 of the FRE could nullify its worth as it provides a court with considerable discretion in excluding expert evidence.<sup>1580</sup> The rule states that “[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence”.

Interestingly, and despite the dual safeguards of reliability and relevance that exist in *Daubert*, in matters where capital punishment is at stake, courts tend to take a far more liberal stance with the admission of expert testimony,<sup>1581</sup> giving a wider interpretation to proportionality per the Eighth Amendment (cruel and unusual punishment) of the *Constitution*<sup>1582</sup> and to the rules of evidence.<sup>1583</sup> As illustrated in *U.S. v Fields*<sup>1584</sup> below, this liberality does not always fall in favour of the defendant.

In *U.S. v Fields*,<sup>1585</sup> the defendant appealing against the death penalty averred that evidence led against him by a psychiatrist tasked with ascertaining future

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<sup>1576</sup> Capra 2018: 1539.

<sup>1577</sup> Murphy 2016: 622-623.

<sup>1578</sup> Murphy 2016: 624.

<sup>1579</sup> Murphy 2016: 635.

<sup>1580</sup> Hopkinson 2018: 735.

<sup>1581</sup> Hopkinson 2018: 730.

<sup>1582</sup> Murphy 2016: 634.

<sup>1583</sup> Murphy 2016: 635.

<sup>1584</sup> *U.S. v Fields* 483 F.3d 313 (5<sup>th</sup> Cir. 2007).

<sup>1585</sup> *U.S. v Fields* 483 F.3d 313 (5<sup>th</sup> Cir. 2007).

dangerousness should be subject, specifically, to the reliability element of *Daubert*, particularly as the psychiatrist had declared his testimony as to the prediction of future dangerousness ‘subjective and non-scientific’.<sup>1586</sup> The APA as *amicus curiae* urged the court to apply *Daubert* also with particular reference to reliability to expert evidence in federal matters that concern the death penalty.<sup>1587</sup>

The court found that the psychiatric evidence did not have to be held to the stringency of *Daubert*, citing lack of precedent in the application of *Daubert* to federal death penalty hearings and section 3593(c) of the USC which allows any evidence in mitigation or aggravation of sentence and to which pertinently normal admissibility rules do not apply unless “that information may be excluded if its probative value is outweighed by the danger of creating unfair prejudice, confusing the issues, or misleading the jury”. The court found this not to be the case with the evidence in question<sup>1588</sup> and further held that the *Federal Death Penalty Act* of 1994 does not necessitate a *Daubert* analysis.<sup>1589</sup> The court upheld the conviction and sentence.<sup>1590</sup>

The averred liberality aside, courts have been inconsistent in admitting neuroscientific evidence which demonstrates brain conditions at the request of defendants illustrating diminished criminal capacity or insanity or in mitigation of sentence.<sup>1591</sup> In addition hereto, Kaye<sup>1592</sup> contends, with particular reference to criminal trials, that *Daubert* has merely devolved into a checklist. Moreover, it is asserted that challenges to *Daubert* fail because courts all too often rely on precedent regarding admissibility as opposed to facts specific to the case at hand.<sup>1593</sup>

### 5.5.5 Advantages

While the hallmark of the adversarial system is cross-examination, even with vigorous cross-examination, a court cannot simply hand technical and scientific evidence to a

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<sup>1586</sup> *U.S. v Fields* 483 F.3d 313 (5th Cir. 2007) part 4: Expert Testimony on Future Dangerousness.

<sup>1587</sup> *U.S. v Fields* 483 F.3d 313 (5th Cir. 2007) part 4: Expert Testimony on Future Dangerousness.

<sup>1588</sup> *U.S. v Fields* 483 F.3d 313 (5th Cir. 2007) III. Conclusion.

<sup>1589</sup> Hopkins 2018: 731.

<sup>1590</sup> *U.S. v Fields* 483 F.3d 313 (5th Cir. 2007) III. Conclusion.

<sup>1591</sup> Murphy 2016: 629.

<sup>1592</sup> Kaye 2018: 1643.

<sup>1593</sup> Epps & Todorow 2018: 1178.

jury.<sup>1594</sup> Proponents of the *Daubert* test claim the fallibility of juries in support hereof, claiming that the test guards against emotion which is often inherent in jury decisions and takes the decision on the admissibility away from not only juries but also the scientific community, and places it in the hands of the trial court judge.<sup>1595</sup>

The court in *El du Pont de Nemours & Co. v. Robinson*<sup>1596</sup> succinctly elucidated this point stating that:

[e]xpert witnesses can have an extremely prejudicial impact on the jury, in part because of the way in which the jury perceives a witness labelled as an expert... A witness who has been admitted by the trial court as an expert often appears inherently more credible to the jury than does a lay witness. Consequently, a jury more readily accepts the opinion of an expert witness as true simply because of his or her designation as an expert... Because expert evidence can be hard to evaluate, it can be both powerful and misleading... Consequently some commentators believe that ostensibly scientific testimony may sway a jury even when as science it is palpably wrong.<sup>1597</sup>

*Daubert* provides a means to mitigate adversarial bias by allowing opposing litigants to challenge the reliability of the expert evidence being led.<sup>1598</sup> To temper the ostensible flexibility of *Daubert*, its proponents argue that hallmarks of the adversarial judicial system cross-examination and the presentation of conflicting evidence serve as a shield against the admission of deficient or faulty expert evidence.<sup>1599</sup>

As such, *Daubert* gives judges a tool with which they can filter out unsound evidence and keep such evidence away from juries.<sup>1600</sup> It has been asserted that juries in criminal trials take scientific expert evidence as fact, which naturally has far-reaching consequences for justice as defective expert evidence could conceivably end in a wrongful conviction.<sup>1601</sup> Per the *Frye* test, the scientific community was the balustrade between expert testimony and the 'ears of the jurors', but *Daubert* places the court between the jury and expert testimony.<sup>1602</sup>

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<sup>1594</sup> Domitrovich 2016: 41.

<sup>1595</sup> Ryan 2016: 358.

<sup>1596</sup> *El du Pont de Nemours & Co. v Robinson* 923 S.W.2d 549 (Tex. 1995).

<sup>1597</sup> *El du Pont de Nemours & Co. v Robinson* 923 S.W.2d 549 (Tex. 1995) at 553.

<sup>1598</sup> Kim 2016: 68.

<sup>1599</sup> Epps & Todorow 2018: 1176.

<sup>1600</sup> Mannucci 2018: 1954.

<sup>1601</sup> Mannucci 2018: 1956.

<sup>1602</sup> Epps & Todorow 2018: 1164.

### **5.5.6 Federal Rule of Evidence 706 and the phenomenon of the ‘hired gun’**

Federal Rule of Evidence 706 (hereinafter referred to as the “FRE 706”) is an extremely pragmatic yet seldom used<sup>1603</sup> judicial tool which allows the court to call its own scientific experts to assist it in deciphering technical and scientific evidence.<sup>1604</sup> This allows the court, in concert with FRE 702, to exercise its gatekeeping function absolutely. The court is at liberty to ask the parties to the trial for suggestions herein, or it may appoint an expert *sua sponte*. Ultimately, the decision of which expert to appoint vests solely with the court.<sup>1605</sup> The expert must notify all parties of his or her findings, the expert may be called to testify,<sup>1606</sup> and all parties to the matter may cross-examine the expert and are still entitled to their own experts. The FRE 706 expert is entitled to receive reasonable recompense associated with his or her appearance in court.<sup>1607</sup> It must be noted herein that a FRE 706 expert does not replace party appointed experts but complements them.<sup>1608</sup>

Central to the adoption of FRE 706 was the ubiquity of the ‘hired gun’ and so-called ‘expert shopping.’<sup>1609</sup> The adversarial nature of litigation in the USA wholly lends itself, and indeed tacitly encourages, parties to litigation to the procurement of experts who are at the very least sympathetic to their argument. The upshot of this is what Bernstein<sup>1610</sup> terms ‘outlier experts’ who testify on widely divergent ends of the scientific spectrum regarding the issue at hand which only serves to further confuse judge and jury.<sup>1611</sup>

Herein, Bernstein also contends that even if an attorney opts not to hire what he calls a ‘venal hired gun’ to fit the needs of a case or indeed cannot find one, selection bias will occur because of so-called outlier experts who hold views which are outside commonly accepted knowledge or science either by virtue of “idiosyncrasy or incompetence”.<sup>1612</sup> He further contends that to counteract bias, courts must make use

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<sup>1603</sup> Mannucci 2018: 1957.

<sup>1604</sup> Mannucci 2018: 1956.

<sup>1605</sup> Domitrovich 2016: 42.

<sup>1606</sup> Mannucci 2018: 1957.

<sup>1607</sup> Domitrovich 2016: 43.

<sup>1608</sup> Mannucci 2018: 1957.

<sup>1609</sup> Domitrovich 2016: 43.

<sup>1610</sup> Bernstein & Lasker 2015: 8-9.

<sup>1611</sup> Domitrovich 2016: 44.

<sup>1612</sup> Bernstein & Lasker 2015: 8-9.

of court appointed experts.<sup>1613</sup> These experts have no partisan impetus to tailor their testimony.<sup>1614</sup> Despite FRE 706, this remains a rare occurrence.<sup>1615</sup>

It is averred that because the services of experts are procured in the interest of advancing the case of the procurer, experts are by their very nature hired guns.<sup>1616</sup> There is a surfeit of negative sentiment among scholars and jurists regarding hired experts.<sup>1617</sup> Kim<sup>1618</sup> asserts that expert evidence is hindered by its inherent partisanship. Posner J, dissenting in *Chaulk By Murphy v Volkswagen of America, Inc.*,<sup>1619</sup> stated that “[the expert’s testimony is illustrative] of the old problem of expert witnesses who are often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything not palpably absurd on its face (sic) that cannot now be proven by some so-called ‘experts.’”<sup>1620</sup>

The perception that expert evidence lacks impartiality and serves only the interests of those who have retained the services of the expert is an all too commonly held view of the American bench. This has undoubtedly contributed to the systemic suspicion which pervades expert evidence and the exponential devaluation of its perceived value.<sup>1621</sup> While it cannot be disputed that experts provide an invaluable service to both the court and to juries, Posner J further averred that “some experts... are more than willing to proffer opinions of dubious value for the proper fee”.<sup>1622</sup>

However idealistic or quixotic it may be, an expert witness should serve the court and the jury only. This was succinctly put by the court in *El du Pont de Nemours & Co. v Robinson*<sup>1623</sup> in which it was reiterated that “experts whose opinions are available to the highest bidder have no place testifying in a court of law, before a jury, and with the imprimatur of the trial judge’s decision that he is an expert”.<sup>1624</sup> But ‘hired guns’ must

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<sup>1613</sup> Bernstein & Lasker 2015: 9.

<sup>1614</sup> Domitrovich 2016: 45.

<sup>1615</sup> Mannucci 2018: 1957.

<sup>1616</sup> Mannucci 2018: 1959.

<sup>1617</sup> Kim 2016: 67-68.

<sup>1618</sup> Kim 2016: 67-68.

<sup>1619</sup> *Chaulk By Murphy v Volkswagen of America Inc.* 808 F.2d 639 (7<sup>th</sup> Cir. 1986).

<sup>1620</sup> *Chaulk By Murphy v Volkswagen of America Inc.* 808 F.2d 639 (7<sup>th</sup> Cir. 1986) at 664.

<sup>1621</sup> Kim 2016: 67-68.

<sup>1622</sup> *El du Pont de Nemours & Co. v Robinson* 923 S.W.2d 549 (Tex. 1995) at 553-554.

<sup>1623</sup> *El du Pont de Nemours & Co. v Robinson* 923 S.W.2d 549 (Tex. 1995).

<sup>1624</sup> *El du Pont de Nemours & Co. v Robinson* 923 S.W.2d 549 (Tex. 1995) at 553-554.

testify according to their client's whims because, if they do not, they quite simply will not be hired again<sup>1625</sup> and stand to will lose their sheen within the expert 'marketplace'.

