

**AN ANALYSIS OF THE LEGAL RESPONSE  
TO CHILDREN WHO COMMIT SERIOUS  
CRIMES IN SOUTH AFRICA**

By

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## DECLARATION OF ORIGINALITY

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Signature of Supervisor: \_\_\_\_\_

## LIST OF ABBREVIATIONS

ACRWC	African Charter on the Rights and Welfare of the Child
CC	Constitutional Court
CJA	Child Justice Act
CPA	Criminal Procedure Act
CRC	Convention on the Rights of the Child
DPP	Director of Public Prosecutions
FGC	Family Group Conference
IMC	Inter-Ministerial Committee
ISS	Institute for Security Studies
NGO	Non-Governmental Organisation
NICRO	National Institute for Crime Prevention and the Reintegration of Offenders
NMMU	Nelson Mandela Metropolitan University
NPA	National Prosecuting Authority
p	page
para	paragraph
PER/PELJ	Potchefstroomse Electronic Law Journal
PTCS	Pre-Trial Community Service
RJ	Restorative Justice
S	The State
SA	South Africa
SACR	South African Criminal Reports
SAJHR	South African Journal of Human Rights
SALC/SALRC	South African Law Reform Commission
SALR	South African Law Reports
SCA	Supreme Court of Appeal
sch	schedule
TRC	Truth & Reconciliation Commission
UN	United Nations
UNICEF	United Nations Children's Fund
UNISA	University of South Africa
UNJDJL	United Nations Rules for Juveniles Deprived of their Liberty
UP	University of Pretoria
UWC	University of the Western Cape
v	versus
VIS	Victim Impact Statement
VOM	Victim Offender Mediation
YES	Youth Empowerment Scheme

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## SUMMARY

South Africa's first democratic elections in April 1994 led to the birth of a new political era which also brought constitutional guarantees for children in conflict with the law; one of the most important being section 28(1)(g) of the Constitution which provides that a child can only be detained as a measure of last resort and for the shortest appropriate period of time.

Despite this provision, past sentencing practice has shown an over-reliance on the use of custodial sentences. This could largely be attributed to the tug-of-war between the legislature and the courts about the applicability of the minimum sentencing legislation on children between the ages of sixteen and eighteen.

With the promulgation of the Child Justice Act, renewed emphasis has been placed on the desirability to keep children out of prison. To achieve this purpose, diversion of children is now a central feature of the child justice system. Should a matter however proceed to trial, the Act provides for a wide range of alternative sentencing options that can be imposed on children.

The purpose of this dissertation is to establish to what extent the courts make use of these alternatives to imprisonment, especially in cases where children committed very serious offences such as murder and rape. This dissertation concludes that, although alternative sentences are appropriate sentences for serious offences, courts still impose custodial sentences for these types of offences, and that the seriousness of the offence is the most important aggravating factor tipping the scale in favour of the imposition of custodial sentences.

The growing number of young people in already overcrowded South African prisons is a cause for concern, said the new Department of Correctional Services (DCS) Minister Nosiviwe Mapisa-Nqakula on Tuesday.

Mapisa-Nqakula, accompanied by her deputy, Hlengiwe Mkhize, was visiting the Boksburg Correctional Centre on their fourth leg of their regional visits to listen and familiarize themselves with correctional services.

She was shocked to find a number of young people, some aged 15, being held in the Boksburg prison for serious crimes.

Boksburg houses 554 juveniles, most of them serious offenders serving long sentences, including life terms.

Mapisa-Nqakula said she was becoming aware of the reality of a South African society that produced young people who commit serious crimes. [...] Mapisa-Nqakula said the magnitude of the prisons problem was beyond correctional services. It required society to take responsibility for rehabilitation.<sup>1</sup>

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<sup>1</sup> Taken from [www.24.com](http://www.24.com), visited 22 July 2009.

# **CHAPTER 1**

## **INTRODUCTION**

“[...] If you want to increase the crime problem, incite men to greater evil, [...] then lock violators up in prison for long periods, reduce their outside contacts, stigmatize them and block their lawful employment when released, all the while setting them at tutelage under the direction of more skilled and predatory criminals. I know of no better way to gain your ends than these.”<sup>2</sup>

### **1. CONTEXT OF THE STUDY**

#### **1.1 Introduction**

##### **1.1.1 The sentencing phase**

##### **1.1.2 Sentencing aims**

##### **1.1.3 The starting point: The Zinn-Triad**

###### **1.1.3.1 The crime**

###### **1.1.3.2 The criminal**

###### **1.1.3.3 The interests of society**

#### **1.2 The development of a separate juvenile justice system for children in conflict with the law**

##### **1.2.1 Introduction**

##### **1.2.2 The difficulty courts experience when sentencing children**

##### **1.2.3 Developing a separate juvenile justice system in South Africa**

###### **1.2.3.1 History**

###### **1.2.3.2 Constitutional developments**

###### **1.2.3.3 Development of a post-constitutional jurisprudence**

###### **1.2.3.4 Minimum sentences**

#### **1.3 The Child Justice Act 75 of 2008**

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<sup>2</sup> Allen HE (1997) Corrections in the community.

## 1.4 Purpose of the study

## 1.5 Important Definitions

## 1.6 Methodology and structure

# 1. CONTEXT OF THE STUDY

## 1.1 Introduction

Sentencing is seen as the most difficult and complex phase of a criminal trial.<sup>3</sup> During the sentencing phase a presiding officer is expected to consider the so-called Zinn-triad<sup>4</sup> (the offence, the offender and the interests of society) and to a large extent rely on the balancing of all the legally relevant factors in order to come to an appropriate sentence.<sup>5</sup> Within this balancing process the courts are expected to impose sentences that will serve the purposes of deterrence, prevention, rehabilitation and retribution.<sup>6</sup>

The difficulty South African courts have in determining an appropriate sentence can be based on the following reasons:<sup>7</sup>

- The first has to do with the discretion a court has when sentencing an offender. Our courts seem to experience problems in separating the fact-finding phase from the decision-making phase.<sup>8</sup>
- Secondly, the sentencing phase constitutes a shift from the strict adversarial

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<sup>3</sup> See Terblanche (2007) 114.

<sup>4</sup> S v Zinn 1969 (2) SA 537 (A).

<sup>5</sup> Terblanche 2005 (2) SACJ 187 on 189.

<sup>6</sup> Ibid on 198.

<sup>7</sup> Ibid on 187.

<sup>8</sup> Ibid on 193. The exercise of discretion has two distinct phases. First, all the factors relevant to sentence have to be established, and in this process discretion should play hardly any role. It is only when all the facts have to be balanced and considered in conjunction with other relevant considerations and circumstances that the exercise of discretion comes into play.

contest to a convergence of accusatorial and inquisitorial procedures.<sup>9</sup> Most role players in the criminal justice system experience difficulty in dealing with the more inquisitorial procedures required during sentencing as they have been schooled only in the adversarial trial system.<sup>10</sup>

- Thirdly, it is often difficult to determine the blameworthiness of the offender. The courts frequently refer to the blameworthiness or culpability of the offender as a measure of how severe the punishment needs to be.<sup>11</sup> The modern view of the seriousness of the crime generally also refers to the blameworthiness of the offender.<sup>12</sup> This would mean that the seriousness of the offence is affected by the extent to which the offender can be blamed for the harm caused by the crime.<sup>13</sup> This is a partly objective assessment but it should include those subjective factors that will lessen or increase the blame that can be attributed to the offender.<sup>14</sup> Typical examples include youth; provocation and certain forms of mental illness.<sup>15</sup>
- Fourthly, and most importantly, the court finds itself in a conflict zone. On the one hand it is forced to have a more individualised approach to sentencing,<sup>16</sup> and, on the other it is faced with criticism over big differences in sentences for

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<sup>9</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p3.

<sup>10</sup> Terblanche 2005 (2) SACJ 187 on 187.

<sup>11</sup> Terblanche (2007) 150 and op cit n152.

<sup>12</sup> Terblanche (2007) 150.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid.

<sup>15</sup> Ibid.

<sup>16</sup> See for instance *S v Scheepers* 1977 (2) SA 155 (A) at 158G-H where Viljoen JA stated: “[d]it is ‘n vaste beginsel in ons reg dat daar geïndividualiseer moet word...In die proses van individualisering kan sosiologiese omstandighede, strafbelewensfaktore, rehabilitasievoorsigte [...] nie uit die oog verloor word nie.”



offenders who commit similar crimes.<sup>17</sup>

It would thus seem that sentencing is a very complex part of the trial and that judicial officers face a very difficult job in sentencing offenders. As will be indicated later<sup>18</sup> the sentencing phase is even more difficult when children are involved.

### **1.1.1 The sentencing phase**

The procedures to be followed after conviction and the order in which the various presentations are to be made have evolved over time,<sup>19</sup> and are now partly prescribed in the Criminal Procedure Act.<sup>20</sup> The sentencing phase consists of four stages.<sup>21</sup> Immediately after conviction the state may prove the accused's previous convictions.<sup>22</sup> Thereafter the defence and the state have the opportunity to present evidence, often by way of an *ex parte* statement from the Bar,<sup>23</sup> on issues and facts that will influence sentence.<sup>24</sup> Thirdly, both parties will be given the opportunity to address the court,<sup>25</sup> followed, finally, by the court's consideration of the available information and of the

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<sup>17</sup> See Terblanche (2007) 119 where he sets out the demerits of the judicial discretion. He states that divergent sentences imposed on similarly placed people for similar crimes are at odds with the right to be equal before the law. Also see *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 35.

<sup>18</sup> See para 1.2.2 later.

<sup>19</sup> Terblanche (2007) 79.

<sup>20</sup> Act 51 of 1977; hereafter referred to as the CPA.

<sup>21</sup> Van der Merwe A (2005) *Aspects of the Sentencing Process in Child Sexual Abuse Cases* Unpublished PhD Thesis, Rhodes University, p4.

<sup>22</sup> Section 271(1) of the CPA.

<sup>23</sup> Terblanche (2007) 79. In terms of the CJA this is not practice. See chapter 3 later.

<sup>24</sup> Section 274(1) of the CPA provides as follows: "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."

<sup>25</sup> Section 274(2) of the CPA provides: "The accused may address the court on any evidence received under subsection (1), as well as on the matter of sentence, and thereafter the prosecution may likewise address the court."

imposition of a proper sentence.<sup>26</sup> As indicated above,<sup>27</sup> the sentencing phase has developed a more inquisitorial nature.<sup>28</sup> It differs from the trial phase in that it is more flexible and also focuses on new and separate issues that become relevant.<sup>29</sup> The necessary information in this phase extends beyond the elements of the crime and the question of guilt or innocence.<sup>30</sup> Numerous judgements have stated that, if the parties to the issue do not provide sufficient information to enable the court to impose an appropriate sentence, the court has to act positively in order to get the necessary information.<sup>31</sup> In *R v Hepworth*<sup>32</sup> the court noted:

“[...] [A]nd a Judge’s position in a criminal trial is not merely that of an umpire to see that the rules of the game are observed by both sides. A Judge is an administrator of justice, he is not merely a figure-head, he has not only to direct and control the proceedings according to recognised rules of procedure but to see that justice is done.”

With the accused as an individual becoming more important, and with his or her future being considered,<sup>33</sup> the inquisitorial role of the presiding officer is becoming more

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<sup>26</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p4.

<sup>27</sup> See paragraph 1.1 above.

<sup>28</sup> Terblanche (2007) 94.

<sup>29</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University on p5.

<sup>30</sup> Ibid.

<sup>31</sup> Terblanche (2007) 87-88.

<sup>32</sup> 1928 AD 265 at 277-278. Terblanche op cit n74 p86.

<sup>33</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p5.

important in order to reach an appropriate sentence.<sup>34</sup>

### 1.1.2 Sentencing aims

Each sentence should express a general justifying aim.<sup>35</sup> Lawyers, philosophers, religious leaders and others however, do not agree on the sole purpose of punishment.<sup>36</sup> In the selection of a generally justifiable aim for the imposition of a sentence, the courts normally consider retribution, deterrence, prevention and rehabilitation.<sup>37</sup> In more recent years a fifth theory called restorative justice has emerged.<sup>38</sup>

#### Retribution

The theory of retribution is sometimes referred to as the “justice” theory because punishment is said to redress the imbalance brought about by the crime.<sup>39</sup> This element has as its aim the expression of public revulsion to the offence and the punishment of the offender.<sup>40</sup> The idea is that when a person commits a crime, an injustice has occurred. Therefore, the only way of restoring social balance is to punish the offender.<sup>41</sup> The term retribution, however, has no single meaning.<sup>42</sup> The various senses in which our courts have referred to retribution are the following:<sup>43</sup>

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<sup>34</sup> The CJA now formally provides for an informal, inquisitorial pre-trial procedure where diversion and other possible ways to deal with children in conflict with the law, can be considered. See para 3.2.4.3 in Chapter 3.

<sup>35</sup> Du Toit et al (updated 2010) 28-9.

<sup>36</sup> See Greenbaum & Maisel (2001) 163, where they state that there are many different ideas of why and how criminals should be punished.

<sup>37</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p9.

<sup>38</sup> Greenbaum & Maisel (2001) 163.

<sup>39</sup> Du Toit et al (updated 2010) 28-10. Rabie & Strauss (1979) 4.

<sup>40</sup> Ibid.

<sup>41</sup> Greenbaum & Maisel (2001) 163.

<sup>42</sup> Terblanche (2007) 165.

<sup>43</sup> Ibid.

- It is an expression of society's moral outrage at the crime,<sup>44</sup>
- it relates to the maxim that the punishment must fit the crime,<sup>45</sup>
- it is sometimes equated to vengeance,<sup>46</sup>
- the ordinary dictionary meaning refers to requital for evil.<sup>47</sup>

In essence retribution requires the sentencing court to impose an appropriate sentence on the offender,<sup>48</sup> and, although it has many critics,<sup>49</sup> it can play a dominant role in sentencing.<sup>50</sup>

### **Deterrence**

Deterrence can be described as follows: a person would refrain from committing certain acts if this person knows that committing such acts would have unpleasant consequences. Deterrence may be general (that is aimed at the public at large) or individual (aimed at the offender).<sup>51</sup>

In terms of general deterrence, the sentence is used as an example to other potential offenders.<sup>52</sup> The belief is that the threat of similar punishment will cause potential offenders to refrain from committing crime.<sup>53</sup>

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid. Also see Greenbaum & Maisel (2001) 163 where it is explained that retribution is the equivalent for "an eye for an eye." Also see Schmallegger (1997) 360.

<sup>47</sup> Ibid.

<sup>48</sup> Terblanche (2007) 170. Also see Greenbaum & Maisel (2001) 163.

<sup>49</sup> Greenbaum & Maisel (2001) 163. Rabie & Strauss (1979) 6.

<sup>50</sup> S v De Kock 1997 (2) SACR 171 (T) at 192e; S v Smith 1996 (1) SACR 250 (E) at 253b-c.

<sup>51</sup> Du Toit et al (updated 2010) 28-10.

<sup>52</sup> Terblanche (2007) 156.

<sup>53</sup> Ibid.

Despite this belief, there is an ever-growing body of research showing that deterrence cannot be accepted as a fact.<sup>54</sup> This, however, does not mean that sentencing can be done away with. Even by our highest courts have explained that the real deterrent is not in the extent of the punishment, but rather in the certainty that punishment will follow.<sup>55</sup>

The theory behind individual deterrence is that the offender would be deterred from re-offending either because he has learned from the previous unpleasant punishment, or because he is fearful of what may happen to him if he re-offends.<sup>56</sup>

### **Prevention**

Prevention is forward looking in that it seeks to prevent the commission of future crimes.<sup>57</sup> Rabie & Strauss<sup>58</sup> states that “the basic idea [...] is offenders should become, and citizens generally should remain law-abiding.” In the narrow sense it means the physical prevention of the accused to commit further crimes.<sup>59</sup> The incapacitation of an offender is of particular importance if that offender is a danger to society, and can only be reached by the incarceration of that offender.<sup>60</sup> The extent to which the offender can be removed from society should, however, be limited by the requirement that the punishment must fit the crime.<sup>61</sup>

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<sup>54</sup> Terblanche (2007) 157. Also see Greenbaum & Maisel (2001) 164 where it is noted that studies have shown that many offenders who have served prison sentences do commit further crimes after being released. Rabie & Strauss (1979) 11 also indicate that this theory has been criticized because of high recidivism rates amongst offenders.

<sup>55</sup> See *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 122 where Chaskalson J states: “[t]he greatest deterrent to crime is the likelihood that offenders will be apprehended, convicted and punished.”

<sup>56</sup> Terblanche (2007) 161&162. Rabie & Strauss (1979) 11.

<sup>57</sup> Du Toit et al (updated 2010) 28-10.

<sup>58</sup> (1979) 9.

<sup>59</sup> Terblanche (2007) 162.

<sup>60</sup> Ibid.

<sup>61</sup> Ibid.

## Rehabilitation

Rehabilitation has been explained as “aimed at the improvement of the offender”<sup>62</sup> and as “the offender has been made to see that she acted in error.”<sup>63</sup> Whatever the correct view of rehabilitation, it generally presupposes that treatment is preferred to punishment.<sup>64</sup> This theory of punishment is aimed at changing the personality or character of an offender, or assisting him to overcome a specific problem such as drug dependency, or helping him to gain job skills for employment so that he will not need to commit future crimes.<sup>65</sup>

Rehabilitation has always been seen as an important consideration by our courts.<sup>66</sup> In 1985, in the case of *S v Skenjana*<sup>67</sup> the court declared that retribution has lost ground to rehabilitation. Later, in the well-known case of *S v Williams*<sup>68</sup> the Constitutional Court indicated that there has been a shift of emphasis from retribution to rehabilitation. A number of important judgements have recently held that, especially in the case of really serious crimes where long imprisonment terms are imposed, rehabilitation becomes a minor consideration.<sup>69</sup> With the promulgation of the CJA, however, the rehabilitation of the child offender has become a very important consideration during the sentencing phase.<sup>70</sup>

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<sup>62</sup> Terblanche (2007) 163.

<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> Greenbaum & Maisel (2001) 164. Rabie & Strauss (1979) 12.

<sup>66</sup> *S v Skenjana* 1985 (3) SA 51 (A) at 55A-B.

<sup>67</sup> Ibid.

<sup>68</sup> 1995 (2) SACR 251 (CC); 1995 (3) BCLR 861 (CC). In this case the sentence of juvenile whipping was declared unconstitutional.

<sup>69</sup> Terblanche (2007) 164.

<sup>70</sup> Section 69(1)(c) of the CJA specifically provides that one of the objectives of sentencing in terms of the act is to promote the reintegration of the child into the family and the community. The preamble of the act also states that one of the aims of the act is to be “proactive in crime prevention by placing increased

## Restorative Justice

The theory of restorative justice is similar to retribution,<sup>71</sup> the means however, for reaching this goal differs.<sup>72</sup> Rather than focusing on retribution or punishment, restorative justice seeks to reach an agreed upon sentence that will restore the community, the victim and the offender to their former state.<sup>73</sup> Restorative Justice promotes the view that crime is a violation of relationships rather than a simple breaking of the law, and that the appropriate response should go beyond punishment and encompass putting right the wrong caused to victims and society.<sup>74</sup> Where retributive justice focuses on the violation of the law; restorative justice focuses on the violation of people and relationships.<sup>75</sup>

Three programmes have become hallmarks of restorative justice processes:<sup>76</sup>

- **Victim-offender mediation**

This involves bringing together the victim and offender, along with a mediator who coordinates and facilitates the meeting. In the meeting the victim can describe the effect that the crime has had on him/her and the offender can explain why he/she committed the crime. When both the victim and offender have had their say, the mediator will help them consider possible ways to make things right.<sup>77</sup>

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emphasis on the effective rehabilitation and reintegration of children in order to minimize the potential for re-offending.”

<sup>71</sup> The goal is to restore society and the victim of crime to the state that existed before the crime was committed.

<sup>72</sup> Greenbaum & Maisel (2001) 164.

<sup>73</sup> Ibid.

<sup>74</sup> Van Bonde JC 2008 OBITER (29:2) 133 on 134.

<sup>75</sup> Van Ness D, Morris A & Maxwell G Introducing Restorative Justice in Maxwell G & Morris A (eds) Restorative Justice for Juveniles: Conferencing, Mediation & Circles (2001) 3.

<sup>76</sup> Ibid p6.

<sup>77</sup> Ibid p7.

- **Conferencing**

Conferencing differs from victim-offender mediation in that it not only involves the primary victim and offender, but also secondary victims such as family members or friends of the victim and offender. In addition, representatives of the criminal justice system may also participate. The group will then decide together on what the offender needs to do to repair the harm. The agreement is then put into writing, signed and sent to the appropriate criminal justice officials.<sup>78</sup>

- **Circles**

Circles are similar to conferencing in that they expand participation beyond the primary victim and offender. In this case, however, any member of the community who has an interest in the case may come and participate.<sup>79</sup> Typically, the offender begins with an explanation of what happened, and then everyone around the circle is given an opportunity to talk.

As will be indicated in the chapters to follow, rehabilitation and restorative justice principles now form a central part of the child justice system.

### **1.1.3 The starting point: The Zinn-triad**

In *S v Zinn*<sup>80</sup> Rumpff JA was the author of a dictum that would become trite: “[w]hat has to be considered is the triad consisting of the crime, the offender and the interests of society.”<sup>81</sup>

#### **1.1.3.1 The crime**

The crime has always been an extremely important ingredient of any sentence – in fact –

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<sup>78</sup> Ibid p7-8.

<sup>79</sup> Ibid p8-9.

<sup>80</sup> 1969 (2) SA 537 (A).

<sup>81</sup> At 540G-H.



no other factor has the same influence on the nature and extent of the sentence.<sup>82</sup> This relationship is further expressed by the proportionality principle.<sup>83</sup> One of the most difficult steps in the sentencing process is to find a sentence which reflects the seriousness of the crime. In determining the seriousness of the crime, courts usually look at the view society may have of the crime.<sup>84</sup>

### 1.1.3.2 The criminal

The process of looking specifically at the offender is often referred to as individualisation.<sup>85</sup> Ideally, the presiding officer should get to know the character and motives of the offender because many factors<sup>86</sup> are involved when the criminal is considered.<sup>87</sup> Furthermore, the courts have emphasized that justice should be tempered with mercy.<sup>88</sup> In *S v V*<sup>89</sup> Holmes JA declared: “The element of mercy, a hallmark of a civilized and enlightened administration, should not be overlooked, [...] True mercy has nothing in common with soft weakness, or maudlin sympathy for the criminal, or permissive tolerance. It is an element of justice in itself.”<sup>90</sup>

In *S v Van der Westhuizen*<sup>91</sup> Baker J held that “mercy” means: “[T]hat justice must be done, but it must be done with compassion and humanity, not by rule of thumb, and that a

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<sup>82</sup> Terblanche (2007) 147.

<sup>83</sup> Ibid.

<sup>84</sup> In *S v Mhlakaza* 1997 (1) SACR 515 (SCA) at 518b-c the court stated: “[...] ‘n Vonnis moet uitdrukking gee aan die wetsgehoorsame gemeenskap se gevoel van verontwaardiging oor ‘n bepaalde misdryf. Hoe afskuweliker ‘n misdaad in die oë van die ordentlike publiek, hoe swaarder moet die straf wees.”

<sup>85</sup> Terblanche (2007) 150.

<sup>86</sup> This include age, marital status, presence of dependants, level of education and employment.

<sup>87</sup> Terblanche (2007) 150.

<sup>88</sup> Rabie & Strauss (1979) 60.

<sup>89</sup> 1972 (3) SA 611 (A).

<sup>90</sup> On 614.

<sup>91</sup> 1974 (4) SA 61 (C).

sentence must be assessed not callously or arbitrarily or vindictively, but with due regard to the weaknesses of human beings and their propensity for succumbing to temptation.”<sup>92</sup>

The average offender, however, appears before the presiding officer for a very short time.<sup>93</sup> This makes it almost impossible for the presiding officer to get to know that offender.<sup>94</sup> A valuable aid in developing a better understanding of the accused is the use of a pre-sentence report.<sup>95</sup>

### **1.1.3.3 The interests of society**

The interests of society should be understood as “serving the interests of society.”<sup>96</sup> When considering the interests of society, it is important to remember that the most severe sentence is not necessarily the most appropriate. Notwithstanding a persistent demand for increasingly more severe sentences to be imposed on all offenders for all crimes.<sup>97</sup> The foundation for this demand is found in the belief that no sentence can really be too severe, and that the more severe it is the better it will protect society.<sup>98</sup>

Du Toit<sup>99</sup> correctly states that the interests of society can operate both to increase and decrease punishment. For example, society’s interests will not be served by sending an offender to prison, causing him to lose his job and his dependants to be supported by the

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<sup>92</sup> At 66E-F.

<sup>93</sup> Terblanche (2007) 151.

<sup>94</sup> Ibid.

<sup>95</sup> In terms of the CJA, presiding officers are now obliged to obtain a pre-sentence report before imposing sentence on a child. See paragraph 3.5 below for a more detailed discussion about the role of the pre-sentence report when a child is being sentenced.

<sup>96</sup> Terblanche (2007) 155.

<sup>97</sup> Ibid on 146.

<sup>98</sup> Ibid.

<sup>99</sup> (1981) 54.

state.<sup>100</sup> In such instance, the interests of society will mitigate the sentence. A good illustration of how the interests of society can mitigate the sentence, was the case of *S v S*.<sup>101</sup> In this case Rumpff JA imposed a fully suspended sentence on an offender in order to allow him to complete his treatment with the same psychologist and to allow his family to also participate in the treatment.

The interests of society are best served by a sentence that produces the biggest advantage, or the least potential harm to society.<sup>102</sup>

## **1.2 The development of a separate juvenile justice system for children in conflict with the law**

### **1.2.1 Introduction**

Despite the fact that the South African law did not have a separate child justice system for a long time, children had always been treated differently than adults.<sup>103</sup> Section 290 of the CPA,<sup>104</sup> for instance, provided for sentences that could only be imposed on children.<sup>105</sup> A further indicator that children warranted special treatment can be seen from the rule that the youthful age of an offender is an important mitigating factor to be

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<sup>100</sup> Du Toit (1981) 55.

<sup>101</sup> 1977 (3) SA 830 (A).

<sup>102</sup> Terblanche (2007) 154. Van der Merwe contends that the triad has been squared with the increased acknowledgement of the role of the victim(s) in the sentencing process – see Van der Merwe A (2005) *Aspects of the Sentencing Process in Child Sexual Abuse Cases* Unpublished PhD Thesis, Rhodes University, p256. This was endorsed by the fact that the use of a VIS during the sentencing phase has now for the first time been recognised in the CJA – this is discussed further in para 3.4 in Chapter 3.

<sup>103</sup> SALC Discussion Paper 79: *Juvenile Justice: 1998* p 28. The South African common law, for instance, had special provisions regarding the criminal capacity of children. For children under the age of 7 years, there was an irrebutable legal presumption, which declared that such children were incapable of forming the intention to commit a crime. A child between the ages of 7 and 14 was presumed to lack criminal capacity until this presumption was rebutted by the state.

<sup>104</sup> Criminal Procedure Act 51 of 1977.

<sup>105</sup> These included that a child under the age of 21 could be placed under the supervision of a probation or correctional officer or that such a child could be sent to a reformatory. Children below the age of 18 could also be placed in the custody of any other suitable person. Section 290 of the CPA has however been repealed by the Child Justice Act 75 of 2008 – see paragraph 1.3 later.

considered when passing sentence.<sup>106</sup>

## 1.2.2 The difficulty courts experience when sentencing children

In *Director of Public Prosecutions, Kwazulu-Natal v P*<sup>107</sup> the court acknowledged that the sentencing of child offenders are even more complex than the sentencing of adults.<sup>108</sup>

The complexity courts experience when sentencing children can be based on the following:

- In addition to the so-called “traditional approach” as set out in *S v Zinn*,<sup>109</sup> child offenders should be sentenced with due regard to section 28 of the Constitution of the Republic of South Africa.<sup>110</sup>
- International developments regarding juvenile justice<sup>111</sup> provide a comprehensive framework within which the issue of child justice must be understood.<sup>112</sup> By ratifying the UN Convention on the Rights of the Child, South Africa is obliged, in terms of article 40(3) thereof, to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law.<sup>113</sup> The Constitutional Court’s decision in *S v Williams*<sup>114</sup> also suggested that South Africa’s child justice legislation should incorporate acceptable international

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<sup>106</sup> See *S v Malinga* 1986 (4) SA 296 (E) where the court noted that the role youthfulness played at sentencing stage was that it was regarded as “an element which, depending on the circumstances of the case, tend[ed] to mitigate the severity of punishment.” See further *S v Lehnberg* 1975 (4) SA 553 (A) which has become a locus classicus on youth as a mitigating factor.

<sup>107</sup> 2006 (1) SACR 243 (SCA).

<sup>108</sup> At para [12].

<sup>109</sup> 1969 (2) SA 537 (A).

<sup>110</sup> Act 108 of 1996. See discussion about this in para 1.2.3.2 later.

<sup>111</sup> Such as the UN Convention on the Rights of the Child; the UN Standard Minimum Rules for the Administration of Juvenile Justice; the UN Rules for the Protection of Juveniles Deprived of their Liberty and the African Charter on the Rights and Welfare of the Child.

<sup>112</sup> SALC Project 106: Report on Juvenile Justice: 2000 p 1.

<sup>113</sup> *Ibid.*

<sup>114</sup> 1995 (3) BCLR 861 (CC); 1995 (2) SACR 251 (CC). See para 1.2.3.3 later for a more detailed discussion of this case.

standards as well as further rules and limitations as to ensure the effective implementation of these international standards.<sup>115</sup>

- Problems experienced by children in conflict with the law are, by their very nature, social in origin. No child is born a criminal or chooses to be born in socio-economically deprived circumstances. A child in conflict with the law is generally victims of circumstance and, as a point of departure, deserves the opportunity to be afforded a “second chance.”<sup>116</sup>
- In sentencing children special considerations are involved, none perhaps more so than simply the fact that there is a measure of sympathy for the immaturity and impetuosity which are so characteristic of the youth in general. In *S v Solani*<sup>117</sup> Steenkamp J stated that juveniles are often immature, lack experience and are more likely to do something irresponsible than adults. He further states that “[t]hey should be brought to justice, in the interests of society, with understanding and mercy.”<sup>118</sup>
- When sentencing children favour must be given to sentences, which will help with the rehabilitation and reintegration of such child into society.<sup>119</sup> In *R v Smith*<sup>120</sup> the court declared: “[T]he State should not punish a child of tender years as a criminal and stamp him as such throughout his after life, but it should endeavour...to educate and uplift him...”<sup>121</sup> In *S v Adams*<sup>122</sup> Steyn J confirmed that great care is needed in determining a suitable punishment especially in the

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<sup>115</sup> SALC Project 106: Report on Juvenile Justice: 2000 p 150.

<sup>116</sup> Kotze (2009) (11:3) Art 40 7.

<sup>117</sup> 1987 (4) SA 203 (NC).

<sup>118</sup> At 220E-F.

<sup>119</sup> SALC Project 106: Report on Juvenile Justice: 2000 p 150. See Greenbaum & Maisel (2001) 164 where it is noted that studies have shown that rehabilitation has so far been most successful with youthful offenders.

<sup>120</sup> 1922 TPD 199.

<sup>121</sup> At 201.

<sup>122</sup> 1971 (4) SA 125 (C).

case of juveniles, where the possibility of reform is greater and the result of an indiscriminate exercise of the sentence discretion potentially irreparable.<sup>123</sup> The major problem is that South Africa does not have the resources to run expensive treatment programmes and most prisons are poorly equipped for skills training or other opportunities for rehabilitation.<sup>124</sup>

- Lastly, when sentencing a child, the court – once again – finds itself in a conflict zone. On the one hand it is faced with research indicating that children commit some of the most heinous crimes in this country,<sup>125</sup> and, on the other, with a human rights model that requires the courts to treat children differently than adults.<sup>126</sup>

It would thus seem that sentencing children is a diverse phenomenon and judicial officers face a particularly complex task in finding appropriate sentences for children.

### **1.2.3 Developing a separate juvenile justice system in South Africa**

#### **1.2.3.1 History**

The first intensive calls for a fair and equitable juvenile justice system emerged in the early 1990's, and emanated from a group of non-governmental organisations (NGO's) who went into courts, police cells and prisons to provide assistance to children who were

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<sup>123</sup> At 126H.

<sup>124</sup> Greenbaum & Maisel (2001) 164.

<sup>125</sup> In the past decade children were involved in a number of controversial crimes: In Dec 2001, four boys, aged 15 and 16 at the time, attacked and killed an unidentified man and assaulted another. These four boys, who later became famous as the so-called "Waterkloof 4" later started serving their 12 year imprisonment sentence after a seven year battle to avoid jail.

In 2005 a 16 year old boy, BS, was arrested as one of the four accused hired by Dina Rodrigues to kill her ex-boyfriend's six month old baby, Jordan-Leigh Norton.

On 14 Jan 2008, 18 year old Johan Nel walked into the Skierlik informal settlement near Swartruggens and started shooting – killing 4 people (including a 3 month old baby) and injuring another 8. He later received a 176 year sentence.

In Aug 2008 more controversy followed as 18 year old Morné Harmse, who later became known as the "samurai sword killer" received a 20 year sentence for killing a 16 year old school friend with an ornamental samurai sword.

On April third 2010, controversial political leader Eugene Terre'blanche was found dead in his home in Ventersdorp. One of the accused a mere 15 years old.

