



RESOURCE GUIDE TO A PROPER APPROACH TO JUVENILE OFFENDERS IN THE REGIONAL COURTS

THIS RESOURCE GUIDE IS A COMPILATION OF READING MATERIAL THAT FORM PART OF WORKSHOPS ON JUVENILE OFFENDERS CONDUCTED BY THE ASSOCIATION OF REGIONAL MAGISTRATES OF SOUTHERN AFRICA AND FUNDED BY DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT COURT SERVICES UNIT.

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PART A

WORKSHOP ADMINISTRATION

ACKNOWLEDGEMENTS

1. ARMSA WISH TO ACKNOWLEDGE THE FOLLOWING AUTHORS AND OR PUBLICATIONS FROM WHICH CONTRIBUTIONS WERE INCLUDED.
 - 1.1. PART B - WAS EXTRACTED FROM **THE CHILD LAW GUIDE FOR PROSECUTORS**
 - 1.2. PART C - JUSTICE COLLEGE NOTE – **THE SENTENCING OF JUVENILES**
 - 1.3. PART D - **ALTERNATIVE SENTENCING REVIEW** – ANNE SKELTON.
 - 1.4. PART D & E **PRIMUS VOLUME 1**
 - 2.3.1 **SHAMING AS A FORM OF RESTORATIVE JUSTICE - A POSSIBLE SOUTH AFRICAN APPLICATION - L H CLAASSEN**
 - 2.3.2 **GAGU V THE STATE [2006] SCA 5 (RSA)**
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PART B

CHILD JUSTICE

Part B - Child Justice

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When children as “child offenders” come into contact with the criminal justice system, the handling of their cases needs to be done in such a way as to give these children a new direction to their lives. The chapters in Part B offer some perspectives on the many areas of contact between professionals in the criminal justice system and child offenders.

Cross-referencing with Part C: see *Chapters 3 and 11* for more on the topics of communicating with children and *Chapter 12* on diversionary programmes for adult offenders.

1. Introduction To Relevant Aspects Pertaining To The Child Offender

All children, whether offenders or victims, have a right to special treatment in the criminal justice system. This special treatment requires prosecutors to bear in mind the rights of the child, the social context of the child and the overall level of development of the child. (See Part A of this Manual.)

It is of paramount importance when dealing with children that prosecutors seriously consider whether a prosecution is called for or whether the matter could rather be diverted. If a prosecution is instituted, prosecutors should also consider whether the prosecution could be converted into a children's court enquiry. If a prosecution does appear to be the most viable option, prosecutors should also actively participate at the sentencing stage of the proceedings: prosecutors have a duty to ensure that a suitable sentence is imposed and should therefore always address the court on the most suitable sentencing option. Unimaginative sentences, such as ones that are merely suspended on condition that a crime may not be committed again or sentences that are simply postponed, will rarely have any positive effect on the child offender. Suitable conditions of suspension can be proposed by the prosecutor: these may include the child offender attending responsibility training programmes, performing community service, and so on. The aims and purpose of diversion, as well as the utilisation of relevant diversion programmes, should also be taken into account when dealing with the subject of sentence.

In **S v Z and four others**, 1999(1) SACR 427, new standards in sentencing juveniles were laid down. These should be studied *in toto*: innovative and imaginative sentencing is encouraged and a sentence that effectively ends the minute the child walks out of the court is noted as seldom suitable. It is also stated that in principle, imprisonment for youthful offenders is to be avoided. See also **S v D** 1999(1) SACR 122 NC and **S v Kwalase** 2000(2) SACR 135 CPD, where, at 139 h, van Heerden J holds as follows:

The judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an individualised response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the sentencing judicial official must structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family or community.

The learned Judge also refers to draft legislation presently being prepared by the South African Law Commission aimed at dealing comprehensively with juvenile offenders and creating a new structure to govern criminal proceedings against such offenders. In Chapter 8 of Part B of this Manual, some information on this draft legislation is also provided.