The proverbial jury remains out as to whether the augmented admissibility standards for expert evidence that followed in the wake of *Daubert* have served to provide the trier of fact with additional arsenal in the quest of judicial truth finding. De Ruiter and Kaser-Boyd<sup>1626</sup> assert that, while this question remains open, *Daubert*, although perhaps not entirely meeting its initial stated objective, has succeeded in creating a greater consciousness of and appreciation of the dangers of so-called 'junk science' among the judicial fraternity.

## 5.6 CASE LAW

The case law in the paragraphs that follow underscores and explicates upon the elemental concepts discussed in and pertinent to this chapter. Included herein are cases that illustrate that bipolar disorder can serve as a basis for the insanity defence<sup>1627</sup> and a downward departure in sentencing.<sup>1628</sup> Also illustrated is how bipolar disorder serves to increase sentence.<sup>1629</sup>

### 5.6.1 *U.S. v Beatty*<sup>1630</sup>

The appellant was charged with one count of bank robbery and one count of transporting a stolen vehicle across state lines. The appellant filed a notice of insanity defence and a motion to determine mental competency/insanity under secs. 4241(a), (b)1 and 4242 of the USC which was granted by the court *a quo* (district court).<sup>1631</sup>

The appellant underwent a psychological evaluation in 2002, was diagnosed with psychotic disorder not otherwise specified, posttraumatic stress disorder, and bipolar I disorder, mixed, in partial remission. The appellant was found to be suffering from "a

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<sup>1625</sup> Kim 2016: 68.

<sup>1626</sup> de Ruiter & Kaser-Boyd 2015: 10.

<sup>1627</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006).

<sup>1628</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004); *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002).

<sup>1629</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011).

<sup>1630</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004).

<sup>1631</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 821.

severe mental disease or defect” that rendered him unable to appreciate the nature, quality or unlawfulness of his actions during the alleged offence. He was found not guilty by reason of insanity and committed to the custody of the Attorney General. In the appeal at hand, the appellant sought his release from the custody order.<sup>1632</sup>

In 2003, the appellant was sent for another mental health evaluation to determine if his release would present a considerable risk of bodily harm to other persons or serious damage to the property of another. The experts herein stated that ascertaining the appellant’s true diagnosis had been difficult given that he had been diagnosed with a raft of mental illnesses and disorders over the preceding period of seven years. Based on the present evaluation, the appellant was suffering from posttraumatic stress disorder, antisocial personality disorder, and borderline personality disorder, but not from bipolar disorder. The report stated that the appellant, in the mental condition he was when examined which was described as stable, did not pose a substantial risk of danger to other persons or the property of other persons.<sup>1633</sup>

At subsequent hearing in 2003, the court *a quo* conducted a competency hearing pursuant to section 4243 of the USC to ascertain the appellant’s suitability for release. The court held, on the basis of the inconsistencies between the two reports, that the appellant had failed to demonstrate that his unconditional release “would not create a substantial risk of bodily injury to another person or serious damage to property of another due to a present mental disease or defect”.<sup>1634</sup> The court, expressing its concern regarding the contradictory reports in respect of the defendant’s mental state, rejected the finding that the appellant should be released, as contained in the second report, and ordered the appellant to undergo another mental evaluation.<sup>1635</sup>

In the evaluation report, it was stated that the appellant suffered from major mental illness, the nature of which could not be confirmed as the appellant was medicated at the time of the evaluation. It was recommended that, because of appellant’s aggressive tendencies, he should not be released, or should only be released with strict conditions. At a second, subsequent competency hearing pursuant to section

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<sup>1632</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 821.

<sup>1633</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 822.

<sup>1634</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 822.

<sup>1635</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 822-823.

4243 of the USC, and with the report from the aforementioned evaluation, court *a quo* once again released the appellant into the custody of the Attorney General.<sup>1636</sup> It was against this custody order that the appellant appealed. The appeal turned on whether the appellant’s release would “create a substantial risk of bodily injury to another person or serious damage of property of another due to a present mental disease or defect”.<sup>1637</sup>

The court held that:

[a]n insanity acquittee, like [the appellant], may be confined only as long as he is both mentally ill *and* (emphasis supplied) dangerous; however, an insanity acquittee is not entitled to be released from custody until he can prove by clear and convincing evidence that he is no longer suffering from a mental disease or defect, or that, although he suffers from a mental disease or defect, he can be released under conditions that would eliminate his dangerous propensities.<sup>1638</sup>

The appellant averred that the court *a quo* had erred as it should not have relied on the first report and that the appellant should have been released after the second mental evaluation. The court, citing *U.S. v Clark*,<sup>1639</sup> and given the responsibility the courts carry in terms of ensuring public safety when a “clinical patient” is released, may take a patient’s “entire behavioural and psychological profile, not just its most recent manifestation” into consideration when assessing the risk of dangerousness. In addition hereto, courts do not have to slavishly follow expert medical opinions, but must assess their credibility and apportion only as much weight as it deserves.<sup>1640</sup>

Despite no diagnosis of bipolar disorder being made in respect of the second report, the report noted that bipolar disorder had previously been diagnosed in the appellant, as well as a raft of other serious mental illnesses. The report stated that the offence in question was more likely as a result of drug use than bipolar disorder. Furthermore, the report also noted the appellant’s proclivity towards violent and manipulative

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<sup>1636</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 823-824.

<sup>1637</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 824.

<sup>1638</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 824.

<sup>1639</sup> *U.S. v Clark* 893 F.2d 1277, 1282 (11th Cir.), cert. denied, 494 U.S. 1090, 110 S. Ct. 1833, 108 L.Ed.2d 962 (1990).

<sup>1640</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 824-825.

behaviour, and averred that this augmented the risk of future violence. The appeal court thus found no error in court *a quo*'s decision.<sup>1641</sup>

In addition hereto, and despite the appellant's contentions regarding the second report, the second report stated that bipolar disorder (being a serious mental illness) could not be ruled out.<sup>1642</sup> Furthermore, the second report stated that even though the appellant was stable, he required extensive (close) monitoring and that, due to the appellant's history of "aggression, severe personality pathology, substance dependence, and possible Bipolar I Disorder", his unconditional release may present a considerable risk of bodily harm to other persons or serious damage to the property of another.<sup>1643</sup>

The court, with the second report before it, once again found that the appellant had failed to prove, by clear and convincing evidence, that he was indeed eligible for release. Accordingly, the court found no error in the court *a quo*'s finding.<sup>1644</sup>

### **5.6.2 U.S. v Markham<sup>1645</sup>**

The appellant pled guilty to bank robbery, without the benefit of plea agreement, and was sentenced to 70 months imprisonment by the court *a quo* (trial court).<sup>1646</sup> During the present appeal, the appellant averred that court *a quo* abused its discretion by not granting a downward departure in sentencing as the appellant suffered from bipolar disorder. The appellant had led expert evidence in the court *a quo* that he suffered from bipolar disorder and asserted that this caused reduced mental capacity which should have been taken into account in respect of sentencing.<sup>1647</sup> Despite the court *a quo* acknowledging that the defendant had bipolar disorder at the time the offence was committed, it found that "it was not particularly persuaded that it was a cause effect

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<sup>1641</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 825.

<sup>1642</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 826.

<sup>1643</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 826.

<sup>1644</sup> *U.S. v Beatty* 111 Fed. Appx. 820 (6th Cir. 2004) at 826.

<sup>1645</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011).

<sup>1646</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011) at 730. Order and judgment.

<sup>1647</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011) at 731. Background.

relationship between the offence or that the bipolar disorder contributed substantially to the commission of the offence”.<sup>1648</sup>

The present appeal turned on whether the 70-month sentence was substantively unreasonable given the influence of the appellant’s bipolar disorder. Substantive unreasonableness addresses the question of whether the length of a sentence is reasonable in light of section 3553(a) of the USC.<sup>1649</sup> As in the present case, if the sentence handed down by the trial court is correctly within the Guidelines’ range, it is assumed that the sentence is reasonable. Indeed, the fact that an appellate court *might* reasonably conclude that a different sentence would have been more appropriate does not provide sufficient reason for the appeal court to overturn the sentence imposed by the trial court.<sup>1650</sup>

The court accorded this deference to the court *a quo*’s decision in respect of the sentence that was initially handed down. The appellate court’s reasoning herein was that a trial court is in a better position to both find facts and to decide their import per section 3553(a) of the USC as the judge observes the evidence on a firsthand basis, makes decisions regarding the credibility, has full knowledge of the facts and, on the basis hereof, can glean insights which would not be conveyed by reading the record.<sup>1651</sup>

The court herein observed that the court *a quo* was not appreciably persuaded that a causal connection between the crime and the appellant’s mental illness existed. On this basis, the court held that there was no reason to conclude that the court *a quo* had abused its discretion in that no circumstances existed under section 3553(a) of the USC to reduce the sentence. The court held that, although it agreed with the appellant on the basis of the record in that it could apply a downward variance in respect of the appellants mental illness, the court *a quo*’s decision in respect of the sentence was not “arbitrary, capricious, or manifestly unreasonable”.<sup>1652</sup>

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<sup>1648</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011) at 730. Order and judgment.

<sup>1649</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011) at 731-732. Discussion.

<sup>1650</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011) at 732. Discussion.

<sup>1651</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011) at 732. Discussion.

<sup>1652</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10<sup>th</sup> Cir. 2011) at 732. Discussion.

### 5.6.3 *U.S. v Diehl Armstrong*<sup>1653</sup>

The defendant was charged with one count each of conspiracy to commit armed bank robbery, bank robbery, and carrying and using a firearm during and in relation to a crime of violence. The defence filed a motion to determine the defendant's competency to stand trial. The court, per section 4141(b) and 4247(b) and (c) of the USC, ordered that the defendant be committed to the custody of the Attorney General for psychological or psychiatric testing. During May 2002, the court held a hearing over a period of two days where extensive testimony by several lay witnesses and expert witnesses was led and medical records were heard.<sup>1654</sup>

Pursuant to the aforementioned order, the defendant underwent a 30-day psychological evaluation.<sup>1655</sup> One expert testified that the defendant did not suffer from bipolar disorder but rather personality disorder NOS (not specified) with borderline, paranoid and narcissistic traits.<sup>1656</sup> It was further testified in support hereof that the defendant had, in terms of the restoration of her competency, not responded consistently to medication. In addition hereto, although the defendant's ability to assist the defence in her preparation for her case was diminished, this was imputed to her personality disorder and not bipolar disorder. Herein, it was noted by the court that any finding of lack of competency to stand trial must be due to serious mental illness and not a personality disorder.<sup>1657</sup>

Indeed, the hearing turned primarily on whether the defendant did suffer from bipolar disorder as opposed to personality disorder NOS. The crux of the prosecution's argument was that the defendant was erroneously diagnosed and maintained this untruth in order to claim disability benefits. It was posited that subsequent mental health professionals merely rubber stamped the diagnosis of bipolar disorder without independently verifying the diagnosis.<sup>1658</sup>

The defence called their own expert, a forensic psychiatrist, who testified that the defendant did suffer from bipolar disorder and, whilst the defendant understood the

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<sup>1653</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056. Only Westlaw citation available, case not reported.

<sup>1654</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 1.

<sup>1655</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 15.

<sup>1656</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 16.

<sup>1657</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 17.

<sup>1658</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 18.

charges against her and the attendant legal proceedings, her mental illness caused her to experience a psychosis to the extent that she was unable to assist in adequately preparing her defence for the criminal charges that she faced.<sup>1659</sup>

The expert further noted that sufferers of bipolar disorder can suffer from psychosis but those with personality disorders cannot. He also noted that while the defendant also suffered from an unspecified personality disorder, this served to exacerbate the psychosis and manic symptoms she displayed.<sup>1660</sup> In support hereof, the defence called several mental health experts who testified that the defendant did suffer from bipolar disorder.<sup>1661</sup>

A defendant's competency to stand trial hinges on the dual standard of both being able to understand the nature and consequences of the proceedings against him or her, and being able to properly assist in his or her defence. Both the prosecution and the defence agreed that the defendant understood the nature and potential consequences of the legal proceedings against her. As such, the court confined itself to the matter of whether the defendant suffered from a mental disease or defect within the statutory meaning of competency and whether the defendant had the requisite mental capacity to assist in her own defence.<sup>1662</sup>

The court accepted the testimony of the defendant's expert in respect of differentiating between personality disorders and bipolar disorder with particular emphasis on the fact that sufferers of bipolar disorder can experience psychosis while those with a personality disorder generally cannot.<sup>1663</sup> The court thus accepted that the defendant suffered from bipolar disorder. In reaching its decision, the court also acknowledged the numerous psychologists and psychiatrists who had diagnosed the defendant with bipolar disorder during the preceding 30 years and the fact that the defendant had

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<sup>1659</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 22.