<sup>126</sup> See para 1.2.3.2 later.

appearing in courts or awaiting trial.<sup>127</sup> This 1992 campaign Justice for Children: No Child should be Caged initiated by the Community Law Centre at the University of Western Cape, raised national and international awareness about young people in trouble with the law.<sup>128</sup>

Another important milestone in South African child justice history – also launched in 1992 – was an initiative by NICRO.<sup>129</sup> NICRO established a programme aimed at the diversion of children away from the formal justice system.<sup>130</sup>

This programme further aimed to promote the emerging restorative justice concepts<sup>131</sup> specifically focussed on youth.<sup>132</sup> With no enabling legislation in place, these diversion programmes began with NICRO personnel negotiating directly with prosecutors to allow for cases to be withdrawn on condition that child offenders complete a programme organised by NICRO.<sup>133</sup>

The watershed moment for the movement working towards the reform of South Africa's child justice system however, came with the tragic death of thirteen year old Neville Snyman.<sup>134</sup> Neville was detained in a Robertson police cell whilst awaiting trial on

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<sup>127</sup> Skelton (2005) The Influence of the Theory and Practice of Restorative Justice in South Africa with specific reference to Child Justice; Unpublished LLD Thesis, UP, p367-368. See also Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) (2009) 641.

<sup>128</sup> See SALC Discussion Paper 79: Juvenile Justice 1998 p 11.

<sup>129</sup> National Institute for Crime Prevention and the Reintegration of Offenders.

<sup>130</sup> Skelton (2005) The Influence of the Theory and Practice of Restorative Justice in South Africa with specific reference to Child Justice; Unpublished LLD Thesis, UP, p368.

<sup>131</sup> See chapter 3 later.

<sup>132</sup> SALC Discussion Paper 79: Juvenile Justice 1998 p 12.

<sup>133</sup> Skelton (2005) The Influence of the Theory and Practice of Restorative Justice in South Africa with specific reference to Child Justice; Unpublished LLD Thesis, UP, p368.

<sup>134</sup> Ibid on 369.

charges of housebreaking.<sup>135</sup> There he was beaten to death by his cellmates. Neville's death forced the realisation that effective and humane methods of dealing with children in the criminal justice system were imperative.<sup>136</sup>

In August 1992, the television programme AGENDA had highlighted the plight of young people awaiting trial in detention.<sup>137</sup> The National Working Committee on Children in Detention was formed.<sup>138</sup>

In the meantime, NGO's redoubled their efforts. Lawyers for Human Rights<sup>139</sup> ran a campaign called Free a Child for Christmas which resulted in the release of 260 children who had been awaiting trial in prison by 25 December 1992.<sup>140</sup>

In 1993, at the International Seminar on Children in trouble with the Law,<sup>141</sup> Ann Skelton presented a paper<sup>142</sup> which called for a comprehensive juvenile justice system. A non-governmental drafting committee<sup>143</sup> was established following the conference, which led to the publication of *Juvenile Justice for South Africa: Proposals for Policy and Legislative Change* in 1994.

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<sup>135</sup> SALC Discussion Paper 79: Juvenile Justice 1998 p 12.

<sup>136</sup> Community Law Centre Law; Practice and Policy: South African Juvenile Justice Today UWC (1995) 64.

<sup>137</sup> SALC Discussion Paper 79: Juvenile Justice 1998 p 12.

<sup>138</sup> By the Department of Welfare, chaired by Deputy Minister Glen Carelse.

<sup>139</sup> The project was co-ordinated by the Child Rights Project based in Pietermaritzburg, but it was a national campaign. The lawyers assisting the children were also drawn from members of the National Association of Democratic Lawyers and Black Lawyers Association.

<sup>140</sup> Skelton (2005) *The Influence of the Theory and Practice of Restorative Justice in South Africa* with specific reference to Child Justice; Unpublished LLD Thesis, UP, p370.

<sup>141</sup> Held by the Community Law Centre at UWC in Cape Town from 15-17 Oct 1993.

<sup>142</sup> Entitled "Raising ideas for the creation of a new juvenile justice system for South Africa."

<sup>143</sup> The committee called itself the Juvenile Justice Drafting Consultancy.



On 16 June 1995, South Africa's commitment to the plight of children within the criminal justice system was further endorsed by the ratification of the United Nations Convention on the Rights of the Child (CRC). South Africa was now obliged, in terms of article 40(3) thereof to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law.<sup>144</sup>

The establishment of the Inter-Ministerial Committee on Youth at Risk (IMC) in 1995 was arguably the most influential policy development in relation to child justice.<sup>145</sup> The committee consisted of the Ministries of Welfare, Justice, Correctional Services, Safety and Security, Education, Health and the Reconstruction and Development Programme, as well as a number of NGO's.<sup>146</sup> The purpose of the IMC was to deal with children in custody, but it set itself the goal of the development of proposals for the transformation of the entire child and youth care system for "at risk" children. Between 1996 and 1998 the IMC set up seven pilot projects aimed at testing, in a practical way, key facets of child justice models.<sup>147</sup>

One of the other areas highlighted by the work of the IMC was diversion. The first attempt to incorporate diversion in an official document was through the inclusion of recommendations on diversion in the Interim Policy Recommendations of the IMC.<sup>148</sup> This was the first government document to formally acknowledge the limited availability

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<sup>144</sup> SALC Project 106: Report on Juvenile Justice 2000 p 1.

<sup>145</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) (2009) 641. Also see her summary op cit (n25) 641 as to how the 1994 amendment of the Correctional Services Act 8 of 1959 led to the establishment of the IMC.

<sup>146</sup> SALC Discussion Paper 79: Juvenile Justice 1998 p17.

<sup>147</sup> The seven projects are the following: The One-Stop Centre in Port Elizabeth; Family Group Conferences in Pretoria; Arrest, Reception and Referral Centre in Durban; The Family Preservation Project in Inanda; Alternatives in Residential Care in King Williams Town; Professional Foster Care in Northern Cape and the Hendrina Secure Programme in Mpumalanga. See the Report on the Pilot Programmes Inter-Ministerial Committee on Youth at Risk (1997). To read more about the FGC pilot in Pretoria see Davis L & Busby M 2006 (19:1) Acta Criminologica 102.

<sup>148</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) (2009) 642.

of diversion programmes and the unequal access to these programmes.<sup>149</sup> A key policy development that has arisen from the work done by the IMC is the Diversion Guidelines for Prosecutors.<sup>150</sup>

### 1.2.3.2 Constitutional Developments

South Africa's first democratic elections in April 1994 led to the instalment of the new government under the presidency of President Nelson Mandela. In many early speeches he highlighted the rights of children and in an address to parliament he said that:

“[T]he government will, as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we must proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offenders.”<sup>151</sup>

The birth of the new political era for South Africa brought constitutional guarantees for children in conflict with the law.<sup>152</sup> Section 28(2) of the Constitution<sup>153</sup> requires the best interests of the child to be of paramount importance in every decision taken in relation to the child.<sup>154</sup> Section 28(1)(g) sets out clear principles relating to the detention of children, including that detention should be a measure of last resort and used for the shortest appropriate period of time. Further, children should be kept separately from adults in

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<sup>149</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) (2009) 642.

<sup>150</sup> Ibid on 643.

<sup>151</sup> See SALC Discussion Paper 79: Juvenile Justice 1998 p13; Skelton A in Davel T *Children's rights in a transitional society* (1999) 96.

<sup>152</sup> Sloth-Nielsen (1996) Int Jnl of Children's Rights 323-344.

<sup>153</sup> Act 108 of 1996.

<sup>154</sup> This principle has been adopted by South African courts on numerous occasions in handing down sentences for children, for example in *S v B* 2006 (1) SACR 311 (SCA) at para [20].

detention<sup>155</sup> and be treated in a manner, and in conditions, that take into account the child's age.<sup>156</sup>

In this way, it can be said that the Bill of Rights in the Constitution<sup>157</sup> sets a new benchmark against which to measure the law relating to children in the criminal justice system.<sup>158</sup>

### **1.2.3.3 Development of a post-constitutional jurisprudence**

One of the most important cases that came before the Constitutional Court was *S v Williams*<sup>159</sup> in 1995. In this case the sentence of juvenile whipping was declared unconstitutional. In the course of the judgment Langa J made important remarks regarding law reform. He observed that “[t]here is a growing interest in moves to develop a separate juvenile justice system. This impacts directly on the availability of sentencing options for juveniles.”<sup>160</sup> The court further observed that there was much room for creative methods to deal with the problem of juvenile justice. Evidence was placed before the court of various alternative sentencing options and these were recognised by the court, as was the value of non-custodial correctional supervision.<sup>161</sup> Langa J concluded: “Doubtless these processes, still in their infancy, can be developed through involvement

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<sup>155</sup> Section 28(1)(g)(i).

<sup>156</sup> Section 28(1)(g)(ii). Section 35 of the Constitution deals with the rights of accused persons in general, including the rights of children in conflict with the law, and enshrines rights such as the presumption of innocence; the right to a fair and speedy trial and the right to legal representation, including legal representation at state expense if substantial injustice would occur.

<sup>157</sup> Act 108 of 1996.

<sup>158</sup> Gallinetti J *Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime* in Boezaart CJ (ed) (2009) 639-640.

<sup>159</sup> 1995 BCLR 861 (CC).

<sup>160</sup> At para 69.

<sup>161</sup> Para 75. These include the following: 1) Community service orders which are linked to suspended or postponed sentences; and are structured in such a way that they meet the punitive element of sentencing while allowing for the education and rehabilitation of the offender. 2) A victim-offender mediation process in terms of which the victim is enabled to participate in the justice process, receive restitution while the offender is assisted to rehabilitate. 3) Sentences suspended on condition that the offender attends a juvenile offender school for a specific purpose.

by State and non-governmental agencies and institutions which are involved in juvenile justice projects.”<sup>162</sup>

*S v Z en Vier Ander Sake*<sup>163</sup> was the first case in the post-constitutional period to attempt to set out general guidelines for sentencing of child offenders. The guidelines Erasmus J laid down may briefly be described as follows:

- 1 Diversion should be considered prior to trial in appropriate cases;
- 2 the court must exercise its wide sentencing discretion sympathetically and imaginatively;
- 3 the court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially (a) the younger the accused, the less appropriate imprisonment would be; (b) that imprisonment is rarely appropriate in the case of a first offender, and (c) that short-term imprisonment is rarely appropriate;
- 4 the court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.

The approach set out in *S v Z en Vier Ander Sake* was followed the following year in *S v Kwalase*.<sup>164</sup> This judgement is notable for the lengths to which the court went in setting out a clear legal and philosophical framework for the sentencing of offenders below the age of eighteen years.<sup>165</sup> In handing down judgment, Van Heerden J (as she then was) stressed the importance of section 28(1)(g) of the Constitution as well as South Africa’s ratification of the UN Convention on the Rights of a Child.<sup>166</sup> She stressed the fact that

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<sup>162</sup> Para 76.

<sup>163</sup> 1999 (1) SACR 427 (E).

<sup>164</sup> 2000 (2) SACR 135 (C).

<sup>165</sup> Skelton A A decade of case law in child justice Paper presented at the *Child Justice in SA: Children’s Rights under construction* conference held by the Child Justice Alliance in August 2006.

<sup>166</sup> See Applicant’s Heads of Argument in *for Child Centre Law v Minister of Justice and Constitutional Development (National Institute for Crime Prevention and the Reintegration of Offenders as Amicus Curiae)* 2009 (2) SACR 477 (CC) at page 43.

the judicial approach towards the sentencing of children had to be reappraised and developed in order to promote an individualised response which was not only in proportion to the nature and gravity of the offence, but also the offender.<sup>167</sup>

The controversial case of Director of Public Prosecutions, Kwazulu-Natal v P followed.<sup>168</sup> Sachs J later referred with appraisal to the case of P in the Constitutional Courts decision of S v M.<sup>169</sup> He stated that P “confirmed the need for a re-appraisal of the juvenile justice system in the light of the Constitution.”<sup>170</sup> He further held that: “A truly child centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances would in fact be contrary to the best interests of the child involved.”<sup>171</sup>

The effect of the Constitution on the sentencing of child offenders was dealt with again in the Supreme Court of Appeal’s decision of N v The State.<sup>172</sup> In delivering the majority judgment, Cameron JA was particularly helpful in spelling out the effective operation of the constitutional principals of ‘detention as a measure of last resort’ and ‘to be detained only for the shortest appropriate period of time.’ He contended that:

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<sup>167</sup> Ibid p 43-44.

<sup>168</sup> 2006 (1) SACR 243 (SCA). This case arose from an appeal by the State of a non-custodial sentence that had been handed down by the High Court in a case of murder committed by a girl who was only twelve years old at the time of the commission of the offence. The SCA replaced the postponed sentence with a suspended prison term of seven years suspended for five years.

<sup>169</sup> 2008 (3) SA 232 (CC).

<sup>170</sup> At para 11.

<sup>171</sup> At para 24.

<sup>172</sup> [2008] ZASCA 30. This case concerned a 17 year old who had been sentenced for rape by the Magistrates’ Court to a period of 10 years imprisonment, four years of which were suspended. The majority of the Supreme Court of Appeal, set aside the sentence and replaced it with a sentence of correctional supervision in terms of section 276(1)(i) of the Criminal Procedure Act, requiring him to spend one sixth of his sentence in prison before becoming eligible for release on correctional supervision.

“This bears not only on whether we choose prison as a sentencing option, but on the sort of prison sentence we impose, if we must. So if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative.”<sup>173</sup>

He concludes his judgment as follows:

“We distinguish child offenders from adults because we recognise that their crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error and impulse. We recognise that imposing full moral responsibility for a misdeed might be too harsh. In that we allow them some leeway of hope and possibility. That is not maudlin or sentimental, but necessary if we are to have any belief in our future.”<sup>174</sup>

These judgements as mentioned above really began a constitutional jurisprudence on the sentencing of children.

#### **1.2.3.4 Minimum sentences**

During the same time however, the sentencing of children was sent in the opposite direction with the introduction of the minimum sentencing regime. The Criminal Law Amendment Act<sup>175</sup> commenced operation on 13 November 1998 and created a minimum sentencing regime for specified classes of offences.<sup>176</sup> It was introduced as a temporary

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<sup>173</sup> At para 39.

<sup>174</sup> At para 45.

<sup>175</sup> Act 105 of 1997.

<sup>176</sup> These include the following: murder and rape, when committed in particular circumstances or against certain persons; various offences referred to in the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004; various offences under the Drugs and Drug Trafficking Act 140 of 1992; trafficking in young persons for sexual purposes; sexual exploitation of a child or mentally disabled person; offences related to the dealing in or smuggling or possession of ammunition, firearms, explosives or ornaments; any offences relating to exchange control; extortion; fraud; forgery;

measure only, but it has since been extended from time to time.<sup>177</sup> The Act excluded children below the age of sixteen from its ambit,<sup>178</sup> but children older than sixteen, but under the age of eighteen was included within the ambit of the Act, but the procedure for them was different than the procedure for adults.<sup>179</sup> The High Courts had some difficulty with the interpretation of the provisions relating to sixteen and seventeen year olds, with approaches differing in different divisions.<sup>180</sup> This matter was finally resolved by the unanimous judgement of the Supreme Court of Appeal in *S v B*.<sup>181</sup> The decision can briefly be summarized as follows:

- The SCA found that the correct interpretation of section 51(3)(b) was that, when a court was sentencing a person for an offence committed when they were 16 or 17, it was not subject to the constraints of the minimum sentencing regime. Rather, the section automatically gave the sentencing court a discretion not to impose the relevant minimum sentence.<sup>182</sup>
- This was in contrast with section 51(3)(a), which applied to adult offenders and which permitted departures from the minimum sentence only when a court found “substantial and compelling circumstances.”<sup>183</sup>

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uttering; theft, involving certain sums of money or committed under certain circumstances; and treason; sedition or robbery.

<sup>177</sup> It was extended for 12 months with effect from 1 May 2000 (Government Gazette 21122 GN 23, 20 April 2000); for 2 years with effect from 1 May 2001 (Government Gazette 7059 GN 29, 30 April 2001); for 2 years with effect from 1 May 2003 (Government Gazette 24804 GN 40, 30 April 2003); for 2 years with effect from 1 May 2005 (Government Gazette 27549 GN 21, 29 April 2005); and for 2 years with effect 1 May 2007 (Government Gazette 29831 GN 10; 25 April 2007).

<sup>178</sup> Section 51(6).

<sup>179</sup> Section 51(3)(b) requires that the reasons for imposing the minimum sentence on a child should be placed on record.

<sup>180</sup> *S v Blaauw* 2001 (2) SACR 255 (C), [2001] 3 All SA 588 (C); *S v Nkosi* 2002 (1) SACR 135 (W), 2002 (2) SA 1222 (W); *DOV, Tvl v Makwetsja* 2004 (2) SACR 1 (T), [2003] 2 All SA 249 (T).

<sup>181</sup> 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA).

<sup>182</sup> At para 12.

<sup>183</sup> At para 10.

- Thus, the SCA concluded that the “substantial and compelling circumstances” requirement did not apply to persons who committed an offence when aged 16 and 17. In such cases, the sentencing court was free to apply the usual sentencing criteria in deciding an appropriate sentence.
- The SCA also recognised, however, that the sentencing court should take into account the fact that the legislature had ordinarily ordained the prescribed sentences for the offences in question. This would operate as a weighting factor in the sentencing process.<sup>184</sup>

On 31 December 2007, the Criminal Law (Sentencing) Amendment Act<sup>185</sup> came into force.<sup>186</sup> This Act rendered the minimum sentencing regime permanent and its effect (and, according to the Minister of Justice and Constitutional Development, its express object)<sup>187</sup> was to reverse the decision of the SCA in *S v B* and to apply the minimum sentencing regime to children who were 16 and 17 at the time of commission of the offence.

The severe effects of rendering the minimum sentencing regime permanent were further exacerbated by the effect of receiving a minimum sentence on one’s parole. The general rule regarding parole is that one half of the sentence must be served before an offender can be considered for parole. Although the Criminal Law Amendment Act<sup>188</sup> and the Criminal Law (Sentencing) Amendment Act<sup>189</sup> do not deal with parole, special parole provisions apply in relation to minimum sentences, which are to be found in the

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<sup>184</sup> At para 11.

<sup>185</sup> Act 38 of 2007.

<sup>186</sup> Government Gazette 30638 GN 1257, 31 December 2007.

<sup>187</sup> See the answering affidavit by the Minister submitted to the Constitutional Court in the case of *Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and Reintegration of Offenders as Amicus Curiae)* 2009 (2) SACR 477 (CC).

<sup>188</sup> Act 105 of 1997.

<sup>189</sup> Act 38 of 2007.



Correctional Services Act.<sup>190</sup> Section 73(6)(b) Correctional Services Act<sup>191</sup> requires that where any person has been sentenced to a minimum sentence in terms of the Criminal Law Amendment Act,<sup>192</sup> he or she is ineligible for parole consideration until he or she has served four-fifths of the sentence or 25 years, whichever is shorter. A court may order (at time of sentence) that a person may be considered for parole after serving two-thirds of the sentence, but this is still longer than the norm. Section 76(3)(b) of the Act<sup>193</sup> provides that a person serving a life sentence may only be considered for release on parole after serving 25 years of the sentence, but a prisoner on reaching the age of 65 may be placed on parole if he or she has already served 15 years. Neither of these provisions provide for shorter periods or more regular review for offenders who were below the age of 18 years at the time of the commission of the offence.<sup>194</sup>

In July 2009, the Constitutional Court declared the provisions in the Criminal Law Amendment Act<sup>195</sup> (as amended)<sup>196</sup> which made the minimum sentencing regime applicable to sixteen and seventeen year olds, unconstitutional.<sup>197</sup> Cameron J, in handing down the majority judgment, held these provisions to be in conflict with section

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<sup>190</sup> Act 111 of 1998.

<sup>191</sup> Ibid.

<sup>192</sup> Act 105 of 1997.

<sup>193</sup> Act 111 of 1998.

<sup>194</sup> This position has now changed with the introduction of the Correctional Services Amendment Act 25 of 2008. This Act introduced a new “incarceration framework.” This entails that the National Council of Correctional Services, in consultation with the National Commissioner of Correctional Services, can determine minimum periods that must be served before sentenced offenders can be considered for release on parole. This Act, however did not change the position regarding the parole of persons sentenced under section 51 & 52 of Act 105 of 1997 or persons serving life sentences.

<sup>195</sup> Act 105 of 1997.

<sup>196</sup> By Act 38 of 2007.

<sup>197</sup> Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and Reintegration of Offenders as Amicus Curiae) 2009 (2) SACR 477 (CC).

28(1)(g)<sup>198</sup> and section 28(2)<sup>199</sup> of the Constitution.<sup>200</sup> The court further made the clearest statement regarding the meaning and interpretation of section 28(1)(g) saying that the fact that detention must be used only as a last resort in itself implies that imprisonment is sometimes necessary. The Bill of Rights, however, mitigates the circumstances in which imprisonment can happen – it must be a last resort (not a first or intermediate resort) and it must be for the shortest possible period of time.<sup>201</sup> Cameron J defined it further, stating: “If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option.”<sup>202</sup>

In short, section 28(1)(g) requires an individualised judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that the minimum sentences entails.<sup>203</sup>

### **1.3 The Child Justice Act 75 of 2008**

The Child Justice Act (CJA), which came into operation on 1 April 2010, has a long and protracted history.<sup>204</sup> The Child Justice Act<sup>205</sup> -- while retaining most features of our present criminal justice process – introduced a number of new concepts and procedures,

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<sup>198</sup> See para 1.2.3.2 above.

<sup>199</sup> See para 1.2.3.2 above.

<sup>200</sup> At para [78].

<sup>201</sup> At para [31].

<sup>202</sup> At para [31].

<sup>203</sup> At para [32].

<sup>204</sup> See Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) Child Law in South Africa (2009) 643-648; Gallinetti J What happened to the Child Justice Bill? The process of law reform relating to child offenders 2006 (17) SACQ 7; Gallinetti J & Skelton A A long and winding road: The Child Justice Bill, civil society and advocacy 2008 (25) SACQ 3; Gallinetti J Getting to know the Child Justice Act The Children’s Rights Project, University of Western Cape, available at [www.childjustice.org.za](http://www.childjustice.org.za).

<sup>205</sup> Act 75 of 2008, which was developed by the South African Law Commission and introduced into parliament as Bill 49 of 2002.

some of which are presently used in practice but are not provided for in legislation.<sup>206</sup>

These include:

- Raising the minimum age of criminal capacity from seven to ten years;
- Providing a legislative framework for the assessment of all children in the criminal justice system;
- Introducing a preliminary inquiry process;
- Introducing a legislative framework for diversion;
- Introducing guidelines to ensure that children only be detained as a measure of last resort by requiring courts to consider alternatives to imprisonment for children.
- Introducing a new sentencing option allowing for a term of imprisonment to follow compulsory residence in a care centre.<sup>207</sup>

The result is an Act that revolutionises the criminal justice system in South Africa with regard to children in conflict with the law.<sup>208</sup> Although the Act represents a right-based approach to children in conflict with the law,<sup>209</sup> it also recognises the child's sense of dignity and self-worth<sup>210</sup> and seeks to ensure children's accountability and respect for the fundamental freedoms of others.<sup>211</sup> The aim is to offer child offenders the opportunity to take responsibility for criminal behaviour, make restitution to the victim of the offence and to the community, and to participate in rehabilitation programmes focusing on developing socially acceptable patterns of behaviour.<sup>212</sup>

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<sup>206</sup> Gallinetti J & Skelton A 2008 (25) SACQ 3 at 4.

<sup>207</sup> See section 76(3).

<sup>208</sup> Gallinetti J 2006 (17) SACQ 7 at 12.

<sup>209</sup> Gallinetti J Getting to know the Child Justice Act Children's Rights Project, UWC at p8, available at [www.childjustice.org.za](http://www.childjustice.org.za).

<sup>210</sup> Gallinetti J 2006 (17) SACQ 7 at 12.

<sup>211</sup> Gallinetti J Getting to know the Child Justice Act Children's Rights Project, UWC at p8, available at [www.childjustice.org.za](http://www.childjustice.org.za).

<sup>212</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p61-62.

It is clear that the Child Justice Act represents a decisive break with the traditional criminal justice system.<sup>213</sup> The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain an understanding of the child caught up in behaviour transgressing the law by assessing his or her personality, determining whether the child is in need of care and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative justice processes and the reintegration of the child into the community.<sup>214</sup>

#### **1.4 Purpose of the study**

The purpose of this dissertation is to describe and analyse the legislative sentencing principles and practices for children of 14 years and older, who has committed serious crimes in South Africa,<sup>215</sup> as found in the Child Justice Act.<sup>216</sup> The question posed in this dissertation is whether the constitutionalisation of certain rights for children and the promulgation of the CJA, made any significant difference in the types of sentences that are imposed on children who commit serious crimes.

The conflict between the interests of the child,<sup>217</sup> and the interests of society<sup>218</sup> will be highlighted. Developments, trends and problems in the sentencing process will be identified. This study does not include a theoretical discussion on the role that judicial discretion plays in sentencing or appellate procedures. The provisions of the Child Justice

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<sup>213</sup> The State v CKM, FTM & IMM, Review Judgment delivered by Bertelsmann J & Tolmay J in the North Gauteng High Court on 19 January 2012, available at [www.doj.org.za](http://www.doj.org.za).

<sup>214</sup> Ibid.

<sup>215</sup> The focus of this study is only on two crimes listed in Schedule 3 of the Child Justice Act, namely murder and rape. Schedule 3 also contains a list of other serious offences such as sedition; treason; extortion; robbery; kidnapping; various sexual offences ito The Criminal Law (Sexual Offences and Related Matters Amendment Act) 32 of 2007; genocide; crimes against humanity; and the dealing in and smuggling of ammunition just to name a few.

<sup>216</sup> Act 75 of 2008.

<sup>217</sup> A Constitutional framework that requires that children be detained as a measure of last resort and be treated differently than adults – see para 1.2.3.2 earlier.

<sup>218</sup> The interests of society require that children who commit serious crimes be punished accordingly. In addition, the interests of society also require harsher sentences for crimes such as rape, which has become a very big problem in our country.

Act dealing with children between the ages of 10 and 14 also fall outside the ambit of this study, and are only discussed in so far as it relates to general principles and procedures also applicable to children above the age of fourteen. The reason for this being that the sentence of imprisonment can only be imposed on children aged fourteen years or older.

### 1.5 Important definitions

**Assessment:** assessment can be defined as developmental assessment and include an evaluation of a person, the family circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact on the victim and the attitude of the alleged offender in relation to the offence and any other relevant factor.<sup>219</sup> The purpose of such assessment is, inter alia, to estimate the age of the child; to establish the prospects of diversion; to establish whether a child is in need of care and to make recommendations regarding the release or detention of a child.<sup>220</sup>

**Child:** a person under the age of 18 years.<sup>221</sup>

**Community-based sentences:** are sentences that allow a child to remain in the community.<sup>222</sup>

**Diversion:** means the diversion of a matter involving a child away from the formal court procedures in a criminal matter.<sup>223</sup>

**Family group conference:** is an informal procedure, which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their

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<sup>219</sup> Section 1 of the Probation Services Amendment Act 35 of 2002.

<sup>220</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) (2009) 656.

<sup>221</sup> Section 28(3) of the Constitution, Act 108 of 1996.

<sup>222</sup> Section 72(1) Child Justice Act, 75 of 2008.

<sup>223</sup> Section 1 Child Justice Act, 75 of 2008.

families and other appropriate persons and at which a plan is developed on how the child will redress the effects of the offence.<sup>224</sup>

**Preliminary inquiry:** is an informal inquiry of an inquisitorial nature to consider the assessment report by the probation officer, to establish whether a matter can be diverted and to identify a suitable diversion option and to consider the release or placement of the child pending the finalisation of the preliminary inquiry or the child's first appearance in court.

**Pre-sentence report:** is any report drawn up by an expert (eg a probation officer; a social-welfare expert; psychiatrists; criminologists; clinical psychologists) which is designed to assist the court in the quest to find an appropriate sentence.<sup>225</sup>

**Probation Officer:** any person who has been appointed as a probation officer in terms of section 2 of the Probation Services Act 116 of 1991.<sup>226</sup>

**Restorative justice:** means an approach to justice that aims to involve the child offender, the victim, the family concerned and the community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution and taking measure to prevent a recurrence of the incident and promoting reconciliation.<sup>227</sup>

**Sentence:** any measure applied by the court to the person convicted of a crime and which finalises the case, except where specific provision is made for reconsideration of that measure, for example a suspended sentence.<sup>228</sup>

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<sup>224</sup> Section 61(1)(a) Child Justice Act, 75 of 2008.

<sup>225</sup> Terblanche (2007) 104.

<sup>226</sup> Section 1 Child Justice Act, 75 of 2008.

<sup>227</sup> Section 1 Child Justice Act, 75 of 2008.

<sup>228</sup> Terblanche (2007) 2.

**Serious crimes:** refer to crimes listed in Schedule 3 to the Child Justice Act (75 of 2008) and it include crimes like murder, rape, treason, sedition, extortion, robbery, kidnapping and various offences in terms of the Criminal Law (Sexual Offences and Related Matters) Amendment Act, 32 of 2007.<sup>229</sup>

**Victim-impact statement:** a sworn statement by the victim or someone authorised by the victim to make a statement on behalf of the victim which reflects the physical, psychological, social, financial or any other consequences of the offence for the victim.<sup>230</sup>

**Victim-offender mediation:** means an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence.<sup>231</sup>

## 1.6 Methodology and structure

### Methodology

This study adopts a qualitative approach. Literary sources are reviewed – namely legislation, reported cases, books, journal articles, discussion papers and reports of the Law Commission.

### Structure

Chapter 2 investigates the international developments with regards to child justice, such as the United Nations Convention on the Rights of a Child, the United Nations Minimum Rules for the Administration of Juvenile Justice, the African Charter on the Rights and Welfare of the Child, the United Nations General Comment No.10, as these provided a comprehensive framework within which the issue of child justice should be understood. By ratifying these international instruments, South Africa was obliged to establish laws and procedures to deal with children in conflict with the law.

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<sup>229</sup> Schedule 3 Child Justice Act, 75 of 2008.

<sup>230</sup> Section 70(1) Child Justice Act, 75 of 2008.

<sup>231</sup> Section 62(1)(a) Child Justice Act, 75 of 2008.

Chapter 3 contains an overview of the relatively newly introduced Child Justice Act. The new concepts and procedures introduced by the act are briefly described. This chapter further contains a discussion of the different sentencing options available to children in terms of the new act. The use of the under-utilized plea bargain process in terms of the Criminal Procedure Act is also highlighted.

In Chapter 4 all judgments delivered after the promulgation of the Child Justice Act are examined in order to identify the interpretations given to the sentencing provisions of the Act as well as the internal guidelines developed with regard to procedures, general principles and sentencing patterns. The important question posed in this chapter is whether the promulgation of the Constitution and the Child Justice Act, stating that imprisonment should be a measure of last resort, made any significant difference with regards to the imposition of custodial sentences on children. The Child Justice Act introduces a wide variety of alternative sentencing options, and, with due regard to the desirability to keep children out of prison, the extent to which these alternatives are imposed on children who have committed the serious offences of rape or murder, is investigated.

Chapter 5 concludes this dissertation and notes that the promulgation of the Constitution and the Child Justice Act did not make any significant difference with regards to the imposition of custodial sentences on children, as children found guilty of the offences murder and rape still receive custodial sentences. It did however impact on the length of the sentences imposed on these children. It is further concluded that the seriousness of the offence is the guiding principle used by Presiding Officers in order to decide whether a custodial sentence is appropriate in the circumstances. Emphasis is placed on the under-utilized alternative sentencing options provided for in the Act, and how these sentences can be used for serious offences is stressed.



## **CHAPTER 2**

### **INTERNATIONAL AND REGIONAL INSTRUMENTS**

#### **UNDERPINNING THE CHILD JUSTICE REFORM PROCESS IN**

#### **SOUTH AFRICA**

“The case that children have rights has to a large extent been won: the burden now shifts to monitoring how well governments honour the pledges in their national laws and carry out their international obligations.”<sup>1</sup>

### **2.1 Introduction**

### **2.2 International Instruments**

#### **2.2.1 United Nations Standard Minimum Rules for the Administration of Juvenile Justice**

#### **2.2.2 United Nations Guidelines for the Prevention of Juvenile Delinquency**

#### **2.2.3 United Nations Convention on the Rights of the Child**

#### **2.2.4 General Comment No. 10**

### **2.3 Regional Instruments**

#### **2.3.1 The African Charter on the Rights and Welfare of the Child**

### **2.4 Conclusion**

### **2.1 Introduction**

A number of international and regional instruments, such as the United Nations

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<sup>1</sup> Freeman FM *The limits of children's rights* in Freeman M & Veerman P (eds) *The ideologies of Children's Rights* (1992) as cited by Sloth-Nielsen J 1996 *Acta Juridica* 6.

Convention on the Rights of a Child,<sup>2</sup> the United Nations Guidelines for the Prevention of Juvenile Delinquency,<sup>3</sup> the United Nations Standard Minimum Rules for the Administration of Juvenile Justice<sup>4</sup> and the African Charter on the Rights and Welfare of the Child,<sup>5</sup> formed and shaped the child justice reform process in South Africa.

These instruments largely led to the constitutionalisation of certain rights<sup>6</sup> when South Africa promulgated its first Constitution<sup>7</sup> after the first democratic elections in 1994, and provided South Africa with a clear picture of what an ideal child justice system should look like.<sup>8</sup>

## **2.2 International Instruments**

### **2.2.1 United Nations Standard Minimum Rules for the Administration of Juvenile Justice**

The Beijing Rules was the first international legal instrument to comprehensively detail norms for the administration of juvenile justice with a child rights focus and development-orientated approach.<sup>9</sup> It provided a blue print of the essential elements that

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<sup>2</sup> Also known as the CRC, adopted by the United Nations on 20 November 1989, and came into force on 2 September 1990. It was ratified by South Africa on 16 June 1995.

<sup>3</sup> Also known as the Riyadh Rules, adopted by General Assembly Resolution 40/33 of 29 November 1985.