2. Assessment

Compiled by Joan van Niekerk

Child offenders need to be thoroughly assessed before any recommendations about a diversionary programme can be made or – in the case of a child found guilty at a trial – appropriate sentencing can be decided on.

The factors that need to be considered in the assessment process are described and explained in this section.

“Assessment” in the child justice field refers to a process of gathering information about a child offender, the circumstances of that child, the behaviour of the child, and the circumstances and facts surrounding the child’s (alleged) criminal activity. The process of assessment continues with developing from this information-gathering process an evaluation of the child that gives insight into the development, abilities, and situation of the child. This will enable professionals within the criminal-justice system to make decisions that are in the best interests of the child, that ensure the safety of the community as a whole, and that serve the interests of justice.

2.1 Types Of Assessment

Assessment may be required to inform a number and variety of decisions. The purposes of an assessment may include:

- determining where the child will be kept during the investigation process;
- establishing the age of the child;
- establishing the criminal capacity of the child;
- assessing the suitability of the child for diversion and the conditions attached to diversion;
- deciding whether a particular case should be transferred to a children’s court;
- formulating a recommendation with regard to the placement of a child; and
- formulating recommendations around sentencing if a matter goes to trial and the child is found guilty of a criminal offence.

Therefore, the type and process of assessment will need to be adapted to the particular purpose of the assessment, the crime that the child is alleged to have committed or is convicted of having committed, as well as the circumstances of the child, and who is available to make qualified assessment. The kind of assessment that is required for the decision to use diversion for a child who has committed theft, for example, will be quite different from that required for the child who has committed a crime of indecent assault. A further and more in-depth assessment may be required for a child who goes through a trial process and either pleads or

is found guilty, where the court requires an assessment to inform the process of sentencing.

It is therefore essential for the criminal-justice professional to have clarity as to the purpose of the assessment, and in turn, to give the assessor clarity on the purpose for which the assessment will be used and whatever information is available on the nature and circumstances of the crime for which the child has been brought into the criminal justice system, as this information is not only relevant but vital to the assessment process.

2.2 Who Does Such An Assessment?

Traditionally within the criminal justice system, a probation officer who is a qualified professional and who provides probation services to the court in which the child may appear performs the process of assessment.

However, in reality, many geographical areas may not have the services of a trained and qualified probation officer available to them and it may be necessary to consider alternative means of providing the justice system with the information and evaluation of the child that is required. Assessments required by the court could be provided by other mental health professionals or possibly by trained lay assessors or youth counsellors in situations in which a qualified social worker/probation officer is not available.

For more specific assessments, the child offender may be referred to other professionals and organisations. Where the child's intellectual ability needs to be assessed, for example, the referral for assessment may be directed to a clinical or educational psychologist. Similarly, where the child's substance abuse may need to be assessed, the child may be referred to a professional or organisation that has specific skills and knowledge in the assessment and management of substance abuse. Referrals for assessment will also be dependent on the resources available within the geographical area of the court.

With regard to aberrant sexual behaviour, it is recommended that the child offender be referred to a professional who does have some experience in working with sexual deviance, as this is a specialised area of knowledge and expertise.

2.3 Factors To Consider In The Assessment Process

The focus of the assessment will also depend on the purpose of the assessment but should include the child, the family (caretaker) circumstances, the community, and factors relating to the criminal act for which the child has been brought into the criminal justice system.

Factors to consider will include those in relation to the child, the family (caretaker) circumstances, the community, and the crime.