<sup>1660</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 22.

<sup>1661</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 25.

<sup>1662</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 27.

<sup>1663</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 27.

experienced partial relief from the symptoms of bipolar disorder through the administration of antipsychotic medications, including<sup>1664</sup> Geodon.<sup>1665</sup>

The court further accepted the defence's evidence in that the veracity of a diagnosis of bipolar disorder was not diminished by the fact that not all medications indicated for the treatment thereof had worked for the defendant.<sup>1666</sup> Furthermore, the court held, in abeyance with the defence, that bipolar disorder is a lifelong illness for which there is no cure<sup>1667</sup> and that the defendant's functional limitations must be attributed, largely if not solely, to bipolar disorder, personality disorders notwithstanding.<sup>1668</sup>

Having determined that the defendant did suffer from a major mental illness, the court turned its attention to the question of whether the defendant, by virtue of her illness, was incapable of properly assisting her legal counsel in the defence of her trial. The court held that, on the preponderance of evidence presented, the defendant was not competent to stand trial.<sup>1669</sup>

The court also accepted the representations made by the defence counsel in respect of the defendant's failure to heed counsel's advice and interact with him in preparing her defence, as well as her lack of insight into the illogical nature of her own approach towards her defence. Furthermore, it was also accepted that the defendant's functional issues and irrationality were a result of psychosis and not personality disorders, nor as a result of discord with her defence counsel.<sup>1670</sup>

The court concluded that, on the preponderance of the evidence led at the hearing, the defendant suffered from psychotic symptoms as a result of bipolar disorder, and this rendered her unable to consult with her defence counsel with a sufficient degree of rational understanding. To this extent, the court found that the defendant suffered from a mental disorder which rendered her incompetent to stand trial in that she could not assist her defence counsel in her defence. The court accepted the testimony of

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<sup>1664</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 28.

<sup>1665</sup> Cunha. "Geodon", <https://www.rxlist.com/geodon-drug.htm> (accessed 15 November 2022). "Geodon is... used to treat the symptoms of Schizophrenia, acute agitation with Schizophrenia and Bipolar I Disorder... It belongs to a class of medications called antipsychotic."

<sup>1666</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 29.

<sup>1667</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 32.

<sup>1668</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 33.

<sup>1669</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 33B.

<sup>1670</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 34.

the expert for the defence in that the defendant could regain competency if treated for her bipolar disorder and ordered that she be committed to the custody of the Attorney General for a period of hospitalisation and appropriate treatment in accordance with section 4241 of the USC.<sup>1671</sup>

#### **5.6.4 U.S. v Davis<sup>1672</sup>**

The defendant pled guilty to one count of conspiracy to possess with intent to distribute over one kilogram of phencyclidine. She sought a downward departure of her sentence. The Guidelines provided for a period of incarceration between 70-87 months. Probation's recommended sentence was 70 months.<sup>1673</sup>

The defendant was examined by two experts – a clinical therapist and a psychiatrist – at the behest of her defence attorney. The therapist diagnosed the defendant with bipolar disorder and dependent personality disorder. The psychiatrist found that the defendant had, amongst other maladies, “long term issues with her cognitive capacity and possible brain impairment which could result in problems with... reasoning and problem solving”.<sup>1674</sup>

The basis upon which the defendant sought the downward departure of her sentence was twofold: extraordinary family hardship and diminished mental capacity and duress.<sup>1675</sup> In consideration hereof, the court referred to section 3553(b) of the USC wherein court is permitted to deviate from the Guidelines range if there are “aggravating or mitigating circumstance[s] of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines that should result in a sentence different from that described”.

The court also looked to questions formulated in *Koon*<sup>1676</sup> in deciding if a departure from the Guidelines was warranted herein:

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<sup>1671</sup> *U.S. v Markham v Diehl Armstrong* 2008 WL 2963056 at 37.

<sup>1672</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004).

<sup>1673</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 1.

<sup>1674</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 1.

<sup>1675</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 2.

<sup>1676</sup> *Koon v U.S.* 518 U.S. 81 (1996).

- 1) [W]hat features of this case, potentially, take it outside the Guidelines' 'heartland' and make of it a special, or unusual, case?
- 2) Has the [Sentencing] Commission forbidden departures based on those features?
- 3) If not, has the Commission encouraged departures based on those features?
- 4) If not, has the Commission discouraged departures based on those features?"<sup>1677</sup>

The court affirmed that where extraordinary family circumstances exist, a court may grant a downward departure.<sup>1678</sup> Herein, it held that extraordinary family circumstances were indeed present in that the defendant's children would suffer needlessly were she to be incarcerated.<sup>1679</sup> The court found that the defendant's cognitive impairment, her mental illnesses, including bipolar disorder, and the influence which an abusive partner had had over her had been a factor in her criminal behaviour and subsequent commission of the crime,<sup>1680</sup> to the extent that she could not fully control her behaviour despite knowing it was unlawful.<sup>1681</sup>

The court accordingly exercised its discretion and held that a departure in terms of both section 5k2.13 and section 5K2.12, the latter because of coercion and duress, was warranted.<sup>1682</sup> The defendant was accordingly sentenced to 70 months imprisonment.<sup>1683</sup>

### **5.6.5 U.S. v Silleg<sup>1684</sup>**

The appellant waived indictment<sup>1685</sup> and pled guilty to the possession of and receiving child pornography in the court *a quo*.<sup>1686</sup> A pre-sentence investigation report recommended a sentence of 41 months. The appellant argued for a downward

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<sup>1677</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 3.  
<sup>1678</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 3.  
<sup>1679</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 5.  
<sup>1680</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 6.  
<sup>1681</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 7.  
<sup>1682</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 7.  
<sup>1683</sup> *U.S. v Davis* No. 03 CR 84 (N.D. Ill. Aug. 24, 2004) at 2.  
<sup>1684</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002).  
<sup>1685</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 559.  
<sup>1686</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 558.

departure in terms of section 5k2.13 of the Guidelines based on diminished mental capacity.<sup>1687</sup> The government opposed the motion.<sup>1688</sup>

In support of the motion, the appellant presented expert reports by two psychiatrists and a report by a psychologist who had treated him for several years. The experts unanimously agreed that the appellant did not suffer from paedophilia or a paraphilia, but instead suffered from bipolar disorder II which they deemed a 'biochemical imbalance' and held that a causal nexus between this and the criminal conduct existed.<sup>1689</sup> Furthermore, one of the experts stated that the appellant was in a manic or hypomanic state during the commission of the crimes and this impaired his control over his actions.<sup>1690</sup> Further evidence of erratic spending, abuse the appellant had suffered as a child, and a familial link to bipolar disorder was led.<sup>1691</sup>

The basis of the state's opposition was that the appellant could not sufficiently prove he suffered significantly reduced mental capacity nor could he sufficiently prove a causal link between his illness and the commission of the crimes. The defence countered this argument by noting that the state had not led expert evidence to rebut the appellant's assertions. The court *a quo*, however, assented to the sentence of 41 months imprisonment.<sup>1692</sup>

The basis of the current appeal turned on the appellant's assertion that the court *a quo* erroneously held that it was not within its remit to grant a downward departure of the Guidelines in terms of section 5k2.13.<sup>1693</sup> The court found *inter alia* on the weight of precedent before it<sup>1694</sup> that a departure of the Guidelines in cases of child pornography, as contemplated in section 5k2.13, could be granted.<sup>1695</sup> The sentence was accordingly vacated and remanded for resentencing, including reconsideration of the appellant's motion for downward departure from the Guidelines in accordance with section 5k2.13.<sup>1696</sup> The resentencing case was not, however, reported.

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<sup>1687</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 559.

<sup>1688</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 560.

<sup>1689</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 559.

<sup>1690</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 559-560.

<sup>1691</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 560.

<sup>1692</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 560.

<sup>1693</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 561.

<sup>1694</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 564.

<sup>1695</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 563.

<sup>1696</sup> *U.S. v Silleg* 311 F.3d 557 (2nd Cir. 2002) at 564.

### 5.6.6 *U.S. v Rodman*<sup>1697</sup>

The defendant was charged with wilfully and knowingly threatening the life of the president of the USA.<sup>1698</sup> The court ordered a psychiatric evaluation.<sup>1699</sup> A psychiatrist from a federal medical centre prepared the report and found the defendant to be incompetent to stand trial. The Fifth Amendment of the *Constitution* holds that a court may not try and convict mentally incompetent defendants.<sup>1700</sup> It was, however, recommended that the defendant should be involuntarily medicated to restore his competency. The defendant disputed these recommendations.<sup>1701</sup>

The defendant had, in the past, variously been diagnosed with bipolar type schizoaffective disorder,<sup>1702</sup> schizophreniform disorder, bipolar disorder, and psychotic disorder NOS (not specified). The defendant had also been involuntarily held for psychiatric treatment on two occasions. On two occasions, he was diagnosed with bipolar disorder and treated with lithium. Both discharge summaries indicated the defendant was only minimally treatment compliant.<sup>1703</sup>

As discussed in *Diehl Armstrong*<sup>1704</sup> above, the test contained in section 4241 of the USC is if a defendant is able to consult with his or her counsel with a “reasonable degree of rational understanding” and holds a rational and factual understanding of the proceedings against him or her.<sup>1705</sup> The court, in abeyance with the report,<sup>1706</sup> found the defendant was incompetent to stand trial because, whilst the defendant was able to appreciate the nature of the criminal proceedings, due to his paranoid and delusional beliefs caused by ‘bipolar type schizoaffective disorder’, he had no insight into his mental condition.<sup>1707</sup> This, the court averred once again in agreement with the report, would render the defendant unable to assist in his defence.<sup>1708</sup>

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<sup>1697</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006).

<sup>1698</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 487; 490.

<sup>1699</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 491.

<sup>1700</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 487-488.

<sup>1701</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 490.

<sup>1702</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 493.

<sup>1703</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 491.

<sup>1704</sup> *U.S. v Markham* 418 Fed. Appx. 730 (10th Cir. 2011).

<sup>1705</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 488.

<sup>1706</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 493.

<sup>1707</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 488.

<sup>1708</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 488 and 493.

The court then turned its attention to the question of involuntary medication. The court emphasised that interests of the government and the interests of the defendant had to be balanced when considering the involuntary medication of a pre-trial defendant with the purpose of attaining competency as the involuntary medication would cause a substantial encroachment to the defendant's liberty and privacy per the Fifth Amendment of the *Constitution*.<sup>1709</sup>

The court also stressed the importance the Supreme Court placed on the requirement of a strong governmental interest and that each case should be decided on its own merits.<sup>1710</sup> In addition thereto, when deciding a matter of involuntary medication, a court must also consider if a defendant has been held in a prison medical facility for an extended period of time.<sup>1711</sup>

The court found the government's argument for involuntary medication lacking as it did not prove to have a substantial interest in pursuing the trial.<sup>1712</sup> Furthermore, the defendant had been held for a period which was not dissimilar to that which he would have served if he had been convicted and sentenced per the Guidelines. The defendant also had a valid entitlement to the insanity defence. The court therefore held that it would not further governmental interests to pursue a trial.<sup>1713</sup>

Accordingly, as well as finding the defendant incompetent to stand trial, the court also rejected the government's request for involuntary medication.<sup>1714</sup> It ordered that the defendant be committed to the custody of the Attorney General for hospitalisation not exceeding 45 days per section 4241 of the USC for the purposes of ascertaining if a significant probability existed that the defendant would attain competency to the extent that legal proceedings against him could move forward in the foreseeable future and if his release would cause significant risk of bodily injury to other persons or serious damage to property of other persons.<sup>1715</sup> The court also ruled that if after the period of hospitalisation, the defendant's mental state had not improved to the extent that legal

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<sup>1709</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 488; 495.