<sup>4</sup> Also known as the Beijing Rules. See McGregor M An Evaluation of the Child Justice Act Unpublished LLM dissertation, NMMU, January 2010 where she notes that the abovementioned two instruments were adopted before the adoption of the CRC, and these instruments were thus not binding on State Parties. A lot of these Rules have however been included in the CRC, thereby attaining binding status.

<sup>5</sup> This Charter was adopted by the then OAU in 1990 but only came into force on 29 November 1999. It was ratified by South Africa on 7 January 2000.

<sup>6</sup> Rights such as the presumption of innocence, the right to a fair trial, the right not to give self-incriminating evidence, the right to legal representation, the right to be kept separately from adults, the right to be kept in conditions that take account of the child's age and the right to be detained only as a measure of last resort.

<sup>7</sup> Act 108 of 1996.

<sup>8</sup> Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p26.

<sup>9</sup> Brink RB The Child Accused in the Criminal Justice System Unpublished LLM dissertation, NMMU, January 2010.

an effective child justice system must contain,<sup>10</sup> which includes the following:

- Principle of Proportionality

The Beijing Rules describes the aims of child justice in the following terms: “The Juvenile Justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offender and the offence.”<sup>11</sup>

The proportionality principle is a very important principle when a child is sentenced, as reactions to children who commit offences should also be designated as to ensure the welfare of the young offender.

- Diversion

Rule 11 of the Beijing Rules centralised the principle of diversion.<sup>12</sup> This Rule goes further and envisages the involvement of the individual and the community in diversion.<sup>13</sup> As will be indicated later,<sup>14</sup> the use of diversion forms a central part of the new Child Justice System in South Africa.

- Adjudication and sentencing

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<sup>10</sup> Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p20.

<sup>11</sup> Rule 5.1. It is important to note that these Rules are set out with commentaries following each section. The commentary on this Rule provides that the response to young offenders should be based not only on the gravity of the offence, but should also consider the personal circumstances of the child.

<sup>12</sup> Rule 11.1 provides that: “Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by [a] competent authority.”

<sup>13</sup> See Rule 11.3 which clearly states that diversion involving community service or other services should only be done with the consent of the child and his or her parent or guardian. Rule 11.4 of the Beijing Rules requires that efforts be made to provide for community programmes such as temporary supervision, restitution and compensation.

<sup>14</sup> See Ch 3 para 3.6 later.

These Rules provide that where a child has not been diverted, the child should be dealt with by a competent authority.<sup>15</sup> These proceedings must aim to serve the best interest of the child and must be conducted in an atmosphere of understanding.<sup>16</sup> A child shall have the right to be legally represented in any proceedings against the child, and where a child cannot afford legal representation, the child can apply for free legal aid in countries where provision is made for such a service.<sup>17</sup> The Beijing Rules also provide guiding principles with regards to sentencing, such as the principle of proportionality<sup>18</sup> and the well-being of the child as a central consideration in his or her case.<sup>19</sup> The least possible measures which restrict or remove the child's liberty are stressed<sup>20</sup> and corporal punishment is prohibited.<sup>21</sup>

The Beijing Rules concludes that research and evaluation of newly developed child justice systems are imperative so as to constantly develop in order to meet the changing realities.<sup>22</sup>

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<sup>15</sup> Rule 14.1. See also Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p23.

<sup>16</sup> Rule 14.2. The proceedings must be done in an atmosphere which allows the child to participate and express him or herself freely. See also Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p23.

<sup>17</sup> Rule 15.1. See also Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p23.

<sup>18</sup> Rule 17.1(a). See also Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p23.

<sup>19</sup> Rule 17.1(d). See also Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p23.

<sup>20</sup> Rule 17.1(b). The Commentary on this Rule explains that strictly punitive approaches are not appropriate. It goes further and states that even when a child has committed a very serious offence, retributive considerations should always be outweighed by the interest of safeguarding the well-being and the future of the child.

<sup>21</sup> Rule 17.3. This provision against corporal punishment is in line with art 7 of the International Covenant on Civil and Political Rights; the Declaration on the Protection of All Persons from being subject to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; as well as the Convention against the Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

<sup>22</sup> Rule 30. See also Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p24.

### 2.2.2 United Nations Guidelines for the Prevention of Juvenile Delinquency

Since 1955, the United Nations have organised congresses on Crime Prevention and Treatment of Offenders every five years, bringing together representatives of the world's national Governments, experts in crime prevention and criminal justice, scholars of international repute and members of NGO's concerned.<sup>23</sup> Juvenile delinquency and its prevention have been items on the agenda of nearly all United Nations Congresses on Crime Prevention and Treatment of Offenders.<sup>24</sup>

The United Nations Guidelines for the Prevention of Juvenile Delinquency,<sup>25</sup> although receiving very little recognition in South Africa,<sup>26</sup> give guidance to States for strategies to prevent children from becoming involved in crime. The crux of these Guidelines is that real efforts must be made to provide a continuum of services which tackle the problem of juvenile offending before it occurs, followed by supporting services based in the family and the community.<sup>27</sup> These Guidelines propounded a social policy focusing on the centrality of the child, the family and the involvement of the community.<sup>28</sup>

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<sup>23</sup> Verhellen & Coppelaere 1996 (4) Int Jnl of Children's Rights 57 on 58.

<sup>24</sup> These Congresses include Geneva (1955) which comprised problems relating to youthful offenders but also to abandoned, orphaned and maladjusted minors; London (1960) recommended limiting the concept of juvenile delinquency to violations of criminal law, excluding vaguely antisocial behaviour or rebellious attitudes normally associated with the process of growing up. Caracas (1980) debated the theme 'Crime Prevention and Quality of Life.' This Congress was important not only because of its pro-active approach of prevention but also because of the impetus it gave towards more 'binding' engagements in dealing with juvenile crime. The provision of social justice for all children was strongly emphasized as a factor in prevention. In Milano (1985) the Beijing Rules were adopted and in Havana (1990) two complementary instruments were adopted.

<sup>25</sup> The Riyadh Guidelines.

<sup>26</sup> The only real recognition afforded to it in SA was the National Crime Prevention Strategy (NCPS), which was published in 1996. This was hailed as an excellent example of social crime prevention policy, and it is unfortunate that it was overtaken by a crime control approach and is rarely referred to by Government.

<sup>27</sup> Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, Sept 2008, p18.

<sup>28</sup> See Skelton A & Tshehla B *ibid* where they state that the heart of the document is the chapter headed "Socialisation Process." The involvement of the family is emphasized in Rule 12, which provides that:

"[s]ince the family is the central unit responsible for the primary socialisation of children, government and the social efforts to preserve the integrity of the family, including the extended family, should be pursued. The society has a responsibility to assist the family in providing care and protection and in ensuring the physical and mental well being of children."

### 2.2.3 United Nations Convention on the Rights of the Child

Starting in the late 1980's leading to the time of South Africa's ratification of the CRC in 1995, there was an overwhelming concern for the plight of children in trouble with the law.<sup>29</sup> This led to the emergence of a strong children's rights movement in South Africa.<sup>30</sup> Children's Rights orientated NGO's launched campaigns to focus public attention to children in detention for offences not linked to the struggle.<sup>31</sup> Soon calls for a new and separate juvenile justice system were heard.<sup>32</sup> South Africa's commitment to the plight of children in the criminal justice system was to a large extent endorsed with South Africa's ratification of the CRC on 16 June 1995.<sup>33</sup>

This important Convention deals with a broad range of children's rights and provided South Africa with a comprehensive framework within which the issue of juvenile justice must be understood.<sup>34</sup> Article 4<sup>35</sup> of the CRC places an obligation on State parties to establish a legislative system that encapsulates the rights or give effect to the rights contained in the CRC.<sup>36</sup>

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Community involvement is emphasized by Rule 32 which provides as follows:

“Community based services and programs which respond to the special needs, problems, interests and concerns of young persons and which offer appropriate counseling and guidelines to young persons and their families should be developed, or strengthened where they exist.”

<sup>29</sup> Odongo OG (2005) *The Domestication of International Law Standards on the rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD Thesis, UWC on p102-103.

<sup>30</sup> *Ibid* on 104.

<sup>31</sup> *Ibid* on 104. For a detailed discussion on the work done by NGO's see Chapter 1 para 1.2.3.1.

<sup>32</sup> *Ibid*.

<sup>33</sup> See Chapter 1 para 1.2.3.1.

<sup>34</sup> Skelton A & Tshela B *Child Justice in South Africa* ISS Monograph 150, Sept 2008 p16. Also see McGregor M (2010) *An Evaluation of the Child Justice Act* Unpublished LLM-dissertation, NMMU, p7.

<sup>35</sup> Article 4 of the CRC provides that “[s]tate parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present Convention...”.

<sup>36</sup> McGregor M (2010) *An Evaluation of the Child Justice Act* Unpublished LLM Dissertation, NMMU, p7.

Articles 37 and 40 deal specifically with the subject of child justice. Article 37 provides preemptory protection to the child's bodily integrity against cruel and inhumane treatment.<sup>37</sup>

Article 40 deals with the administration of juvenile justice, providing in article 40(1) that:

“State parties recognise the right of every child alleged as, accused of or recognised as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which take into account the child's age and the desirability of promoting the child's reintegration and the child's assuming constructive role in society.”

This provision reflects a child-centered approach and sets a high standard.<sup>38</sup> The second part of this article<sup>39</sup> has strong nuances with the concept of restorative justice.<sup>40</sup>

In article 40(2) several due process rights, which are guaranteed to every child in the criminal justice system, are set out.<sup>41</sup> Article 40(3) further obliges States to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. This means that by ratifying the CRC, South Africa undertook to develop a specialised legal framework and infrastructure for dealing with children in the criminal justice system.<sup>42</sup>

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<sup>37</sup> Ibid. This article also prohibits the death penalty for children, as well as imprisonment without the possibility of parole.

<sup>38</sup> Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, Sept 2008 p17.

<sup>39</sup> Which highlights the reintegration of the child into society and his/her assuming constructive role in society.

<sup>40</sup> This concept is discussed in more detail in Chapter 3.

<sup>41</sup> These rights have been incorporated in section 28(1)(g) and section 35 of the Constitution.

<sup>42</sup> Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, Sept 2008 p17.

The need for alternative sentences is set out in article 40(4).<sup>43</sup> This indicates the importance of the development of programmes that can serve as positive alternatives to the sanctions presently used.<sup>44</sup> While the South African legal framework allows for a range of alternative sentencing options in practice, the access to such options is limited by the fact that the programmes supporting such alternatives tend to be clustered in urban areas.<sup>45</sup>

#### 2.2.4 General Comment No. 10

The United Nations Committee on the Rights of a Child, during the 44<sup>th</sup> session in Geneva from January to February 2007, issued a general comment [General Comment No. 10 (2007)] on the topic of *Children's Rights in Juvenile Justice*.<sup>46</sup> The Comment dealt with the leading principles underlying a comprehensive policy relating to juvenile justice.<sup>47</sup> The rationale behind the General Comment was to provide State parties with more elaborated guidance and recommendations in their efforts to establish a juvenile justice system that complies with the CRC.<sup>48</sup> The most important principles highlighted by the General Comment are:

- The principle of the best interest of the child

The Committee clearly stated that article 3 of the CRC which deals with the best interest principle should be interpreted to mean that the traditional objectives of criminal justice, such as retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders.<sup>49</sup>

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<sup>43</sup> Ibid on 17.

<sup>44</sup> Ibid on 17.

<sup>45</sup> Ibid on 17.

<sup>46</sup> Ibid on 26.

<sup>47</sup> Ibid on 26.

<sup>48</sup> See Article 3 of the General Comment.

<sup>49</sup> Article 10.



- Intervention

The Committee provided that State parties should take measures for dealing with children in conflict with the law without resorting to judicial proceedings, as an integral part of their juvenile justice systems.<sup>50</sup> The exact nature and content of the measures for dealing with children in conflict with the law without resorting to judicial proceedings, was left to the discretion of State parties.<sup>51</sup>

The Committee did however emphasise clear guidelines for the use of diversion.<sup>52</sup> When proceedings are instituted against a child, the juvenile justice system should provide ample opportunities to deal with such children by using social and/or educational measures, and deprivation of liberty should be strictly limited, particularly at the pre-trial stage.<sup>53</sup>

- The minimum age of criminal responsibility

Article 40(3) of the CRC requires State parties to seek to promote the establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law, but does not mention a specific minimum age in this regard.<sup>54</sup> In the absence of a definite minimum age of criminal responsibility in the CRC, the Committee urged State parties not to set their minimum age of criminal responsibility below the age of 12 years.<sup>55</sup>

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<sup>50</sup> Article 26.

<sup>51</sup> Article 27.

<sup>52</sup> These include that the child must freely and voluntarily admit responsibility and that such admission cannot be used against him/her in any subsequent proceedings; the child must also consent to the diversion in writing, which consent must be based on adequate and specific information on the nature, content and duration of the measure, as well as the consequences of non-compliance; the law must clearly indicate in which cases diversion is possible and completion of the diversion programme by the child must result in a definite and final closure of the case.

<sup>53</sup> Article 28.

<sup>54</sup> Article 31.

<sup>55</sup> Article 33. In South Africa, the minimum age of criminal capacity has been risen from 7 years (under the Common Law) to 10 years (under the Child Justice Act). For a detailed discussion about the South African position see para 3.2.3 in Chapter 3.

- Sentencing

The Committee emphasised that magistrates and/or judges should be provided with a wide variety of possible alternatives to institutional care or prison so as to assure that deprivation of liberty is used only as a measure of last resort and for the shortest appropriate period of time.<sup>56</sup> The proportionality principle was again emphasized, as well as the fact that States may not use a strictly punitive approach to deal with children in conflict with the law.<sup>57</sup>

## 2.3 Regional Instruments

### 2.3.1 The African Charter on the Rights and Welfare of the Child

Following the adoption of the CRC by the General Assembly of the United Nations (UN) in 1989, was the African Charter on the rights and Welfare of the Child, which was adopted by the Assembly of Heads of State and Government of the Organisation of African Unity (OAU) in July 1990.<sup>58</sup>

Although the Charter does not differ significantly in content from the CRC on issues relating to juvenile justice, it is sometimes favoured by South Africans because of its emphasis on responsibilities corresponding with rights.<sup>59</sup> The UN instruments promote a highly individualised approach to the rights of the child, whereas the Charter takes a more collective approach, blending children's rights with respect for families and communities.<sup>60</sup>

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<sup>56</sup> Article 70.

<sup>57</sup> Article 71.

<sup>58</sup> Olowu 'D 2002 (10) Int Jnl of Children's Rights 127 at 127.

<sup>59</sup> Skelton A *Juvenile justice reform: children's rights and responsibilities* versus crime control in Davel CJ (ed) *Children's rights in a transitional society* Proceedings of a conference hosted by the Centre for Child Law in Pretoria, 30 Oct 1998, on p93.

<sup>60</sup> Ibid.

This approach of the African Charter accords well with the concept of restorative justice, and the trend towards restorative justice is another influence which can be identified as having a major impact on the reform of juvenile justice in South Africa.<sup>61</sup>

## **2.4 Conclusion**

The international instruments discussed in this chapter provided some much needed momentum to the child justice revolution that started in the early 1990's in South Africa. These instruments largely led to the constitutionalisation of certain rights when South Africa promulgated its first Constitution in 1994 and provided South Africa with a clear picture of what an ideal child justice system should look like.

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<sup>61</sup> Ibid.

## **CHAPTER 3**

### **THE CHILD JUSTICE ACT: NEW HOPE FOR CHILDREN IN CONFLICT WITH THE LAW**

“We are aware of all the inconveniences of prison, and that it is dangerous when it is not useless. And yet one cannot ‘see’ how to replace it. It is a detestable solution, which one seems unable to do without.”<sup>1</sup>

#### **3.1 BACKGROUND TO THE ACT**

##### **3.1.1 The law reform process**

###### **3.1.1.1 The Correctional Services Act, Act 8 of 1956**

###### **3.1.1.2 Crises Creates Opportunity**

##### **3.1.2 Work by the Project Committee**

###### **3.1.2.1 Introduction**

###### **3.1.2.2 The Issue Paper**

###### **3.1.2.3 The Discussion Paper**

###### **3.1.2.4 The Final Report and Draft Child Justice Bill**

#### **3.2 THE CHILD JUSTICE ACT**

##### **3.2.1 Introduction**

##### **3.2.2 Application of the Act**

##### **3.2.3 The Minimum Age of Criminal Capacity of Children**

##### **3.2.4 Pre-Trial Procedures**

###### **3.2.4.1 Introduction**

###### **3.2.4.2 Assessment**

###### **3.2.4.3 The Preliminary Inquiry**

###### **3.2.4.4 Pre-Trial Detention**

###### **3.2.4.4.1 Release and detention before a child’s first appearance at the preliminary inquiry**

###### **3.2.4.4.2 Release and detention after a child’s first appearance at the preliminary inquiry**

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<sup>1</sup> Foucault M (1975) 2.

### **3.3 SENTENCING POLICY APPLICABLE TO CHILD ACCUSED**

#### **3.3.1 Sentencing policy prior to the promulgation of the Constitution**

#### **3.3.2 The Current Guiding Principle: Section 28(1)(g) of the Constitution**

#### **3.3.3 Sentencing policy in terms of the Child Justice Act**

##### **3.3.3.1 Introduction**

##### **3.3.3.2 Sentencing options**

###### **3.3.3.2.1 Community-based sentences**

###### **3.3.3.2.2 Restorative justice sentences**

###### **3.3.3.2.2.1 Introduction**

###### **3.3.3.2.2.2 Practical examples of restorative justice during sentencing**

###### **3.3.3.2.2.3 Family Group Conferencing**

###### **3.3.3.2.2.4 Restorative Justice as a sentencing option for serious crimes**

###### **3.3.3.2.3 Fines and alternatives to fines**

###### **3.3.3.2.4 Correctional supervision**

###### **3.3.3.2.5 Compulsory residence in a child and youth care centre**

###### **3.3.3.2.6 Imprisonment**

### **3.4 THE ROLE OF VICTIM IMPACT STATEMENTS IN THE SENTENCING PROCESS**

### **3.5 THE NEED FOR A PRE-SENTENCE REPORT WHEN A CHILD IS SENTENCED**

### **3.6 DIVERSION AS AN OPTION FOR SERIOUS CRIMES**

#### **3.6.1 Introduction**

#### **3.6.2 Diversion in terms of the Child Justice Act**

##### **3.6.2.1 Diversion defined**

##### **3.6.2.2 The objectives of diversion**

##### **3.6.2.3 Stages at which diversion can take place**

###### **3.6.2.3.1 Pre-trial prosecutorial diversion**

###### **3.6.2.3.2 Diversion at the preliminary inquiry or child justice court**

###### **3.6.2.4 Consequences of a diversion order**

###### **3.6.2.5 Conclusion**

### 3.6.2.6 Diversion for serious offences?

## 3.7 PLEA-BARGAIN AGREEMENTS AS A TOOL TO KEEP CHILDREN OUT OF PRISON

### 3.8 CONCLUSION

#### 3.1 BACKGROUD TO THE ACT

##### 3.1.1 The law Reform Process

###### 3.1.1.1 The Correctional Services Act, Act 8 of 1956

In 1994, section 29 of the Correctional Services Act<sup>2</sup> was amended to put a blanket ban on the pre-trial detention of any person under the age of eighteen years. This amendment was intended to prohibit the pre-trial detention of all children under the age of eighteen years, irrespective of the offence with which the child had been charged or prior criminal history.<sup>3</sup> After the amendment was promulgated in 1995, chaos ensued due to the sudden promulgation of the amendment, coupled with lack of planning and provisioning.<sup>4</sup> Approximately 800 children were released into the care of their parents because of lack of adequate places of safety and other alternatives.<sup>5</sup> A few children who committed serious and violent crimes took advantage of this chaotic situation, and a cycle of arrests ensued<sup>6</sup> and release without the completion of the resulting criminal proceedings.<sup>7</sup> The government was forced to backtrack in the light of these developments against a fervent public backlash. This led to a second amendment of the Correctional Services Act in 1996.<sup>8</sup> This second amendment

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<sup>2</sup> Act 8 of 1956.

<sup>3</sup> Child Justice Alliance: Oral submissions to the Department of Justice and Constitutional Development to be made at the public hearings held from 5 February 2008 onwards; p3.

<sup>4</sup> Ibid.

<sup>5</sup> Ibid.

<sup>6</sup> Second and further arrests.

<sup>7</sup> Ibid n3

<sup>8</sup> This amendment remains applicable to this day, having been left unchanged by the Correctional Services Act of 1998.

provided for limited circumstances when children older than 14, but under the age of 18, could be detained in prisons while awaiting trial.

The chaos that ensued due to the amendment of section 29 of the Correctional Services Act<sup>9</sup> directly resulted in the establishment of the Inter-Ministerial Committee on Youth at Risk.<sup>10</sup> The work of the IMC was a significant factor in the development of law reform to deal with children in trouble with the law in that it measurably and substantially contributed to the incorporation of the assessment, diversion, secure care and probation in the theory, practice, policy and fiscal planning of child justice.<sup>11</sup>

Recognising our newly international<sup>12</sup> and constitutional obligations,<sup>13</sup> as well as following on developments such as the appointment and ensuing work of the IMC on Youth at Risk, in 1996 the then Minister of Justice, Mr. Dullah Omar, appointed a project committee of the South African Law Commission (SALC)<sup>14</sup> to investigate juvenile justice.

### **3.1.1.2 Crises Creates Opportunity**

As stated above, the Section 29 amendment crises led to the establishment of the Inter-Ministerial Committee on Young People at Risk (IMC) in 1995, which was chaired by the then Minister of Social Development, Geraldine Fraser-Moleketi.

The Committee was made up of various ministers from several key departments,<sup>15</sup>

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<sup>9</sup> Ibid n2.

<sup>10</sup> Also see a short discussion of the work done by the IMC in para 1.2.3.1 above.

<sup>11</sup> Sloth-Nielsen J A short history of time: Charting the contribution of the social development delivery to enhance child justice 1996-2006 in Gallinetti J, Kassan D & Ehlers L (eds) *Child Justice in SA: Children's Rights under Construction* Conference Report Open Society Foundation for SA and the Child Justice Alliance, 2006 p17 onwards. Also see para 1.2.3.1 above.

<sup>12</sup> See Chapter 2 above.

<sup>13</sup> See paras 1.2.3.2 and 1.2.3.3 above.

<sup>14</sup> Now known as the South African Law Reform Commission (SALRC).

<sup>15</sup> Which included Social Development (called Welfare & Population Development at that time); Justice; Safety & Security; Correctional Services; Education, Health and the Reconstruction and Development Programme.

and also individuals from the non-governmental sector.<sup>16</sup> The work done by the IMC provided a platform to rebuild the child care system; to deracialise it; and to educate the sector about a new paradigm of child and youth care services that aimed to keep children in the community as far as possible.<sup>17</sup>

The IMC issued their interim policy recommendations in 1996.<sup>18</sup> Although these never became final policy, their influence was nevertheless widespread.<sup>19</sup> One of the most important issues highlighted by the Interim Policy Recommendations of the IMC was certainly the establishment of secure care facilities for children awaiting trial.<sup>20</sup> In 1996, the IMC also conducted an investigation into the availability and suitability of places of safety, schools of industry and reform schools for the accommodation of children awaiting trial.<sup>21</sup> The development of probation services was another key priority of the IMC,<sup>22</sup> and this ultimately led to the passing of the Probation Services Amendment Act in 2002,<sup>23</sup> which was the first statute in South Africa to include restorative justice in its text.<sup>24</sup>

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<sup>16</sup> The organisations represented were the National Association of Child Care Workers; Lawyers for Human Rights; the Community Law Centre (UWC); NICRO; the Institute of Criminology (UCT); the National Children's Rights Committee, the National Youth Development Project and the National Council for Child and Family Welfare.

<sup>17</sup> IMC Reclaiming Young People at Risk: Report on the work of the Inter-Ministerial Committee on Young People at Risk November 1996, p4-6.

<sup>18</sup> Skelton AM The Influence of the Theory and Practice of Restorative Justice in South Africa with special reference to child justice Unpublished LLD Thesis (2005) UP, p405.

<sup>19</sup> Ibid.

<sup>20</sup> In 1995 already the IMC had pronounced that the solution to the problem of children awaiting trial was the establishment of secure care, in accordance with carefully drafted "national regulations, minimum standards and practice guidelines, which are based on international instruments and international accepted child and youth care practice." See IMC Interim Policy Recommendations (1996) 60.

<sup>21</sup> This report revealed gross human rights abuses occurring in facilities, and renewed efforts were made to bring about the complete transformation of the child & youth care system.

<sup>22</sup> The Department has taken various measures to strengthen probation services, including the establishment of a separate personnel administration standard; training of probation officers; discussions with universities, notably UCT, to enhance graduate and post graduate learning in the field; and the establishment of a professional board for probation work.

<sup>23</sup> Act 35 of 2002.

<sup>24</sup> For more on restorative justice see para 3.3.3.2.2 below.



It is apparent that the vision of the Interim Policy Recommendations was a holistic one, including child justice and child care within one paradigm which emphasised prevention and early intervention over court interventions and residential placements.<sup>25</sup>

### **3.1.2 Work by the Project Committee**

#### **3.1.2.1 Introduction**

Late in 1996, after the section 29 debacle, the then Minister of Justice, Dullah Omar, requested the South African Law Commission to include an investigation into juvenile justice into its programme.<sup>26</sup> He appointed as members of this committee individuals from civil society to be members of the Juvenile Justice Project Committee, whom he knew to be advocates for restorative justice, and who had been part of the non-governmental lobby group calling for substantial reform to the criminal justice system in relation to child offenders.<sup>27</sup>

The work done by the Project Committee can be categorised into three stages, namely:

- The Issue Paper
- The Discussion Paper
- The Final Report containing a draft Child Justice Bill

These three stages spanned a period of nearly four years from the date of the appointment of the Project Committee.

#### **3.1.2.2 The Issue Paper**

The Issue Paper was released by the SALC in May 1997 and contained very broadly framed questions in regard to which respondents were invited to provide comment.<sup>28</sup>

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<sup>25</sup> Skelton AM The Influence of the Theory and Practice of Restorative Justice in South Africa with special reference to child justice Unpublished LLD-thesis (2005) UP, p405.

<sup>26</sup> Ibid on 409-410.

<sup>27</sup> Ibid on 410.

<sup>28</sup> Child Justice Alliance: Oral Submissions on the Child Justice Bill to the Portfolio Committee on Justice & Constitutional Development, held from 5 Feb 1997 onwards, p4. Also see Gallinetti J 2006 (17) SACQ 8.

This paper was distributed to a broad spectrum of interested persons, organisations and institutions – both governmental and non-governmental.<sup>29</sup> The Issue Paper proposed, for the first time, a distinctive child justice system to be provided for by separate legislation, independent of the Criminal Procedure Act.<sup>30</sup>

Following the release thereof, the Commission embarked on an extensive process of consultation. In a concerted effort to give effect to the Commission's outreach policy, the project committee embarked on an innovative communications strategy.<sup>31</sup> A video was commissioned and used as the basis for introducing the issues relevant to juvenile justice.<sup>32</sup>

Thirteen workshops and briefings were held, and the Committee also prepared a simplified questionnaire that was widely distributed.<sup>33</sup> The purpose of this questionnaire was to canvass a wide variety of views.

In November 1997, the Commission hosted an international drafting conference in Gordon's Bay, in order to debate in detail the content of the Issue Paper before the formulation of the Discussion Paper.<sup>34</sup>

### **3.1.2.3 The Discussion Paper**

The 450-page Discussion Paper on Juvenile Justice was released by the Commission in December 1998, and thereafter subjected to intensive public consultation.<sup>35</sup> The

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<sup>29</sup> SALC Project 106: Report on Juvenile Justice, 2000 p1.

<sup>30</sup> Ibid p1.

<sup>31</sup> Ibid p2.

<sup>32</sup> Child Justice Alliance: Oral Submissions on the Child Justice Bill to the Portfolio Committee on Justice & Constitutional Development, held from 5 Feb 1997 onwards, p5. This video was produced with the financial & technical support of UNICEF.

<sup>33</sup> Ibid. Also see SALC Project 106: Report on Juvenile Justice 2000, p2.

<sup>34</sup> Ibid. At the conference ten international experts met with key South African role players to engage in a comparative discourse regarding the drafting of legislation on child justice, and to debate in detail the content of the Issue Paper.

<sup>35</sup> Ibid.

second phase of consultation, in contrast to the first phase that followed the release of the Issue Paper, was characterised by specific focus group workshops.<sup>36</sup> Thus, State Departments that would bear the responsibility for the implementation of the new legislation were consulted, a briefing was held with representatives of NGO's, with persons concerned with the provision of legal aid as well as with members of various Portfolio Committees.<sup>37</sup> Furthermore, a two-day conference to examine social, political and anthropological factors influencing the setting of a minimum age of criminal capacity was hosted.<sup>38</sup>

One of the major innovations regarding the consultation process undertaken by the SALC, was the fact that they undertook a consultation study with children (mainly children who had had some contact with the criminal justice system).<sup>39</sup> The purpose of this endeavour was to ensure that children's voices were also heard in the drafting of new laws that affected them.<sup>40</sup> Finally, a large number of written comments on the Discussion Paper were received from various academics, practitioners and institutions.<sup>41</sup>

The Discussion Paper proposed a vision for a new system of child justice.<sup>42</sup> The vision comprised a comprehensive system for children in conflict with the law, striving at all times to prevent children from being drawn further into criminal justice processes.<sup>43</sup>

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<sup>36</sup> SALC Project 106: Report on Juvenile Justice, 2000 p2.

<sup>37</sup> Child Justice Alliance: Oral submissions on the Child Justice Bill to the Portfolio Committee on Justice & Constitutional Development, held from 5 Feb 1997 onwards, p5.

<sup>38</sup> Ibid.

<sup>39</sup> Gallinetti J Getting to know the Child Justice Act The Children's Rights Project, Community Law Centre, University of Western Cape (available at [www.childjustice.org.za](http://www.childjustice.org.za)), p7.

<sup>40</sup> Ibid.

<sup>41</sup> Child Justice Alliance: Oral submissions on the Child Justice Bill to the Portfolio Committee on Justice & Constitutional Development, held from 5 Feb 1997 onwards, p5. Also see Gallinetti J 2006 (17) SACQ 8.

<sup>42</sup> SALC Discussion Paper 79: Juvenile Justice, 1998, p4-5.

<sup>43</sup> SALC Project 106: Report on Juvenile Justice, 2000, p16.

### **3.1.2.4 The Final Report and draft Child Justice Bill**

In the preparation of the final Report, the responses and views expressed at workshops and in written comments were taken into account. This final Report contained the fully developed Child Justice Bill. The Bill was then introduced into Parliament in 2002, and was subject to extensive debates during 2003. Due to the long delays in processing the Bill, it was only introduced into Parliament again in 2008, after which it was finally promulgated into law on 1 April 2010.

The product is a law that creates a new procedural framework for dealing with children who come into conflict with the law.<sup>44</sup>

The fact that child justice has finally been accorded a particular place in domestic legislation through the creation of a separate procedural criminal justice system for children, can be to no small extent attributed to the concerted efforts of government, civil society and the judiciary.<sup>45</sup> Over the past two decades they have worked tirelessly, in the absence of legislation, policy, practice and legal precedents, at ensuring the protection of the rights of children in conflict with the law.<sup>46</sup>

## **3.2 THE CHILD JUSTICE ACT**

### **3.2.1 Introduction**

On 1 April 2010, after more than a decade of advocacy, deliberations, development and drafting, the Child Justice Act<sup>47</sup> was finally promulgated in South Africa.<sup>48</sup> The implementation of the Act was officially launched at the Walter Sisulu Child and Youth Care Centre in Soweto, and was attended by, amongst others, various

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<sup>44</sup> Gallinetti J Getting to know the Child Justice Act The Children's Rights Project, Community Law Centre, University of Western Cape, p8.

<sup>45</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart C J (ed) Child Law in South Africa (2009) 636.

<sup>46</sup> Ibid.

<sup>47</sup> Act 75 of 2008.

<sup>48</sup> Badenhorst C Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes Criminal Justice Initiative Occasional Paper 10 (2011) A Report by the Open Society Foundation p1.

ministers<sup>49</sup> deputy ministers, directors-general, members of the judiciary and Magistrates as well as delegates from the National Prosecuting Authority and representatives from civil society.<sup>50</sup>

The most important aim of the Act is to establish a separate criminal justice system for children that expands and entrenches the principles of restorative justice, while ensuring their responsibility and accountability for the crimes they commit.<sup>51</sup> The Act places an increased emphasis on the need for effective rehabilitation and reintegration of child offenders, in an attempt to minimise the potential of re-offending.<sup>52</sup>

### 3.2.2 Application of the Act

There are three categories of children and persons that the Act applies to:

- Children below the age of ten years at the time of the commission of the offence;<sup>53</sup>
- Children aged ten years and older but under the age of eighteen years at the time of arrest or when the summons or written notice was served on them;<sup>54</sup>
- Persons who are aged eighteen years or older but under the age of twenty-one years and who committed an offence when under eighteen years of age.<sup>55</sup>

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<sup>49</sup> Including Social Development; Justice & Constitutional Development; and Women, Children and Persons with Disabilities.

<sup>50</sup> Ibid n48, p9.

<sup>51</sup> Ibid p9.

<sup>52</sup> Ibid p9.

<sup>53</sup> Section 4(1)(a). Section 9 sets out procedures that apply to children under ten years of age who have committed a crime. These include a referral to a Children's Court or counseling if necessary. This, however, falls outside the ambit of this dissertation.

<sup>54</sup> Section 4(1)(b). The reason why this particular section does not read children who are aged ten years or older but under the age of eighteen years at the time of the commission of the offence, is that the Act is not intended to apply, for instance, to someone who committed an offence whilst aged seventeen, but who was only arrested at the age of twenty-seven. The procedures in the Act are intended to protect children who are actually in the criminal justice system.