- *In relation to the child*
The chronological age of the child should be taken into consideration in relation to the child's physical, intellectual, language, cognitive, emotional, and social development. These aspects of development may not be congruent with chronological age, and development in one area may not be comparable with development in another. Some very intellectually competent and bright children, for example, may lag in emotional maturity. (See Chapter 3 in Part A of this Manual.)
- *In relation to the circumstances of the family (caretaker) of the child*
The assessment should include the family's (caretaker's) ability and means to provide the child with an adequate standard of care: physically, emotionally, socially and spiritually. Assessment of the child's family situation should include the family's ability to guide and control the child's behaviour.
- *In relation to the community*
The community in which the child lives should be assessed in terms of the resources and support mechanisms available to the child and the child's family. (Do resources within the community exist that support the development of the child? Does support for the family or caretaker of the child exist within the community that may assist in the management of the child's behaviour where the family may have limited ability?) The child's experience within the educational system is also a relevant factor to consider: what educational opportunities has this child been exposed to in the broadest sense of the word and what is the child's capacity to take advantage of the opportunities offered?
- *In relation to the crime*
The following factors should be considered:
 - the child's willingness to acknowledge the criminal act;
 - the apparent motivation of the child offender with regard to the criminal act;
 - the child's understanding of his/her criminal behaviour and its wrongfulness;
 - the compulsivity of the behaviour;
 - the level of behavioural control that the child has or could be expected to have given the chronological and emotional age of the child; and
 - the child's understanding of the impact of his/her behaviour on the victim(s) of the crime.

It is essential to assess the risk to the child and the community of repeat criminal behaviour, especially where the criminal act committed may be related to compulsive patterns of behaviour: for example, where the criminal behaviour is substance dependency related, or indicates some form of "sexual addiction".

2.4 Sources Of Information

It is essential that information gathering for an assessment process extend beyond gathering information from the child only. The following factors may act as "filters" to information giving and gathering:

- developmental factors;
- fear and anxiety about having been caught;
- what the long term consequences of this information gathering will be,
- and the child's ability to interact openly and communicate clearly with the person gathering the information.

Many children will respond defensively, and relationship building to facilitate open communication between adult and child may prove difficult even where a professional has special skills and experience relating to children.

Cultural constraints on interaction between adults and children may also influence a child's ability to communicate freely with an adult.

It is essential, therefore, that during the assessment process, collateral information about the child is obtained in order to inform the assessment process. This might include contact with family members and caretakers, teachers in the school environment, the family's religious mentor, community leaders, and so on.

2.5 The Environment In Which The Assessment Takes Place

Wherever possible, it is essential that child-friendly environments be available to the person who is assessing the child, during the process of information gathering from the child. A child's sense of safety and comfort may impact considerably on the quality of information gathered during the assessment process. It is also important that wherever possible there is privacy and a lack of interruption. The presence of persons extraneous to the assessment process should be avoided. Children are often intimidated by the presence of more than one interviewer. Wherever possible, a visit to the child's home environment should be made during the information-gathering process.

2.6 General Comments

It is essential that where the outcome of the assessment will influence a decision relating to the child's custody, the assessment should be conducted within the shortest time period possible. This is particularly important for the child who is held in custody – whether this be in prison, police cells, or a place of safety and detention for children in trouble with the law. All of these environments have the potential to cause harm to the well being and development of children, so any stay in these facilities should be as brief as is safe and appropriate for the child, as well as for the safety of the community.

The role of the criminal justice professional is not to assess the child but to use the resources available to complete the assessment process in relation to the child, to understand the assessment process, and ensure that the best interests of both the child offender and the community are served.

However, where there are no resources to assist in the assessment process, the investigating officer and prosecutor will have to do the assessment themselves, in consultation with each other.

3. Criminal Capacity

Compiled by Retha Meintjes, DDPP, Tvl

In this section, Advocate Meintjes defines criminal capacity and presents common-law assumptions about criminal capacity in children of different ages. The conclusion to the section sums up its contents in a way that cannot be bettered:

The court should be careful not to place an old head on young shoulders and it must take into consideration the age, knowledge, experience and, what is most important, the judgement of the child in the specific circumstances facing the child at the time of the commission of the prohibited act.