<sup>1710</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 495.

<sup>1711</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 495.

<sup>1712</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 489; 496.

<sup>1713</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 497.

<sup>1714</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 488-489.

<sup>1715</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 488; 494.

proceedings could move forward, he would be subject to 18 USC section 4246 and that the court would proceed accordingly.<sup>1716</sup>

## 5.7 CONCLUSION

This chapter has endeavoured to present a comprehensive illustration of the USA criminal justice system as it relates to mentally ill offenders with specific focus on offenders who suffer from bipolar disorder. Topics pertinent in this regard have been discussed with a focus on MHCs. In addition hereto, the *Daubert* test and expert evidence and federal sentencing, as it pertains to mentally ill offenders, has been studied. This has included an analysis of the insanity defence and diminished criminal capacity as a partial defence or possible mitigating factor. Also included herein is a discussion of legislation pertinent to mentally ill offenders and applicable case law.

While MHCs offer a beacon of hope, the vast amount of mentally ill offenders in the USA,<sup>1717</sup> coupled with a lack of funding, means the outreach of MHCs remains relatively limited.<sup>1718</sup> While many provisions that ensure criminal justice for offenders, and indeed mentally ill offenders, are enshrined in legislation,<sup>1719</sup> the USA criminal justice system places a plethora of obstacles in the way of criminal justice for mentally ill offenders. Indeed, the burden of proof for the insanity defence lies with the defendant.<sup>1720</sup>

Other contributory factors include no constitutional imperative in respect of obtaining expert evidence to ascertain lack of criminal capacity by virtue of mental disease or illness;<sup>1721</sup> no specific legislative prohibition on the execution of mentally ill

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<sup>1716</sup> *U.S. v Rodman* 446 F.Supp.2d 487 (D.S.C. 2006) at 494.

<sup>1717</sup> Liebowitz *et al.* "A way forward: Diverting people with mental illness from inhumane expensive jails into community-based treatment that works", [http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward\\_July-2014.pdf](http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward_July-2014.pdf) (accessed 10 September 2022).

<sup>1718</sup> Brem & Haigh. "Rise of US Mental Health Courts Highlighted in 'Any Given Day' Documentary", <https://www.jurist.org/commentary/2022/07/hannah-brem-elizabeth-haigh-any-given-day-mental-health-courts/> (accessed 3 October 2022).

<sup>1719</sup> *Inter alia* United States Sentencing Commission Manual. sec. 5H1.3 and sec. 5K2.13; Title 18 USC sec. 3006A; Amendments V & VIII of the *Constitution*.

<sup>1720</sup> *United States Code*. Title 18. Part I. Chapter 1. sec. 17(b).

<sup>1721</sup> Robinson 2014: 238.

offenders,<sup>1722</sup> and the underuse of *Daubert* in criminal trials.<sup>1723</sup> As stated above in paragraph 5.3.3, mentally ill offenders are more likely to receive longer prison sentences.<sup>1724</sup> Illustrative of this, and as noted in paragraph 5.4, Los Angeles County Jails, Rikers Island, and Chicago Cook County Jail are the largest *de facto* psychiatric facilities in the USA.<sup>1725</sup>

Estimates from literature put the population of federal inmates who are mentally ill as high as 50 per cent.<sup>1726</sup> Furthermore, it is asserted that the prevalence of mental impairment among offenders is three times that of the general populace.<sup>1727</sup> Significantly in this regard, the APA lists schizophrenia, bipolar disorder, and depression as the three most prevalent mental illnesses in prisons across the USA.

This already untenable state of affairs is compounded by the fact that prisoners with mental illness are at a higher risk of suffering physical and sexual abuse at the hands of other prisoners and by prison staff.<sup>1728</sup> A 2003 report by Human Rights Watch found that mentally ill prisoners are subject to “deep-rooted patterns of neglect, mistreatment and even cavalier disregard for [their] well-being”.<sup>1729</sup> Compounding this egregious state of affairs, mentally ill offenders have a greater likelihood of being detained in solitary confinement<sup>1730</sup> and experience more difficulty obtaining parole.<sup>1731</sup>

As stated above in paragraph 5.3.3, while legislation exists to safeguard criminal justice for mentally ill offenders, the exponential trend of handing out harsher sentences to mentally ill offenders is gaining traction.<sup>1732</sup> A blistering editorial in the New York Times which highlighted the case of John Ferguson, a man who suffered from paranoid schizophrenia, who was put to death by the State of Florida, puts this

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<sup>1722</sup> Slobogin 2000: 668.

<sup>1723</sup> Epps & Todorow 2018: 1177.

<sup>1724</sup> Bagaric 2016: 32.

<sup>1725</sup> Liebowitz *et al.* “A way forward: Diverting people with mental illness from inhumane expensive jails into community-based treatment that works”, [http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward\\_July-2014.pdf](http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward_July-2014.pdf) (accessed 10 September 2022).

<sup>1726</sup> Sarteschi 2013: 1.

<sup>1727</sup> Davidson & Rosky 2015: 354.

<sup>1728</sup> Liebowitz *et al.* “A way forward: Diverting people with mental illness from inhumane expensive jails into community-based treatment that works”, [http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward\\_July-2014.pdf](http://www.bazelon.org/wp-content/uploads/2017/11/A-Way-Forward_July-2014.pdf) (accessed 10 September 2022).

<sup>1729</sup> D'Emic 2015: 369.

<sup>1730</sup> Sarteschi 2013: 8.

<sup>1731</sup> Sarteschi 2013: 7.

<sup>1732</sup> Bagaric 2016: 13.

unpropitious paradox succinctly; “[o]nce again, a state is attempting to put to death a man who is clearly ineligible for execution under the *Constitution*. Once again, state and federal courts are ignoring uncontested facts by hiding behind the draperies of legal procedure. And once again we are forced to wonder why the Supreme Court is so reluctant to step in when a man’s life is at stake”.<sup>1733</sup>

The following and final chapter concludes the thesis. This will include a comparative analysis of South Africa and the comparator countries. Furthermore, I will assay to answer the research questions posed in chapter one as well as propose recommendations to provide fair criminal justice to offenders with bipolar disorder.

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<sup>1733</sup> Editorial. “Florida Ignores the Supreme Court”, <https://www.nytimes.com/2013/08/05/opinion/florida-ignores-the-supreme-court.html> (accessed 21 September 2022).

## CHAPTER SIX: CONCLUSION AND RECOMMENDATIONS

### 6.1 INTRODUCTION

In this, the final chapter of the thesis, the research questions posed in chapter one will be answered. An analysis of South Africa as well as both comparator countries will be presented regarding the criminal justice systems and how these systems cater to the offender who suffers from bipolar disorder. In addition hereto, an evaluation of both the state of mental health care in South Africa and how offenders who suffer from bipolar disorder are provided for within the South African criminal justice system is also explored. Lastly, recommendations and, ultimately, proposed solutions for a better, alternative form of sentencing for offenders suffering from bipolar disorder, are posited. This takes the form of MHCs tailored to a uniquely South African context.

As elaborated on in this chapter, it is contended that the test for criminal capacity is adequate for the accused with bipolar disorder in South Africa. With respect to criminal justice, which will be examined later in this chapter, adequate provision is also made in respect of legislation and policy such as the MHCA and the National Mental Health Policy Framework and Strategic Plan, 2013–2020 (MHPF),<sup>1734</sup> respectively, but the implementation thereof is abhorrent.

It is trite that bipolar disorder is often misdiagnosed and, because of the manic/depressive episodic nature of bipolar disorder, it is particularly difficult to ascertain what the mental state of the accused was at the time of the commission of the offence.<sup>1735</sup> It can thus be argued that because of the complex nature of bipolar disorder, the test for criminal capacity may not adequately provide for offenders who suffer from it. This being said, however, the test for criminal capacity is very similar across all three countries. Case law discussed in chapters three, four and five support that bipolar disorder present in both “manic and depressive” state at the time of

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<sup>1734</sup> “The MHPF provides a blueprint for the WHO recommendations in South Africa and is in line with the current South African health system, with mental health services provided at tertiary, secondary and primary levels of care, including community mental health services. The South African mental health legislation and policies are regarded as among the most progressive internationally” (Sorsdahl *et al.* 2023: 3).

<sup>1735</sup> Noonan & Johnson 2002: 7.

commission of an offence can lead to the conclusion that the accused either lacked the volitional or cognitive element of criminal capacity and thus cannot be held liable. This, however, must be substantiated by expert evidence. Accordingly, it is opined that bipolar disorder is adequately provided for in respect of the test for criminal capacity in South Africa.

South African courts subscribe to the principle that experts serve the court and not the party at whose disposal they appear.<sup>1736</sup> The objectivity of an expert witness is thus paramount. The testing of the integrity and veracity of expert medical evidence, whether it be in respect of bipolar disorder or any other malady, is the duty of the court as the court is the final arbiter of the dispute before it.<sup>1737</sup> In *Jacobs*,<sup>1738</sup> the court stated that “it is of great importance that the value of the opinion should be capable of being tested; and unless the expert witness states the grounds upon which he bases his opinion it is not possible to test its correctness, so as to form a proper judgment upon it”.

As discussed in the expert witness section in chapter three and in the comparative analysis section to follow, South African is not, however, immune to the phenomenon of the hired gun as expert witnesses are generally paid for their services.<sup>1739</sup> South Africa does not have a national register of expert witnesses like the Netherlands,<sup>1740</sup> nor is the payment of expert witnesses regulated in South Africa.<sup>1741</sup> In addition, the adversarial system of litigation in South Africa begets adversarial bias and the proclivity to lead favourable evidence.<sup>1742</sup> It is thus contended that South Africa could introduce steps to make the current system less partisan. The payment of expert witnesses could be regulated, a national register of expert witnesses could be introduced, and most significantly with respect to mentally ill offenders, legislation could be introduced wherein an expert is appointed to an accused who cannot afford an expert of their own, if the prosecution introduces their own expert witness.

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<sup>1736</sup> *Stock v Stock* 1981 (3) SA 1280 (A).

<sup>1737</sup> *Buthlezi v Ndaba* 2013 (5) SA 437 (SCA): 442.

<sup>1738</sup> *Rex v Jacobs* 1940 TPD 142: 146.

<sup>1739</sup> Van den der Hoven 2006: 169.

<sup>1740</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k(1).

<sup>1741</sup> Van den der Hoven 2006: 169.

<sup>1742</sup> Meintjes-Van der Walt 2002: 25.

As expanded on below, while a move to a more structured and methodical approach to the admission of expert evidence should be lauded, *Daubert's* failings within the US criminal justice system are manifest and potentially mirror the problems the South African criminal justice system could face if *Daubert* were to be introduced.

The treatment of offenders with bipolar disorder and other mentally ill offenders is also covered in this chapter. Were South Africa adherent to the legislatively enshrined rights of mentally ill offenders, it would be reasonable to subject such an offender to the South African criminal justice system. While it is not possible for offenders with bipolar disorder to be entirely diverted from the South African criminal justice system, is it submitted that MHCs, which were analysed in chapter five and are explored later in this chapter, offer a practical alternative and more than just punishment for an accused who suffers from bipolar disorder.

## **6.2 COMPARATIVE ANALYSIS**

### **6.2.1 Test for criminal capacity**

The test for criminal capacity in all three countries is similar and contains both a volitional and cognitive element.

In South Africa, the test is contained in section 78(1) of the CPA and states that:

[a] person who commits an act or makes an omission which constitutes an offence and who at the time of such commission or omission suffers from a mental illness or intellectual disability which makes him or her incapable-

- (a) of appreciating the wrongfulness of his or her act or omission; or
- (b) of acting in accordance with an appreciation of the wrongfulness of his or her act or omission,

shall not be criminally responsible for such act or omission.

In the Netherlands, the test for criminal incapacity is contained in article 39 of the CC<sup>1743</sup> and holds that “[a]ny person who commits an offence for which he cannot be

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<sup>1743</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title III: art. 39.

held responsible by virtue of mental disease or illness shall not be criminally accountable”.