<sup>55</sup> Section 4(2)(a) &(b). This provision recognises that eighteen to twenty-one year olds are still young and can benefit from the procedures in the Act.

### 3.2.3 The Minimum Age of Criminal Capacity of Children

Snyman<sup>56</sup> describes the concept of criminal capacity as follows:

“[B]efore a person can be said to have acted with culpability, he must have criminal capacity – an expression often abbreviated simply to ‘capacity.’ A person is endowed with capacity if he has the mental abilities required by law to be held responsible and liable for his unlawful conduct. It stands to reason that people such as the mentally ill [...] and very young cannot be held criminally liable for their unlawful conduct, since they lack the mental abilities which normal adult people have.

The mental abilities which a person must have in order to have criminal capacity are:<sup>57</sup>

- The ability to appreciate the wrongfulness of his conduct;<sup>58</sup> and
- The ability to conduct himself in accordance with such appreciation of the wrongfulness of his conduct.”

The establishment of a minimum age below which a child shall be presumed not to have the necessary capacity to infringe the law, is one of the cornerstone principles in the development of a separate child justice system.<sup>59</sup> It has long been accepted that childhood is relevant to the general consideration of criminality.<sup>60</sup> The view that young children are slow to develop mental capacity and an acknowledgement that the criminal justice system is an inappropriate place to deal with their misbehaviour finds

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<sup>56</sup> Snyman CR (ed) (2002) 158.

<sup>57</sup> This is a two fold test: The first leg of the test is often referred to as the “insight” test, and the second leg of the test is often referred to as the “self-control” test. See Burchell JM (2005) 358.

<sup>58</sup> Section 11(1) of the CJA amended the Common Law with regard to children and states that a child between the ages of 10 and 14 must be able to appreciate the difference between right and wrong. See Walker S (2011) SACJ (1) 33 at 35-39 where she argues that section 11(1) of the CJA has lowered the threshold for proving the criminal capacity of children, thus altering the law to their detriment. She further argues that this might be in conflict with section 28(2) of the Constitution.

<sup>59</sup> Skelton A & Badenhorst C The Criminal Capacity of Children in South Africa: International Developments & Considerations for Review (2012) A Report by the Child Justice Alliance; available at [www.childjustice.org.za](http://www.childjustice.org.za); p31.

<sup>60</sup> The most direct reference to this is found in Article 40(3)(a) of the CRC.

reflection in the concept of age and criminal capacity.<sup>61</sup> Although a very important principle, there has been a lot of uncertainty in fixing an acceptable minimum age of criminal capacity, since the CRC and the Beijing Rules only provided for general guidelines in this regard. It was left up to State Parties to decide on a minimum age of criminal capacity taking into account a child's level of emotional, mental and intellectual maturity.<sup>62</sup>

When South Africa finally ratified the CRC in June 1995, it was one of the countries with the lowest minimum ages of criminal capacity in the world, namely seven years.<sup>63</sup> Criminal capacity of children was governed by two common law presumptions, namely:<sup>64</sup>

- Children below the age of seven years were irrebuttably presumed to be *doli incapax* and could thus never be prosecuted;
- Children aged older than seven years but under the age of fourteen years were rebuttably presumed to be *doli incapax*.<sup>65</sup>

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<sup>61</sup> Odongo OG (2005) *The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD Thesis, UWC on p130.

<sup>62</sup> Skelton A & Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments & Considerations for Review* (2012) A Report by the Child Justice Alliance; available at [www.childjustice.org.za](http://www.childjustice.org.za); p31.

<sup>63</sup> Skelton A & Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments & Considerations for Review* (2012) A Report by the Child Justice Alliance; available at [www.childjustice.org.za](http://www.childjustice.org.za); p14. Various countries have reviewed their minimum ages of criminal capacity since the adoption of the CRC in 1989. In Australia, for instance, the statutory minimum age of criminal capacity was raised to ten years in all Australian jurisdictions. In Ireland the minimum age of criminal capacity was raised from seven to twelve years for most offences (there are exceptions in cases of serious offences such as murder, rape and aggravated sexual assault where children aged ten and eleven can be prosecuted). Various African countries also followed suit where Ethiopia, for instance, raised their minimum age of criminal capacity to nine years; Malawi to ten years; Uganda to twelve years and Ghana and Sierra Leone to fourteen years.

<sup>64</sup> *Ibid* p14.

<sup>65</sup> This means that if such child was to be prosecuted, the prosecution had to prove that the accused had the required criminal capacity at the time of committing the offence. This was done by proving that a child had the ability to appreciate the wrongfulness of his/her actions, and to act in accordance with that appreciation.

The investigation by the South African Law Commission into juvenile justice<sup>66</sup> also included an investigation into the possibility of raising the age of criminal capacity and a review of the *doli incapax* presumption.<sup>67</sup> Acknowledging that the criminal capacity of children were influenced by a wide range of social and political considerations, as well as differing perspectives and beliefs about child development, the Commission, together with the Centre for Child Law of the University of Pretoria, hosted a two-day seminar in May 1999.<sup>68</sup> The seminar was attended by legal academics, prosecutors, advocates from various Offices of the Director of Public Prosecutions, staff from the Justice Training College, Magistrates, Probation Officers, anthropologists, educationalists, child psychologists and child developments experts.<sup>69</sup> International papers on approaches to minimum age were presented, extensive debate took place and concrete proposals were developed by conference participants.<sup>70</sup>

In the final report on Juvenile Justice, the SALC recommended that the minimum age of criminal capacity be raised from seven to ten years, and to retain the rebuttable presumption of *doli incapax* with regard to children between the ages of ten and fourteen years.<sup>71</sup>

By the time the Child Justice Bill was again introduced into Parliament in 2008,<sup>72</sup> the majority of the submissions supported a minimum age of criminal capacity of twelve

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<sup>66</sup> See para 3.1.2.1 above.

<sup>67</sup> Skelton A & Badenhorst C *The Criminal Capacity of Children in South Africa: International Developments & Considerations for Review* (2012) A Report by the Child Justice Alliance, available at [www.childjustice.org.za](http://www.childjustice.org.za), p15.

<sup>68</sup> SALC Project 106: Report on Juvenile Justice, 2000 p24.

<sup>69</sup> *Ibid* p24-25.

<sup>70</sup> *Ibid* p25. For an Overview on the proceedings of the seminar see ARTICLE 40 1999 (1:2) Community Law Centre, University of Western Cape; Davel CJ *The Delictual Accountability and Criminal Capacity of a Child: How big can the gap be?* 2001 (34:3) *DE JURE* 604-609.

<sup>71</sup> SALC Project 106: Report on Juvenile Justice, 2000 p34-35.

<sup>72</sup> The draft Child Justice Bill (B49 of 2002) published with the Report on Juvenile Justice by the SALC was introduced into Parliament in August 2002. It then disappeared from the Parliamentary agenda until a new version was published in 2007 and introduced into Parliament in January 2008.



years.<sup>73</sup>

The Portfolio Committee, however, decided to set the minimum age of criminal capacity at ten years.<sup>74</sup> The Bill made provision for a review of the minimum age of criminal capacity within five years after the implementation of the Act.<sup>75</sup>

### **3.2.4 Pre-Trial Procedures**

#### **3.2.4.1 Introduction**

The requirements relating to separate procedures applicable to the different stages of the juvenile justice system, are described as follows by Odongo:<sup>76</sup>

“A ‘juvenile justice system’ requires the institution of separate laws, procedures and institutions that apply specifically to children in conflict with the law in contrast to or alongside but distinct from the criminal justice system applicable to adult offenders. This is the requirement of the CRC in Article 40(3)[...].<sup>77</sup> The requirement of separation relates to numerous aspects spanning the pre-trial, trial and the post-trial phases. Thus from the moment of a child’s arrest through to subsequent phases of the criminal procedure, international law requires a ‘system’ which is unique to child offenders and

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<sup>73</sup> Most of the arguments in support of raising the minimum age of criminal capacity to twelve years were based on General Comment No. 10, which stated that a minimum age of criminal capacity set below the age of twelve years, were internationally unacceptable. See United Nations Committee on the Rights of the Child, Forty-Fourth Session, Geneva, 15 Jan – 2 Feb 2007; Genl Comment No. 10 (2007) CRC/C/GC/10 25 April 2007.

<sup>74</sup> One of the main reasons for this was because there were no reliable or accurate statistics on the number of children between the ages of ten and thirteen who have been accused of committing offences or the type of offences that they allegedly committed.

<sup>75</sup> This provision has been retained and section 8 of the CJA provides for a review of the minimum age of criminal capacity and requires the Minister to submit a report to Parliament not later than five years after commencement of this section.

<sup>76</sup> Odongo OG (2005) *The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD-Thesis, UWC.

<sup>77</sup> Article 40(3) of the CRC provides: “State Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of or recognised as having infringed the penal law.”

substantially different from that relating to adults in the criminal justice system.”<sup>78</sup>

### 3.2.4.2 Assessment

Section 34 of the Child Justice Act<sup>79</sup> provides as follows:

“(1) Every child who is alleged to have committed an offence must be assessed by a probation officer, as set out in subsections (2) and (3), unless assessment has been dispensed with in terms of section 41(3).<sup>80</sup>

(2) A probation officer who has been notified by a police official that a child has been handed a written notice, served with a summons or arrested, must assess the child before the child appears at a preliminary inquiry[...].”<sup>81</sup>

The desirability of pre-trial assessment was first advocated at the International Conference on Juvenile Justice Reform held in 1993.<sup>82</sup> Following this, the IMC decided that pre-trial assessment would be based on the concept of developmental assessment, which entails focusing on the child’s strengths and abilities rather than the pathology attached to the offence or family environment from which the child had come.<sup>83</sup>

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<sup>78</sup> At 260.

<sup>79</sup> Act 75 of 2008.

<sup>80</sup> Section 41(3) provides that the prosecutor may dispense with the assessment if it is in the best interest of the child, provided that the reasons for dispensing with the assessment must be entered into the record of the proceedings.

<sup>81</sup> The preliminary inquiry must be held within 48 hours after the arrest of the child, alternatively within the time stated in the Summons or the Notice to Appear – Section 43(3)(b).

<sup>82</sup> Sloth-Nielsen J A Short History of Time: Charting the Contribution of Social Development Delivery to Enhance Child Justice 1996-2006 in Gallinetti, Kassan & Ehlers (eds) *Child Justice in South Africa: Children’s Rights under Construction* Conference Report, a conference held by the Child Justice Alliance in August 2006.

<sup>83</sup> Gallinetti J Getting to know the Child Justice Act The Children’s Rights Project, Community Law Centre, UWC (available @ [www.childjustice.org.za](http://www.childjustice.org.za)) p 33. Also see Gallinetti J *Child Justice in SA: The Realisation of the Rights of Children Accused of Crime* in Boezaart C J (ed) *Child Law in SA* (2009) 642.

The Probation Services Amendment Act<sup>84</sup> eventually defined assessment as developmental assessment, in other words “an evaluation of a person, the family circumstances of the person, the nature and circumstances of the person, the nature and circumstances surrounding the alleged commission of an offence, its impact on the victim, the attitude of the alleged offender in relation to the offence and any other relevant factor.”<sup>85</sup>

Further, an amendment to section 4(1) of the Probation Services Act<sup>86</sup> ensures that the duty of performing assessments, and the related issue of reception and referral of accused persons, form part of the core mandate of the probation service.<sup>87</sup> This meant that pre-trial assessment became part of South African Law but was only applicable to and binding on probation officers.<sup>88</sup> There was no legislation requiring the criminal justice system to implement pre-trial assessment.<sup>89</sup>

The Child Justice Act is now the regulatory framework making pre-trial assessment part of the criminal justice system in relation to children;<sup>90</sup> and the objections thereof include the following:<sup>91</sup>

- Estimate the probable age of the child;
- Formulate recommendations regarding the release or detention and placement of the child;

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<sup>84</sup> Act 35 of 2002. This Act amended the Probation Services Act 116 of 1991.

<sup>85</sup> See Section 1 of the Probation Services Amendment Act, Act 35 of 2002.

<sup>86</sup> Act 116 of 1991.

<sup>87</sup> See Kassan D Probation officers as Roleplayers in Sloth-Nielsen J & Gallinetti J (eds) *Child Justice in Africa: A Guide to Good Practice* at 130-131 where she explains that probation offices are generally social workers appointed specifically to render probation services and in fulfilling their duties they take on various roles, including investigators, supervisors, crime ‘preventors’, planners and implementers of programmes as well as conveners and mediators in restorative justice.

<sup>88</sup> Gallinetti J Getting to know the Child Justice Act The Children’s Rights Project, Community Law Centre, UWC (available @ [www.childjustice.org.za](http://www.childjustice.org.za)) p33.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid.

<sup>91</sup> See section 35 of the CJA.

- Gather information relating to previous convictions, previous diversion or any pending charges in respect of the child;
- Determine whether the child is a child in need of care and protection and should be referred to a Children's Court; and to
- Establish the prospects of diversion of the child.

Upon completion of the assessment, an assessment report must be submitted to the prosecutor before the preliminary inquiry.<sup>92</sup> This assessment procedure forms part of an integrated system designed for the efficient management of the cases of children who come in conflict with the law.<sup>93</sup>

### **3.2.4.3 The Preliminary Inquiry**

The idea of a preliminary inquiry was first raised by the Grahamstown Director of Public Prosecutions whom suggested that the proposed child justice legislation should provide for a pre-charge procedure where an oral summary of the available evidence and all other relevant information could be placed before the Magistrate by the Prosecutor.<sup>94</sup> The Magistrate should then make a ruling as to where the case should be channelled.<sup>95</sup>

The Child Justice Act now introduces this wholly new procedure to facilitate the management of children in the criminal justice system, namely the Preliminary Inquiry.<sup>96</sup>

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<sup>92</sup> See section 40.

<sup>93</sup> Gallinetti J Child Justice in SA: The Realisation of the Rights of Children Accused of Crime in Boezaart C J (ed) Child Law in SA (2009) 656. The assessment procedure plays a crucial role to ensure that the benefits of diversion and the preliminary inquiry are achieved. This will be accomplished by producing a report containing motivated recommendations on how the matter should proceed.

<sup>94</sup> SALC Project 106: Report on Juvenile Justice (2002) 108.

<sup>95</sup> Ibid.

<sup>96</sup> See sections 43 to 50 of the CJA. The preliminary inquiry is an informal pre-trial procedure which is inquisitorial in nature and may be held in a court or any other suitable place. It should be held within 48 hours after the arrest of the child and the main objectives thereof include to consider the assessment report of the probation officer, to make a decision as to whether the child can be diverted before plea, to consider an appropriate diversion option, to determine whether the child is a child in need of care and protection and to determine the release or placement of the child pending the conclusion of the preliminary inquiry, the appearance of a child or the referral of the matter to a Children's Court.

This procedure is aimed at preventing children from getting ‘lost’ in the system.<sup>97</sup> The preliminary inquiry is basically a child’s first appearance in court. Previously, there was no set procedure for what usually happens at a child’s first appearance in court, save for their rights being explained to them.<sup>98</sup>

However, the preliminary inquiry now provides for a set of compulsory decisions to be taken regarding the child, so that from the outset of the case there is a general consensus between the role-players about how the matter is to be managed.<sup>99</sup>

In terms of section 49, there are essentially only two orders that can be made at the preliminary inquiry:

- The first is a diversion order which is made if the child is diverted in terms of section 52(5);<sup>100</sup>
- The second is an order that the matter be referred to the child justice court for plea and trial.<sup>101</sup>

#### **3.2.4.4 Pre-trial Detention**

Extensive pre-trial detention has been a long-standing area of concern in juvenile justice practice globally.<sup>102</sup> Prior to the adoption of the CRC, a comparative study of

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<sup>97</sup> See the 2008 submission on the Child Justice Bill from the Centre for Child Law, available at [www.childjustice.org.za](http://www.childjustice.org.za), for a discussion of the purpose of the preliminary inquiry and how it should work to ensure that a child is not ‘lost’ in the system.

<sup>98</sup> Gallinetti J Child Justice in SA: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) Child Law in SA (2009) 653. See also Gallinetti J Getting to know the Child Justice Act The Children’s Rights Project, Community Law Centre, UWC (available @ [www.childjustice.org.za](http://www.childjustice.org.za)) p38.

<sup>99</sup> Ibid.

<sup>100</sup> See para 3.6 later.

<sup>101</sup> If such an order is made the inquiry magistrate must refer the child to the Legal Aid Board for legal representation if the child does not already have a legal representative. If the child is in detention, the inquiry magistrate must inform the child of the charge(s) against him or her and the date of his/her next appearance. The inquiry magistrate must also inform the child’s parents of the next appearance. If the child is not in detention, the inquiry magistrate can extend any condition of release and must warn the child and his or her parents of the child’s next appearance.

<sup>102</sup> Odongo OG (2005) The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context Unpublished LLD Thesis, UWC, p281.

children in adult prisons throughout the world revealed that a common feature in all the national surveys was the lack of protection for children in the pre-trial stages of criminal proceedings.<sup>103</sup> This study recorded:

“Extensive powers of the police, vague provisions for the protection of rights of arrested or detained persons and practically non-existent accountability of officials directly or indirectly responsible for ill-treatment of children caused the taking of children into custody and their pre-trial detention to be emphasised as a primary concern for the protection of children.”<sup>104</sup>

Investigations by the Law Society revealed similar shocking details with regards to detention of children in South Africa.<sup>105</sup> In the Grootvlei prison, there were complaints that wardens allowed juveniles to be “sold” to adult offenders for sex.<sup>106</sup> Similarly, the conditions in the juvenile section in the Pollsmoor prison were found to be appalling due to the problem of overcrowding. In addition, the report noted that there was one report of sexual abuse by fellow prisoners at least every fortnight.<sup>107</sup>

Despite the promulgation of the Constitution,<sup>108</sup> as well as numerous ad hoc efforts on the part of the legislature to limit pre-trial detention of children,<sup>109</sup> the pre-trial detention of children in South Africa remains problematic.

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<sup>103</sup> Ibid.

<sup>104</sup> Tomasevski K (ed) (1986) 103 as quoted by Odongo OG (2005) *The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD Thesis, UWC, p281.

<sup>105</sup> See Law Society of South Africa 2003 Prison Report, available at <http://www.pmg.org.za>. This report highlighted overcrowding in juvenile sections in various prisons countrywide. In addition, this report noted that in various prisons there is no proper separation of juveniles from adult offenders.

<sup>106</sup> Ibid at p4.

<sup>107</sup> Ibid at p17.

<sup>108</sup> Section 28(1)(g) of the Constitution provides that every child has the right to not be detained except as a measure of last resort, in which case, the child may only be detained for the shortest appropriate period of time. See more about this in para 3.3 below.

<sup>109</sup> The 1994 amendment to section 29 of the Correctional Services Act, Act 8 of 1959, for instance. See para 3.1.1.1 and 3.1.1.2 above.

Prior to the promulgation of the Child Justice Act, the law relating to the release and detention of children awaiting trial was quite complex. In order to see the full picture, certain sections of the Criminal Procedure Act had to be read together with section 29 of the Correctional Services Act.<sup>110</sup>

The Child Justice Act simplified the law with regards to pre-trial detention of children and deals with two situations:

- Release and detention before the child's first appearance at the preliminary inquiry; and
- Release and detention after the child's first appearance at the preliminary inquiry.

#### **3.2.4.4.1 Release and detention before a child's first appearance at the preliminary inquiry**

When considering the release and detention of a child who has been arrested, preference must be given to releasing the child.<sup>111</sup> It is important to note that if a child is 14 years or older and charged with a Schedule 3 offence, such child must be detained in a police-cell or lock-up, pending the child's first appearance at the preliminary inquiry.<sup>112</sup> There is thus no possibility of a child being detained in prison prior to his or her first appearance at the preliminary inquiry.

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<sup>110</sup> See Skelton A & Tshehla B Child Justice in South Africa ISS Monograph 150, September 2008, p46-47. The position can briefly be summarized as follows: A child who has been arrested and charged with a crime other than a crime referred to in Part II or Part III of Schedule 2 of the CPA (a less serious crime), may be released by a police official on bail or into the care of the person in whose custody he or she is with a written warning. The police are also empowered to place a child in a place of safety or under the supervision of a probation officer or correctional official. If a child is not released by the police, the child can be held in police cells for 24 hours, where after the child should be released into the care of a parent or guardian. Where this is not possible, the child may be held in a place of safety. Where there is no place of safety within a reasonable distance from the court, the child is 14 years or older and charged with an offence listed in a schedule to the Correctional Services Act, the child may be sent to prison to await trial. Magistrates' also have a discretion to send a child of 14 years or older to prison if the child is charged with any other offence, and if the Magistrate is of the opinion that the circumstances are so serious as to warrant such detention. Children may also apply to be released on bail in terms of sections 59, 59A and 60 of the CPA.

<sup>111</sup> Section 21(1).

<sup>112</sup> Section 27(b).

### 3.2.4.4.2 Release and detention after a child's first appearance at the preliminary inquiry

- **Release**

There are three options for releasing a child, who has not yet been released, at the preliminary inquiry or later in the child justice court.

In terms of section 21(3), a presiding officer may:

- In respect of any offence, release a child into the care of a parent, an appropriate adult or guardian;
- In respect of an offence referred to in Schedule 1 or 2, release a child on his or her own recognisance;
- If a child is not released from detention in terms of the above two options, release a child on bail.

A child can only be released into the care of a parent, guardian or appropriate adult or on his or her own recognisance as provided if it is in the interests of justice to release the child.<sup>113</sup> To determine whether such release is in the interests of justice, the court must consider certain factors,<sup>114</sup> which include:

- The best interests of the child;
- Whether the child has previous convictions;
- The fact that the child is 10 years or older but under the age of 14 years and is presumed to lack criminal capacity;
- The interests and safety of the community in which the child resides;
- The seriousness of the offence.

If a child is released into the care of a parent, or on his/her own recognisance, the presiding officer must warn the child and his or her parent, guardian or appropriate adult of the next appearance date.<sup>115</sup>

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<sup>113</sup> Section 24(2)(a) and (b).

<sup>114</sup> Section 24(3).

<sup>115</sup> If a child fails to appear on the date, time and place specified, or fails to comply with any of the conditions that were set, the presiding officer may issue a warrant for the arrest of the child or cause a



Section 25 of the Act deals with bail and provides for a specific procedure. In terms of this section, an application for bail must be considered in three stages, namely:

- Whether the interest of justice permit the release of the child on bail;
- If so, a separate inquiry must be held into the ability of the child and his or her parent to pay the amount of money being considered or any appropriate amount, and
- If, after the inquiry, it is found that the child and his or her parent are unable to pay any amount of money, then the presiding officer must set appropriate conditions that do not include an amount of money for the release of the child on bail.

- **Detention**

If, after the child's first appearance at the preliminary inquiry, the child has not yet been released, the presiding officer may place a child in a suitable child and youth care centre, or in prison.<sup>116</sup> Placement in a child and youth care centre is the best option and placement in prison should only be used as a measure of last resort.<sup>117</sup> Any child, in respect of any offence, can be placed in a child and youth care centre, and in deciding whether or not to place a child in a child and youth care centre pending the trial of such child, the presiding officer must take the factors listed in section 29(2) into account.<sup>118</sup> The presiding officer must also consider the recommendations contained in the probation officer's assessment report.

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summons to be issued. When a child then appears before a presiding officer pursuant to this warrant of arrest or summons, the presiding officer must enquire into the reasons for the child's failure to appear or comply with the conditions and make a determination whether or not the failure is due to the child's fault. If it is found that the failure is not due to the child's fault, the presiding officer may order the child's release on the same conditions; or order the child's release on any other condition; and if necessary, make an appropriate order which will assist the child and his or her family to comply with the conditions initially imposed. If it is found that the failure is due to the child's fault, the presiding officer may order the release of the child on different or further conditions or make an order that the child be detained.

<sup>116</sup> Section 26(3).

<sup>117</sup> Section 26(1).

<sup>118</sup> These factors include the age and maturity of the child, the seriousness of the offence, the risk that the child may be a danger to himself, herself or any other person or a child in the child and youth care centre, the appropriateness of the level of security of the child and youth care centre when regard is had to the seriousness of the offence allegedly committed by the child and the availability of accommodation in an appropriate child and youth care centre.

In terms of section 30(1), a presiding officer may only send a child to prison awaiting trial if:

- The child is 14 years or older and charged with a Schedule 3 offence;<sup>119</sup>
- The detention is necessary in the interests of the administration of justice or the safety or protection of the public or the child or another child in detention;
- There is a likelihood that the child, if convicted, could be sentenced to imprisonment; and
- An application for bail has been postponed or refused or the child has not complied with bail conditions once granted.

As a further protection against young people being detained in prison awaiting trial, a child who is 14 years or older but under the age of 16 years may only be detained in a prison if, in addition to the factors listed above, the Director of Public Prosecutions (DPP), or an authorised prosecutor issues a certificate which confirms that there is sufficient evidence to institute prosecution against the child for an offence listed in schedule 3 and the child is charged with the offence.<sup>120</sup>

In making a decision to detain a child in prison, a presiding officer must consider the recommendations contained in the probation officer's assessment report, as well as any relevant evidence placed before him or her.<sup>121</sup>

If a child is in detention awaiting trial, either in a child and youth care centre or in prison, the presiding officer must at every court appearance:<sup>122</sup>

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<sup>119</sup> In terms of section 30(5) a presiding officer can send a child 14 years or older charged with a schedule 1 or 2 offence to prison awaiting trial if, in addition to all the factors listed in section 30(1) and (3), there are substantial and compelling reasons to do so.

<sup>120</sup> Section 30(2).

<sup>121</sup> Section 30(3). The evidence placed before the presiding officer should include evidence regarding the best interests of the child; the child's state of health, previous convictions, previous diversions or charges pending against the child; the risk that the child may be a danger to himself, herself or any other person in a child and youth care centre; any danger that the child may pose to the safety of members of the public; whether the child can be placed in a child and youth care centre which complies with the appropriate level of security; the risk of the child absconding from the child and youth care centre; the probable period of detention until the conclusion of the matter; any impediment to the preparation of the child's defence or any delay in obtaining legal representation which may be brought about by the detention of the child; the seriousness of the offence in question or any other relevant factor.

<sup>122</sup> Section 32.

- Determine whether or not the detention is or remains necessary and whether the placement is or remains appropriate;
- Enter the reasons for the detention or further detention on the record of the proceedings;
- Consider the reduction of the amount of bail, if applicable;
- Inquire whether or not the child is being treated properly and being kept in suitable conditions, if applicable;
- If not satisfied that the child is being treated properly and being kept in suitable conditions, order that an inspection or investigation be undertaken into the treatment and conditions and make an appropriate remedial order;
- Enter the reasons for any decisions made in this regard on the record of the proceedings.

### **3.3 Sentencing Policy Applicable to Child Accused**

#### **3.3.1 Sentencing policy prior to the promulgation of the Constitution**

In South Africa there was no distinct approach (a different policy from the sentencing of adults) to the sentencing of children. All sentencing options available to children were contained in the Criminal Procedure Act.<sup>123</sup> The Act provided for a range of sentencing options, which included the imposition of a fine; a caution and reprimand; correctional supervision and the postponement and suspension of sentence upon one or more conditions set by the Act.<sup>124</sup> The CPA did not place any limits on the power of sentencing officers to impose custodial sentences to children.

#### **3.3.2 The Current Guiding Principal: Section 28(1)(g) of the Constitution**

The lack of a sentencing policy in respect of children has been ameliorated to a considerable extent by the inclusion of a children's rights clause derived from the

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<sup>123</sup> Act 51 of 1977.

<sup>124</sup> Even the death penalty was considered to be a competent sentence for children who committed offences whilst under the age of eighteen. Youth was just considered as an extenuating circumstance in respect of which a court had a discretion to impose a sentence of imprisonment in lieu of the death penalty. The Criminal Law Amendment Act, Act 107 of 1990, which amended section 227 of the CPA eventually prohibited the imposition of the death penalty as a sentence for children.

CRC in the South African Constitution of 1996.<sup>125</sup> Although it has long been recognised that a different approach should be followed when child offenders are to be sentenced,<sup>126</sup> it was Van Heerden J who first indicated that the approach to the sentencing of child offenders needed to be “re-appraised and developed.” In delivering judgment in *S v Kwalase*<sup>127</sup> three elements of this re-appraisal were highlighted namely:

1. The requirement of proportionality between the gravity of the offence, the interests of the child and the sentence;
2. The importance of a sentence that assists with the rehabilitation of the child and with his or her re-integration into society and the family;
3. Renewed employment of innovative sentences other than imprisonment.

Section 28(1)(g) of the Constitution<sup>128</sup> now provides:

“Every child has the right –

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

- (i) kept separately from detained persons over the age of 18 years, and
- (ii) treated in a manner, and kept in conditions, that take account of the child’s age.”

This Constitutional guarantee sets a new benchmark against which to measure the law relating to children in the criminal justice system.<sup>129</sup> While these provisions which

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<sup>125</sup> Odongo OG (2005) *The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context*, Unpublished LLD Thesis, UWC, p368.

<sup>126</sup> See *R v Smith* 1922 TPD 199 201; *S v Jansen* 1975 (1) SA 425 (A).

<sup>127</sup> 2000 (2) SACR 135 (C) at 139i-g. Also see the discussion about this case in para 1.2.3.3 in Chapter 1.

<sup>128</sup> Act 108 of 1996. Also take note of sec 28(2) which provides that a child’s best interests are of paramount importance in all matters concerning the child.

<sup>129</sup> Gallinetti J *Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime* in Boezaart CJ (ed) (2009) 639-640.

constitutionalise the principles of the best interests of the child and include the restrictions on detention have influenced court decisions regarding the use of imprisonment for children who commit offences whilst below the age of eighteen years,<sup>130</sup> the provision remains very vague.<sup>131</sup>

Yacoob J, in delivering the minority judgment in the matter of *Centre for Child Law v Minister of Justice & Constitutional Development*,<sup>132</sup> described the difficulty the courts experience with the interpretation of section 28(1)(g) of the Constitution as follows:

“Certain pronouncements by our courts on the meaning of the phrase ‘last resort’ imply that the phrase renders appropriate a distinction between ‘first resort’ and ‘last resort’ or even first resort, intermediate resort, and last resort. This approach implies that a court is obliged to consider all options other than imprisonment, exclude them one by one and consider imprisonment as a form of punishment only after it has concluded that each of the other methods of punishment are inappropriate in the circumstances. This approach is, with respect, somewhat mechanical and not conducive to giving the constitutional provision its full effect in the protection of children. The injunction that children must be sentenced to imprisonment as a matter of last resort means simply that a child must be sentenced to a term of imprisonment only if, after considering all the relevant circumstances, the court concerned concludes that there is no option but to sentence the child to imprisonment.”<sup>133</sup>

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<sup>130</sup> See paras 1.2.3.2; 1.2.3.3 and 1.2.3.4 of Chapter 1.

<sup>131</sup> This is evident from the number of contradicting judgments delivered by the High Courts on the applicability of the minimum sentences on children who commit serious offences. See paras 1.2.3.3 and 1.2.3.4 in chapter 1.

<sup>132</sup> CCT 98/08 [2009] ZACC 18. Also see the brief discussion about this case in para 1.2.3.4 in Chapter 1.

<sup>133</sup> At para [87] – [88]. Yacoob J goes further, saying that these “relevant circumstances” would include the nature and gravity of the offence, any mitigating circumstances, all the personal circumstances concerning the child as well as the requirements of society. In addition to these the vulnerability of the child concerned, that fact that the child can easily be influenced, the child’s lack of maturity as well as rehabilitation have to be taken into account.

Simply put, if a court concludes that imprisonment is the only appropriate option, a custodial sentence complies with the Constitution.<sup>134</sup> Section 28(1)(g) therefore requires two specific questions to be asked, namely: Is imprisonment appropriate in the circumstances? If it is, what is the appropriate shortest period?<sup>135</sup> Courts would be failing in their duty if, where imprisonment is the only appropriate option, they impose a lesser sentence out of undue sympathy for the child concerned.<sup>136</sup>

While differing on the role that the Legislature can play in the sentencing process,<sup>137</sup> the majority judgment to a large extent concurs with the minority judgment of Yacoob J. Cameron J remarks as follows on the meaning of section 28(1)(g):<sup>138</sup>

“The principles of ‘last resort’ and ‘shortest appropriate period’ bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered [...]”.

In short, section 28(1)(g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails.<sup>139</sup> With this judgment, the highest court in the country made the clearest statement regarding the meaning and interpretation of section 28(1)(g) of the Constitution.

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<sup>134</sup> At para [90].

<sup>135</sup> At para [92].

<sup>136</sup> At para [88].

<sup>137</sup> Cameron J feels that the very nature of minimum sentences is to diminish the courts’ power of individuation by constraining their discretion in the sentencing process (at para [45]); while Yacoob J concludes that section 28(1)(g) in no way, either expressly or by implication, limit the role of the Executive and Legislature in the determination of sentences (at para [97]).

<sup>138</sup> At para [31].

<sup>139</sup> At para [32].

### 3.3.3 Sentencing policy in terms of the Child Justice Act

#### 3.3.3.1 Introduction

For the first time in South African law a statute now contains provisions regarding the objectives of sentencing and factors to be considered during sentencing.<sup>140</sup> The Child Justice Act provides that the objectives of sentencing of child offenders are to –

- Encourage the child to understand the implications of and be accountable for the harm caused;<sup>141</sup>
- Promote the individualised response which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the offence;<sup>142</sup>
- Promote the reintegration of the child into the family and community;<sup>143</sup>
- Ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration;<sup>144</sup>
- Ensure that imprisonment is used as a measure of last resort and only for the shortest appropriate period of time.<sup>145</sup>

Odongo<sup>146</sup> submits that the express inclusion of these broadly framed principles implies that they should be of guidance to the sentencing process.<sup>147</sup> These principles were, to a large extent drawn from the phrasing of Article 40(1) of the CRC, and affirm the primacy of the interests of a convicted child offender and the likelihood of his or her reintegration over and above other sentencing objectives in general penal

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<sup>140</sup> Skelton A & Tshela B Child Justice in South Africa ISS Monograph 150, Sept 2008; p59.