Prosecutors are often confronted with the question of whether to institute criminal proceedings against child offenders and if so, what evidence is necessary and when such evidence should be presented, in order to prove criminal capacity. This chapter will address this question by looking at the capacity of children to have a wider understanding of the wrongfulness of their acts; some common law presumptions; when to institute proceedings; when to prove capacity; and some excerpts from relevant case law.

3.1 Capacity - A Wider Meaning Than Simply Knowing The Difference Between Right And Wrong

The provisions of Sections 77 and 78 of the Criminal Procedure Act, although dealing with “Capacity to Understand Proceedings: Mental Illness and Criminal Responsibility”, are equally apposite when having to deal with the question whether to institute a prosecution with reference to child offenders.

The accused person must be capable of understanding the proceedings so as to make a proper defence (*insight*) (see s 77(1)) and must be capable of “appreciating the wrongfulness” of their act and to “act in accordance” with such appreciation (*self control*) (see s 78(1)).

Criminal capacity is discussed by Snyman (**Criminal Law 3rd Ed** at 150) as follows:

X’s capacity is determined with the aid of two psychological factors, namely first his ability to distinguish between right and wrong, and secondly his ability to conduct himself in accordance with his insight into right and wrong...

At p 166, with reference to the criminal capacity of children, the author continues:

The test ought to be whether such a child, in spite of his age, is nevertheless capable of appreciating the nature and consequences of his conduct and that it is wrong....and further whether he is capable of acting in accordance with that appreciation.....The fact that the courts recognise that a child should have the power to resist temptation before he can be considered to have criminal capacity, is evident from the large number of decisions in which the courts have refused to convict children between the age of seven and fourteen years who have committed crimes under the influence of older persons...

In Burchell and Hunt's **Criminal Law and Procedure Volume 1, General Principles of Criminal Law, 3rd edition** by Burchell at p 153, reference is also made to the report of the Rumpff Commission and the following is stated:

The cognitive function relates to the individual's capacity to think, perceive and reason- the capacity by which humans learn, solve problems, make plans; the conative function relates to the capacity for self-control and the ability to exercise free will....Criminal capacity is thus concerned with a person's cognitive and conative functions or, in other words, his or her capacity for insight and self-control.

3.2 Common Law Presumptions

1. All children under the age of seven years are irrebuttably presumed to be *doli incapax* and can thus never be prosecuted.
2. Children between the ages of seven and 14 years are rebuttably presumed to be *doli incapax* and if any such child is to be prosecuted, the prosecution must prove that the accused had the required criminal capacity at the time of committing the offence.
3. All persons, children included, are rebuttably presumed to be mentally sane.

3.3 When To Institute Proceedings

Whenever confronted with the decision of whether to prosecute a child between the ages of seven to 14, the following factors, as part of the usual prosecution policy considerations, need be considered.

1. *the child's age* [A prosecution will rarely be considered when the child is of tender years (+/-10 and younger)];
2. *the nature of the crime* [The more heinous, the less weight will be given to the age factor; if having acted under the influence of others, the extent of this influence must be considered];

3. *the possible benefits of diversion*, should the child be prepared to plead guilty [It is preferable that the child be made to take responsibility for his/her actions];
4. *the possible benefits of prosecution* [What sentence would probably be suggested/imposed?];
5. *the views and concerns of the complainant*;
6. *the interests of the community* [Is the child a trouble maker, are there previous transgressions, and so on?];
7. *the results of any assessment of the child* [Level of maturity, personal circumstances, etc. If, from a preliminary assessment, it appears that the child is of sufficient intelligence to understand the proceedings and *prima facie* appears to know the difference between right and wrong and to have had the power to refrain from committing the act, a prosecution may be considered. If there is any doubt, the prosecutor should obtain assistance from a professional (usually a probation officer) prior to instituting proceedings.]; and
8. *balancing relevant considerations* [The relevant children's rights instruments need be taken into account, the child's best interests to be of paramount importance. Please note that to simply decline to prosecute might not be in the best interests of the child at all.].