In the USA, the test is contained in the USC section 17(a) and may be invoked under any federal statute if the defendant “at the time of the commission of the acts constituting the [offence]... as a result of a severe mental disease or defect, was unable to appreciate the nature and quality or the [unlawfulness] of his acts”.<sup>1744</sup>

In South Africa, there is no formal definition of what constitutes a mental illness.<sup>1745</sup> As noted in chapter three, South African courts have held that the behaviour of an accused holds greater persuasive value than a label of a particular mental illness<sup>1746</sup> and that attempting to define the concept of mental illness would be imprudent.<sup>1747</sup> In the Netherlands, there is likewise no universal definition of mental illness. It cannot be determined according to definitions contained in the DSM handbook, for example, and must be diagnosed by a behavioural expert.<sup>1748</sup> The USA, too, has no universal definition of mental illness and courts may, theoretically, consider any mental illness in respect of the defence of insanity and as a factor in mitigation of sentence regarding diminished criminal capacity.<sup>1749</sup>

In all three countries, diminished capacity is not a complete defence and can only influence the sentence imposed. In South Africa, in terms of section 78(7) of the CPA, diminished capacity by virtue of mental illness or defect is not a defence and is only relevant to matters of sentencing.<sup>1750</sup> In the Netherlands, no legislation directly addresses diminished criminal capacity, but article 37a(2) of the CC facilitates it.<sup>1751</sup> In the USA, the Guidelines, albeit it not explicitly, permit a downward departure from a minimum sentence by virtue of mental illness.<sup>1752</sup>

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<sup>1744</sup> *United States Code*. Title 18. Part I. Chapter 1: sec. 17(a).

<sup>1745</sup> Burchell 2016: 280.

<sup>1746</sup> Swanepoel 2009: 112.

<sup>1747</sup> *S v Mahlinza* 1967 (1) SA 408 (A): 418.

<sup>1748</sup> *ECLI:NL:GHARN:2011:BQ4981 - Gerechtshof Arnhem*, 18-05-2011 / 21-004515-09. np. Behavior after arrest.

<sup>1749</sup> Bagaric 2016: 10.

<sup>1750</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(1)(a) & (b). (see also *S v Mnisi* 2009 (2) SACR 227 (SCA): 231).

<sup>1751</sup> *The Criminal Code* BWBR0001854/2023-10-01: Book One: Title IIA. sec. 2: art. 37a.

<sup>1752</sup> United States Sentencing Commission Guidelines Manual. sec. 5K2.13.

In South Africa, the question of diminished criminal capacity is one of degree and it is completely at the court's discretion.<sup>1753</sup> The degree of diminished criminal capacity in South Africa is neither unambiguous<sup>1754</sup> nor is there an objective test for it.<sup>1755</sup> In the Netherlands, as noted previously in this section, there is no specific legislation that directly references diminished criminal capacity, but it can be inferred from article 37a of the CC. With reference hereto, there are five degrees of criminal capacity which a court may impute to an offender: full criminal capacity, slightly diminished criminal capacity, diminished criminal capacity, severely diminished criminal capacity, and complete absence of criminal capacity.<sup>1756</sup>

In the USA, a court may consider downward departures from the Guidelines by virtue of diminished capacity in respect of mental illness, in accordance with section 3553(b)(1) of the USC, if the mental condition is present "of a kind, or to a degree" which is not sufficiently provided for in the Guidelines.<sup>1757</sup> In addition hereto, a court may also take offender characteristics into account, like mental illness, which would normally be relevant in accordance with Chapter 5 Part H of the Guidelines, but characteristics would have to be present to an 'exceptional degree'.<sup>1758</sup>

### **6.2.2 Expert evidence**

In South Africa, an expert does not need to be professionally trained<sup>1759</sup> or have academic qualifications. It is at the court's discretion to decide if an expert is indeed an expert regarding the subject at hand.<sup>1760</sup> The Netherlands is far more imprecise, simply holding that the qualifications an expert must have and the manner in which expertise is decided must be elaborated upon by way of an AMvB.<sup>1761</sup> In the USA, the court must decide if an expert is suitably qualified.<sup>1762</sup>

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<sup>1753</sup> Burchell 2016: 302.

<sup>1754</sup> *Director of Public Prosecutions: Transvaal v Venter* 2009 (1) SACR 165 (SCA): 191.

<sup>1755</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(7).

<sup>1756</sup> de Ruiter & Petrila 2018: 833.

<sup>1757</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5K2.0(a)(1)(A).

<sup>1758</sup> United States Sentencing Commission Guidelines Manual. Chapter 5. Part C. sec. 5K2.0(a)(4).

<sup>1759</sup> Meintjes-Van der Walt 2003: 362.

<sup>1760</sup> Schwikkard 2010: 970. (see also *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 772-773.)

<sup>1761</sup> Meintjes-Van der Walt translation 2001: 66: referencing HR 24 July 1928, NJ 1929 150.

<sup>1762</sup> Rules of Evidence. Art. I. Rule 104.

As discussed above in paragraph 5.5.5, it is asserted that *Daubert* provides a means to mitigate adversarial bias by allowing opposing litigants to challenge the reliability of the expert evidence being led.<sup>1763</sup> At the core of *Daubert* lies the dual standard of reliability and relevance which ostensibly ensures that an expert is both suitably qualified and that the methodology the expert uses is sound.<sup>1764</sup> To this end, it is arguable that any criminal justice system would benefit from a more structured and methodical approach to the admission of expert evidence. While it is a theoretical possibility that the South African criminal justice system could benefit from the application of the *Daubert* standard, its application within the US criminal justice system has proven problematic and has served to highlight weaknesses which are particularly significant within a South African context.

*Daubert* is utilised less in criminal trials than it is in civil trials as defendants ordinarily lack the financial resources to counter oppose expert testimony led by the prosecution.<sup>1765</sup> The rights to equality before the law and equal protection and benefit of the law are enshrined in section 9(1) of the *South African Constitution*. In addition, section 34 holds that that “[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, in another independent and impartial tribunal or forum”. Greenbaum<sup>1766</sup> argues that the aforementioned “suggest(s) that citizens are adequately catered for in accessing justice [but] the lived reality for poor persons (indigent defendants) is that this is not substantively attained. The formal framework creates unfulfilled expectations”. An appurtenant disadvantage in this respect is the prohibitive cost of expert witnesses and private legal representation.<sup>1767</sup>

As well as being costly, *Daubert* proceedings are also time consuming<sup>1768</sup> which goes against the constitutionally entrenched right to a speedy trial contained in the Sixth Amendment of the *US Constitution*.<sup>1769</sup> The *South African Constitution* contains a similar provision 35(3)(d) which holds that “[e]very accused person has the right to a

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<sup>1763</sup> Kim 2016: 68.

<sup>1764</sup> Peck 2016: 1072.

<sup>1765</sup> Epps & Todorow 2018: 1177.

<sup>1766</sup> Greenbaum 2020: 244.

<sup>1767</sup> Greenbaum 2020: 258.

<sup>1768</sup> Capra 2018: 1535.

<sup>1769</sup> Capra 2018: 1539.

fair trial, which includes the right to have their trial begin and conclude without unreasonable delay”. The reality, however, does not bear this out. Remand detainees make up a third of the prison population in South Africa.<sup>1770</sup> *Daubert* would impose an additional procedural step in court and would only serve to exacerbate an already overburdened criminal justice system.

Cameron *et al.* also assert that “an over-burdened criminal justice system threatens the rights of every accused, imposing systemic delay on all”.<sup>1771</sup> In addition, they argue that “[w]ith a powerful Bill of Rights on one side, protecting the rights of accused, and insufficient, or insufficiently trained, skilled, or motivated, police and prosecutors on the other, SA became enmeshed in what appeared to be a trap: Process and rights over output, process and rights over product, and process and rights over efficiency”. This crisp summation illustrates why *Daubert* is not feasible within the context of the South African criminal justice system.

In South Africa, in respect of the evidence an expert may lead, it must be “by reason of their special knowledge and skill, [that] they are better qualified to draw inferences than the trier of fact”.<sup>1772</sup> In the Netherlands, an expert must testify as to what science and knowledge he/she has obtained regarding the subject in question.<sup>1773</sup> Knowledge (*wetenschap*) includes “all special knowledge one possesses or is assumed to possess, even though such knowledge does not qualify as ‘science’ in the more limited sense of the word [which] corresponds with the fact that for a long time, experts have been heard in criminal proceedings whose special knowledge did not make them practitioners of science”.

Courts in the Netherlands have wide ranging discretion in deciding the admissibility of expert evidence.<sup>1774</sup> In the USA, it is the expert's “scientific, technical, or other specialised knowledge that will help the trier of fact... understand the evidence or to

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<sup>1770</sup> Cameron *et al.* “Justice postponed: What causes unreasonable delays in criminal trials?”, <https://www.derebus.org.za/justice-postponed-what-causes-unreasonable-delays-in-criminal-trials/> (accessed 17 September 2023).

<sup>1771</sup> Cameron *et al.* “Justice postponed: What causes unreasonable delays in criminal trials?”, <https://www.derebus.org.za/justice-postponed-what-causes-unreasonable-delays-in-criminal-trials/> (accessed 17 September 2023).

<sup>1772</sup> *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 772.

<sup>1773</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k I(3).

<sup>1774</sup> Römken 2000: 357.

determine a fact in issue”.<sup>1775</sup> Courts in South Africa,<sup>1776</sup> the Netherlands,<sup>1777</sup> and the USA<sup>1778</sup> are not bound by expert evidence as it is the preserve of courts in all three jurisdictions to decide on the ultimate issue.

In South Africa, expert evidence is opinion evidence which, generally, is disallowed. Expert evidence, however, if relevant, is an exception.<sup>1779</sup> In The Netherlands, opinion evidence is inadmissible unless it is expert evidence.<sup>1780</sup> In the USA, opinion on the ultimate issue is not automatically objectionable,<sup>1781</sup> but in criminal matters an expert may not opine as to the criminal capacity of the defendant at the time of committing the crime as this task rests only with the trier of fact.<sup>1782</sup>

In South Africa, hearsay evidence is generally inadmissible in criminal proceedings unless the party against whom the evidence is to be led agrees thereto.<sup>1783</sup> In the Netherlands, hearsay evidence is admissible.<sup>1784</sup> In the USA, hearsay evidence is inadmissible unless otherwise prescribed by the *Constitution*, Supreme Court rules or the FRE.<sup>1785</sup> Likewise, evidence which is in the realm of common knowledge in South Africa,<sup>1786</sup> the Netherlands,<sup>1787</sup> and the USA,<sup>1788</sup> does not require expert evidence.

In South Africa, expert witnesses are generally paid for their services and the payment thereof is not regulated.<sup>1789</sup> Superior courts may appoint assessors for criminal trials.<sup>1790</sup> Legal culture in the Netherlands is such that lip service is not merely paid to the principle that experts serve the court and not the parties to litigation.<sup>1791</sup> Most experts, forensic pathologists, and the police, for example, are employed by the

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<sup>1775</sup> Federal Rules of Evidence. Rule 702.

<sup>1776</sup> Meintjes-Van der Walt 2003: 371.

<sup>1777</sup> Römkens 2000: 357. (see also Franken 2008: 220).

<sup>1778</sup> Hopkinson 2018: 735.

<sup>1779</sup> *Coopers (South Africa) (Pty) Ltd v Deutsche Gesellschaft für. Schädlingsbekämpfung MBH* 1976 (3) SA 352 (A): 370.

<sup>1780</sup> Tak 2008: 106.

<sup>1781</sup> Federal Rules of Evidence. Art. VII. Rule 704(a).

<sup>1782</sup> Federal Rules of Evidence. Art. VII. Rule 704(b).

<sup>1783</sup> *The Law of Evidence Amendment Act* 45 of 1988 sec. 3(1)(a).

<sup>1784</sup> Franken 2008: 220. 2008.

<sup>1785</sup> Federal Rules of Evidence. Art. VIII. Rule 802.

<sup>1786</sup> *Criminal Procedure Act 51 of 1977: sec. 210.* (see also *Holtzhausen v Roodt* 1997 (4) SA 766 (W): 772-773).