<sup>141</sup> Section 69(1)(a).

<sup>142</sup> Section 69(1)(b).

<sup>143</sup> Section 69 (1)(c).

<sup>144</sup> Section 69(1)(d).

<sup>145</sup> Section 69(1)(e).

<sup>146</sup> Odongo OG (2005) The Domestication of International Law Standards on the rights of the Child with specific reference to Juvenile Justice in the African Context Unpubl LLD Thesis, UWC.

<sup>147</sup> At 383.

law – such as deterrence and punishment.<sup>148</sup> In this regard it is implied that any sentencing officer must impose a sentence which is compatible with these principles contained in the Act.<sup>149</sup>

### **3.3.3.2 Sentencing options**

#### **3.3.3.2.1 Community based sentences**

Section 72 of the Child Justice Act describes a community-based sentence as a sentence which allows a child to remain in the community.<sup>150</sup>

A Child Justice Court imposing a community-based sentence must request a probation officer to monitor the child's compliance with the relevant order, and to provide the court with progress reports.<sup>151</sup>

Important to note in this regard, is that a community-based sentence<sup>152</sup> can now be imposed as a sentence on its own. Previously, most sentences that would be described as “alternative sentences” could not be imposed on their own; they could only be imposed as conditions of a suspension or postponement of sentence.<sup>153</sup> The Issue Paper first raised the question as to whether it would be desirable for legislation to provide that alternative sentences be imposed independently, without the necessity of always linking these to suspended or postponed sentences.<sup>154</sup> This was taken further

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<sup>148</sup> Ibid.

<sup>149</sup> Ibid on 384.

<sup>150</sup> These include any diversion order in terms of section 53 of the CJA (see para 3.6 below) or a sentence involving correctional supervision in terms of section 75 (see para 3.3.3.2.4 below). It is important to note that diversion can operate at two different phases of the process. A child can be diverted before the conclusion of the trial in a child justice court, or the diversion orders available in terms of the act can be imposed as a sentence, which can be linked to community-based sentences or the sentence of correctional supervision.

<sup>151</sup> Section 72(2)(a). Failure by a child to comply with this sentence may result in the child being brought back to court for an inquiry into the failure of the child – section 79 of the Act.

<sup>152</sup> For example compensation, community service, attendance of courses or treatment at a centre.

<sup>153</sup> SALC Project 106: Report on Juvenile Justice, 2000; p. 156.

<sup>154</sup> Ibid on 157. What is regarded as a condition of sentence in SA may be imposed independently in some foreign jurisdictions. Section 283 of the New Zealand Children, Young Persons and their Families Act, 1989, includes in its range of sentencing options sentences such as payment of reparation towards emotional harm or loss of or damage to property, restitution and community harm.



by the review of literature on the subject in the Discussion Paper. This, and the desirability of linking these sentences to the acquisition of skills and vocational training,<sup>155</sup> influenced the formulation of this sentence option in the Act.

### **3.3.3.2.2 Restorative Justice (RJ) Sentences**

#### **3.3.3.2.2.1 Introduction**

Restorative justice is, like justice, essentially an ideal.<sup>156</sup> The rationale behind restorative justice is that the injustice brought about by the crime should be restored, principally by the offender him-or herself.<sup>157</sup>

From the outset it is important to note that, while the term restorative justice may be relatively new to South Africans, the spirit of the concept is strongly embedded in the history of African society through the notion of ubuntu.<sup>158</sup>

For as far back as oral history can take us, African communities have seen justice through a restorative lens.<sup>159</sup> African Customary law has always had traditional mechanisms to deal with problems arising in community.<sup>160</sup> It has been said that “reconciliation, restoration and harmony lie at the heart of African adjudication.”<sup>161</sup>

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<sup>155</sup> From this the linkage to the diversion options listed in section 53 of the Act.

<sup>156</sup> Terblanche (2007) 175.

<sup>157</sup> Ibid.

<sup>158</sup> Skelton A & Frank C Conferencing in South Africa: Returning to our future in Morris A & Maxwell G (eds) *Restorative Justice for Juveniles: Conferencing, Mediation & Circles* (2001) 104. Ubuntu has been described as a worldwide view, which is both a guide for social conduct as well as a philosophy of life. Therefore, more than merely applicable to justice, ubuntu describes the individual’s status in relation to others through the idea that a person is only a person because of other people. Ubuntu embodies ideas about the interconnectedness of people to each other, the importance of the family group over the individual and the value of benevolence towards all others in the community.

<sup>159</sup> Skelton A & Frank C Conferencing in South Africa: Returning to our future in Morris A & Maxwell G (eds) *Restorative Justice for Juveniles: Conferencing, Mediation & Circles* (2001) 104; Skelton A *Juvenile Justice reform: children’s rights and responsibilities versus crime control* in Davel CJ (ed) (1999) *Children’s Rights in a transitional society* 93.

<sup>160</sup> Ibid.

<sup>161</sup> Allott 1977 (1) *Journal of African Law* 21.

South Africa's most famous and engaging experience with restorative justice has undoubtedly been the Truth and Reconciliation Commission (TRC).<sup>162</sup> The Commission sought to explore some of the most painful periods in South Africa's history with a view to unearthing the facts of politically motivated violations of human rights and enabling the country to move into its future, having confronted its past.<sup>163</sup>

Dr. Alex Borraïne,<sup>164</sup> the Deputy Chairperson of the TRC describes the case process of the TRC as follows: "Essentially it is the holding in tension of the political realities of a country struggling through a transition founded on negotiation and an ancient African philosophy which seeks for unity and reconciliation rather than revenge and punishment."

While the testimonies of the perpetrators of human rights violations were central to the proceedings of the TRC, more important was the fact that victims told of their loss and pain, and were afforded the opportunity to ask questions of perpetrators.<sup>165</sup> The public hearings of the Commission, which received extensive coverage in the print and electronic media, exposed the South African public to this different understanding of the function of justice.<sup>166</sup>

The coming into power of the first democratically elected government, introduced a flurry of new policy-making.<sup>167</sup> Through the lobbying of people in the NGO sector,

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<sup>162</sup> The Truth and Reconciliation Commission was established in terms of the Promotion of National Unity and Reconciliation Act, Act 34 of 1995; Skelton A *Juvenile Justice reform: children's rights and responsibilities versus crime control* in Davel CJ (ed) (1999) *Children's Rights in a transitional society* 93.

<sup>163</sup> Skelton A & Frank C *Conferencing in South Africa: Returning to our future* in Morris A & Maxwell G (eds) *Restorative Justice for Juveniles: Conferencing, Mediation & Circles* (2001) 107.

<sup>164</sup> Borraïne A *A Country Unmasked: The Story of South Africa's Truth & Reconciliation Commission* (2000) at 362 as quoted by Skelton A & Frank C *Conferencing in South Africa: Returning to our future* in Morris A & Maxwell G (eds) *Restorative Justice for Juveniles: Conferencing, Mediation & Circles* (2001) 107.

<sup>165</sup> Skelton A & Frank C *Conferencing in South Africa: Returning to our future* in Morris A & Maxwell G (eds) *Restorative Justice for Juveniles: Conferencing, Mediation & Circles* (2001) 107.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid* on 108.

restorative justice concepts found their way into a number of key government policy documents.<sup>168</sup> The Department of Welfare, in their White Paper published in 1997, highlighted crime prevention through restorative justice, and indicated a move towards restorative conflict resolution processes in the place of prosecution and sentencing.<sup>169</sup> The National Crime Prevention Strategy, led by the Department of Safety & Security, also echoed these ideas. The IMC<sup>170</sup> took up the notion of Restorative Justice, and it was included as a practice principle of the Interim Policy Recommendations for the Transformation of the Child and Youth Care System.<sup>171</sup>

### **3.3.3.2.2 Practical examples of Restorative Justice during sentencing<sup>172</sup>**

In *S v Maluleke*,<sup>173</sup> Judge Bertelsmann described the promising possibilities for the introduction of customary law principles into the formal criminal justice system. The importance and relevance of restorative justice in SA was highlighted when Judge Bertelsmann stated that, although not well integrated, our African heritage is relevant, seen in the context of an innovative approach to sentencing, restorative justice may become an important tool in reconciling the victim, the offender and the community. At stake in this case was a traditional custom in terms of which the accused should send an older member of her family to that of the deceased, as a token of an apology and a way to mend the relationship between the families.<sup>174</sup> The accused was sentenced to eight months imprisonment, suspended on condition, inter alia, that she followed this custom.

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<sup>168</sup> Ibid.

<sup>169</sup> Ibid.

<sup>170</sup> See para 3.1.1.2 above.

<sup>171</sup> Skelton A & Frank C Conferencing in South Africa: Returning to our future in Morris A & Maxwell G (eds) *Restorative Justice for Juveniles: Conferencing, Mediation & Circles* (2001) 108.

<sup>172</sup> For detailed discussions on the cases below see Skelton A & Batley M *Restorative Justice: A contemporary South African Review* 2008 (21:3) *Acta Criminologica* 37 on p41-42; Hargovan H *Knocking and Entering: Restorative Justice arrives at the Courts* 2008 (1) *Acta Criminologica* 24 on 33.

<sup>173</sup> Unreported case CC 83/04, dated 13 June 2006 (T). M was charged with murder, as she has actively participated with her husband, in what was described as a “sustained assault upon the deceased after he had been apprehended in her home into which he had broken with the apparent intent to commit theft. See Hargovan 2008 (1) *Acta Criminologica* 24 at 33.

<sup>174</sup> See paras 13-21 of the judgment.

*S v M*<sup>175</sup> illustrates how restorative justice principles provide an opportunity for judicial officers to look beyond adjudication, to do more than to just process a case, acknowledge the profound impact the legal process and its outcome may have on all participants' lives and well-being, and to develop an ethic of care and humanise the legal process.<sup>176</sup> As upper guardian of N, the court ordered continuing counselling,<sup>177</sup> and made an order for two specific sessions. The first session had to address the disclosure of the two incidents of rape by her stepfather which set in motion the investigation and subsequent trial of her stepfather. The social worker had to explain what happened at court and the role of N's evidence. The following message from the judge was to be conveyed to her:<sup>178</sup>

“[S]he is a brave young woman who acted as she should have done by making the report to the school, she has not only ended the abuse of herself but perhaps protected others; her values and sense that she is entitled to the privacy of her body is absolutely correct and that no one is to suggest otherwise; she is not to feel degraded or ashamed in any respect; she remains as ‘virginal’ as anyone else in both body and soul; as she is entitled to feel proud of how she tackled this very difficult issue.”

The second session had to deal with the judgment of the court, as well as provide assistance to N to work through the implication thereof.<sup>179</sup> An explanation of what the

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<sup>175</sup> 2007 (2) SACR 60 (W). In this case the court convicted a stepfather, aged 63, of raping his stepdaughter, N, twice over a four to five month period. The circumstances surrounding the unusual sentence by Satchwell J were that N's mother, after coming from a physically abusive relationship with N's father, married the accused two years prior to the first incidence of rape on N. Despite any evidence that the mother knew what was going on, the court formed the impression that, in the absence of a strong and protective parent the incidents of rape were “allowed” and that the family exchanged the physical abuse by the husband for the sexual abuse by the stepfather. Within the above context N's mother manipulated her to the extent that she felt burdened with responsibility for the accused's conviction and likely sentence. Apparently the mother was emotionally dependant on her husband and could not properly function without him. She further facilitated a visit by N to the accused in prison and supervised the process of forgiveness as expected in the Bible, which in her view logically demanded the accused's return to the family.

<sup>176</sup> Van der Merwe 2010 (1) SACJ 98 on 105.

<sup>177</sup> This despite the mother's instruction to stop it.

<sup>178</sup> Para 50.

<sup>179</sup> Van der Merwe 2010 (1) SACJ 98 on 105.

sentencing process entails; whose responsibility it is to take the decision and legal reasons to impose life imprisonment had to be explained to N, as the court felt that it can play an essential role in dealing with N's apparent self-blame as well as her mother's anger and rejection.<sup>180</sup> Other important information that was to be conveyed included the practical implication of life imprisonment for all their lives and answering questions from the complainant.<sup>181</sup>

The court accepted that it could not protect N from the misguided beliefs and responses of her mother,<sup>182</sup> yet in an effort to mediate it, reached out to her in an unusual way. Satchwell J used her standing as a judge to convey a powerful message with healing potential to the complainant.<sup>183</sup> She concluded by highlighting that "N stands alone in this terrible ordeal" and "she is scarred for life."<sup>184</sup>

In *S v Shilubane*<sup>185</sup> the court dealt with the theft of seven fowls. Notwithstanding the accused's genuine remorse, he had been sentenced to nine months imprisonment. On review, Bosielo J (with Shongwe J concurring) set aside the sentence and replaced it with a suspended sentence. The court remarked that, in line with the new philosophy on restorative justice, the complainant would have been more pleased to receive compensation for his loss.<sup>186</sup>

The *Dikoko* case<sup>187</sup> dealt, interestingly enough, not with a criminal matter, but a civil claim for damages arising from defamation. Whilst the majority awarded a hefty claim for financial damages, the two separate but concurring minority judgments by Justices Mokgoro and Sachs, focused instead on a restorative justice approach,

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<sup>180</sup> Ibid.

<sup>181</sup> Ibid.

<sup>182</sup> Para 50.

<sup>183</sup> Van der Merwe 2010 (1) SACJ 98 at 105.

<sup>184</sup> Para 116.

<sup>185</sup> 2008 (1) SACR 295 (T).

<sup>186</sup> Skelton & Batley 2008 (21:3) Acta Criminologica 37 on 41.

<sup>187</sup> *Dikoko v Mokhatla* 2006 (6) SA 235 (CC).

making the point that dignity could not be restored through disproportionate punitive monetary claims, and that an apology would have been a more powerful tool, more in keeping with African notions of ubuntu and our constitutional commitment to dignity.<sup>188</sup>

A further important Constitutional Court case, *S v M* (Centre for Child Law as Amicus Curiae)<sup>189</sup> dealt with the duties of a sentencing court when sentencing a primary caregiver of children. Sachs J, in writing for the majority, characterised correctional supervision as providing better opportunities for a restorative justice approach. He found that restorative justice recognises that the community, rather than the criminal justice agencies, is the prime site of crime control. He also spoke about the significance of making repayments of defrauded money on a face-to-face basis, because “restorative justice ideally requires looking the victim in the eye and acknowledging wrongdoing.”<sup>190</sup>

In the case of *S v Saayman*<sup>191</sup> restorative justice came in for some careful examination regarding the concepts of “shaming” and the constitutional right to dignity.<sup>192</sup> In sentencing the accused the regional magistrate indicated that he wanted the sentence to provide some measure of relief to the victims of the crime. To a suspended sentence linked to correctional supervision, he added a further condition that the accused should stand out in the open, to ask for forgiveness from the victims, by standing in the entrance to the commercial crimes court, under supervision of a police official. The accused was required to stand there for fifteen minutes, on a specific date, holding a placard bearing an apology to victims. When an application for leave to appeal was brought before the Magistrate, he explained that what the court was attempting to achieve was to try and restore relationships between the parties by

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<sup>188</sup> Skelton & Batley 2008 (21:3) *Acta Criminologica* 37 on 41. Also see Hargovan H 2008 (1) *Acta Criminologica* 24 at 33.

<sup>189</sup> 2007 (12) BCLR 1312 (CC).

<sup>190</sup> Para 71.

<sup>191</sup> 2008 (1) SACR 393 (E).

<sup>192</sup> The accused pleaded guilty to six counts of fraud amounting to a total value of R13 387.21. The frauds committed by her led to the black-listing by the Credit Bureau of certain of the complainants (whose identities she had fraudulently used), thereby causing them embarrassment and inconvenience.

assisting the accused to tender an apology in public to the complainants. The questions that were central to the review proceedings were whether the condition imposed by the Magistrate accorded with restorative justice principles and whether it passed the constitutional muster. On both counts the court found that the order, as creative and well-intentioned as it may have been, was not consonant with restorative justice principles, and that it was unconstitutional on the basis that it infringed the right to dignity.

This emerging jurisprudence proves beyond any doubt that restorative justice is no longer an academic debate on the margins of South African society.<sup>193</sup> It is a living issue in our criminal justice system, and is being dealt with and developed by our courts.<sup>194</sup>

### **3.3.3.2.2.3 Family Group Conferencing (FGC)**

Section 71(3)(a)<sup>195</sup> provides that a child justice court may refer the matter to a family group conference.

When FGC were first heard of in South Africa they excited immediate interest among juvenile justice advocates.<sup>196</sup> The process of conferencing promised a set of beliefs that went to the heart of many of the problems inherent in the administration of justice for children accused of crimes.<sup>197</sup>

South Africa has undertaken two formalised experiments with FGC.<sup>198</sup> Although the projects both had shortcomings, they have provided illumination to practitioners and policy makers, while raising further illumination to practitioners and policy-makers,

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<sup>193</sup> Skelton & Batley 2008 (21:3) *Acta Criminologica* 37 on 42.

<sup>194</sup> *Ibid.*

<sup>195</sup> Of the Child Justice Act.

<sup>196</sup> Skelton A & Frank C Conferencing in South Africa: Returning to our future in Morris A & Maxwell G (eds) *Restorative justice for juveniles: Conferencing, Mediation & Circles* (2001) 109.

<sup>197</sup> *Ibid.*

<sup>198</sup> *Ibid.* These projects were the Wynberg Pilot in 1995 and the Pretoria Pilot in 1996 & 1997.

while raising further questions of both a practical and philosophical nature.<sup>199</sup> At the end of the two projects, people involved in the projects had the following to say about the projects:

“One of the first questions the project grappled with was what exactly the point of a [FGC] is. If we can refer a child to a life skills programme or community service directly from the court what is the point of the costly and time-consuming [FGC]? At the end of the project[s], the answer [was] clear: the power lies in the process. A change in attitude and behaviour of any person cannot be guaranteed by just completing a programme. [FGC] invest in these dynamics and create the opportunity and possibility for change to occur.”<sup>200</sup>

The Child Justice Act now includes detailed procedures for the setting up and running of FGC.<sup>201</sup> A probation officer<sup>202</sup> has the responsibility of convening the conference as soon as possible but within 21 days after the decision to hold a conference, has been taken.<sup>203</sup> The FGC is empowered to regulate its own procedure and to make such a plan as it deems fit, provided that it is appropriate to the child and family and is consistent with the principles contained in the Act. The plan must specify the objectives for the child and the family, as well as the period in which they are to be achieved, must contain details of the services and assistance to be provided for the child and family and must include such matter relating to education, employment, recreation and welfare of the child as are relevant.<sup>204</sup>

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<sup>199</sup> Ibid. For more information on these projects see Sloth-Nielsen J Theory and Practice of Family Group Conferencing in South Africa: An overview of General Principals, and Report on the Pioneering Wynberg Pilot Project Unpublished Social Justice Resource Project, Institute of Criminology, UCT, 1996; Bracken N & Batley M Family Group Conferences: Putting the Wrong Right (Inter Ministerial Committee on Young People at Risk, Pretoria, 1998).

<sup>200</sup> Bracken N & Batley M Family Group Conferences: Putting the Wrong Right (Inter Ministerial Committee on Young People at Risk, Pretoria, 1998) at 144.

<sup>201</sup> Section 61 of the Act.

<sup>202</sup> A Social Worker employed by the Department of Social Development.

<sup>203</sup> Section 61(2).

<sup>204</sup> See sections 61(5) and 61(6).



#### 3.3.3.2.4 Restorative Justice as a sentencing option for serious crimes

According to Terblanche,<sup>205</sup> there can be no doubt that RJ is one of the most exciting developments in criminal justice theory over the past few decades. He also contends that lessons from the past have indicated that new ways of thinking are not always well received by people in the system,<sup>206</sup> and obviously, by the public. When the Act was first tabled in Parliament, the public contended that the Act lets children “off the hook” and absolves them from responsibility for their criminal actions.<sup>207</sup> Even more worrying, was the contention that the RJ notions included in the Act allowed children to “just say sorry.” While society can surely not let misdeeds go unnoticed, these children require development and application of responsive and useful measures aimed at ensuring law abiding adults.<sup>208</sup> It goes without saying that child offenders are frequently drawn from the most vulnerable and marginalised groups. They are the children of broken families; they live in gang-invested neighbourhoods; they are without satisfactory adult role-models; they themselves have been victimised from early in life.<sup>209</sup> These children are in need of guidance and protection, and not a “lock them up and throw away the key” mentality.

Often forgotten is the fact that the high profile cases involving child offenders<sup>210</sup> constitute a miniscule proportion of the overall number of cases which will be dealt with in terms of the Act. The vast bulk of children will be appearing in lower courts on far less notorious charges. This is not to say that the RJ sentences are too lenient to be imposed on children who commit serious crimes. Even our courts have acknowledged that, in appropriate cases, RJ measures could be applied for serious offences. In *S v Tabethe*<sup>211</sup> Bertelsman J declared that “[i]n the light of these facts, the

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<sup>205</sup> Terblanche (2007) 178.

<sup>206</sup> Ibid.

<sup>207</sup> Sloth-Nielsen J & Gallinetti J 2011 (14:4) PELJ 62.

<sup>208</sup> Ibid at p83.

<sup>209</sup> Ibid.

<sup>210</sup> See fn 127 in Chapter 1.

<sup>211</sup> 2009 (2) SACR 62 (T). In this case the accused was convicted of raping his 15 year old stepdaughter. The court imposed a 10 year sentence, wholly suspended for a period of 5 years. The sentence was later overturned on appeal and the SCA replaced it with a 10 year imprisonment sentence

court was of the view that this case was the one rape case – certainly the first this court has dealt with – in which restorative justice could be applied in full measure.”<sup>212</sup>

The drafters of the Act did not exclude the imposition of RJ sentences on children who commit schedule 3 offences, which means they also view these types of sentences suitable for serious offences.

### 3.3.3.2.3 Fines and alternatives to fines

Section 74(1) of the Child Justice Act authorises a child justice court to impose a fine as a sentence.<sup>213</sup>

A fine can be described as a sentence by the court which orders the offender to pay a specified amount of money to the State.<sup>214</sup> Although being one of the most commonly imposed sentences in South Africa, they have mainly been directed at the lower end of the crime severity scale.<sup>215</sup>

Before imposing a fine as a sentence, the court should conduct a proper investigation into the means of the offender, parent or guardian to pay the fine.<sup>216</sup> The court should thus ensure that a child is not imprisoned simply for being unable to afford a fine.<sup>217</sup>

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– see *DPP v Thabethe* (619/10) [2011] ZASCA 186 (30 September 2011). The appeal judgment is discussed in para 4.4.1.2 in Chapter 4.

<sup>212</sup> At para 36.

<sup>213</sup> Joubert J J (2009) 314.

<sup>214</sup> Terblanche (2007) 261. During the SALC’s deliberations on the Child Justice Bill, there was substantial support for the fact that a monetary fine be excluded from the range of sentencing options provided for in the Act. Most respondents however agreed that restitution, reparation to the victim and compensation in monetary form should be retained as valuable components of a restorative justice approach. The main reason for this probably relates to the fact that it is mostly parents who end up paying the fine, implying that the court punishes the parent and not the child – SALC Project 106: Report on Juvenile Justice: 2000 p.156 and 169.

<sup>215</sup> Terblanche (2007) 261.

<sup>216</sup> Joubert (2009) 314. Initially the court will use its discretion to determine an appropriate amount for the fine. On the basis of the seriousness of the crime and in the light of all the relevant mitigating and aggravating factors, the presiding officer will intuitively determine an amount which reflects the “objective” blameworthiness of the offender. After determining an appropriate amount for the fine, the court will then assess the means of the offender in order to determine whether this amount should be adjusted. It is a general principle of our law that a fine should not be imposed if the offender cannot reasonably afford it –Terblanche (2007) 263.

<sup>217</sup> Joubert (2009) 314. Ideally, the offender’s means refer to his complete financial position, including weekly or monthly income, available cash, investments and other assets, as well as his obligations. In

Subsection (2) provides for a number of alternatives to the fine, such as payment of an amount of money as a form of symbolic restitution, or delivering a service instead of a fine.<sup>218</sup> These alternatives are aimed at achieving the general principle that a child offender should assume responsibility for the committed crime.<sup>219</sup>

#### **3.3.3.2.4 Correctional supervision**

For many years it was possible to impose a sentence closely resembling the current sentence of correctional supervision; as it was possible to suspend a sentence on various conditions such as community service; the submission to various forms of treatment and training and even house arrest.<sup>220</sup> Such a sentence was however not a practical option, as sentencing officers themselves had to find suitable agencies to enforce them.<sup>221</sup>

In the late 1980's the Minister of Justice requested the Interdepartmental Working Group on the Overcrowding of Prisons<sup>222</sup> to investigate the implementation of some kind of supervision as a sentencing option.<sup>223</sup> The result was correctional supervision which was introduced through the Correctional Services and Supervision Matters Amendment Act.<sup>224</sup>

The first important judgment on correctional supervision was delivered by Kriegler AJA in *S v R*.<sup>225</sup> This judgment can still today be described as the locus classicus on correctional supervision; in that it provided direction to arguments regarding the way

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practice, however, the available cash and income are mostly used as the only measures of the kind of fine the offender will be able to pay – Terblanche (2007) 263.

<sup>218</sup> Joubert JJ (2009) 314.

<sup>219</sup> Ibid.

<sup>220</sup> Terblanche (2007) 279.

<sup>221</sup> Ibid.

<sup>222</sup> A “committee” under the chairmanship of the regional court president of Northern Transvaal at the time – Mr. W F Krugel.

<sup>223</sup> Terblanche (2007) 279.

<sup>224</sup> Ibid. Act 122 of 1991.

<sup>225</sup> 1993 (1) SACR 209 (A); 1993 (1) SA 476 (A). Ibid op cit n6.

in which the courts have to formulate the sentence and played a major role in establishing a belief in the rehabilitative value of correctional supervision.<sup>226</sup> Kriegler AJA knew how important the role of the judiciary would be in establishing correctional supervision as a fully accepted form of sentence in South Africa, and he therefore declared that: “Wat meer is, die wetgewer het ondubbelsinnig deur die klemverskuiwing, wat uit die wysigingswet as geheel spreek, aangedui dat straf, hervormend maar desnoods hoogs bestraffend, nie noodwendig of selfs primêr deur opsluiting in ‘n gevangenis haalbaar is nie.”<sup>227</sup>

In *S v D*<sup>228</sup> Nicholas AJA described correctional supervision as:

“[a] new sentencing option [that] has been received by sentencers [...] with doubt and misgivings – [...]. The lack of enthusiasm was perhaps not surprising; many of those concerned in the administration of criminal justice had acquired a particular mind-set as a result of years of habituation to the idea that imprisonment is the punishment of choice for serious crime...”<sup>229</sup>

Section 75 of the Child Justice Act now provides:<sup>230</sup>

“A child justice court that convicts a child of an offence may impose a sentence involving correctional supervision –

- (a) in the case of a child who is 14 years or older; in terms of section 276(1)(h) or (i) of the Criminal Procedure Act; or
- (b) in the case of a child who is under the age of 14, in terms of section 276(1)(h) of the Criminal Procedure Act.”

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<sup>226</sup> Terblanche (2007) 280.

<sup>227</sup> Ibid op cit n7.

<sup>228</sup> 1995 (1) SACR 259 (A). Ibid op cit n9.

<sup>229</sup> At 265 c-d.

<sup>230</sup> Section 75.

According to section 1 of the Criminal Procedure Act, correctional supervision is defined as “a community-based sentence to which a person is subject in accordance with Chapter V and VI of the Correctional Services Act, 1998, and the regulations made under that Act...”<sup>231</sup>

In *S v R*<sup>232</sup> Kriegler AJA found that correctional supervision does not so much describe a specific sentence as a collective term for a wide range of measures sharing one common feature – they are all executed within the community.<sup>233</sup>

The severity of the sentence of correctional supervision has been described on various occasions.<sup>234</sup> In *S v E*<sup>235</sup> Howie AJA (as he then was) said: “What is clear is that correctional supervision is no lenient alternative.” In *S v Schutte*<sup>236</sup> Steyn J, referring to the unreported judgment of Conradie J in *S v Harding* quoted a portion of that judgment as follows:

“...correctional supervision is not a soft sentence ... in some ways it is harder than imprisonment. A cynic once said that the easiest life on earth is being a soldier or a nun: you only have to obey orders. Prison is like that. A model prisoner is the one who best obeys orders. These are not ideal circumstances, generally, for the regrowth of character. Correctional supervision gives an offender greater scope for regrowth of character.”

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<sup>231</sup> Terblanche (2007) 281. Thereafter a list follows of the provisions under which a person may find him-/herself under correctional supervision. These include correctional supervision as a substantive sentence; correctional supervision under which a prisoner may be released by the parole board or the Commissioner without the involvement of the court; correctional supervision imposed after reconsideration by the court of an ordinary sentence of imprisonment; correctional supervision imposed after reconsideration by the court of a sentence of indeterminate imprisonment following the declaration of the offender as a dangerous criminal; correctional supervision imposed as a condition of a suspended sentence or of postponed sentencing.

<sup>232</sup> 1993 (1) SACR 209 (A).

<sup>233</sup> At 220h. This “range of measures include house detention, community service, payment of compensation or damages; treatment; development and support programmes; restriction to magisterial district; living at a fixed address; refraining from using drugs or alcohol and to refrain from committing crime.”

<sup>234</sup> Terblanche (2007) 285.

<sup>235</sup> 1992 (2) SACR 625 (A) at 633a-b.

<sup>236</sup> 1995 (1) SACR 344 (C) at 349d-g.

Just as there is no complete list of crimes for which correctional supervision can or should be imposed, there is no such list of crimes for which it should not be imposed.<sup>237</sup> Our courts have however stressed on numerous occasions that judicial officers should not hesitate to impose correctional supervision, even for serious crimes like murder.<sup>238</sup>

Terblanche<sup>239</sup> indicates that correctional supervision is under constant threat of being seen as a lenient sentence. To balance this, there is increased pressure to use alternative sentences because of overcrowding of prisons – often correctional supervision is an obvious choice. He further indicates that the biggest current threat is the judiciary’s lack of trust in the Department of Correctional Services’ will and capacity to implement these services effectively.

### **3.3.3.2.5 Compulsory residence in a child and youth care centre**

Discussions held by the SALC on the Discussion Paper on Juvenile Justice,<sup>240</sup> supported the retention of a provision creating a sentence similar to the then reform-school sentence, in view of the necessity of a sentencing option for children with special behavioural problems who have been convicted of offences.<sup>241</sup> The unequal distribution of reform schools in provinces led to comments about the desirability of a sentence which cannot be implemented due to practical constraints.<sup>242</sup> The Commission however, regarded the inclusion of an intermediate residential sentence for children as essential, in order to minimise the use of detention in prison.<sup>243</sup>

The Child Justice Act now provides a framework to guide decisions relating to sentencing children to child and youth care centres. In terms of section 69(3), a child

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<sup>237</sup> Terblanche (2007) 291.

<sup>238</sup> S v Booyesen 1993 (1) SACR 698 (A); S v Potgieter 1994 (1) SACR 61 (A); S v Kleynhans 1994 (1) SACR 195 (O); S v Ingram 1995 (1) SACR 1 (A).

<sup>239</sup> Terblanche (2007) 313.

<sup>240</sup> SALC Discussion Paper 79: Juvenile Justice: 1998.

<sup>241</sup> At p166.

<sup>242</sup> Ibid p167.

<sup>243</sup> Ibid.

justice court must consider, inter alia, whether the offence is of such a serious nature that it indicates the child has a tendency towards harmful activities;<sup>244</sup> the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm;<sup>245</sup> whether the child is in need of a particular service provided at a child and youth care centre;<sup>246</sup> the previous failure of the child to respond to non-residential alternatives and the desirability to keep the child out of prison.

In terms of section 76, there are two types of sentences to a child and youth care centre. The first involves the sentencing of a child to compulsory residence in a child and youth care centre which provides a programme referred to in section 191(2)(j) of the Children's Act. A sentence like this may be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is earliest.<sup>247</sup> This is essentially the same as the old sentence to a reform school.

The second is completely new and found in section 76(3) of the Act. It occurs when a child justice court convicts a child of an offence listed in schedule 3<sup>248</sup> and which, if committed by an adult, would have justified a term of imprisonment exceeding ten years.<sup>249</sup> In such cases the court may, if substantial and compelling circumstances exist, in addition to a child and youth care centre sentence, sentence the child to a period of imprisonment which is to be served after completion of the period of stay in the child and youth care centre.<sup>250</sup> After completion of the time at the child and youth care centre, the child must be brought before the child justice court and the manager

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<sup>244</sup> Section 69(3)(a).

<sup>245</sup> Section 69(3)(c).

<sup>246</sup> Section 69(3)(d).

<sup>247</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) Child Law in South Africa (2009) 661.

<sup>248</sup> Which is the focus of this dissertation.

<sup>249</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ(ed) Child Law in South Africa (2009) 661.

<sup>250</sup> Ibid.

of the child and youth care centre must submit a report to the court on the child's progress regarding whether objections of sentencing have been achieved and the possibility of the child's reintegration into society.<sup>251</sup> The court then has to decide, if it is in the interests of justice, to confirm the sentence originally imposed or substitute that sentence originally imposed or substitute that sentence with any other sentence that the court considers to be appropriate in the circumstances or order the release of the child, with or without conditions.<sup>252</sup>

This is a wholly new sentence and it elicited much debate in the parliamentary deliberations. Its purpose was ultimately to provide a mechanism for a child who was under 14 years at the time of sentencing<sup>253</sup> to be sent to prison via the child and youth care sentence.<sup>254</sup> It is unwieldy, punitive in approach and it remains to be seen whether it is effective in practice.<sup>255</sup>

### **3.3.3.2.6 Imprisonment**

Imprisonment can be defined as the admission into a prison<sup>256</sup> and confinement of an offender in a prison for the duration determined by the court, or, in some instances, by statute.<sup>257</sup>

The Child Justice Act now sets out a sentencing framework to guide decisions on

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<sup>251</sup> Section 76(3)(b).