3.4 When To Prove Capacity

In many instances the facts of the case itself will prove criminal capacity and the child's capacity to follow the proceedings will soon become apparent or, if represented, some objection will be raised by the defence counsel. Thus, although the onus rests on the prosecution to prove criminal capacity, there is no legal obligation to prove this prior to putting the charge or at any specific stage of the proceedings. It is simply one of the elements necessary to be proved and needs only be proved prior to closure of the state case. It is, therefore, possible to rely on the evidence presented on the merits for purposes of arguing that this element has, in fact, been proved.

3.5 Relevant Case Law - A Few Excerpts

(Do note the trend towards a more enlightened approach.)

Attorney General Transvaal v Additional Magistrate for Johannesburg, 1924 AD 421 at 434:

but this presumption is rebuttable on proof of a malicious mind on the part of the child, in accordance with the maxim of the canonists malitia supplet aetatem

R v Mahwahwa and another, 1956(1)SA250(SR):

Headnote: It is undesirable that youths of about thirteen years of age should be prosecuted for statutory offences which might often be no more than boyish pranks. The accused aged about 13 years had been convicted of contravening section 42 (b)(ii) of the Forest Act 37 of 1949, in that they had without authority lit a fire which had spread and caused damage. On a review. Held, as there had been no evidence to rebut the presumption that the accused were doli incapaces, that the conviction should be set aside.

R v K 1956 (3)SA 353 AD at 357B:

When, for instance, a child under the age of 14 and above the age of seven kills a person and hides the body those circumstances would be evidence to show that the child knew, when he killed, that he was doing a wrongful act

and at 357G:

The trial court also relied on the rule that every man is presumed to intend the reasonable and probable consequences of his unlawful act. Assuming that the appellant committed an unlawful act by defending himself in the manner which he did, I do not think that the presumption can be applied to a child between the ages of 7 and 14: the Crown must show affirmatively that the child knew what the reasonable and possible consequences of his act would be.

Also at 358D:

There are other factors not mentioned by the trial Court which may be regarded as evidence tending to show that the appellant knew that he was doing wrong when he used a sharp instrument in defending himself. He was apparently a few months younger than 14 years of age. As Russell, loc.cit., states the presumption weakens with the advance of the child's years towards fourteen but the onus still rests on the Crown to prove that the appellant was doli capax.*

(The conviction of the accused on a murder charge, having stabbed his mother who was mentally insane and who attacked him, was set aside.)

*The quotation from **Russell on Crime, 10th ed.** vol.I at p 43 at p 356:

The modern rule is that a child of eight and under fourteen is presumed to be incapable of criminal intent (doli capax): but the presumption may be rebutted and weakens with the advance of the child's years towards fourteen, and the particular facts and circumstances attending the doing of the act and manifesting the understanding of the child. The evidence of mens rea which is allowed to displace the presumption (expressed in the ancient phrase malitia supplet aetatem) should be strong and clear beyond reasonable doubt.

R v Tsutso 1962(2) SA 666 (SR) at 668H:

the question is whether the Crown proved beyond all reasonable doubt that the accused's mind was sufficiently mature to understand, and that he did understand, the wrongful character of the conduct in question.

(The accused was ten years of age and stabbed his father's assailant, where after he fled and hid in a pigsty. The conviction was set aside)

S v van Dyk and others, 1969(1)SA 601 (CPD) at 603 B and E:

What is crucial...was his state of mind, and his general appreciation of these matters, at the time when the offence was committed
and

It is quite possible, therefore, that accused No.3 acted under her coercion or influence."

(The accused, 11 years of age, pleaded guilty to housebreaking. Two adults committed the offence while he was keeping a look-out. The conviction was set aside; the Court held that it had not been proved that the accused was *doli capax*.)