<sup>1787</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book Two: Title VI: art. 339(2).

<sup>1788</sup> Mannucci 2018: 1952.

<sup>1789</sup> Van den Hoven 2006: 169. Van der Hoven 2006: 169.

<sup>1790</sup> *Criminal Procedure Act* 51 of 1977: sec. 145(2).

<sup>1791</sup> Meintjes-Van der Walt 2001: 69.

State.<sup>1792</sup> The Netherlands also has a national register of expert witnesses<sup>1793</sup> and if an expert who is not on the list is called, sound reasons as to why the expert is qualified as such by the party calling the expert must be given.<sup>1794</sup> Experts are paid by the treasury.<sup>1795</sup> In the USA, 'expert shopping' is ubiquitous.<sup>1796</sup> Experts advertise their services and are paid by the party hiring them.<sup>1797</sup> Courts may appoint experts but this happens very rarely in practice.<sup>1798</sup>

### 6.2.3 *Onus of proof*

In South Africa, the criminal standard of proof is beyond a reasonable doubt.<sup>1799</sup> Conversely, the onus lies on an accused to prove on the balance of probabilities that he/she suffers from a mental illness or intellectual disability in respect of criminal capacity should this defence be raised by the accused.<sup>1800</sup> In the Netherlands, the criminal standard of proof is one the *de rechterlijke overtuiging* which is equivalent to the South African standard of proof.<sup>1801</sup> The onus of proving a case beyond a reasonable doubt lies with the presiding judge and not the prosecution.<sup>1802</sup> In the USA, the prosecution must prove every element of a crime beyond a reasonable doubt.<sup>1803</sup> The burden of proof in respect of a defence of mental illness or proving that the defendant suffers from mental illness lies with the defendant.<sup>1804</sup> This must be proven on the balance of probabilities.<sup>1805</sup>

South Africa has an adversarial system of litigation,<sup>1806</sup> whilst the Dutch system of litigation is inquisitorial.<sup>1807</sup> The USA, like South Africa, also has an adversarial system

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<sup>1792</sup> Meintjes-Van der Walt 2001: 67.

<sup>1793</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k(1).

<sup>1794</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51k(2).

<sup>1795</sup> *The Code of Criminal Procedure* BWBR0001903/2023-10-01: Book One: Title IIIC: art. 51j(4).

<sup>1796</sup> Domitrovich 2016: 43.

<sup>1797</sup> <https://www.theexpertinstitute.com/> (accessed 10 September 2022).

<sup>1798</sup> Mannucci 2018: 1957.

<sup>1799</sup> *Criminal Procedure Act* 51 of 1977: sec. 105A(2)(a)(i).

<sup>1800</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(1A).

<sup>1801</sup> Meintjes-Van der Walt 2001: 197.

<sup>1802</sup> Franken 2008: 291.

<sup>1803</sup> Grachek 2006: 1480.

<sup>1804</sup> *United States Code*. Title 18. Part I. Chapter 1. sec. 17(b).

<sup>1805</sup> *United States Code*. Title 18. Part III. Chapter 313: sec. 4244(d).

<sup>1806</sup> Meintjes-Van der Walt 2002: 25.

<sup>1807</sup> Römken 2000: 356.

of litigation. Both South Africa and the Netherlands<sup>1808</sup> do not have juries whilst the USA does.<sup>1809</sup>

#### **6.2.4 Sentencing**

Sentencing options that cater specifically to mentally ill offenders in South Africa are contained in secs. 78(6) and (7) of the CPA. Section 78(6) and (7) of the CPA applies to offenders who are found not guilty by reason of lack criminal capacity by virtue of mental illness or intellectual disability. Orders included therein are detainment in a psychiatric hospital<sup>1810</sup> and admission and detainment in a designated health establishment.<sup>1811</sup> Section 78(7) of the CPA applies if the capacity of an offender to appreciate the wrongfulness of the act or act in accordance therewith is diminished by virtue of mental illness or defect, the court may take the fact of such diminished responsibility into account when sentencing the offender.

It can be argued that section 78(6) and (7) are blunt instruments because, unlike MHCs and TBS, no specific emphasis is placed on treatment, rehabilitation and, accordingly, reducing the risk of recidivism. Minimum sentences in South Africa are regarded as harsh and unduly restrict the court's discretion when handing down sentence. Despite this, sentences handed down to offenders who have diminished criminal capacity generally lack the rigidity of the aforementioned minimum sentences.<sup>1812</sup>

In the Netherlands, as discussed above, offenders who have diminished criminal capacity can be sentenced to TBS which includes both a prison sentence, which is served first,<sup>1813</sup> followed by forensic psychiatric treatment.<sup>1814</sup> The prison sentence is proportional to the level of criminal capacity the offender is deemed to have had at the time of committing the offence.<sup>1815</sup> While the USA is known to hand down harsh

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<sup>1808</sup> Tonry & Bijleveld 2007: 9.

<sup>1809</sup> Mannucci 2018: 1954.

<sup>1810</sup> *Criminal Procedure Act 51 of 1977: sec. 78(6)(i)(aa).*

<sup>1811</sup> *Criminal Procedure Act 51 of 1977: sec. 78(6)(ii)(aa).*

<sup>1812</sup> Anonymous. "Imprisoning the nation", <https://www.groundup.org.za/media/uploads/documents/UWCImprisoningThe%20Nation19October2017.pdf> (accessed 3 March 2020).

<sup>1813</sup> de Ruiter & Petrila 2018: 833.

<sup>1814</sup> de Ruiter & Hildebrand 2007: 166.

<sup>1815</sup> de Ruiter & Petrila 2018: 833.

sentences,<sup>1816</sup> mentally ill offenders can be diverted into MHC programs.<sup>1817</sup> MHCs are problem-solving<sup>1818</sup> and treatment-oriented<sup>1819</sup> speciality courts that divert offenders from the criminal justice system into community-based treatment<sup>1820</sup> which serves to increase treatment compliance, reduce the number of mentally ill offenders that are in jail,<sup>1821</sup> and reduce recidivism.<sup>1822</sup>

### 6.3 CONCLUSION

A comprehensive picture of the state of mental health care in respect of mentally ill offenders, with particular reference to those who suffer from bipolar disorder, cannot be set out without an analysis of the current state of mental health care in South Africa. This section includes the analysis noted in the chapter introduction, as well as an examination of mental health care in the context of the South African criminal justice system as it pertains to the offender with bipolar disorder.

#### 6.3.1 *Mental health care within a South African context*

There is undoubtedly no greater display of the total derogation of human rights, and callous and cruel disregard of the mentally ill and intellectually disabled in South Africa in recent times than the Life Esidimeni tragedy. Approximately two thousand patients who received specialist psychiatric care at Life Esidimeni were moved by the provincial government to ill-equipped non-governmental organisations under the auspices of deinstitutionalisation and as a cost saving exercise.<sup>1823</sup> Of these patients, 144 died

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<sup>1816</sup> Anonymous. “Developments in the law: the law of mental illness”, <https://harvardlawreview.org/2008/02/developments-in-the-law-ae-the-law-of-mental-illness/> (accessed 3 October 2022).

<sup>1817</sup> Johnston & Flynn 2017: 685.

<sup>1818</sup> Johnston & Flynn 2017: 685.

<sup>1819</sup> Kondrat *et al.* 2018: 238.

<sup>1820</sup> Ray *et al.* 2015: 801.

<sup>1821</sup> Hughes & Peak 2012: 20.

<sup>1822</sup> Kondrat *et al.* 2018: 238.

<sup>1823</sup> Kabagambe 2019: 4.

from *inter alia* starvation and dehydration and, as of August 2021, eight patients were still missing.<sup>1824</sup>

One can only speculate as to why a tragedy of this scale unfolded with the ostensible legislative and policy protection put in place to protect sufferers of mental illness and mental disability. While this thesis does not set out to answer this question, the Life Esidimeni tragedy is, for a plethora of reasons set out below, symptomatic of a mental health care system beset by dysfunction.

The stigma against mental illness and the abuse of people who suffer from mental illness in South Africa is still pervasive and the manifestation thereof is shocking in its cruelty. The murder of Jostina Sangweni starkly illustrates this. Ms. Sangweni suffered from schizophrenia and was assaulted and set alight by a mob who accused her of witchcraft. Horrifically, her assault was recorded by bystanders with the video thereof later going viral. Her family issued a stark plea that society should accept that people who suffer from mental illness are human beings, and they too deserve the right to life.<sup>1825</sup>

It is contended that the stigma attached to mental illness is one of the primary reasons why it is not treated with due urgency and seriousness.<sup>1826</sup> Professor Malose Langa from the Department of Psychology at the University of the Witwatersrand states that mental illness is simply not sufficiently recognised within the South African health care system because it generally does not present with physical symptoms.<sup>1827</sup> In this respect, Nguse and Wassenaar<sup>1828</sup> state that “[m]ental health has been treated as a

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<sup>1824</sup> Seleka. “Life Esidimeni: Gauteng govt continues search for 8 missing patients”, <https://www.news24.com/news24/southafrica/news/life-esidimeni-gauteng-govt-continues-search-for-8-missing-patients-20210824> (accessed 7 November 2022).

<sup>1825</sup> Seleka. “Society must tolerate people with mental problems, says family of slain Soweto woman”, <https://www.news24.com/news24/southafrica/news/society-must-tolerate-people-with-mental-problems-says-family-of-slain-soweto-woman-20210505> (accessed 17 October 2022).

<sup>1826</sup> Maphanga. “Mental health in general is not fully recognised in SA healthcare, experts say”, <https://www.news24.com/news24/southafrica/news/mental-health-in-general-is-not-fully-recognised-in-sa-healthcare-experts-say-20210414> (accessed 4 November 2022).

<sup>1827</sup> Maphanga. “Mental health in general is not fully recognised in SA healthcare, experts say”, <https://www.news24.com/news24/southafrica/news/mental-health-in-general-is-not-fully-recognised-in-sa-healthcare-experts-say-20210414> (accessed 4 November 2022).

<sup>1828</sup> Nguse & Wassenaar. “Mental health and COVID-19 in South Africa”, <https://journals.sagepub.com/doi/10.1177/00812463211001543> (accessed 23 October 2022).

peripheral and insignificant part of the health sector [and that the lack thereof] borders on ableism and [a distinct] lack of empathy for mentally ill people”.

Psychiatrist Sebolelo Seape<sup>1829</sup> contends that, despite its ubiquity in South Africa, mental illness is still misunderstood, thus leaving many sufferers untreated. She states that the reasons herein are “as diverse as the economic, cultural and social landscape of South Africa”. She cites stigma, the belief that mental illness is indicative of weakness, lack of mental health literacy, and fear of workplace discrimination as impediments to accessing mental health care. She also notes that, in a South African context, culture and traditional beliefs serve as further obstacles preventing people from seeking mental health care treatment.<sup>1830</sup>

Furthermore, Coetzee and Loades<sup>1831</sup> assert that, as a result of the numerous social and political factors that influence daily life, South Africans are at a disproportionate risk of developing mental health issues. This, they aver, is because of the social determinates of mental health which include poverty, violence, stigma and inequality which places people at a greater risk of developing mental health problems. They also attribute the exponential burden of mental health issues to the so-called mental health treatment gap.<sup>1832</sup> In a similar vein, Pillay<sup>1833</sup> states that living in a rural area, deficient education, racial discrimination, interpersonal violence, and unemployment all increase the risk of mental health issues. Indeed, these factors are rife in South Africa.

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<sup>1829</sup> Seape. “OPINION: Equality in mental health hampered by lack of access, lack of investment”, <https://www.news24.com/life/wellness/body/condition-centres/depression/news/opinion-equality-in-mental-health-hampered-by-lack-of-access-lack-of-investment-20201010-3> (accessed 17 October 2022).

<sup>1830</sup> See also The South African College of Applied Psychology. “The shocking state of mental health in South Africa in 2019”, <https://www.sacap.edu.za/blog/management-leadership/mental-health-south-africa/> (accessed 2 November 2022).