<sup>252</sup> Section 76(3)(c)(i)-(iii).

<sup>253</sup> And therefore prohibited from being sentenced to imprisonment to section 77 of the Act. See para 3.3.3.2.6 below.

<sup>254</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) Child Law in South Africa (2009) 661.

<sup>255</sup> Ibid.

<sup>256</sup> Section 1 of the Correctional Services Act, Act 111 of 1998 defines a "prison" as "any place established under this Act as a place for the ... detention, confinement, training or treatment of persons liable to detention in custody ... and for the purposes of section 115 (aiding prisoners to escape from prison) and 117 (escaping from prison) of this Act includes every place used as a police-cell or lock-up."

<sup>257</sup> Terblanche (2007) 211.



imprisonment of children.<sup>258</sup> Section 69(4) of the Act provides that when considering the imposition of a sentence involving imprisonment, the child justice court must take certain factors into account, including the seriousness of the offence;<sup>259</sup> the amount of harm done or risked through the offence<sup>260</sup> and the culpability of the child in causing or risking the harm;<sup>261</sup> the protection of the community;<sup>262</sup> the severity of the impact of the offence on the victim;<sup>263</sup> the previous failure of the child to respond to non-residential alternatives;<sup>264</sup> and the desirability to keep the child out of prison.<sup>265</sup>

Section 77 now provides that a child justice court may not impose a sentence of imprisonment on a child who is under the age of fourteen years at the time of being sentenced for the offence.<sup>266</sup> This fulfils the vision of the SALC, which sought to ensure that children under fourteen years are prohibited from being detained in prison in all circumstances: both awaiting trial and as a sentence.<sup>267</sup> However, a significant difference between what the SALRC envisaged and what the Act now provides has occurred in that in terms of section 77 only children who are under fourteen at the time of sentence are prohibited from being sentenced to imprisonment.<sup>268</sup> This is a departure from the usual sentencing practice in relation to children which ordinarily refers to the age when the child committed the offence.<sup>269</sup> The intention of the

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<sup>258</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) Child Law in South Africa (2009) 661.

<sup>259</sup> Section 69(4)(a).

<sup>260</sup> Section 69(4)(a)(i).

<sup>261</sup> Section 69(4)(a)(ii).

<sup>262</sup> Section 69(4)(b).

<sup>263</sup> Section 69(4)(c).

<sup>264</sup> Section 69(4)(d).

<sup>265</sup> Section 69(4)(e).

<sup>266</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) Child Law in South Africa (2009) 661.

<sup>267</sup> Ibid on 661-662.

<sup>268</sup> Ibid on 662.

<sup>269</sup> Ibid.

legislature in drafting the section in this manner was to ensure that only children actually under fourteen years of age are kept out of prison.<sup>270</sup>

There are a number of problems with this, a key one being that prosecutions may be delayed purposively to ensure the child can be eligible for imprisonment if found guilty.<sup>271</sup>

In addition, section 77 provides that when the court sentences a child who is fourteen years or older at the time of being sentenced for the offence can do so only as a measure of last resort and for the shortest appropriate period of time.<sup>272</sup> These children may be sentenced to imprisonment for a period not exceeding 25 years. The explicit mention of the period of 25 years is unfortunate. While a court always has the discretion to impose a lengthy sentence of this nature, by specifically drawing a court's attention to this period there may be a tendency on the part of presiding officers to impose a lengthier sentence than otherwise would have been imposed.

### **3.4 The Role of Victim-Impact Statements in the Sentencing Process**

South African victim empowerment is based on the concept of restorative justice, which advocates a victim-centred approach to criminal justice.<sup>273</sup> The focus on a victim-centred approach arose in response to a number of issues raised by victims themselves; who questioned their neglected position in the criminal justice system.<sup>274</sup>

Internationally the concerns of victims were recognised and addressed through a number of declarations, the most important of which was the Declaration of Basic

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<sup>270</sup> Ibid.

<sup>271</sup> Ibid.

<sup>272</sup> See para 3.3.2 above. There is an attempt to provide guidance on how to ensure the last resort principle is applied correctly. Section 77(3) states that a child can only be sentenced to imprisonment if the child is convicted of an offence referred to in schedule 3 or schedule 2, if substantial and compelling circumstances exist; or schedule 1 if the child has a previous conviction and substantial and compelling circumstances exist.

<sup>273</sup> Muller & Van der Merwe 2006 (22) SAJHR 647.

<sup>274</sup> Issues included a lack of support, the absence of compensation for harm, the diminished role of the victim in criminal proceedings which are orientated towards offenders and the absence of any constitutional rights for victims – see Muller & Van der Merwe 2006 (22) SAJHR 647.

Principles of Justice for Victims of Crime and Abuse of Power by the General Assembly of the United Nations on 29 November 1985.<sup>275</sup>

In South Africa, the concept of a victim-impact statement was first defined by the SA Law Commission's Discussion Paper on Restorative Justice.<sup>276</sup> The Project Committee on Sentencing<sup>277</sup> later proposed another definition which was more concise and which specifically defined the VIS as a written statement:

“Victim-Impact Statement means a written statement by the victim or someone authorised by this Act to make a statement on behalf of the victim, which reflects the impact of the offence, including the physical, psychological, social and financial consequences of the offence for the victim.”

The CJA was the first piece of legislation in South Africa to formally recognise the use of victim-impact statements,<sup>278</sup> and provides that a prosecutor may, when adducing evidence, consider the interests of a victim of the offence and the impact of the crime on the victim, and, where practicable, furnish the child justice court with a victim-impact statement.<sup>279</sup>

One of the objectives of the CJA linked to victim involvement is the promotion of the spirit of ubuntu,<sup>280</sup> even though the end goal is still to encourage the reintegration of

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<sup>275</sup> GA/RES/40/34. The Declaration is based on the philosophy that adequate recognition should be given to victims and that they should be treated with respect in the criminal justice process.

<sup>276</sup> See SA Law Commission Issue Paper 7 Sentencing: Restorative Justice (Compensation for victims of Crime and Victim Empowerment) Dec 1997 para 2.30, as quoted by Muller & Van der Merwe 2006 (22) SAJHR 647, wherein a VIS is defined as:

“The VIS is a statement made by a victim and addressed to the presiding officer to be considered in the sentencing decisions. The VIS consists of a description of harm, in terms of physical, psychological, social and economic effect that the crime had, and will have in future, on the victim. Sometimes this statement may include the victim's statement of opinion on his feelings about the crime, the offender and the sentence that he feels is appropriate.”

<sup>277</sup> Muller & Van der Merwe 2006 (22) SAJHR 647 at 648.

<sup>278</sup> Section 70.

<sup>279</sup> Section 70(2).

<sup>280</sup> Section 2(b) CJA.

the child offender,<sup>281</sup> who is often found to be some sort of victim him-or herself.<sup>282</sup> The difficulty relating to victims of child offenders is that these victims can be very small children, peers, adults or even elderly people.<sup>283</sup> The victims of serious crimes are seldom involved in restorative justice processes, and their participation is often restricted to giving impact evidence in court.<sup>284</sup>

Apart from giving the prosecutor a discretion to make the court aware of the impact of the crime on the victim during the sentencing phase, the CJA also makes provision for victim participation in other processes, such as diversion. For the most serious offences listed in schedule 3, the DPP must obtain the victim's views, and only after its consideration,<sup>285</sup> authorise diversion.<sup>286</sup> The CJA instructs the DPP to allow the diversion of child offenders, even in the most serious cases, where exceptional circumstances exist.<sup>287</sup> This concept is further explored in the Regulations issued in terms of the Act. Apart from focusing on the circumstances relevant to the child offender,<sup>288</sup> other factors take into account the victim's attitude and circumstances.<sup>289</sup> These factors include factors like whether the victim wants to avoid giving testimony in court;<sup>290</sup> and whether the trial would be potentially damaging to a child witness or victim.<sup>291</sup> The range of diversion options also allow for victim participation, for

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<sup>281</sup> Section 2 (c) CJA.

<sup>282</sup> See para 3.3.3.2.2.4 above. Also see Hargovan 2007 (20:3) *Acta Criminologica* 113 at 118.

<sup>283</sup> Van der Merwe A A new role for victims of child offenders? An evaluation of restorative justice procedures in the CJA 75 of 2008 Unpublished paper SLTSA Stellenbosch January 2011.

<sup>284</sup> *Ibid.*

<sup>285</sup> Section 52(3)(b)(1) CJA; Directive O(3)(C) CJA GN R252 in GG 33067 31 March 2010.

<sup>286</sup> Section 52(3)(a).

<sup>287</sup> Van der Merwe A A new role for victims of child offenders? An evaluation of restorative justice procedures in the CJA 75 of 2008 Unpublished paper SLTSA Stellenbosch January 2011.

<sup>288</sup> I.e. young age; low development level; hardship suffered (like being the head of a child-headed family); compelling mitigating circumstances (diminished responsibility, undue influence).

<sup>289</sup> Van der Merwe A A new role for victims of child offenders? An evaluation of restorative justice procedures in the CJA 75 of 2008 Unpublished paper SLTSA Stellenbosch January 2011.

<sup>290</sup> Directive J(2)(d); ss 97 (4) CJA GN R252 in GG 33067 31 March 2010.

<sup>291</sup> Directive J(2) (g) & (h); ss 97(4) CJA GN R252 in GG 33067 31 March 2010.

example the fact that an oral or written apology can be issued to the victim;<sup>292</sup> restitution of a specific object to the victim,<sup>293</sup> the fact that the child offender can offer some form of service or benefit to the victim<sup>294</sup> and the fact that payment of compensation to the victim is possible.<sup>295</sup> Section 69(4)(c) further provides that a child justice court, when deciding to impose imprisonment, must consider the severity of the impact of the crime on the victim. In essence, this means that a VIS must be presented in all serious crimes such as murder, rape and robbery committed by children.

In addition to providing a victim with a voice, the victim-impact statement is also a useful tool for courts to consider sentencing decisions, especially in cases involving sexual violence, where the courts have accepted that they do not have the necessary expertise to draw conclusions about the effect of an indecent assault or rape, especially where the victim is also a child.<sup>296</sup> In order for judicial officers to exercise their sentencing discretion properly, it is necessary for them, to not only have regard to the objective gravity of the crime, but also to the present and future impact of the crime on the victim.<sup>297</sup>

The CJA endeavours to address the needs of two very different groups in society who are both inherently vulnerable and historically neglected, namely, child offenders and crime victims.<sup>298</sup> It is not surprising that the main focus of the CJA is on child

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<sup>292</sup> Section 53(3)(a).

<sup>293</sup> Section 53(3)(m).

<sup>294</sup> Section 53(3)(o).

<sup>295</sup> Section 53(3)(p).

<sup>296</sup> See *S v Gerber* 2001 (1) SACR 621 (WLD) 624 where it is noted that “[a] court does not have the necessary expertise to generalise about the consequences, if any, for the victim in a case like the present.” Also see *Holtzhausen v Roodt* 1997 (4) SA 766 (W) at 778G-H where the court notes “[r]ape is an experience so devastating in its consequences that it is rightly perceived as striking at the very fundament of human, particularly female; privacy, dignity and personhood. Yet, I acknowledge that the ability of a judicial officer such as myself to fully comprehend the kaleidoscope of emotion and experience, both of rapist and rape survivor is extremely difficult.”

<sup>297</sup> Van der Merwe A A new role for victims of child offenders? An evaluation of restorative justice procedures in the CJA 75 of 2008 Unpublished paper SLTSA Stellenbosch January 2011.

<sup>298</sup> *Ibid.*

offenders, as the Act was primarily designed for them.<sup>299</sup> It does however appear that victims are expected to play a role in the process of reforming and reintegrating child offenders into society.<sup>300</sup> Despite the main objective of the Act being the management of children at risk, victims are given the opportunity to participate and may simultaneously benefit in some way or another.<sup>301</sup>

### **3.5 The need for a pre-sentence report when a child is sentenced**

In recent years, a number of conflicting judgments were delivered regarding the use of pre-sentence reports when children were being sentenced.<sup>302</sup> The Child Justice Act now provides that a court must, upon the conviction of a child; require the preparation of a pre-sentence report which details the child's social background before the making of any order.<sup>303</sup>

A pre-sentence report can provide the necessary background to the child offender and attempt to explain the commission of the crime, enabling the court to find the most appropriate sentence for that offender.<sup>304</sup>

The purpose is, therefore, to individualise the sentence, not so that a light sentence is imposed, but to ensure that a sentence is found which is fair both to the young offender and to society.<sup>305</sup>

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<sup>299</sup> Ibid.

<sup>300</sup> Ibid.

<sup>301</sup> Ibid.

<sup>302</sup> See for example *S v Z en vier ander sake* 1999 (1) SACR 429; *S v Pieterse & 'n Ander* 2001 (1) SACR 23; *S v D* 1999 (1) SACR 125; *S v Manka* 2003 (2) SACR 515 where sentences for rape, murder and house-braking with the intent to steal were set aside and referred back to the sentencing courts to obtain pre-sentence reports before imposing sentences de novo. In *S v Cloete en vyf ander hersieningsake* 2003 (2) SACR 490 sentences for robbery as well as house-braking with the intend to steal & theft were confirmed in the absence of pre-sentence reports because it was held that such reports would not have served any purpose.

<sup>303</sup> See section 71(1)(a) of the Act which states that “[a] child justice court imposing a sentence must, subject to paragraph (b) request a pre-sentence report prepared by a probation officer prior to the imposition of a sentence.”

<sup>304</sup> Terblanche (2007) 320.

<sup>305</sup> Ibid.

## 3.6 Diversion as an option for serious crimes

### 3.6.1 Introduction

Diversion has been defined as entailing “strategies developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted.”<sup>306</sup>

This definition is so broad as to include preventative programmes in relation to child offending.<sup>307</sup> It has therefore been observed that diversion can incorporate a variety of strategies from school-based crime prevention programmes through to community-based programmes used as an alternative to custody.<sup>308</sup> In relation to children in conflict with the law, however, the concept of diversion assumes a much more limited meaning – it involves the referral of cases away from the formal criminal process where there is enough evidence to prosecute.<sup>309</sup>

In South Africa, diversion initiatives have been practiced since the early 1990’s.<sup>310</sup> This practice occurred in the absence of a regulatory framework which led to obstacles to the effectiveness of diversion.<sup>311</sup> Issues such as lack of consistency, lack of uniformity and inequity in the application of diversion options were at the order of

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<sup>306</sup> Muncie J (1999) *Youth and Crime: A critical Introduction* London: Sage p305; quoted by Wood C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* ISS Paper 79, Pretoria p1.

<sup>307</sup> Odongo OG (2005) *The Domestication of International Law Standards on the rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD Thesis; UWC p192.

<sup>308</sup> Ibid.

<sup>309</sup> Ibid. The CJA does however, also make provision that diversion orders can be linked to the sentences of correctional supervision and community-based sentences.

<sup>310</sup> Wood C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* ISS Paper 79, Pretoria, p1.

<sup>311</sup> Odongo OG (2005) *The Domestication of International Law Standards on the rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD Thesis; UWC p207.

the day.<sup>312</sup> Woods explains that “[t]his practice [...] has been implemented in a selective and disjointed manner.”<sup>313</sup>

Since the early 1990’s, diversion has mainly been conducted through programmes offered by non-governmental organisations such as NICRO.<sup>314</sup> Despite the growth of pre-trial diversions in South Africa since the early 1990’s, judicial case law on diversion has been in short supply.<sup>315</sup> The first reference to diversion was the case of *S v D*.<sup>316</sup> In an obiter dictum, the Cape High Court expressed approval for the idea of diversion, but opined that in each and every case, the prosecutor, as *dominus litis*, had the right to proceed with criminal charges against the children.<sup>317</sup>

The position that the decision whether to divert or not largely rested on prosecutorial policy was reiterated by the High Court in the later decision of *M v The Senior Public Prosecutor, Randburg*.<sup>318</sup> The applicant argued that M was entitled to diversion because M’s co-accused who had also been arrested had been granted diversion by the prosecution. The applicant’s argument was therefore that the failure by the prosecution to exercise discretion in relation to M was discriminatory, and hence

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<sup>312</sup> Ibid.

<sup>313</sup> Wood C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* ISS Paper 79, Pretoria, p1.

<sup>314</sup> NICRO launched its first diversion initiatives in SA in the early 1990’s, in the Western Cape and KZN. The first two programmes were the Youth Empowerment Scheme (YES) which is a life skills programme that consists of six sessions; and the Pre-Trial Community Service (PTCS) which allows a child to perform a specified number of hours of community service in lieu of proceeding with a prosecution. NICRO later expanded their programmes to include FGC’s, VOM’s and The Journey. For more info on all these programmes see Wood C (2003) *Diversion in South Africa: A Review of Policy and Practice, 1990-2003* ISS Paper 79, Pretoria and Badenhorst C & Conradie H 2004 (17:2) *Acta Criminologica* 115 at 118-120.

<sup>315</sup> Odongo O G (2005) *The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD Thesis, UWC, p220.

<sup>316</sup> 1997 (2) SACR 673 (C). This case involved four children who had been charged with possession of dagga. Their complaint was that in a similar case, within the same jurisdiction in which they were charged, six weeks earlier, the prosecution had opted to withdraw charges and refer the children to diversion programmes in lieu of prosecution.

<sup>317</sup> At 673h-i.

<sup>318</sup> Case 3284/00 WLD (Unreported). This case involved an application for review brought by the guardian of a minor (M), who had been convicted of shoplifting.



could not stand legal scrutiny. In essence, the applicant contended that M had a right to be diverted, as all her co-accused had been diverted. The prosecutor did not respond to the application and thus it was unknown as to whether the prosecutor did in fact consider diversion. In the absence of such explanation by the prosecutor, the Court drew the inference on the facts of this case to the effect that the prosecutor did not consider the option of diversion. This, the court held, implied that the prosecutor did not properly exercise his discretion.

From the above it is clear that, prior to the promulgation of the Child Justice Act, diversion did not have any legal recognition and it was mainly practised through prosecutorial discretion.

### **3.6.2 Diversion in terms of the Child Justice Act**

In South Africa, diversion is now considered as a central aim of our “young” juvenile justice system.<sup>319</sup> Wide ranging provisions have been included in the Act, aimed at expanding and regulating diversion practices.<sup>320</sup>

Diversion is based on the common law principle that a prosecutor is dominus litis and has a discretion to prosecute a particular matter; and therefore can decide whether a child can be diverted instead of being prosecuted.<sup>321</sup>

#### **3.6.2.1 Diversion defined**

The Child Justice Act defines diversion as: “diversion’ means diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of procedures established by Chapter 6 and Chapter 8.”<sup>322</sup>

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<sup>319</sup> Odongo OG (2005) *The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context* Unpublished LLD Thesis, UWC, p224.

<sup>320</sup> Ibid.

<sup>321</sup> Prosecutorial discretion is provided for in section 179(2) of the Constitution and section 20(1) of the National Prosecuting Authority Act, Act 32 of 1998; which seeks to give effect to section 179 of the Constitution. This discretion has also been guided by policy developed by the NPA. See Gallinetti J *Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime* in Boezaart CJ (ed) *Child Law in South Africa* (2009) 657.

<sup>322</sup> Section 1 of the Child Justice Act.

### **3.6.2.2 The objectives of diversion**

The objectives of diversion are statutorily provided for in section 51 of the Child Justice Act, which states that diversion are to deal with a child outside the formal criminal justice system in appropriate cases; to encourage the child to be accountable for the harm caused by him; to meet the particular needs of the individual child; to promote the reintegration of the child into his family and community; to prevent stigmatising the child and prevent the adverse consequences flowing from being subject to the criminal justice system; to reduce the potential for re-offending; to prevent the child from having a criminal record; to promote the dignity and well-being of the child; and the development of a child's sense of self-worth and ability to contribute to society.

In short, the objectives of diversion are to prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children.<sup>323</sup>

### **3.6.2.3 Stages at which diversion can take place**

In terms of the Act, diversion can occur in three ways:

- Through prosecutorial diversion of children charged with Schedule 1 offences;<sup>324</sup>
- At the preliminary inquiry, through an order of the inquiry magistrate;<sup>325</sup>
- During the trial in the Child Justice Court, through an order of the court.<sup>326</sup>

#### **3.6.2.3.1 Pre-Trial Prosecutorial Diversion**

Section 41 provides that prosecutors have the authority to divert certain matters before the preliminary inquiry takes place. This can only occur if the child committed a

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<sup>323</sup> McGregor M (2010) An Evaluation of the Child Justice Act Unpublished LLM dissertation, NMMU, p34.

<sup>324</sup> Section 41(1).

<sup>325</sup> Section 52(2).

<sup>326</sup> Section 67(1).

Schedule 1 offence,<sup>327</sup> and the diversion can only be to a level one diversion option.<sup>328</sup> In addition, this may only occur if the prosecutor is satisfied that certain factors are present.<sup>329</sup>

### **3.6.2.3.2 Diversion at the preliminary inquiry or child justice court**

Section 52(1) provides that a matter may be considered for diversion at the preliminary inquiry (or later at trial before the child justice court) if:

- The child acknowledges responsibility for the offence;<sup>330</sup>
- The child has not been unduly influenced to acknowledge responsibility;<sup>331</sup>
- There is a prima facie case against the child;<sup>332</sup>
- The child has consented to the diversion, along with his parent, guardian or appropriate adult;<sup>333</sup>
- The prosecutor (in relation to Schedule 1 and 2 offences) or the DPP (in relation to Schedule 3 offences) indicates that the matter may be diverted.<sup>334</sup>

Where the prosecutor or DPP decides to divert a matter, the requirements of sections 52(2) and 52(3) must be met.<sup>335</sup> In terms of section 52(2), a prosecutor can divert a child for committing a Schedule 1 or Schedule 2 offence if the views of the victim or

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<sup>327</sup> Schedule 1 offences are often referred to as “minor” offences, and include offences such as theft; fraud, extortion, forgery where the amount involved is less than R1500; malicious injury to property; assault; perjury; contempt of court; crimen iniuria; defamation; trespassing and public indecency.

<sup>328</sup> Section 53(2) provides that diversion options are set out in two levels. Level one applies to offences listed in schedule 1, and comprises the least onerous options in the CJA. This diversion programmes can only be ordered for a period not exceeding twelve months where the child is under 14, and for a period not exceeding 24 months where the child is 14 years or older. Level one diversion options represents orders which allow the child to remain in his family or community and includes orders such as placing a child under a good behaviour order; a family time order; supervision and guidance order; a compulsory school attendance order; a reporting order and a positive association order.

<sup>329</sup> See paragraph 3.6.2.3.2 below.

<sup>330</sup> Section 52(1)(a).

<sup>331</sup> Section 52(1)(b).

<sup>332</sup> Section 52(1)(c).

<sup>333</sup> Section 52(1)(d).

<sup>334</sup> Section 52(1)(e).

<sup>335</sup> McGregor M (2010) An Evaluation of the Child Justice Act Unpublished LLM dissertation, NMMU, p36.

any other person who has a direct interest in the affairs of the victim were considered; and the prosecutor has consulted with the investigating officer.<sup>336</sup>

Section 52(3) provides that the relevant DPP who has jurisdiction over the matter may divert a matter involving the commission of a Schedule 3 offence.<sup>337</sup> Such matters can only be diverted if exceptional circumstances exist and the DPP must indicate his decision to divert such matters in writing.<sup>338</sup> The DPP must also afford the victim the opportunity to express his views on whether the matter should be diverted, and, in addition, he must also consult with the investigating officer.<sup>339</sup>

#### **3.6.2.4 Consequences of a diversion order**

If a child successfully completes a diversion programme, the prosecution will withdraw the case against the child.<sup>340</sup> If the child, however, fails to successfully complete the diversion programme, the magistrate can issue a warrant for the child's arrest. When the child appears, the magistrate will hold an inquiry into why the child failed to appear.<sup>341</sup>

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<sup>336</sup> Ibid p 36 – 37.

<sup>337</sup> Schedule 3 offences are the most serious offences that a child can commit and includes offences such as murder and rape. For these types of offences only level two diversion options may be imposed. Level two diversion options can be imposed for a period of at least 24 months where the child is younger than 14, and for a period of at least 48 months where the child is older than 14. These diversion options comprise of some of the level one diversion options but for an extended duration. They also include options such as orders for monetary compensation and community service to victims of crime or the child's immediate community. Prominently included as level two diversion options is RJ options such as FGC's and VOM's.

<sup>338</sup> McGregor M (2010) An Evaluation of the Child Justice Act Unpublished LLM dissertation, NMMU, p37.

<sup>339</sup> Ibid. See para 3.4 above on the role of VIS in the sentencing process.

<sup>340</sup> See section 59 of the Child Justice Act. This means that the child does not get a criminal record and that the prosecution cannot prosecute on the same facts again.

<sup>341</sup> If the failure to complete the programme was not due to the child's fault, the magistrate may continue with the same diversion option initially imposed; add or apply another diversion option; make an appropriate order which will assist the child to comply with the order initially imposed – see section 58(1)-(3) of the CJA.

However, if it is found that the failure to appear is due to the child's fault, section 58(4)(a)-(c) provides that; if the matter was diverted by the prosecution or at the preliminary inquiry; the prosecutor may proceed with the prosecution. If the matter was diverted by the Child Justice Court, the magistrate may record the acknowledgement of responsibility made by the child as an admission in terms of section 220 of the CPA.

### 3.6.2.5 Conclusion

Prior to the promulgation of the CJA, diversion was not afforded legal recognition and it was mainly practiced through prosecutorial discretion, which led to uncertainty and inequity in the application of diversion programmes.<sup>342</sup>

The CJA now explicitly enacts diversion and thereby provides certainty and equity in the treatment of children in conflict with the law while providing for a legislative framework for restorative justice.<sup>343</sup> The Act aims to increase the number of children who are diverted, but at the same time builds in a number of safeguards to protect children's procedural rights.<sup>344</sup>

### 3.6.2.6 Diversion for serious offences?

Interestingly, civil society organisations offering diversion services and programmes have reported a visible drop in the number of children referred to diversion programmes since the promulgation of the Act.<sup>345</sup> The NPA contended that the fact that children do not want to take responsibility for their actions, and the fact that prosecutors do not divert schedule 2 and 3 offences, contributed to the decline.<sup>346</sup>

Badenhorst<sup>347</sup> however indicates that a more realistic explanation is the drop in the number of arrests by the police. She argues that police officers at station level may not as yet received training on the Act. Uncertainty and ignorance about the correct and lawful procedures to be followed during arrest and thereafter, results in police officers

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<sup>342</sup> McGregor M (2010) An Evaluation of the Child Justice Act Unpublished LLM-dissertation, NMMU, p41.

<sup>343</sup> Ibid.

<sup>344</sup> Skelton A & Tshela B Child Justice in South Africa ISS Monograph 150, Sept 2008, p54.

<sup>345</sup> Badenhorst C Overview of the Implementation of the Child Justice Act, 2008 (Act 75 of 2008): Good intentions, questionable outcomes Report by the Criminal Justice Initiative of the Open Society Foundation, 2011 p19.

<sup>346</sup> Ibid on 20. From statistics provided by the Parliamentary Monitoring Group it was clear that there were not such a big difference in the number of children diverted for schedule 1 offences than those diverted for schedule 2 & 3 offences.

<sup>347</sup> Ibid.

opting not to arrest children at all;<sup>348</sup> but to rather just release them on a warning. The decrease in the number of diversions as a result of ignorance by police officials is only one of the challenges in the implementation process of the Act, which has often been described by child justice scholars as “teething problems.”<sup>349</sup>

There are various indications that diversion is working in South Africa.<sup>350</sup> Chapter 4 will however indicate that diversion is seldom considered for serious offences.<sup>351</sup> It is essential to ensure that all deserving cases, even those where the child has committed a very serious offence, are considered for diversion.<sup>352</sup>

Diversion can be a very positive and valuable process, and if applied correctly and frequently, it can and will ensure that child offenders receive the protection and opportunities they are entitled to.<sup>353</sup>

### **3.7 PLEA-BARGAIN AGREEMENTS AS A TOOL TO KEEP CHILDREN OUT OF PRISON**

Plea-agreements are a controversial topic and are often subjected to sharp criticism.<sup>354</sup> Despite this, plea-bargaining is an established procedure that plays an important part in reducing the number of cases which go to trial and a countermeasure against overburdened court rolls.<sup>355</sup> This process is regulated by section 105A of the CPA,

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<sup>348</sup> Ibid p17. Also see Pinnock D Child Justice Act undercut from within Published in the Mail & Gaurdian on 30 September 2011, available on [www.mg.co.za](http://www.mg.co.za); accessed on 19/01/2012.

<sup>349</sup> Pinnock D Child Justice Act undercut from within Published in the Mail & Gaurdian on 30 September 2011, available on [www.mg.co.za](http://www.mg.co.za); accessed on 19/01/2012.

<sup>350</sup> Badenhorst C & Conradie H 2004 (17:2) Acta Criminologica 115 at 129. See also p120 where the authors indicate that only 6,7% of children re-offend in the first 12 months after attending a diversion programme. This percentage is based on research conducted in 1999.

<sup>351</sup> Although diversion cannot really be seen as a sentencing option in terms of the CJA, the diversion options in the act can be linked to restorative justice sentences, community-based sentences and correctional supervision.

<sup>352</sup> Ibid.

<sup>353</sup> Ibid at p130.

<sup>354</sup> SALC Project 73: Fourth Interim Report on the Simplification of Criminal Procedure (Sentence Agreements) 2001; p20.

<sup>355</sup> Ibid.

which provides that a prosecutor and a legally represented accused may enter into an agreement relating to the plea and sentence of the accused.<sup>356</sup>

This can be a useful tool to the prosecution to secure convictions of perpetrators of sexual offences, especially in cases where the victim is also a child and the only witness. More importantly, it can be used to keep child accused out of prison, especially in cases where children are accused of committing serious offences, where the possibility of imprisonment is so much bigger. Unfortunately, it is seldom used by legal practitioners acting on behalf of child accused for this purpose.

### 3.8 CONCLUSION

This chapter contains an overview of the relatively newly introduced CJA. The new concepts and procedures introduced by the act were briefly described, but the focus of this chapter was the discussion of the various sentencing options available to children in terms of the act. The CJA established a new regulatory framework within which children accused of crimes should be dealt with, and should be sentenced.

This chapter highlighted the fact that, prior to the promulgation of the CJA, pre-trial diversion was not afforded legal recognition in South Africa. Diversion was mainly practised through the exercise of prosecutorial discretion, and was mainly conducted with the help of NGO's with regards to funding and service delivery.<sup>357</sup> With the promulgation of the CJA, diversion is now a central feature of our young juvenile

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<sup>356</sup> The parties must enter into a written agreement and the prosecutor must inform the court of the agreement before the accused is asked to plead. The court will then enquire from the accused to confirm that an agreement has been entered into, where after the contents of the agreement are disclosed to the court. The court questions the accused to ascertain whether the accused confirms the agreement and the admissions made by him or her in terms of the agreement; whether the accused admits the allegations in the charge and whether the agreement was entered into freely and voluntarily in the accused's sound and sober senses and without being unduly influenced. The court will then consider the sentence agreement, and if the court is satisfied that the agreement is just, the court will convict the accused of the offence(s) charged and sentence the accused in accordance with the sentence agreement. To read more about plea-bargaining, its application, advantages and challenges, see Steyn E Plea-bargaining in South Africa: current concerns and future prospects 2007 (20:2) SACJ 206; Bennun M E Negotiated pleas: policy and purpose 2007 (20:1) SACJ 17; Rogers M B The development and operation of negotiated justice in the South African criminal justice system 2010 (23:2) SACJ 239.

<sup>357</sup> Odongo OG The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context Unpublished LLD Thesis; UWC; p 255.

justice system.<sup>358</sup> The CJA includes a number of standards such as the need for viable diversionary measures; the availability of diversion at any point of decision making by juvenile justice officials and at all stages of the procedure; the consideration of diversion in each and every case including where more serious offences are alleged to have been committed by a child and equal and non-discriminatory access to diversion.<sup>359</sup>

With regards to the sentencing options available in terms of the CJA, the act makes provision for a wide range of alternative sentencing options and also places limitations on sentences that may be imposed on children, for instance life imprisonment<sup>360</sup> and restrictions on the use of deprivation of liberty.<sup>361</sup> Although the CPA also made provision for a variety of alternative sentencing options theoretically, this was never adequately implemented in practice.<sup>362</sup> Past sentencing practice in South Africa has shown an over-reliance on the use of custodial sentences,<sup>363</sup> which can to a large extent be attributed to the confusion brought about by the introduction and application of the minimum sentencing regime. This led to a failure by judicial officers to fully utilise the array of alternative sentences available to children.<sup>364</sup> As will be indicated in Chapter 4 below, this position largely remains the same, even after the promulgation of the CJA, and the requirement that a pre-sentence report must be obtained before sentence is imposed, which was aimed at making the use of alternative sentences more attainable.<sup>365</sup>

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<sup>358</sup> Ibid on 254.

<sup>359</sup> Ibid on 255.

<sup>360</sup> Section 77(4) of the CJA.

<sup>361</sup> Section 77(1)(a) & (b).

<sup>362</sup> Odongo OG The Domestication of International Law Standards on the Rights of the Child with specific reference to Juvenile Justice in the African Context Unpublished LLD Thesis; UWC; p404.

<sup>363</sup> Ibid on 404.

<sup>364</sup> Ibid on 404.

<sup>365</sup> Ibid on 406.