S v S 1977(3) SA 305 OPA:

The accused was 13 years of age at the time of committing the crime of sodomy. He testified that he waited for the other children to leave before sodomising the complainant because he was scared they would tell the grown-ups, in which event he would get a hiding. At 312 G it was held that:

Hier is die getuienis positief en slaan direk op sy daad beide wat hy vooraf gedink, toe gedoen en daarna verwag het.

and at 313 B

Ek stem nie saam....dat `n proefbeampte se verslag of `n soortgelyke ondersoek gebiedend noodsaaklik was om die beskuldigde se vermoens en insigte behoorlik te bepaal, alvorens hy skuldig bevind kon word nie.

Weber v Santam Versekeringsmaatskappy Bpk 1983(1) 381AD, from the head note:

Where the issue is whether or not a child is culpae capax, care should be taken not to place 'an old head on young shoulders'. It would appear that it has thus far been too readily accepted, purely on the ground of a child's training, that he has attained a sufficient degree of development and maturity to control his irrational or impulsive acts. If the child's acts and omissions are to be measured against the standard of the adult, it must be asked whether he is sufficiently mature in regard to the situation at issue to comply with that standard. The question of the accountability of an infantia maior must be approached subjectively by determining whether the child's emotional and intellectual capacity had, at the relevant stage, developed to such a degree that he had sufficient discretion to distinguish between permissible and impermissible conduct and to act accordingly.*

*between seven and 14 years

S v Kwadiso and another 1977(3) SA876 ECD:

The accused, nine years of age, was found guilty of theft and, due to his criminal record, sent to a reformatory. The Attorney General's comments were requested by the reviewing judge and are quoted at p 877C:

Normally a child of nine years should not be brought before a criminal court but rather taken to a children's court. This policy is followed by my office and only in exceptional cases will children of such tender years be charged in a criminal court.

(The referral was set aside and the matter referred back to be converted into a children's court enquiry.)

S v F 1989(1)SA 460ZHC:

The accused, ten years of age, was convicted of indecently assaulting the complainant, eight years of age. Despite the probation officer's report, to the effect that he was incapable of appreciating criminal court proceedings, a prosecution was instituted. On review it was held, at 462A- J:

Though mindful of the Attorney-General's prerogative in regard to prosecutions, I am compelled to hold that it is wrong, unjust and prejudicial to the interests of the accused and society to prosecute a child where the evidence is that such a child will not understand or appreciate the proceedings.....It is common knowledge that young children necessarily internalise perceived behaviour of those around them and then will often proceed to experiment themselves without being conscious of the wrongfulness of such behaviour. In thus

mimicking behaviour they are not acting criminally.....As can be seen these facts are entirely consistent with an instance of childish experimentation which went wrong.

In conclusion it is clear from the above that prosecutors should act with special care when dealing with child offenders. To sum up, in the words of Burchell and Hunt *op.cit.* at p160:

The court should be careful not to place an old head on young shoulders and it must take into consideration the age, knowledge, experience and, what is most important, the judgement of the child in the specific circumstances facing the child at the time of the commission of the prohibited act. The judgement of a child is the cognitive (or volitional) aspect of the capacity enquiry and covers the child's ability to control irrational acts or to act in accordance with the appreciation of the wrongfulness of his or her act. It is important to acknowledge that children often do act irrationally and sometimes forget what they have been told.

Should a prosecution be instituted, the prosecutor has to ensure that the necessary evidence to prove criminal capacity is placed on record. If not apparent from the circumstances prevailing at the time of the commission of the offence, extraneous evidence will be necessary, which has to be obtained in any event for purposes of deciding whether to prosecute or not. Such evidence might be obtained from an objective person preferably, such as the child's teacher, or by having the child assessed by a relevant mental health professional.

Sources consulted

Burchell and Hunt Criminal Law and Procedure Volume 1, General Principles of Criminal Law, 3rd edition by Burchell.
Snyman Criminal Law 3rd edition.