<sup>1831</sup> Coetzee & Loades. “OPINION | Where do we begin in making mental health and wellbeing a global priority for all?”, <https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-where-do-we-begin-in-making-mental-health-and-wellbeing-a-global-priority-for-all-20221010> (accessed 17 October 2022).

“[T]he lack of resources, support, and infrastructure required to provide services and treatment to those [in need].” Coetzee & Loades. “OPINION | Where do we begin in making mental health and wellbeing a global priority for all?”, <https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-where-do-we-begin-in-making-mental-health-and-wellbeing-a-global-priority-for-all-20221010> (accessed 17 October 2022).

<sup>1833</sup> Pillay 2019: 464.

It is trite that lack of access to mental health care is a violation of human rights in accordance with section 27 of the *South African Constitution*. As previously stated in chapter three, South Africa boasts progressive legislation such as the MHCA and indeed policy like the MHPF. Such instruments *should* protect sufferers of mental illness, but the implementation thereof leaves much to be desired.<sup>1834</sup>

Furthermore, a lack of a tenable model for the funding of mental health care<sup>1835</sup> and improvement in terms of the geographic distribution of mental health care facilities to improve equitable access to mental health treatment only serve to perpetuate the *status quo*.<sup>1836</sup> It is estimated that one in six South Africans suffer from anxiety, depression, or substance-use disorders; 40 per cent of South Africans with HIV suffer from a diagnosable mental disorder, and it is estimated that only 27 per cent of South Africans with severe mental disorders receive treatment.<sup>1837</sup> In addition, South Africa's already dire mental health situation has been exacerbated by the COVID-19 pandemic.<sup>1838</sup>

South Africa, quite simply, does not provide sufficiently in terms of affordable mental health treatment. Long waiting times and a dearth of health care specialists, particularly in the public sector, only serve to exacerbate this.<sup>1839</sup>

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<sup>1834</sup> Pillay 2019: 465 (see also Nguse & Wassenaar. "Mental health and COVID-19 in South Africa", <https://journals.sagepub.com/doi/10.1177/00812463211001543> (accessed 23 October 2022).

<sup>1835</sup> Nguse & Wassenaar. "Mental health and COVID-19 in South Africa", <https://journals.sagepub.com/doi/10.1177/00812463211001543> (accessed 23 October 2022).

<sup>1836</sup> Seape. "OPINION: Equality in mental health hampered by lack of access, lack of investment", <https://www.news24.com/life/wellness/body/condition-centres/depression/news/opinion-equality-in-mental-health-hampered-by-lack-of-access-lack-of-investment-20201010-3> (accessed 17 October 2022).

<sup>1837</sup> Pillay 2019: 463.

<sup>1838</sup> Nguse & Wassenaar. "Mental health and COVID-19 in South Africa", <https://journals.sagepub.com/doi/10.1177/00812463211001543> (accessed 23 October 2022). "[T]he lack of resources, support, and infrastructure required to provide services and treatment to those [in need]." Coetzee & Loades. "OPINION | Where do we begin in making mental health and wellbeing a global priority for all?", <https://www.news24.com/news24/opinions/columnists/guestcolumn/opinion-where-do-we-begin-in-making-mental-health-and-wellbeing-a-global-priority-for-all-20221010> (accessed 17 October 2022).

### **6.3.2 Mental health care and the mentally ill and bipolar disordered offender in South Africa**

There are a profusion of difficulties that confront mentally ill offenders in South Africa which include the stigma attached to mental illness,<sup>1840</sup> the overcrowding of and lack of adequate mental health care in prisons,<sup>1841</sup> their status as a vulnerable group which increases the threat of violence and even death,<sup>1842</sup> and legislation, as discussed above, which remains largely unimplemented. A recent article by Bega and Stolz<sup>1843</sup> asserts that almost 150 state patients who have been found to be criminally unaccountable or unfit to stand trial are currently “languishing... neglected or abused” in prison due to a dire shortage of psychiatric beds and medical staff.

As discussed in chapter three, a study conducted in 2013 found almost 80 per cent of offenders serving prison sentences of 25 years or more had a diagnosable mental condition,<sup>1844</sup> the most prevalent of which, per a JICS report for the period 2015/16, was bipolar disorder.<sup>1845</sup> In November 2022, former Constitutional Court justice Edwin Cameron, who is an inspecting judge for the JICS, stated that “state patients [are] a vulnerable group of inmates and the mental wellness challenges they may face places them at risk...”. Furthermore, he opined that psychiatric institutions should amend “their operational models to increase the admission of state patients”.<sup>1846</sup> While JICS have made interventions to impel quicker transfer of state patients to psychiatric

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<sup>1840</sup> Szabo 2013: 389.

<sup>1841</sup> Bantjes *et al.* “Human Rights and Mental Health in Post-apartheid South Africa: Lessons from Health Care Professionals Working with Suicidal Inmates in the Prison System”, <https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-017-0136-0> (accessed 7 November 2022).

<sup>1842</sup> Bega & Stoltz. “Neglected and abused, state patients endure prison ‘nightmare’”, <https://mg.co.za/news/2022-11-03-neglected-and-abused-state-patients-endure-prison-nightmare/> (accessed 5 November 2022).

<sup>1843</sup> Bega & Stoltz. “Neglected and abused, state patients endure prison ‘nightmare’”, <https://mg.co.za/news/2022-11-03-neglected-and-abused-state-patients-endure-prison-nightmare/> (accessed 5 November 2022).

<sup>1844</sup> Bantjes *et al.* “Human Rights and Mental Health in Post-apartheid South Africa: Lessons from Health Care Professionals Working with Suicidal Inmates in the Prison System”, <https://bmcinthealthhumrights.biomedcentral.com/articles/10.1186/s12914-017-0136-0> (accessed 7 November 2022).

<sup>1845</sup> Gasas. “Horror stories of mental illness in SA prisons”, <https://www.news24.com/health24/Mental-Health/News/horror-stories-of-mental-illness-in-sa-prisons-20180802> (accessed 7 November 2022).

<sup>1846</sup> Bega & Stoltz. “Neglected and abused, state patients endure prison ‘nightmare’”, <https://mg.co.za/news/2022-11-03-neglected-and-abused-state-patients-endure-prison-nightmare/> (accessed 5 November 2022).

facilities, there have been incidents of violence against state patients and also violence which has resulted in death.<sup>1847</sup>

Dr Tando Melapi, who is the head of forensic psychiatry at Sterkfontein Hospital, states that for an accused, and especially an accused charged with minor offences, it is likely that their waiting period for a psychiatric bed will exceed the prison sentence they will ultimately receive if found guilty.<sup>1848</sup> In addition hereto, secs. 77(6)(a) and 78(6)(a) or (b) of the CPA read with section 47(6) of the MHCA effectively permit indefinite sentences for offenders who lack criminal capacity as their release has to be determined by a judge in chambers.

Other obstacles include:

- Reverse onus

It is averred that the reverse onus contained in section 78(1A) of the CPA which is placed on an accused who, on the balance of probabilities, must prove that they suffer from a mental illness or intellectual disability,<sup>1849</sup> is at odds with the presumption of innocence and the right to equality before the law and the equal protection of the law per secs. 35(3)h and 9(1) of the *Constitution*, respectively.<sup>1850</sup> This, quite plausibly, puts mentally ill offenders on the back foot in respect of their defence. The same can be said of offenders who suffer from bipolar disorder. Indeed, suffering from bipolar disorder could make meeting the standard of proof herein even more challenging as bipolar disorder is frequently misdiagnosed.<sup>1851</sup>

- Misdiagnosis

As noted in chapter two, it is averred that no mental illness is more misdiagnosed than bipolar.<sup>1852</sup> As a result of the aforementioned lack of insight, when diagnosing bipolar disorder, anecdotal information from a partner or family members is useful.<sup>1853</sup> How

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<sup>1847</sup> Bega & Stoltz. "Neglected and abused, state patients endure prison 'nightmare'", <https://mg.co.za/news/2022-11-03-neglected-and-abused-state-patients-endure-prison-nightmare/> (accessed 5 November 2022).

<sup>1848</sup> Bega & Stoltz. "Neglected and abused, state patients endure prison 'nightmare'", <https://mg.co.za/news/2022-11-03-neglected-and-abused-state-patients-endure-prison-nightmare/> (accessed 5 November 2022).

<sup>1849</sup> *Criminal Procedure Act* 51 of 1977: sec. 78(1A).

<sup>1850</sup> Burchell 2016: 296.

<sup>1851</sup> Noonan & Johnson 2002: 7.

<sup>1852</sup> Noonan & Johnson 2002: 7.

<sup>1853</sup> Singh & Rajput 2006: 60.

often, or if ever this is enquired into both in court and during enquiries per secs. 77(1) or 78(2), is not known.

The court in *Ferreira*<sup>1854</sup> held, that to be viewed objectively by a court, the actions of an accused must be observed from the accused's perspective and only in doing so can a court give effect to an accused's constitutional right to equality.<sup>1855</sup> This is significant as bipolar disorder has made scant appearance in South African courts, as illustrated in the case law section of chapter three.

In addition, if an accused suffers from bipolar disorder and it is misdiagnosed or not diagnosed at all, whether prior to the offence or during an enquiry per secs. 77(1) or 78(2) of the CPA, effect to the aforementioned cannot be given. The potential implication hereof is that an accused who might have been found to have had complete incapacity or diminished criminal capacity in this regard would not be able to adduce a diagnosis of bipolar disorder in court.

## 6.4 RECOMMENDATIONS

### 6.4.1 *The way forward: TBS or mental health courts?*

Its disadvantages notwithstanding, TBS is an undoubtedly successful and progressive model.<sup>1856</sup> At first blush and given the immense challenges mentally ill offenders face within the South African criminal justice system, the TBS model is ostensibly appealing. Crucially, however, the Netherlands has a high budget for mental health care services<sup>1857</sup> and an exponentially decreasing prison population.<sup>1858</sup> Such is the latter that the Netherlands has concluded agreements with countries including Belgium wherein those convicted in Belgium will serve their sentences in the Netherlands.<sup>1859</sup>

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<sup>1854</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA): 467.

<sup>1855</sup> *S v Ferreira and Others* 2004 (2) SACR 454 (SCA): 467-468.

<sup>1856</sup> de Boer & Gerrits 2007: 459.

<sup>1857</sup> Statistics Netherlands. "Relatively high budget for mental health care services", <https://www.cbs.nl/en-gb/news/2015/49/relatively-high-budget-for-mental-health-care-services> (accessed 15 May 2022).

<sup>1858</sup> Boone *et al.* 2022: 488.

<sup>1859</sup> Pakes & Holt 2017: 79.

In stark contrast to the Netherlands, South Africa apportions less than five per cent of its health budget to mental health.<sup>1860</sup> The paucity of investment by the government in mental health care impedes the access thereof.<sup>1861</sup> The implication hereof is that the treatment gap means only one in ten South Africans are able to access mental health care.<sup>1862</sup>

The focus of the recommendations will be diversion out of the conventional criminal justice system as opposed to imprisonment. The socioeconomic landscape in South Africa informs this rationale, and TBS does not divert offenders out of the criminal justice system. As illustrated above, the juxtaposition between South Africa and the Netherlands in respect of mental health care budgets and the size of prison populations is stark.

In addition to a chronically underfunded mental health care system<sup>1863</sup> and overcrowded prisons,<sup>1864</sup> South Africa's exceptionally high unemployment rate<sup>1865</sup> coupled with the universal verity of a criminal conviction substantially hindering the prospects of employment,<sup>1866</sup> also provides strong justification to divert offenders out of the criminal justice system. Crucially, mental illness remains highly stigmatised in South Africa.<sup>1867</sup> Conversely, societal attitudes in the Netherlands regarding TBS and mental illness are generally largely sympathetic.<sup>1868</sup> In light of the above, MHCs, adapted to the unique challenges faced by offenders in South Africa who suffer from bipolar disorder, are posited as a feasible means by which these offenders can access therapeutic interventions, medication and criminal justice.

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<sup>1860</sup> Pillay 2019: 465.

<sup>1861</sup> Nguse & Wassenaar. "Mental health and COVID-19 in South Africa", <https://journals.sagepub.com/doi/10.1177/00812463211001543> (accessed 23 October 2022).