## **CHAPTER 4: SENTENCES IMPOSED ON CHILDREN SINCE THE PROMULGATION OF THE ACT**

“Children are the soul of our society. If we fail them, then we have failed as a society.”<sup>1</sup>

### **4.1 Introduction**

### **4.2 Rape**

#### **4.2.1 BF v S**

#### **4.2.2 TJT v S**

#### **4.2.3 S v MK**

#### **4.2.4 S v FM (Centre for Child Law as Amicus Curiae)**

#### **4.2.5 Rampeta & Three Others v S**

#### **4.2.6 KM v S**

#### **4.2.7 IJ v S**

### **4.3 Murder**

#### **4.3.1 JL v S**

#### **4.3.2 EJB v S**

#### **4.3.3 S v Mahlangu & Another**

#### **4.3.4 BOM & AL v S**

#### **4.3.5 S v TLT**

#### **4.3.6 S v CT**

#### **4.3.7 Mpofo v Minister of Justice and Constitutional Development & Two Others (Centre for Child Law as Amicus Curiae)**

#### **4.3.8 S v IO**

### **4.4 Analysis and Comment**

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<sup>1</sup> Judges Saldaker & Potgieter in the judgment of *SS v The Presiding Officer of the Children's Court: District of Krugersdorp* Unreported case A3056/11; South Gauteng High Court.

#### **4.4.1 Custodial sentences**

##### **4.4.1.1 Aggravating and mitigating factors**

###### **4.4.1.1.1 Introduction**

###### **4.4.1.1.2 Rape**

###### **4.4.1.1.2.1 Aggravating factors tipping the scale in favour of custodial sentences**

- a) Circumstances related to the commission of the crime**
- b) The accused**
- c) Society's interest**
- d) The interest of the victim**

###### **4.4.1.1.2.2 Mitigating factors taken into consideration by the court**

- a) Circumstances related to the commission of the crime**
- b) The accused**

###### **4.4.1.1.3 Murder**

###### **4.4.1.1.3.1 Aggravating factors tipping the scale in favour of custodial sentences**

- a) Circumstances related to the commission of the crime**
- b) The accused**
- c) Society's interest**
- d) The interest of the victim**

###### **4.4.1.1.3.2 Mitigating factors taken into consideration by the court**

- a) The accused**

###### **4.4.1.1.4 Conclusion**

##### **4.4.1.2 The length of the sentence**

###### **4.4.1.2.1 Rape**

###### **4.4.1.2.2 Murder**

###### **4.4.1.2.3 Conclusion**

#### **4.4.2 The use of expert evidence in the sentencing process**

##### **4.4.2.1 Expert evidence with regard to the accused**

###### **4.4.2.1.1 The personal circumstances of the accused**

###### **4.4.2.1.2 The recommendation of and weight attached to expert evidence**

##### **4.4.2.2 Expert evidence with regard to the victim**

### 4.4.2.3 Conclusion

## 4.1 Introduction

This chapter examines all the judgments that were delivered since the promulgation of the Act, in order to identify the interpretations given to the sentencing provisions of the Act as well as the internal guidelines developed with regards to procedure, general principles and sentencing patterns.

The important question posed in this chapter is whether the promulgation of the Constitution and the Child Justice Act, stating that imprisonment should be a measure of last resort, made any significant difference with regards to the imposition of custodial sentences on children. The CJA introduces a wide variety of alternative sentencing options, and, with due regard to the desirability to keep children out of prison, the extent to which these alternatives are imposed on children who have committed the serious offences of rape and murder, is investigated.

## 4.2 Rape

### 4.2.1 BF v S<sup>2</sup>

The appellant and his co-accused were convicted and sentenced by the Parow Regional Court on charges of robbery with aggravating circumstances and rape. The background facts leading to the conviction is as follows:

On the night of 6 July 1999, the appellant and his co-accused entered the premises of the complainant, Mr. Esterhuizen, with the intention to steal. They found Mr. Esterhuizen outside the house, as the barking of the dogs had woken him. They forced him back into the house with a knife and a firearm. All the other occupants of the house - Mr. Esterhuizen's wife and children - were awakened and bundled into one room and threatened with the knife and firearm. The appellant and his co-accused demanded money. Having failed to solicit money, they demanded back cards and the appellant left

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<sup>2</sup> (208) [2011] ZASCA 177.

to withdraw money after forcefully obtaining the pin codes. The appellant later returned without the money and the two accused started removing goods with an estimated value of R6220.00 from the complainants' house. While ransacking the house, the appellant and his co-accused raped one of the complainant's daughters. The complainant's other daughter was also raped later that evening by the co-accused. This whole episode took about six to seven hours.<sup>3</sup>

The appellant was sentenced to 15 years imprisonment on the robbery charge and 10 years imprisonment on the rape charge, effectively having to serve a period of 25 years imprisonment.<sup>4</sup>

The accused appealed to the Western Cape High Court. Their appeal was dismissed and their sentences confirmed. The High Court granted the appellant leave to appeal against sentence only.<sup>5</sup>

The only issue before the Supreme Court of Appeal was whether or not, in the circumstances of the case, the trial court and the High Court misdirected itself in imposing a lengthy custodial sentence on the appellant, who was 14 years and 10 months old at the time of the commission of the offence.<sup>6</sup> This, notwithstanding the provisions of section 51(6) of the Criminal Law Amendment Act.<sup>7</sup> The appellant contended that the trial court misdirected itself by failing to consider the cumulative effect of the sentences and that a 25 year jail term is shockingly inappropriate for a 14 year old.

The court, noting the difficulty courts experience to determine an appropriate sentence, concluded as follows:

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<sup>3</sup> Paras [3] – [4].

<sup>4</sup> Para [1].

<sup>5</sup> Ibid.

<sup>6</sup> Para [2].

<sup>7</sup> Act 105 of 1997. See para 1.2.3.4 above.

“It becomes more onerous where a child is the offender and the offence a very serious one. In the present case the robbery involves the use of a firearm and a knife whilst the rape is of a child under the age of 16 years. A decision regarding an appropriate sentence becomes even more difficult – when a juvenile has to be sentenced for having committed a very serious crime like this case. Whilst the gravity of the offences calls loudly for [a] severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant requires a balanced approach reflecting an equally strong rehabilitative component. After all, the appellant was an immature youth merely 14 years old. Although youthfulness remains a strong mitigating factor, one cannot ignore the sad reality that, nowadays it is the youth that is engaged in violent and serious crimes.”<sup>8</sup>

The court ultimately held that the trial court over-emphasized the seriousness of the offence at the expense of the appellant’s youthfulness.<sup>9</sup> The appeal was upheld and the sentence of the trial court set aside and replaced with a 10 year sentence on the robbery charge and a 12 year sentence on the rape charge. The court ordered that the sentences should run concurrently and should be antedated to 13 December 2000, effectively meaning that the appellant will serve 12 years imprisonment.

#### **4.2.2 TJT v S<sup>10</sup>**

In this case, the appellant and his co-accused was charged on four counts, namely one count of house-braking with the intention to commit rape; two counts of rape and one count of robbery with aggravating circumstances.

The facts of the case are, briefly, that on the 18<sup>th</sup> of August 2008, at approximately midnight, the two accused forcibly opened the door and entered the house of the

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<sup>8</sup> Para [8].

<sup>9</sup> Para [13].

<sup>10</sup> Unreported case A138/2011, Free State High Court.

complainants. Each one of the accused was armed with a knife.<sup>11</sup> Each one of the accused then proceeded to rape each of the complainants in the presence of a thirteen year old boy that was staying with the two complainants. Thereafter the accused removed items from the house and left. At the time of the commission of the offence, the appellant was fifteen years old.<sup>12</sup>

Both accused were found not guilty on count one. They were, however, convicted on the two rape counts and on count four, the court found that no robbery was committed and both accused were convicted of theft. On 14 September 2010, the High Court sitting in Harrismith, sentenced both accused to nine years imprisonment on each of the rape counts and two years imprisonment for theft.<sup>13</sup> The court ordered that the sentences should run consecutively, so that each accused had to serve 20 years imprisonment.<sup>14</sup>

The Full Bench, recognising that the trial court correctly held that the appellant has committed a serious crime by attacking and raping the complainants in the sanctity of their house and in the presence of a thirteen year old boy, found that the trial court “virtually ignored the appellant’s personal circumstances and failed to recognise that the appellant, as a child, had to be treated differently during sentencing.”<sup>15</sup>

The Full Bench proceeded to set aside the sentence imposed by the trial court and ordered that the two years imprisonment imposed in respect of count 4 and three years of the nine year imprisonment sentence in respect of count 3, should run concurrently with the nine

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<sup>11</sup> See paras [5] to [8].

<sup>12</sup> Ibid.

<sup>13</sup> Paras [3] – [4].

<sup>14</sup> Para [4].

<sup>15</sup> Para [11]. The personal circumstances were highlighted in the probation officer’s report which was handed in as an exhibit. These included the fact that the appellant was raised by a single parent, his father left his mother whilst he was still a toddler and subsequently he does not know him; he did not have any previous convictions; there was a high risk of juvenile delinquency in the area wherein he lived and all his family members were unemployed – see para [9].

year sentence in respect of count 2, effectively imposing a 15 year imprisonment sentence on the appellant.<sup>16</sup>

#### 4.2.3 S v MK<sup>17</sup>

The accused pleaded guilty on two counts of rape of two male complainants (aged 8 and 12) in the Wynberg Regional Court. The two counts were taken together for purpose of sentence and the accused was sentenced to 5 years imprisonment, which was antedated to the date of his arrest.<sup>18</sup>

During the trial, a pre-sentence report was obtained and admitted into evidence by agreement. The social worker, having evaluated all the information she had obtained,<sup>19</sup> concluded in recommending that the accused be diverted in terms of section 53(4)(c) and (d) of the CJA. The Regional Magistrate, however, held that diversion is only available prior to conviction and further reasoned that the seriousness of the crimes outweighed correctional supervision sentence options.<sup>20</sup>

The Appeal Court, having considered the pre-sentence report prepared by the probation officer, found that the accused was in dire need of guidance, correction, rehabilitation and the re-integration into his family and community. In addition, the court found that these objectives can best be achieved outside a prison environment.<sup>21</sup>

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<sup>16</sup> Para [13].

<sup>17</sup> Unreported case 65/2012; South Gauteng High Court.

<sup>18</sup> Para [1].

<sup>19</sup> The social worker indicated that the accused comes from an unsophisticated, poor, albeit stable, family background. Juvenile delinquency stepped in at a very young age and the accused would disappear from home for long periods of time where he would live on the streets. He soon engaged in substance abuse. This impacted negatively on his scholastic performance and he prematurely abandoned school. The accused himself was the victim of sexual assault, having been raped on several occasions, and for this reason professed ignorance that rape was a crime. A psychiatric report emanating from Sterkfontein Hospital, where the accused was assessed pursuant to an order of the court in terms of section 79 of the CPA, indicated a diagnosis of moderate mental retardation, reactive attachment disorder and substance abuse.

<sup>20</sup> Para [3].

<sup>21</sup> Para [7].

The court held that the recommendations of the social worker, namely that:

- The accused be detained at the Sterkfontein Hospital for intensive therapy and treatment;
- That he thereafter be referred to and be ordered to attend sexual offenders programmes and, finally
- That he be placed under the supervision of a probation officer for purpose of monitoring and follow-up;

was in the best interest of the accused and needed to be implemented. The matter was remitted to the trial court to impose sentence afresh in the light of the findings made by Van Oosten J.<sup>22</sup>

#### **4.2.4 S v FM (Centre for Child Law as Amicus Curiae)<sup>23</sup>**

The accused, FM, was charged in the Regional Court with the crime of contravening the provisions of section 3 of the Criminal Law Amendment Act,<sup>24</sup> corresponding to the common law crime of rape. It was alleged that on 8 September 2010, the accused raped and an eleven year old mentally disabled girl. The accused pleaded guilty and was, upon conviction, sentenced to 15 years imprisonment of which 5 years were suspended for 5 years.<sup>25</sup>

The Regional Magistrate who heard the case, uncertain whether cases in which sentence was imposed by a Regional Magistrate or where a child was legally represented were subject to automatic review under the CJA, has submitted the matter to the High Court for consideration.<sup>26</sup> The question on appeal was whether an accused, who was legally

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<sup>22</sup> Para [8].

<sup>23</sup> Unreported case A263/12; North Gauteng High Court.

<sup>24</sup> (Sexual Offences and Related Matters) Act 32 of 2007.

<sup>25</sup> Paras [1] to [13].

<sup>26</sup> Para [14].



represented and who was sentenced by a regional court to a period of imprisonment and has elected not to appeal, is entitled to have his case automatically reviewed by a judge.<sup>27</sup>

The High Court held that section 85(1) of the CJA should be interpreted to provide for the automatic review in respect of all children convicted in terms of the CJA who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in a child and youth care centre.<sup>28</sup>

In reconsidering his sentence, the court had some harsh words for the accused:

“No 16 year old boy, particularly one who participated in the adult world to the degree to which the accused did, could honestly believe that he had a relationship with this mentally disabled 11 year old girl. What the accused meant when he made this claim was that when the mood took him, he used the victim as a receptacle for gratification of his sexual urges and when he did so, the victim did not object. In the light of the history I have described above, the accused was at the time he was sentenced a menace to society. A custodial sentence was essential to protect society against a person who did not recognise the boundaries that the Bill of Rights imposes in respect of every person’s dealings with every other member of society.”<sup>29</sup>

In conclusion, the court noted:

“I think it is important that the accused should not be punished for his choices as an adult would be. It is true that he chose to leave school, consume drugs and alcohol and commit a number of crimes. But the choices he made were juvenile choices and the primary purpose of the sentence imposed on the accused must be

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<sup>27</sup> Ibid.

<sup>28</sup> Para [38].

<sup>29</sup> Para [40] – [41].

not to punish him for those choices but to facilitate every effort to bring him to understand that the choices and that the world in which he lives does offer other choices and a way of life other than that in which he grew up.”<sup>30</sup>

The court proceeded to reduce his sentence to 10 years imprisonment, of which 5 years were wholly suspended for a period of 5 years. The sentence was antedated to 17 October 2010.<sup>31</sup>

#### **4.2.5 Rampeta & Three Others v S<sup>32</sup>**

The four accused were charged with 3 counts, one of which was rape. It appears that the complainant, a 15 year old girl, was abducted by the four appellants while she waited for a taxi. They took her to the house of the third appellant, where all four of them raped her.<sup>33</sup>

At the time of the commission of the offence, the first appellant was 20 years of age; the second appellant was 18 years old; the third appellant was 16 and the fourth appellant 18. All four of them were sentenced to life imprisonment on the rape charge.<sup>34</sup>

In reconsidering sentence, the court took into account that this involved a gang rape of a victim below the age of sixteen; that three of the appellants were first offenders; that none of the appellants grew up in a normal family home<sup>35</sup> as well as the fact that the victim did not sustain any serious physical injuries. In addition, the court held that the sentences must be apportioned to the role of each of the appellants in the commission of the crime

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<sup>30</sup> Para [45].

<sup>31</sup> Para [49].

<sup>32</sup> Unreported case A311/11; Free State High Court.

<sup>33</sup> Para [9] to [11].

<sup>34</sup> Para [5].

<sup>35</sup> The first, third and fourth appellants were raised by their grandmothers and the second appellant was raised by his sister.

as it was clear from the evidence that the first appellant played a leading role in the commission of the crime.

The court proceeded to reduce their sentences and the first appellant was sentenced to 23 years imprisonment, the second and fourth appellants were sentenced to 18 years imprisonment and the third appellant to 15 years imprisonment.<sup>36</sup>

#### **4.2.6 KM v S<sup>37</sup>**

The appellant was charged with three counts of rape and one count of sexual assault in the Benoni Regional Court. He was sentenced to life imprisonment on each of the rape charges and five years imprisonment on the sexual assault charge.<sup>38</sup>

During the time of the commission of the offences, the appellant and the complainants were inhabitants of a place of safety called Mary Moodley. This is a place of safety where juvenile boys who had been sexually abused by members of their families were housed and treated.<sup>39</sup>

The Appeal Court found that three life sentences on three counts of rape were excessive given the youthful age of the appellant,<sup>40</sup> and reduced his sentence to a collective sentence of 18 years imprisonment on all four counts, of which six years were suspended for five years.<sup>41</sup>

#### **4.2.7 IJ v S<sup>42</sup>**

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<sup>36</sup> Para [19].

<sup>37</sup> Unreported case A286/2012; Gauteng North and South Provincial Division.

<sup>38</sup> Para [1].

<sup>39</sup> Para [3].

<sup>40</sup> The appellant's age is never mentioned in the judgment.

<sup>41</sup> Para [7].

<sup>42</sup> Unreported case A121226; Western Cape High Court.

This matter came before the Western Cape High Court on automatic review in terms of section 85(1)(a) of the CJA. The accused was a 14 year old boy at the time of the commission of the offence. He was charged with three counts of rape in terms of section 3 of the Criminal Law (Sexual Offences and Related Matters) Act<sup>43</sup> in that he raped three young boys, two being six years old and one being seven years old.

The accused was legally represented, he pleaded guilty to all the charges, was convicted and sentenced to compulsory residence in Eureka, a Child and Youth Care Centre, for a period of 5 years.<sup>44</sup> In addition, he was sentenced to three years imprisonment after the 5 years compulsory residence.<sup>45</sup>

In addition to the sentence, an ancillary order in terms of section 50(2) of the Sexual Offences Act was made, which had the effect that the accused's name would be entered in the National Register for Sexual Offenders.<sup>46</sup>

The High Court noted that various crucial questions arose out of the granting of an order that the child's name be entered in the Register.<sup>47</sup> These were, whether such an ancillary order was a competent order for a Child Justice Court to make in terms of the CJA; and, if so, whether a court was compelled to make such an order in respect of a minor who had been convicted of a sexual offence against a child, irrespective of the circumstances of

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<sup>43</sup> Act 32 of 2007. Hereinafter referred to as the Sexual Offences Act.

<sup>44</sup> Para [4].

<sup>45</sup> Section 76(3). See para [5].

<sup>46</sup> Para [7]. In terms of section 50(2)(a)(i) of the Sexual Offences Act, a court that has convicted a person of a sexual offence against a child or a person who is mentally disabled, and after sentence has been imposed by that Court for such an offence; in the presence of a convicted person, must make an order that the particulars of the person be included in the Register.

<sup>47</sup> Para [13].

the case.<sup>48</sup> Due to the importance of the issues raised, the review was heard by a full bench of the court, consisting of Fourie J, Henney J and Steyn J.<sup>49</sup>

Henney J, in delivering judgment, went to great lengths to discuss the purpose and rationale behind both the Sexual Offences Act and the CJA.<sup>50</sup> The court also took cognisance of the extent of sexual violence against women and children in our country, quoting various judgments in which this was highlighted.<sup>51</sup>

The court held that, although the inclusion of the particulars of an offender who commits a sexual offence against a child into the Register, may violate some of the offender's constitutional rights,<sup>52</sup> such limitation was a reasonable and justifiable limitation in terms of section 36 of the Constitution.<sup>53</sup>

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<sup>48</sup> Para [14].

<sup>49</sup> Para [10].

<sup>50</sup> See paras [15] – [51] and [94] – [98] of the judgment.

<sup>51</sup> The court quoted a number of judgments, namely *F v Minister of Safety & Security & Others* 2012 (1) SA 536 (CC) at para 37 where the court noted “[t]he abuse of women and girl-children is rife in this country.”

*DPP v Prins* 2012 (2) SACR 183 at para [1] where Wallis JA noted:

“[n]o judicial officer sitting in South Africa today is unaware of the extent of sexual violence in this country and the way in which it deprives so many women and children of their right to dignity and bodily integrity and, in the case of children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone. It is a sad reflection on our world, and societies such as our own, that women and children have been abused and that such abuse continues, so that their rights require legal protection...”

*S & another v Acting Regional Magistrate, Boksburg: Venter & another* at para 23 where Mthiyane AJ said “[o]ur Constitution sets its face firmly against all violence, and in particular sexual violence against vulnerable children, women and men. [...]”

<sup>52</sup> Such as the right to dignity; the right to privacy; the right to fair labour practices and freedom of trade, occupation and profession – see para [55].

<sup>53</sup> Section 36 states that any right in the Bill of Rights may only be limited in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and the extent of the limitation; (d) the relation between the limitation and its purpose and (e) less restrictive means to achieve the purpose.

The court however, went on, stating:

“One of the difficulties I have is that this provision provides that all sexual offenders who commit sexual offences against children or mentally disabled persons, must be included in the Register. In my view, there may be particular circumstances in a case involving a child sex offender and his or her child victim, that do not call for the inclusion of the former’s details in the Register, owing to the fact that the ultimate goal of protecting children against sexual abuse and exploitation is not served by such an approach. [...]”<sup>54</sup>

And then later:

“However, the lack of discretion granted to a presiding officer, together with the broad range of offences that fall under the term ‘sexual offences’, some of which may not be as serious as others, means that courts cannot take the particular circumstances into account, whether or not the child offender truly poses a threat to children, and whether or not the circumstances of a case justify such an approach.”<sup>55</sup>

The court concluded by declaring section 50(2) of the Sexual Offences Act unconstitutional and invalid to the extent that a presiding officer is not allowed a discretion whether or not to make such an order and that the offender is not given an opportunity to make representations before such an order is made.<sup>56</sup> In addition, the court confirmed the conviction and sentence of the applicant, IJ. The order of constitutional invalidity is yet to be confirmed by the Constitutional Court.

### 4.3 Murder

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<sup>54</sup> Para [121].

<sup>55</sup> Para [122].

<sup>56</sup> Para [134].

#### 4.3.1 JL v S<sup>57</sup>

The appellant, a sixteen year old, was convicted on 12 February 2009 in the Cape Town Regional Court on one count of murder. The case against him was that he killed the deceased, a fifteen year old, in Wale Street in Cape Town on the evening of 2 December 2007, by inflicting a single stab wound to his chest. In April, the appellant was sentenced to 10 years direct imprisonment of which four years were conditionally suspended for five years.<sup>58</sup>

His appeal against conviction and sentence came before the Western Cape High Court in March 2012. The appellant's sentence was essentially attacked on the basis that the Magistrate misdirected himself by following the recommendation of the probation officer (who had recommended direct imprisonment) without subjecting that recommendation to sufficient critical analysis.<sup>59</sup>

The High Court contended that the trial court misdirected itself by taking the probation officer's report on face value. Firstly, the Magistrate accepted the probation officer's concern about the placement of the appellant in a child and youth care centre. The probation officer had formed the view that there was a risk that the appellant might abscond. In her report, however, she commented that the appellant had successfully completed his term of rehabilitation after having been arrested for possession of tik.<sup>60</sup> Secondly, the court failed to take cognisance of the fact that the appellant's father was a

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<sup>57</sup> Unreported case A 724/2010; Western Cape High Court.

<sup>58</sup> In sentencing the appellant to an effective 6 years imprisonment, the Magistrate took the following factors into account: the seriousness of the offence; the trend of ever younger offenders being convicted of offences of this nature; the fact that a 15 year old victim was deprived of a life that lay ahead of him; the fact that the incident had a severe impact on his family – the victim's girlfriend was pregnant at that time and the court took cognisance of the fact that a child will have to be raised without a father; the fact that the community was tired of violence; that the offence itself was callous and that the appellant showed no remorse. See para [18] of the judgment.

<sup>59</sup> The appellant's legal representative requested a further postponement of proceedings in order to obtain a correctional supervision report, which was denied by the Magistrate. The appellant submitted that the Magistrate should have established what rehabilitation programs were available under correctional supervision as an alternative to direct imprisonment. See paras [20] and [24] of the said judgment.

<sup>60</sup> Para [21].

positive role-model in his life and that he provided the necessary support to the appellant in the furtherance of his education.<sup>61</sup>

On this basis, the High Court remitted the matter to the trial court to call for a correctional supervision report and to consider sentence afresh.<sup>62</sup>

#### **4.3.2 EJB v S<sup>63</sup>**

On 11 December 2003, the appellant, who was seventeen years old at the time of the commission of the murder, was convicted together with his co-accused and sentenced to 15 years imprisonment by Monare AJ.

The backdrop to the conviction and sentencing of the appellant was that on 15 February 2001; he, together with Accused 2 (then 15) and Accused 3 (then 19) came across the deceased, who was inebriated. Accused 2, in racist terms, suggested that the deceased should be assaulted. They all assaulted the deceased by kicking and punching him. The deceased was left lying on the pavement where he subsequently died as a result of the injuries emanating from the assault. The trial court considered the evidence before it and concluded that the three accused committed the crime in pursuit of a common purpose and found them guilty of murder on *dolus eventualis*.<sup>64</sup> They were each sentenced to 15 years imprisonment.<sup>65</sup>

The appeal only came before the North Gauteng High Court in 2010 and was heard by Judges Mavundla, Van der Byl and Maumela. The court dismissed the appeal against

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<sup>61</sup> Para [22].

<sup>62</sup> Para [31].

<sup>63</sup> Unreported case A195/10, North Gauteng High Court.

<sup>64</sup> Para [6].

<sup>65</sup> In sentencing the accused, the court was mindful of the Constitutional provisions applicable to children. The court also took into account the fact that the accused took liquor, drugs and dagga prior to the commission of the offence. In addition, the court requested a probation officer's report and a correctional supervision report. Both these reports suggested sentences in terms of section 276 of the CPA.



sentence and confirmed the 15 year sentence imposed by the trial court, explaining as follows:

“The gravity of the offence committed by the appellant and his socio in crime does not lie only in the killing of an innocent person, and the severity and brutality of the commission thereof but more in the motive which propelled them to commit it – racism! Racially motivated offences committed by whoever offends against the ethos and aspirations of the peoples of this nascent democracy. [...] In conclusion, I find that the sentence imposed is not shockingly inappropriate and serves the desert of the appellant. [...]”<sup>66</sup>

#### **4.3.3 S v Mahlangu & Another<sup>67</sup>**

The first test for the CJA come only two days after its promulgation when notorious political leader Eugene Terre’blanche was found beaten to death on his farm. The two accused, one a minor of only 15, stood charged of housebreaking with the intent to rob; robbery with aggravating circumstances; murder and attempted robbery with aggravating circumstances. It was alleged that on 3 April 2010, the two accused broke into the house of the deceased, robbed him of his Nokia cell phone, murdered him and attempted to rob him of his white Opel Corsa bakkie. It was also alleged that, after the crime(s) occurred, accused 2 (the minor), contacted the police and confessed to having committed the murder together with his adult co-accused.

During the trial, a trial-within-a-trial was held wherein the admissibility or inadmissibility of the minor’s confession, the DNA evidence collected from the minor as well as certain pointings-out made by the minor after the crime, were argued.

Controversy followed when the police officers who were first to arrive on the scene,

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<sup>66</sup> Para [22] and [30].

<sup>67</sup> (CC70/2010) [2012] ZAGPJHC 114 (22 May 2012).

acknowledged during testimony that they knew nothing about the CJA.<sup>68</sup> Their investigation was riddled with procedural errors, which included the fact that a probation officer was never informed about the arrest; the minor was never kept separate from his adult co-accused; DNA evidence was collected from the minor without a probation officer being present; the minor was interviewed in the early hours of 4 April 2010, with the minor not having slept and not having anything to eat for hours.

Judge Horn, finding that the failure to have regard to the minor's fundamental rights was so serious that it impinged on his right to a fair trial, found the evidence to be inadmissible. In the absence of any other evidence linking the minor to the murder of the deceased, the court only found the minor guilty of housebreaking with the intent to steal.

#### **4.3.4 BOM & AL v S<sup>69</sup>**

The appellants, both 18 years old at the time of the commission of the offences, were convicted and sentenced in the Regional Court, Springs, for raping and murdering a 13 year old girl. The deceased was found in an open veld near appellant 2's house, with several stab wounds and a knife blade stuck in her head.<sup>70</sup> Appellant 1 was convicted of murder and acquitted on the rape charge. Appellant 2 was convicted on both counts. On 23 July 2012 the appellants were each sentenced to life imprisonment for murder. Appellant 2 was sentenced to another life imprisonment term for rape.<sup>71</sup>

As both accused were already aged 18, the offences brought the sentences within the purview of section 51(1) of the Criminal Law Amendment Act.<sup>72</sup> The Regional

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<sup>68</sup> See Child K Police caught in the Act in ET trial Article published in the Mail & Gaurdian on 21 October 2011; available on [www.mg.co.za](http://www.mg.co.za); accessed on 01/10/2012.

<sup>69</sup> Unreported case A827/12, North Gauteng High Court.

<sup>70</sup> See para [4] – [12] for the background facts of the case.

<sup>71</sup> Para [1].

<sup>72</sup> Act 105 of 1997. See para 1.2.3.4 in Chapter 1.

Magistrate, not finding any substantial and compelling circumstances, proceeded to impose the mandatory life imprisonment sentences.

On appeal, the court held that the Regional Magistrate did not attach due weight to the presentence reports prepared by the probation officer,<sup>73</sup> especially the socio-economic backgrounds of the appellants.<sup>74</sup>

The Appeal Court held that the Regional Magistrate did not take the cumulative effect of the appellants' youth, their socio-economic backgrounds, and the role played by liquor in the offence, into account. The court held that “[l]ife imprisonment is the heaviest sentence a person can legally be obliged to serve. It should therefore not be imposed lightly, without full and proper consideration of all the relevant facts.”<sup>75</sup>

The court proceeded to replace their sentences to 20 year imprisonment sentences. In respect of appellant 2, the court ordered the murder and rape sentence to run concurrently.<sup>76</sup>

#### **4.3.5 S v TLT<sup>77</sup>**

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<sup>73</sup> Para [26].

<sup>74</sup> In respect of appellant 1, these included that his parents died, where after he was cared for by siblings. After the death of his parents he started to display inappropriate behaviour, such as absconding from school. He dropped out of school about a year thereafter and started using dagga by the age of 16. He had two previous convictions of assault GBH and malicious injury to property on which he was sentenced to 4 years imprisonment which was wholly suspended.

With regards to appellant 2, the pre-sentence report indicated that he was raised by his grandmother. He left school during grade 10 on his own violation. He then started smoking dagga and drank alcohol “a lot”. He presented a lot of anger when confronted with what he had done. He also had two previous convictions – crimes which he had committed with appellant 1.

<sup>75</sup> Para [33].

<sup>76</sup> Para [38].

<sup>77</sup> Unreported case 61/2013, South Gauteng High Court.

The accused was charged in the Alexandra Regional Court with murder. He was aged 15 years and 10 months at the time of the commission of the offence, and 16 years at the time of sentencing.<sup>78</sup>

The accused pleaded guilty on the count of murder in terms of section 112(2) of the CPA. From his plea explanation it appeared that a fight erupted regarding a cap that was taken from a friend of the accused. The accused intervened, and when he got slapped, he pulled out a knife and fatally stabbed the deceased five times.<sup>79</sup>

During the sentencing proceedings two pre-sentence reports were obtained, one from a probation officer, and the other from a social worker working at the Child and Youth Care Centre where the accused was detained during the course of the trial.<sup>80</sup>

The social worker gave a positive report regarding the behaviour of the accused at the facility and recommended a sentence in terms of section 76 of the CJA.<sup>81</sup> The probation officer, however, recommended direct imprisonment.<sup>82</sup> The accused was subsequently sentenced in terms of section 76(1) of the CJA to compulsory residence in a child care centre until he reached 19 years of age.<sup>83</sup>

The matter went on automatic review to the High Court, and the Review Judge enquired if the Magistrate, taking into account all the relevant circumstances, did not feel that detention in a centre for less than three years was a too lenient sentence. The learned

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<sup>78</sup> Para [1].

<sup>79</sup> Para [2] –[3].

<sup>80</sup> Para [4].

<sup>81</sup> Section 76 relates to compulsory residence in a Child and Youth Care Centre. See para 3.3.3.2.5 in Chapter 3.

<sup>82</sup> Para [6]. He based his decision on the following facts: the accused displayed constant misconduct and lack of discipline from a young age; this led him to be expelled from school in 2011; the accused abused substances such as dagga and glue; the impact of the crime on the deceased's family.

<sup>83</sup> Para [7].

Magistrate acknowledged that the sentence might have been too lenient, and conceded that he erred in not adequately taking into account the following factors:<sup>84</sup> that the accused displayed previous troublesome behaviour; that the deceased was stabbed several times; that the accused was armed with a knife; that this incident caused a severe impact on the family of the deceased; and that a concerning prevalence of this kind of senseless violence existed.

In the light of the above, the Review Court indicated that the appeal against sentence must succeed and that a sentence in terms of section 76(3)(a) of the CJA would have been a more appropriate sentence in the circumstances.<sup>85</sup>

#### **4.3.6 S v CT<sup>86</sup>**

The accused, a 15 year old male, was convicted in the Tonga Regional Court of murder. He was sentenced to be detained for a term of five years in the Thokomale Child and Youth Care Centre.<sup>87</sup>

The facts leading to his conviction and sentence were that the deceased, the accused and two of his friends were swimming at a gravel dam at the Langeloop Trust. There were other children at the dam, including S. The accused pulled S into the water and pushed his head under the water. Two other children jumped into the water to rescue S. The deceased, who was unable to swim, was sitting next to the dam and assisted to pull S out of the water. The accused then left S; grabbed the deceased and pushed his head under the water for at least five times. After the fifth time, the deceased did not reappear above the water surface, as he eventually drowned. The accused then warned the others not to tell anyone that he caused the deceased to drown.<sup>88</sup>

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<sup>84</sup> Para [15].

<sup>85</sup> Para [19] – [20].

<sup>86</sup> Unreported case A506/2013, North Gauteng High Court.

<sup>87</sup> Para [1].

<sup>88</sup> Para [3].