4. Detention: The Correctional Services Act

The provisions of Section 29 of the Correctional Services Act, no 8 of 1959, as amended, are peremptory and are quoted in full:

“Section 29 Detention of unconvicted young persons and women

- (1) *Notwithstanding anything to the contrary in any law contained -
 - (a) but subject to subsection (2), an unconvicted person under the age of 14 years;
 - (b) but subject to subsections (2) and (5), an unconvicted person who is 14 years or older but under the age of 18 years,shall not be detained in a prison or a police cell or lock-up.*

- (2) *A person referred to in paragraph (a) or (b) of subsection (1) may be detained in a police cell or lock-up after his or her arrest until he or she is brought before a court within a period not exceeding 24 hours in respect of a person referred to in paragraph (a) of that subsection and not exceeding 48 hours in respect of a person referred to in paragraph (b) of that subsection, if -
 - (a) such detention is necessary and in the interests of justice; and
 - (b) the person concerned cannot be placed in the care of his or her parent or guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983), for the period in question.*

[Sub-s. (2) amended by s. 1 (a) of Act 14 of 1996.]

- (3) *Where a person is detained in a police cell or lock-up as contemplated in subsection (2) the member of the South African Police Service or the peace officer responsible for ordering such detention shall -
 - (a) provide the court before which the person first appears with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up and to keep him or her there until his or her first appearance before the court; or
 - (b) if the person is released before he or she appears in a court, provide the magistrate of the magisterial district in which the detention took place with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up.*

- (4) *The report referred to in subsection (3) (b) shall be submitted to the magistrate referred to in the said subsection not later than one court day of the person concerned being released from detention.*

- (5) (a) *A person referred to in subsection (1) (b) who is accused of having committed an offence shall before his or her conviction*

and sentence, not be detained in a prison or a police cell or lock-up unless the presiding officer has reason to believe that his or her detention is necessary in the interests of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court, mentioned in section 28 of the Child Care Act, 1983 (Act 74 of 1983), is available for his or her detention: Provided that such a person may only be detained in a prison (but not a police cell or lock-up) if he or she is accused of having committed **an offence or category of offences mentioned in Schedule 2, or any other offence, in circumstances of such a serious nature as to warrant such detention**: Provided further that such a person shall be brought before the court that made the order of such detention every 14 days to enable such court to reconsider the said order.

- (b) In the absence of the said presiding officer any other presiding officer of that court may, after consideration of the evidence recorded and in the presence of the said person, make such order as the presiding officer who is absent could lawfully have made in the proceedings in question if he or she had not been absent.

[Sub-s. (5) substituted by s. 1 (b) of Act 14 of 1996.]

- (5A) (a) In considering whether the interests of the administration of justice and the safety and protection of the public necessitate the detention of a person referred to in subsection (1) (b) in a prison (but not a police cell or lock-up) the presiding officer shall, in addition to any factor which he or she deems necessary, take into account the following factors, namely -
- (i) the substantial risk of absconding from a place of safety mentioned in section 28 of the Child Care Act, 1983 (Act 74 of 1983);
 - (ii) the substantial risk of causing harm to other persons awaiting trial in a place of safety; and
 - (iii) the disposition of the accused to commit offences.
- (b) Before the detention of a person in terms of subsection (5) is ordered, oral evidence shall be presented by the State with regard to the factors referred to in paragraph (a).
- (c) A person detained in terms of subsection (5) shall as soon as possible after his or her arrest be afforded the opportunity to obtain legal representation as contemplated in section 25 of the Constitution and section 3 of the Legal Aid Act, 1989 (Act 22 of 1989).
- (d) **The highest priority shall be given to the most expeditious processing of the trial of a person detained in terms of subsection (5).**

[Sub-s. (5A) inserted by s. 1 (c) of Act 14 of 1996.]

(5B) The Minister of Correctional Services shall as soon as possible after the commencement of this Act, ensure that regulations regarding the treatment and conditions of detention of awaiting trial persons under the age of 18 years are brought into line with relevant internationally recognised human rights standards and norms.