<sup>1862</sup> Maphanga. "Not having access to mental health treatment a violation of human rights – expert", <https://www.news24.com/news24/southafrica/news/not-having-access-to-mental-health-treatment-a-violation-of-human-rights-expert-20210415> (accessed 4 November 2022).

<sup>1863</sup> Pillay 2019: 465.

<sup>1864</sup> Bantjes *et al.* "Human Rights and Mental Health in Post-apartheid South Africa: Lessons from Health Care Professionals Working with Suicidal Inmates in the Prison System", <https://bmcinthealthumrights.biomedcentral.com/articles/10.1186/s12914-017-0136-0> (accessed 7 November 2022).

<sup>1865</sup> Trading Economics. "South Africa Unemployment Rate", <https://tradingeconomics.com/south-africa/unemployment-rate> (accessed 17 September 2023).

<sup>1866</sup> Mujuzi & Tsweledi 2014: 244.

<sup>1867</sup> See also The South African College of Applied Psychology. "The shocking state of mental health in South Africa in 2019", <https://www.sacap.edu.za/blog/management-leadership/mental-health-south-africa/> (accessed 2 November 2022).

<sup>1868</sup> McInerney 2000: 227.

#### **6.4.2 Conceptual framework and general working structure from referral to first appearance at a mental health court**

It is submitted that a MHC program be rolled out as a pilot program at one magistrates' court with the option of further MHCs following in the same magisterial district if the initial pilot program proves successful. A large-scale rollout would not be prudent given the aforementioned lack of resources and because a program of this nature should be trialled in a South African setting in order to iron out any potential teething problems whilst refining the program to allow for a more nuanced approach to any challenges MHCs might pose against a South African backdrop.

The staff component, or the MHC 'team', would consist of a dedicated magistrate who has undergone training or has experience in dealing with mentally ill offenders, a psychiatrist, a psychologist, at least one clinical social worker, depending on the case load, and MHC liaison officers at the magistrates' court. It is imperative that the team fosters a relationship of trust and builds rapport with the accused, thus team changes should be avoided if possible.

The basis of the relationship between the accused and the team must be one of respect. The MHC must therefore be premised on the principles of therapeutic justice<sup>1869</sup> and procedural justice,<sup>1870</sup> as discussed in chapter five. The magistrate's role will therefore include more engagement with the accused and will be more inquisitory in nature than would ordinarily be the case in conventional criminal proceedings. Indeed, Judge Matthew D'Emic of the Brooklyn MHC asserts that an accused's engagement with the judge or magistrate in this respect is one of the primary reasons behind the success of the Brooklyn MHC.<sup>1871</sup>

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<sup>1869</sup> Bazelon Centre for Mental Health Law. "The role of mental health courts in system reform", <http://www.bazelon.org/wp-content/uploads/2018/03/Role-of-Mental-Health-Courts.pdf> (accessed 3 October 2022).

<sup>1870</sup> Fisler 2015: 12.

<sup>1871</sup> Fisler 2015: 12.

### **6.4.3 Eligibility and assessment**

An accused must be fit to stand trial to take part in MHC proceedings as participation therein must be entirely voluntary. It is proposed that there should be three referral pathways to MHCs:

- If, at any time during criminal proceedings, a magistrate suspects that an offender who is accused of a minor, non-violent offence<sup>1872</sup> may suffer from a mental illness;
- On request of the accused who avers that he/she suffers from a mental illness; or
- On request of the accused's legal representative who avers that the accused suffers from a mental illness.

Once an accused has been referred to the MHC, he/she will be given an appointment with a social worker at the magistrates' court by an MHC liaison officer who will coordinate all appointments in respect of the MHC. Ideally, this appointment would be no more than one month after referral. The accused will be requested to bring any proof of the mental illness which he/she may be suffering from, including medication, doctor's notes, and hospital discharge forms. The accused will also be permitted to bring a relative or partner to the appointment with the social worker which is particularly important in respect of an accused who suffers from bipolar disorder considering the lack of insight discussed in paragraph 6.3.2.

With due regard to the shortages of mental health professionals, the social worker will make an initial assessment of the accused. As noted, in respect of lack of insight that an accused who suffers from bipolar disorder may experience, the social worker may ask the relative or partner who the accused has brought with them about the

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<sup>1872</sup> For example, shoplifting, disturbing the peace and public drunkenness. It must be noted, however, that while MHCs have historically excluded more serious or felony offences, research is increasingly supporting the assertion that felony and violent mentally ill offenders can, with adequate support, be safely accommodated within society (Fisler 2015: 10). Further, Almquist & Dodd assert that MHCs are "increasingly likely to accept individuals charged with more serious [offences] including felonies and, in some jurisdictions, violent crimes." (Almquist & Dodd. "Mental Health Courts: A Guide to Research-Informed Policy and Practice", <https://csgjusticecenter.org/publications/mental-health-courts-a-guide-to-research-informed-policy-and-practice/> (accessed 10 September 2022). As such, should MHCs be successfully piloted in South Africa, a further pilot project could examine the viability of MHCs to accommodate more serious crimes and/or violent offenders. Complimentary measures herein could include ankle monitors, house arrest and day release to work.

behaviour, general demeanour, and temperament of the accused. The social worker may also make use of psychological and psychiatric diagnostic questionnaires prepared by mental health professionals. These questionnaires could also be prepared by the psychologist and/or psychiatrist on the team to provide one more tailored to the needs of the MHC.

The social worker will make an initial assessment of the accused's mental state and, should the social worker find that the accused likely suffers from a mental illness, an appointment for the accused to see the psychologist and psychiatrist will be made to confirm the initial diagnosis. Once the diagnosis has been confirmed, the accused can be enrolled into the MHC program, should he/she so choose. Should the accused refuse to take part in the program or be found to not suffer from a diagnosable mental illness, he/she will be re-diverted back to the magistrates' court and the conventional criminal justice system.

#### **6.4.4 *Mental health court proceedings and program***

It is proposed that the option to participate in a MHC program, as opposed to conventional court proceedings, should be entirely voluntary. It is further proposed that the accused's legal representative should be actively involved in the proceedings. The reasons herein are threefold: first, the accused will be subject to a therapeutic regime which could include the administration of psychotropic medication; secondly, the attorney must work with the accused and the team to ensure the accused's compliance with the program and, lastly, because the accused will, as is the case in the USA,<sup>1873</sup> effectively waive his/her right to trial and effectively admit to the offence of which he/she is accused.

At the accused's first appearance at the MHC with his/her legal representative, it is envisaged that the charge(s) will be read, and the psychologist and psychiatrist will inform the MHC of their findings in respect of diagnosis and the recommended treatment regime. The terms of the program will then be set out, including the treatment regimen, the length of the program (which should be no longer than the sentence the accused would have ordinarily received in the criminal justice system),

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<sup>1873</sup> Hughes & Peak 2012: 24.

and the sanctions for non-compliance. The accused will once again affirm his/her voluntary participation in the MHC program. The MHC liaison officer will then provide the accused with his/her next appointment at the MHC.

The MHC team must be at the magistrates' court once or twice a month depending on the caseload. No two accused individuals will have the same treatment plan and, accordingly, when attending subsequent appointments at the MHC, the accused might see any combination of the social workers, the psychologist, and the psychiatrist. This being said, it is envisaged that the MHC will be a 'one-stop shop' where the accused can consult with the psychologist and the social workers, bring their relatives or partner if family therapy has been recommended, see the psychiatrist and collect their medication. Medication would be dispensed by way of a *Pelebox*.<sup>1874</sup>

The mental health professional who sees the accused will provide monthly reports to the MHC magistrate. It is suggested that the accused sees the MHC magistrate three times during the program: once at the first appearance; once in the middle of the program as a progress assessment, and at the completion of the program. It is submitted that the accused's legal representative does not have to attend the follow-up hearings with the accused but can/may do so.

Should the accused, the accused's legal representative, or one of the mental health professionals so request, additional hearings with the magistrate could be arranged. Additional hearings would also be necessary if the accused is non-compliant with respect to the program. Regarding sanctions, it is suggested that the MHC adopt a three-strike system. This would mean that a warning would be issued by the MHC after the first and second act of non-compliance. If there is a third act of non-compliance, the accused would be re-diverted back to the magistrates' court and the conventional criminal justice system.

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<sup>1874</sup> Pele Box. "What are smart lockers", <https://www.pelebox.com/locker.html> (accessed 7 November 2022). "Pelebox is a digital platform that manages various internet enabled smart lockers. [The] smart lockers enable patients to collect their repeat chronic medication... [The]... lockers can be placed at various locations" [like MHC's]. The accused's prescription will be enrolled by a MHC liaison officer into the Pelebox collection program. The medication will be loaded into the smart locker whereupon the accused will receive a one-time pin via SMS which they will use to access their medication in the smart lockers which are located at the MHC.

On successful completion of the program, the accused, as mentioned above, would appear before the magistrate at the MHC one last time. Thereafter, the MHC would provide information to the accused in respect of aftercare, should it be necessary. As one of the primary aims of the MHC is to take pressure off an already overburdened criminal justice system, it is not recommended that an accused who has completed the program be allowed to continue to access psychological and psychiatric services at the MHC but can, for example, be referred by a social worker to a mental health professional or institution and may still be able to collect their medication from the MHC.

#### **6.4.5 Benefits of mental health care courts within a South African context**

It is trite that South Africa has both an inordinately high crime rate and that overcrowding of prisons is rife. The national overcrowding rate currently stands at 31.65 per cent which is almost ten per cent higher than 2020/2021.<sup>1875</sup> Diversion programs such as MHCs could fulfil a vital and highly beneficial role within the South African criminal justice landscape for numerous reasons.

MHCs, as previously stated, would offer a ‘one-stop shop’ for mentally ill offenders. As noted above in paragraph 6.3.1, geographic distances between sufferers of mental illness and treatment facilities and mental health care professionals are often vast in South Africa. By offering these services to offenders who suffer from mental illness at magistrates’ courts, of which there are 370 in South Africa,<sup>1876</sup> it would greatly improve accessibility to treatment and reduce the burden on the criminal justice system.

MHCs could serve to reduce the overcrowding of prisons by diverting mentally ill offenders who suffer from mental illness to MHCs. In respect of overcrowding, it could also serve to keep offenders out of jail who suffer from mental illness and who have

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<sup>1875</sup> Cruywagen. “As prison overcrowding rate intensifies, Popcru threatens Pollsmoor strike”, <https://www.dailymaverick.co.za/article/2022-10-13-as-prison-overcrowding-rate-intensifies-popcru-threatens-pollsmoor-strike/> (accessed 7 November 2022).

<sup>1876</sup> The South African Judiciary. “FAQ”, <https://www.judiciary.org.za/index.php/faq> (accessed 7 November 2022).

committed minor offences and who, as asserted above,<sup>1877</sup> often spend more time awaiting a bed in a psychiatric institution than they would have served for the offence.

In addition, MHCs would offer a holistic approach to the treatment of mental illness by not just medicating an accused but by also providing psychological therapy, access to clinical social workers and family therapy. This holistic nature of the program, if mental illness is the reason or indeed one of the reasons for the criminal behaviour, could serve to prevent recidivism.

The envisaged component of family or partner involvement (as stated previously in this paragraph and which is particularly pertinent with bipolar disorder) and the fact that MHCs will be within a local community, will encourage family involvement and could act as a catalyst in creating community involvement. This could potentially go some way in explaining mental illness within and at a community level and reducing the stigma around it.

Rolling out a pilot MHC site at a magistrates' court would be a quick and relatively inexpensive intervention. From a community standpoint, as noted above, it could serve to educate and to reduce stigma around mental illness. Furthermore, by not having a criminal record and having received life skills which ordinarily might not have been imparted without the MHC, an accused's employment prospects are better, and the risk of recidivism is reduced, thus benefitting not only the accused but also the community.

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<sup>1877</sup> Bega & Stoltz. "Neglected and abused, state patients endure prison 'nightmare'", <https://mg.co.za/news/2022-11-03-neglected-and-abused-state-patients-endure-prison-nightmare/> (accessed 5 November 2022).

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