The trial court found the accused guilty of murder on the basis of *dolus eventualis*. The court held that, when S had to be rescued, the accused must have had an appreciation of the risk to life that his conduct of dunking posed. He nevertheless recklessly persisted in the same conduct with the deceased.<sup>89</sup>

On appeal, the sentence was confirmed and the court held that the failure by the Magistrate to enter reasons for imposing a different sentence than the one recommended by the probation officer does not vitiate the sentence.<sup>90</sup> The matter was however remitted to the trial court to determine whether the accused's behaviour problems would not place the other children at the Child and Youth Care under risk or danger.<sup>91</sup>

#### **4.3.7 Mpofo v Minister of Justice and Constitutional Development & Two Others (Centre for Child Law as Amicus Curiae)<sup>92</sup>**

The applicant lodged an application for leave to appeal to the Constitutional Court against a judgment of the South Gauteng High Court, Johannesburg. He wanted his sentence of life imprisonment imposed by the High Court to be set aside; as he argued that he was a child at the time the crime was committed, and that this was not taken into consideration when he was sentenced.<sup>93</sup>

The background facts of the case leading to the application can briefly be described as follows: In 2001, the applicant, together with his co-accused, was convicted in the High Court of murder and other serious offences which were committed in January 1998. On

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<sup>89</sup> Para [6].

<sup>90</sup> Section 71(4) of the CJA states that a presiding officer who imposes a sentence other than the one recommended by the probation officer, must enter the reasons for the imposition of a different sentence on the record. In this instance, the probation officer recommended an imprisonment sentence. The Appeal Court found that, because the Magistrate imposed a more lenient sentence than the one recommended by the probation officer, the accused was not prejudiced. As such, the fact that the reasons were not read into the record, does not make the proceedings void.

<sup>91</sup> Para [13]. This fact was highlighted by the probation officer in the pre-sentence report.

<sup>92</sup> CCT 124/11 [2013] ZACC 15.

<sup>93</sup> Para [2].

21 September 2001, he was sentenced to life imprisonment for the murder, as well as 28 years imprisonment for the other offences, which was to run concurrently with the life term.<sup>94</sup> By the time that his application for leave to appeal was heard by the CC, he had already served 13 years of his sentence.<sup>95</sup>

In the majority judgment handed down by Skweyiya J, the applicant's applications for condonation and for leave to appeal were refused. The majority held that, while a constitutional issue was raised by the application, the interests of justice did not favour the grant of leave to appeal. It held that the applicant failed to establish that a right under section 28 of the Constitution was engaged at all, as he had not shown that he was under the age of eighteen at the time of the commission of the offence. The fact that the application for leave to appeal was only made ten years after the High Court sentenced him, and that he had failed to explain the extent of this delay, further weakened the interests of justice in granting both applications for condonation and for leave. In addition, the applicant did not adequately explain why he brought two previous applications to the CC against his sentence in which this issue was never raised.

In a separate judgment Van der Westhuizen J reasoned that leave to appeal should be granted and that based on the wording of the judgment handed down by the High Court, the applicant was a child at the time he committed the offences. The minority held that the High Court misdirected itself in failing to consider the applicant's rights as a child when it imposed its sentence. In the light of the misdirection, the minority argued that his sentence should be set aside and be substituted with a sentence of 20 years imprisonment.

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<sup>94</sup> Para [4].

<sup>95</sup> Ibid. Applications by the applicant for leave to appeal against his sentence to the High Court and the SCA were dismissed on 16 November 2004 and 17 August 2006 respectively. In 2008, he approached the CC for the first time with an application for leave to appeal; the basis being that the presiding judge was not impartial and violated his constitutional right to a fair trial. He further argued that the fact that the record of his trial could not be traced, infringed his right of access to information. The application for condonation and the application for leave to appeal were dismissed – CCT66/08. In 2009, the applicant approached the court again on the basis that his right of access to information, his right of appeal and his right to a fair trial were infringed. This application was also dismissed – CCT101/09. In both cases, the CC stated in short reasons that it was “not in the interests of justice” to hear the matter.

#### 4.3.8 S v IO<sup>96</sup>

The appellant, a juvenile under the age of eighteen<sup>97</sup> at the time of the commission of the offences, had been convicted in the High Court on two counts of murder, three counts of attempted murder and the unlawful possession of firearms and ammunition. He had been sentenced to an effective term of 25 years imprisonment.

The appellant appealed to a full court against the sentence imposed on him, contending essentially that the trial court's judgment on sentencing did not contain any reference to the provisions of section 28 of the Constitution, which together with the international instruments from which it had originated, had brought about significant changes to the sentencing regime concerning the incarceration of children.

In addition, the appellant's co-accused successfully appealed against his 35 year sentence, which was reduced to 25 years imprisonment.

Van Reenen J held that the provisions of the Constitution relating to the sentencing of juveniles were not absolute, but subject to limitation in appropriate circumstances; such as the seriousness of the offence, the protection of the community and the severity of the impact of the offence on the victim. In this case, the court found that these circumstances justified the need for long term incarceration. The court did however; recognise the existence of factors which justified the fact that the appellant was entitled to be treated more leniently than his adult co-accused;<sup>98</sup> making it self-evident that the appellant's term of imprisonment needed to be less than the effective period of 25 years imposed on his co-accused.

The court thus reduced the appellant's sentence to an effective sentence of 18 years imprisonment.

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<sup>96</sup> 2010 (1) SACR 342 (C).

<sup>97</sup> The specific age of the child is not mentioned in the appeal judgment.

<sup>98</sup> These included his youth; the fact that he was of a personality type making him more susceptible to yielding peer pressure; and the fact that he was found to be more suitable for rehabilitation.



## 4.4 Analysis and Comment

### 4.4.1 Custodial sentences

#### 4.4.1.1 Aggravating and mitigating factors

##### 4.4.1.1.1 Introduction

Aggravating and mitigating factors influence the extent to which the offender is to be blamed for his crime and how much he therefore deserves to be punished.<sup>99</sup> Mitigating factors are those factors that are favourable to the accused and generally result in a lighter sentence, while aggravating factors have the opposite effect.<sup>100</sup> Although there has been very little theoretical discussion of the concepts of aggravating and mitigating circumstances, the Supreme Court of Appeal has referred to them in the context of determining “substantial and compelling circumstances” in terms of section 51(3)(a) of the Criminal Law Amendment Act, Act 105 of 1997.<sup>101</sup>

Van der Merwe<sup>102</sup> explains the importance of aggravating and mitigating factors in determining an appropriate sentence as follows: “[...], where a judicial officer fails to recognise the existence of a particular factor, or wrongly recognises it, or attaches the incorrect weight to a factor in a particular case, the process becomes unbalanced and the sentencing decision may be overturned on appeal.” In addition, she argues that, in the absence of any other source, such as legislation or sentencing guidelines, case law appear to be the main source for establishing aggravating and mitigating factors.<sup>103</sup>

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<sup>99</sup> See para 1.1 in Chapter 1. For a very detailed discussion on how the blameworthiness of an offender can influence the sentence see para 7.2 in Terblanche (2007) 150-152.

<sup>100</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p302.

<sup>101</sup> Ibid. In *S v Malgas* 2001 (1) SACR 469 (SCA) the court held that the content and the meaning of the term “substantial and compelling circumstances” should be determined by weighing the mitigating and aggravating factors. When the aggravating factors are outweighed by the cumulative effect of the mitigating factors, the court may deviate from the prescribed minimum sentence. Also see the discussion on minimum sentences in para 1.2.3.4 in Chapter 1.

<sup>102</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p303.

<sup>103</sup> Ibid.

What follows is a compilation of aggravating and mitigating factors highlighted by courts in the cases discussed in paragraphs 4.2 and 4.3.

#### **4.4.1.1.2 Rape**

##### **4.4.1.1.2.1 Aggravating factors tipping the scale in favour of custodial sentences**

###### **a) Circumstances related to the commission of the crime**

- The gravity of the offence;<sup>104</sup>
- the fact that nowadays it is the youth that is engaged in violent and serious crimes;<sup>105</sup>
- the commission of the crime was pre-planned;<sup>106</sup>
- the complainant was raped in the presence of another boy;<sup>107</sup>
- the victim was exposed to further humiliation;<sup>108</sup>
- the victim was raped by more than one accused;<sup>109</sup>
- the accused threatened to kill the victim if she told anyone about the incident.<sup>110</sup>

###### **b) The accused**

- Substance abuse by the accused;<sup>111</sup>
- the accused was previously charged with offences involving violence and sexual assault, for which he had been diverted.<sup>112</sup>

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<sup>104</sup> BF v S, para 4.2.1 supra at para [8].

<sup>105</sup> Ibid.

<sup>106</sup> Ibid at para [14].

<sup>107</sup> TJT v S, para 4.2.2 supra at para [7].

<sup>108</sup> Rampeta & Three Others v S, para 4.2.5 supra at para [10] where the court noted “[o]p daardie stadium het die ander appellante gelag en aanmerkings gemaak.”

<sup>109</sup> Ibid at para [13].

<sup>110</sup> Ibid at para [11].

<sup>111</sup> S v MK, para 4.2.3 supra at para [6]; S v FM, para 4.2.4 supra at para [8].

<sup>112</sup> S v FM ibid at para [6].

**c) Society's interest**

- High incidence of rape in South Africa;<sup>113</sup>
- Escalation of rape and public outcry in cases where too lenient a sentence is imposed.<sup>114</sup>

**d) The interest of the victim**

- The victim was a child under the age of sixteen;<sup>115</sup>
- the victim was a child who was mentally disabled;<sup>116</sup>
- the victim wants her mother to be with her at all times to protect her against being raped again;<sup>117</sup>
- the victim suffered a behavioural change as a result of the rape;<sup>118</sup>
- the victim suffered serious emotional and psychological scars as a result of the rape.<sup>119</sup>

**4.4.1.1.2.2 Mitigating factors taken into consideration by the court<sup>120</sup>**

**a) Circumstances related to the commission of the crime**

- The victim did not sustain any serious physical injuries during the rape.<sup>121</sup>

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<sup>113</sup> Van der Merwe A (2005) Aspects of the Sentencing Process in Child Sexual Abuse Cases Unpublished PhD Thesis, Rhodes University, p309.

<sup>114</sup> Ibid.

<sup>115</sup> BF v S at para [8]; Rampeta & Three Others v S at para [8].

<sup>116</sup> S v FM at para [3] and [10].

<sup>117</sup> Ibid at para [10].

<sup>118</sup> Ibid.

<sup>119</sup> Rampeta & Three Others v S at para [14].

<sup>120</sup> In all but one of the studied cases (MK), the court imposed custodial sentences. It seems that the mitigating factors does not really influence the presiding officer's decision as to whether or not a custodial sentence must be imposed, but only influences the length of the sentence. A detailed discussion follows in paragraph 4.4.1.2.1 below.

<sup>121</sup> S v FM at para [10]; Rampeta & Three Others v S at para [11].

## **b) The accused**

- Youthfulness;<sup>122</sup>
- the possibility of rehabilitation;<sup>123</sup>
- the accused was a first offender;<sup>124</sup>
- the unfavourable background of the accused;<sup>125</sup>
- the fact that there is a high risk of juvenile delinquency where the accused lived;<sup>126</sup>
- the accused himself was a victim of sexual abuse;<sup>127</sup>
- the accused pleaded guilty;<sup>128</sup>
- the accused spent his formative years without adequate role models for decent behaviour;<sup>129</sup>
- the accused was under the influence of older accused.<sup>130</sup>

### **4.4.1.1.3 Murder**

#### **4.4.1.1.3.1 Aggravating factors tipping the scale in favour of custodial sentences**

##### **a) Circumstances related to the commission of the offence**

- The seriousness of the offence;<sup>131</sup>

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<sup>122</sup> BF v S at para [8] the court noted that “youthfulness remains a strong mitigating factor.” Rampeta & Three Others v S at para [13].

<sup>123</sup> Ibid.

<sup>124</sup> BF v S at para [13]; Rampeta & Three Others v S at para [13].

<sup>125</sup> TJT v S at para 9.4. This can include the fact that the accused was raised by a single parent, that the accused’s father left when he was very young and the fact that all the accused’s family members are unemployed.

<sup>126</sup> Ibid.

<sup>127</sup> S v MK.

<sup>128</sup> S v FM at para 4.

<sup>129</sup> Ibid at para 42.

<sup>130</sup> Rampeta & Three Others v S at para [17].

<sup>131</sup> JL v S, para 4.3.1 supra at para [18].

- the trend that ever younger offenders are committing serious violent crimes;<sup>132</sup>
- the offence itself was callous;<sup>133</sup>
- the fact that it seemed to have been a racially motivated crime;<sup>134</sup>
- the severity and brutality of the assault;<sup>135</sup>
- the fact that it was a gang-related revenge killing.<sup>136</sup>

**b) The accused**

- The accused showed no remorse;<sup>137</sup>
- the accused displayed previous troublesome behaviour.<sup>138</sup>

**c) Society's interest**

- The fact that the community in which the accused lived was tired of violence.<sup>139</sup>

**d) The interest of the victim**

- The victim's death had a severe impact on his family.<sup>140</sup>

**4.4.1.1.3.2 Mitigating factors taken into consideration by the court<sup>141</sup>**

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<sup>132</sup> Ibid. S v TLT, para 4.3.5 supra at para [15].

<sup>133</sup> JL v S at para [18].

<sup>134</sup> EJB v S, para 4.3.2 supra at para [15] and [20].

<sup>135</sup> Ibid at para [20].

<sup>136</sup> S v IO at para [17].

<sup>137</sup> JL v S at para [18]; EJB v S at para [26].

<sup>138</sup> BOM & AL v S at para 4.3.4 supra at para [22] where the court took cognisance that the accused had previous convictions of assault GBH and malicious injury to property. S v TLT at para [15]; S v CT, para 4.3.6 supra at para [9] where the court noted that the accused was aggressive and bullied children at school.

<sup>139</sup> JL v S at para [18].

<sup>140</sup> JL v S at para [18]. The court took into account that the victim's girlfriend was pregnant at the time of his murder and the court noted that a child will grow up without a father. S v TLT at para [15].

<sup>141</sup> The court imposed custodial sentences in all but one of the cases studied. It seems that the mitigating factors are considered mostly to determine the length of the sentence.

#### a) The accused

- The accused previously successfully completed a rehabilitation programme for substance addiction;<sup>142</sup>
- the accused had a positive role model who provided encouragement and support to the accused in the furtherance of his education;<sup>143</sup>
- the fact that the accused consumed alcohol, drugs and dagga before the commission of the offence;<sup>144</sup>
- youthfulness of the accused;<sup>145</sup>
- the unfavourable background of the accused;<sup>146</sup>
- the accused pleaded guilty;<sup>147</sup>
- the accused was of a personality type making him more susceptible to peer pressure.<sup>148</sup>

#### 4.4.1.1.4 Conclusion

From the analysis on the reported cases it is submitted that the seriousness of the offence is the most important aggravating factor taken into account by presiding officers in determining an appropriate sentence. The most important mitigating factor seems to be the importance of the rehabilitation of the child offender, and the returning of that offender as a law-abiding citizen to society. In rape cases though, the courts also rely heavily on the high incidence of violent sexual crimes committed against women and

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<sup>142</sup> JL v S at para [21].

<sup>143</sup> Ibid at para [22].

<sup>144</sup> EJB v S at para [8]; BOM & AL v S at para [24].

<sup>145</sup> EJB v S at para [8].

<sup>146</sup> EJB v S at para [12] where it was noted that “the appellant come[s] from a battered family where alcohol, arguments and assaults were [at] the order of the day since his childhood.” BOM & AL v S it was noted that both the accused’s parents died and he was raised by siblings.

<sup>147</sup> S v TLT at para [2].

<sup>148</sup> S v IO at para [18].

children in South Africa, which seem to influence the length of the sentences that are imposed.<sup>149</sup>

#### **4.4.1.2 The length of the sentence**

##### **4.4.1.2.1 Rape**

Out of all the cases studied, most offenders<sup>150</sup> received custodial sentences. Of note was however the fact that in all but two cases,<sup>151</sup> the courts imposed lengthy direct imprisonment sentences ranging from nine years to eighteen years on accused who were between the ages of sixteen and eighteen at the time when they committed the offences.<sup>152</sup> It is interesting that the minimum sentence for an adult first time offender is 10 years imprisonment.<sup>153</sup> It is thus submitted that, as in the past,<sup>154</sup> courts still heavily rely on the use of custodial sentences for rape. In addition, there seem to be little deviation in the length of sentences imposed under the CJA than those that were imposed under the CPA and the minimum sentencing legislation. Even more worrying, is the fact that there seem to be little deviation between the sentences that are imposed on children and those that are imposed on adults. This can largely be attributed to the wave of serious violent crimes committed against women and children in South Africa.<sup>155</sup> This fact has

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<sup>149</sup> This is discussed in more detail in paragraph 4.4.1.2 below.

<sup>150</sup> Except for one, MK.

<sup>151</sup> MK & IJ. In IJ the court imposed a sentence of 5 years detention in a child and youth care centre, where after the accused have to serve 3 years imprisonment. The accused was 14 at the time of the commission of the offence and would have reached the age of majority by the time he has to start serving his prison term. In MVK, the matter was remitted to the trial court to consider diverting the matter. In this matter the court relied heavily on the fact that a psychiatric report obtained from Sterkfontein Hospital where the accused was assessed in terms of sections 77-79 of the CPA, indicated a diagnosis of moderate mental retardation. It is submitted that the court also had due regard to the fact that the accused himself had been a victim of sexual abuse on several occasions and that exposing him further to the negative elements of imprisonment, may have a lasting effect on his psychological well-being.

<sup>152</sup> KM v S – 18 years imprisonment of which 6 years were suspended for a period of 5 years. BF v S – 12 years imprisonment for a 14 year old. S v FM – 10 years imprisonment for a 16 year old. TJT v S - 9 years imprisonment for a 16 year old (he was convicted on two counts of rape, effectively having to serve 15 years).

<sup>153</sup> Section 51(2)(b)(i) of Act 105 of 1997 read together with Part III of Schedule 2.

<sup>154</sup> See para 3.8 in Chapter 3.

<sup>155</sup> Stout B 2003 (16:1) Acta Criminologica 14 notes that:

been widely acknowledged by our courts,<sup>156</sup> and the role of the courts has been described by the Supreme Court of Appeal in *DPP v Thabethe*<sup>157</sup> as follows:

“Rape of women and young children has become cancerous in our society. It is a crime which threatens the very foundation of our nascent democracy which is founded on protection and promotion of the values of human dignity, equality and the advancement of human rights and freedoms. It is such a serious crime that it evokes strong feelings of revulsion and outrage amongst all right-thinking and self respecting members of society. Our courts have an obligation in imposing sentences for such a crime, particularly where it involves young, innocent, defenceless and vulnerable girls, to impose the kind of sentences which reflect the natural outrage and revulsion felt by law-abiding members of society. A failure to do so would regrettably have the effect of eroding the public confidence in the criminal justice system.”<sup>158</sup>

#### 4.4.1.2.2 Murder

The murder cases studied showed that courts imposed long term imprisonment in only three of the cases. The facts of these cases indicated the existence of circumstances which

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“Research has shown that girls and young women in South Africa are subject to a significant degree of sexual violence, often from their peers. The most comprehensive study of sexual violence in South Africa was carried out by international research group CIETAfrica in 1998 [...]. The organisation describes South Africa as possessing a culture of sexual violence; it found that three out of ten South African women reported being victims of sexual violence.”

<sup>156</sup> See n51 on p121 above. In *DPP v Thabethe* (619/10) [2011] ZASCA 186 (30 September 2011) the court also indicated that: “the rate of rape in the country has reached pandemic proportions. It is no exaggeration to say that rape has become a scourge or a cancer that threatens to destroy both the moral and the social fabric of our society.”

<sup>157</sup> *Ibid.*

<sup>158</sup> At para [22]. In *S v Chapman* 1997 (2) SACR 3 (SCA) at 5 c-e the court held that “[t]he courts are under a duty to send a clear message to the accused, to other potential rapists and to the community: We are determined to protect the equality, dignity and freedom of all women, and we shall have no mercy to those who seek to invade those rights.” In *N v S* (469/2007) [2008] ZASCA 30 (28 March 2008) at para [40], Cameron J stated that “every rape sentence sends a public message.”



the courts felt obliged them to impose lengthy sentences.<sup>159</sup> In the rest of the cases, the imposed sentences ranged between a remittal to the trial court to obtain a correctional supervision report for consideration;<sup>160</sup> 5 years detention in the Thokomale Child and Youth Care Centre<sup>161</sup> and a remittal to the trial court to impose a sentence in terms of section 76(3).<sup>162</sup>

On average, the studied cases show a drastic decrease in the length of the custodial sentences imposed from what was seen prior to the promulgation of the CJA. Also noteworthy, is that the sentences imposed for murder seem to be generally more lenient than those imposed for rape.<sup>163</sup>

#### **4.4.1.2.3 Conclusion**

From the analysis above, it is clear that there is no real difference in the length of the sentences imposed under the CJA for rape, than those that used to be imposed before the promulgation of the CJA. Courts still rely heavily on lengthy imprisonment sentences for rape, even if the offender is a child. In addition, there is no real difference in the length of sentences imposed on children than those imposed on adults. The main reason for this is without doubt the wave of serious violent crimes committed against women and children

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<sup>159</sup> In *BOM & AL v S* the two accused (charged with rape and murder) were already 18 when they committed the offences (which brought their sentences within the purview of the minimum sentencing legislation which is life imprisonment on each count). On appeal, their sentences were reduced to 20 years imprisonment. In *EJB v S* the court places great emphasis on the fact that it was a racially motivated crime and imposed a 15 year sentence on a 17 year old accused. In *Mpofu*, the Constitutional Court refused to grant an order for leave to appeal as the accused could not prove that he was under 18 when he committed the offence. In *S v IO*, the accused were charged with 2 count of murder and 5 counts of attempted murder, ultimately being found guilty on five of those charges. The court also placed a lot of emphasis on the fact that it was a gang-related revenge killing.

<sup>160</sup> *JL v S*.

<sup>161</sup> *S v CT*.

<sup>162</sup> *S v TLT*.

<sup>163</sup> There have been instances where the courts have stated that rape was a fate worse than loss of life. In *S v C 1996 (2) SACR 181 (C) (CPD)* at 186e the court noted that: “[a] rapist does not murder his victim – he destroys her self-respect and destroys her feeling of physical and mental integrity and security. His monstrous deed often haunts his victim and subjects her to mental torment for the rest of her life – a fate often worse than loss of life.”

in our country. Courts have acknowledged that they have a duty to impose sentences that sends out a message, and that failing to do so will cause law-abiding citizens to lose faith in the criminal justice system. In contrast, there is a drastic decrease in the length of sentences imposed for murder.

#### **4.4.2 The use of expert evidence in the sentencing process**

##### **4.4.2.1 Expert evidence with regard to the accused**

###### **4.4.2.1.1 The personal circumstances of the accused**

The studied cases indicated a number of resemblances in the personal circumstances of the accused. With regard to rape, it was noted that all the offenders were between the ages of fourteen and sixteen when they committed the offences;<sup>164</sup> delinquent behaviour stepped in at a young age;<sup>165</sup> and they all engaged in substance abuse.<sup>166</sup> All these factors had a negative effect on their scholastic performance and they dropped out of school. In two of the cases, the accused were victims of sexual abuse themselves.

The personal circumstances of the accused who committed murder to a large extent collaborate with those of the rape offenders. The accused were between the ages of fifteen and eighteen;<sup>167</sup> they displayed inappropriate behaviour from a very young age and they also engaged in substance abuse.

This reiterates the fact that children in conflict with the law are generally victims of circumstance.<sup>168</sup> Allen<sup>169</sup> states that “[we] also recognise that the roots of criminality and crime lay in social conditions; in the depravation, poverty, bad housing...” And later:

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<sup>164</sup> Except for KM v S, whose age is never mentioned.

<sup>165</sup> The accused would disappear from home for long periods of time; hang out with the wrong crowd etc.

<sup>166</sup> Such as glue; dagga; tik and alcohol.

<sup>167</sup> Except for Mpofo, whose age could not be determined.

<sup>168</sup> Para 1.2.2 in Chapter 1 and para 3.3.3.2.2.4 in Chapter 3.

<sup>169</sup> Allen R Juvenile Justice Reform in England and Wales Lecture delivered at UNAFEI during the 118<sup>th</sup> International Training Course, p128.

“[W]e know what makes it likely that children will become offenders. We know the kinds of factors: these are children who have problems in their families, these are children who are failing at school, these are children who at an early age get involved in drugs or alcohol misuse. These are children who get involved in gangs at an early age.”<sup>170</sup>

It has been suggested that dedicated early childhood development and intervention programmes can identify at risk children and address delinquency before it turns into criminality.<sup>171</sup>

#### **4.4.2.1.2 The recommendation of and weight attached to expert evidence**

Research on this topic proved to be very difficult. Most cases involving rape and murder are heard by the Regional Court. As these records are not readily available to the public, the cases studied were cases that went on appeal and/or review to the High Court. In a number of these judgments the High Court did not properly record who the probation officer was; whether the probation officer was a social worker; what the initial recommendation of the probation officer was and whether the trial court imposed the recommendation of the probation officer. The courts also did not make any observations relating to whether the reports were properly prepared or whether it assisted the courts to obtain more insight into the reasons for the commission of the crime.

Only two of the rape cases studied<sup>172</sup> provided sufficient information relating to the recommendations of the probation officer. In both the cases, the review court imposed the recommendation by the probation officer. Sufficient information could only be drawn from three of the murder cases.<sup>173</sup> The court did not impose the recommendations of the

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<sup>170</sup> Ibid p129.

<sup>171</sup> Pelsler E 2007 (22) SACQ 1 at 5. This does however not fall within the scope of this dissertation.

<sup>172</sup> S v MK & S v FM.

<sup>173</sup> S v TLT; EJB v S & JL v S.

probation officer in any of the three cases.<sup>174</sup> Due to lack of information, a proper analysis could not be done.

#### **4.4.2.2 Expert evidence with regard to the victim**

While expert evidence with regard to the accused is obligatory, the court was only presented with a VIS in one of the cases.<sup>175</sup> This is not in line with section 69(4) of the CJA as was argued in paragraph 3.4 in Chapter 3. With regard to the absence of expert evidence on the impact of the crime on the victim in the majority of the cases, it is submitted that courts are not provided with all the relevant information to determine an appropriate sentence.<sup>176</sup> This is essentially true in rape cases, where courts have acknowledged that they do not have the necessary expertise to fully comprehend the impact that an offence like rape can have on a victim.<sup>177</sup>

#### **4.4.2.3 Conclusion**

From the above it is clear that there are a number of resemblances in the personal circumstances of the accused. Lack of information however hindered a proper analysis of the recommendations of and weight attached to expert evidence.

#### **4.4.3 Conclusion**

This chapter examined all the judgments that were delivered in rape and murder cases since the promulgation of the CJA. With regard to the desirability to keep children out of prison, the extent to which courts impose alternative sentencing options on child

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<sup>174</sup> In *JL v S* the recommendation was direct imprisonment, but the matter was remitted to the trial court to obtain a correctional supervision report. In *EJB v S* the recommendation from the probation officer was a term of imprisonment in terms of section 276(1)(i) of the CPA and the recommendation from the correctional supervision officer was correctional supervision. The appeal was dismissed and the 15 year sentence confirmed. In *TLT v S* the recommendations were sentences in terms of section 76(1) of the CJA and imprisonment respectively. The matter was remitted to the trial court to impose a sentence in terms of section 76(3) of the CJA.

<sup>175</sup> *S v FM*. In *Rampeta & Three Others v S*, the court took cognisance of the impact of the rape on the victim, but it is unclear whether this was by way of a VIS.

<sup>176</sup> Van der Merwe A (2005) *Aspects of the Sentencing Process in Child Sexual Abuse Cases* Unpublished PhD Thesis, Rhodes University, p292.

<sup>177</sup> See n296 on page 97 in Chapter 3.

offenders who commit rape and murder was investigated. It was established that there is still an over-reliance on custodial sentences, but in murder cases there has been a drastic decrease in the length of the custodial sentences imposed than prior to the CJA. In rape cases however, courts still impose lengthy direct imprisonment sentences. This can be attributed to the fact that, apart from having regard to the seriousness of the offence, courts also take into account the interests of society that rape offenders be harshly punished.

Research on the use of expert evidence in the sentencing process proved to be problematic. No analysis could be done on whether pre-sentence reports and VIS are properly prepared or whether it assists courts in their quest to determine an appropriate sentence.

## CHAPTER 5

### CONCLUSION

**“He has seen the inside of maximum-security Pollsmoor Prison and says with dead brown eyes that he’s ‘been through life.’ Sixteen and over the hill, with big green tattoos to prove it.”<sup>1</sup>**

This dissertation set out to investigate the legislative sentencing principles and practices for children aged 14 years and older who have committed the offences of murder or rape. The question that this dissertation posed was whether the constitutionalisation of children’s rights and the promulgation of the CJA made any significant difference in the types of sentences imposed on children who commit serious crimes.

Detention of children in prison has been an area of great concern worldwide. South Africa’s fight for children’s rights received momentum from international developments relating to child justice<sup>2</sup>, which provided a comprehensive framework within which the issue of child justice must be understood. By ratifying the United Nations Convention on the Rights of a Child, South Africa was obliged to establish laws, procedures, authorities and institutions specifically applicable to children in conflict with the law.

South Africa’s first democratic elections in April 1994 led to the birth of a new political era which also brought constitutional guarantees for children in conflict with the law; the most important being section 28(1)(g) of the Constitution which provides that a child can only be detained as a measure of last resort and for the shortest appropriate period of time.

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<sup>1</sup> Adams S *South Africa’s One-Stop Child Justice Centres: Protecting the rights of children in conflict with the law* Article published on [www.unicef.org/southafrica/protection](http://www.unicef.org/southafrica/protection).

<sup>2</sup> See Chapter 2.

Despite this provision, past sentencing practice has shown an over-reliance on the use of custodial sentences in South Africa. This could largely be attributed to the tug-of-war between the legislature and the courts about the applicability of the minimum sentencing legislation on children between the ages of sixteen and eighteen. The matter was finally resolved with the Constitutional Court's judgment in *Centre for Child Law v Minister of Justice and Constitutional Development & Others*,<sup>3</sup> where the Constitutional Court declared the provisions of the Criminal Law Amendment Act<sup>4</sup> (as amended)<sup>5</sup> unconstitutional in so far as it made the minimum sentencing regime applicable to children between the ages of sixteen and eighteen.

A couple of months after the judgment, the CJA was finally promulgated after extensive research and debate. The act created a new procedural framework for dealing with children in conflict with the law. With the desirability to keep children out of prison,<sup>6</sup> the CJA places a lot of emphasis on the diversion of children away from the criminal justice system. Should a matter however proceed to trial, the CJA provides for numerous alternatives to imprisonment, which includes restorative justice sentences and a wide range of diversion orders which can be linked with correctional supervision and community-based sentences.

Chapter 4 however indicated that courts still impose custodial sentences in most of the rape and murder cases, irrespective of the age of the offender. It is then submitted that the constitutionalisation of children's rights and the promulgation of the CJA did not make any significant difference with regards to the imposition of custodial sentences on children. In murder cases, it did however impact on the length of the sentences imposed. In contrast, there seem to be no difference in the length of sentences imposed for rape. It

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<sup>3</sup> 2009 (2) SACR 477 (CC).

<sup>4</sup> Act 105 of 1997.

<sup>5</sup> Act 38 of 2007.

<sup>6</sup> Cassim F (1997) *Sentencing the Juvenile Accused* Unpublished LLM Dissertation, UNISA, p46, in explaining that most child offenders can become law-abiding citizens when they are not constantly under the influence of more hardened criminals, notes that "[w]e must prevent as many victims of tomorrow as we can because our youth represent our future leaders."

was submitted that the seriousness of the offence is still the most important aggravating factor tipping the scale in favour of the use of custodial sentences.

Throughout this dissertation, it was argued that alternatives to imprisonment can, in appropriate circumstances, be suitable sentences for serious offences.<sup>7</sup> This has been emphasized by our courts on numerous occasions. In *N v S*<sup>8</sup> Cameron J noted that “[e]very day [a child] spends in prison should be because there is no alternative.” Kriegler AJA, in delivering judgment in *S v R*<sup>9</sup> stated that “...straf, hervormend maar desnoods hoogs bestraffend, nie noodwendig of selfs primêr deur opsluiting in ‘n gevangenis haalbaar is nie.” In relation to sexual offences, Stout<sup>10</sup> notes that:

“Little purpose is served by sending child sex offenders to prison. Prison culture will be hugely damaging to any rehabilitative work that could be done. This is particularly true with relation to young sex offenders, the prison culture which encourages aggression and often models sexual violence, will reinforce rather than challenge the attitudes which lead to sexual offending.”

The case law discussed throughout this dissertation demonstrates a real commitment by courts towards interpreting and applying the paper rights of the CJA and the Constitution, to the real life situation of children.<sup>11</sup> The courts have begun to develop an understanding of children’s autonomy,<sup>12</sup> but with the ideal that no child should ever see the inside of a prison cell, this is an area that can and should be developed further.<sup>13</sup>

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<sup>7</sup> See paras 3.3.3.2.2.4; 3.3.3.2.4; 3.6.2.6 in Chapter 3.

<sup>8</sup> (469/2007) [2008] ZASCA 30 (28 March 2008) at para [39].

<sup>9</sup> 1993 (1) SACR 209 (A); 1993 (1) SA 476 (A) at 221h-i.

<sup>10</sup> Stout B 2003 (16:1) Acta Criminologica 14 at 19.

<sup>11</sup> Skelton A *Constitutional Protection of Children’s Rights* in Boezaart CJ (ed) (2009) 290.

<sup>12</sup> Ibid.

<sup>13</sup> Ibid.



Gallinetti<sup>14</sup> notes that the child justice journey is not over for South Africa. She argues that the implementation of this new legislative regime is a critical component of this lengthy process, which will ultimately determine the success of the efforts to ensure that South Africa complies with its international and constitutional obligations.

**Words: 48 779**

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<sup>14</sup> Gallinetti J Child Justice in South Africa: The Realisation of the Rights of Children Accused of Crime in Boezaart CJ (ed) (2009) 664.

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