[Sub-s. (5B) inserted by s. 1 (c) of Act 14 of 1996.]

(6) A person referred to in subsection (2) or (5) who is detained in a prison or a police cell or lock-up or who is being moved in custody to or from a court or who, while in custody, attends a court or a preparatory examination, shall be kept separate from any person over the age of 18 years who is in custody: Provided that he or she may be permitted to have contact with such a person in custody who has been or is to be charged jointly with him or her, if the correctional official in charge of the prison or the member of the South African Police Service in charge of the police cell or lock-up in which he or she is detained, is of the opinion that such contact will not be detrimental to him or her.

[Sub-s. (6) amended by s. 38 (c) of Act 79 of 1996.]

(7) When a woman under the age of 18 years is detained or in custody as aforesaid, she shall be under the care of a woman.

(8) For the purpose of this section, an unconvicted person shall be construed as a person who has not been convicted or sentenced.

[Sub-s. (8) added by s. 1 (d) of Act 14 of 1996.]

[S. 29 amended by s. 104 of Act 33 of 1960, by s. 8 of Act 75 of 1965, by s. 9 of Act 104 of 1983, by s. 11 of Act 92 of 1990 and by s. 32 of Act 122 of 1991 and substituted by s. 1 of Act 17 of 1994.]”

“Schedule 2 (section 29(5))

- *Murder*
- *Rape*
- *Robbery where the wielding of a fire-arm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved*
- *Assault with intent to commit grievous bodily harm, or when a dangerous wound is inflicted*
- *Assault of a sexual nature*
- *Kidnapping*
- *Any offence under any law relating to the illicit conveyance of supply of dependence producing drugs*

- *Any conspiracy, incitement or attempt to commit any offence referred to in this schedule”*

Please note

Child offenders should not be detained unless compelling circumstances so dictate. If the accused of 14 years or older is detained in prison in terms of subsection 5, such accused must be brought to court every 14 days and the highest priority must be given to the most expeditious processing of the trial in terms of section 5A(d).

A list of places of safety and contact numbers can be found in Part D of this Manual.

5. Relevant Special Provisions In The Criminal Procedure Act

The Act makes special provisions for young people – under the age of 18 – who have been accused of a crime. The provisions refer to notification of parents or a probation officer, referral to a place of safety, and testifying in camera.

1. S. 50(4) provides for the notification of the parent or guardian of a person under the age of 18 years upon the latter's arrest, if it is known that such parent or guardian can readily be reached or can be traced without undue delay, by the police official charged with the investigation of the case.
2. S. 50(5) provides for similar notification to the probation officer of the area of arrest or, if not available, the available correctional official on duty.
3. There is no specific provision dealing with the accused under 18 with reference to bail - the ordinary provisions would thus apply.
4. S. 71 provides that an accused under 18 may, after arrest, be placed in a place of safety, or placed under the supervision of a probation officer or correctional official.
5. S. 72 provides for an accused under 18 to be released on warning, in which event such accused must be placed in the care of a person in whose custody he is and the latter person is to be similarly warned to appear.
6. S. 73 provides for the right to assistance by a legal adviser from the time of arrest and at legal proceedings, and if an accused is under 18, he or she may be assisted by his/her parent(s) or guardian(s) at the proceedings. (Reported cases dealing with parental assistance in pre-trial proceedings are, *inter alia*, **S v Kondile** 1995(1) SACR 394 (SEC) and **S v Manuel** 1997(2) SACR 505 (CPD))
7. S. 74 provides for the warning of parents or guardians of accused under 18 to attend the proceedings if within the district and traceable without undue delay and, if the accused is summoned, by also serving a copy of the summons on them. (Exemption may be granted in writing by the court, upon application.)
8. S. 153(4) provides that the proceedings shall be in camera if the accused is under 18 and publication of such accused's identity is prohibited in terms of s. 154(3)
9. If electing to testify, accused under 18 cannot be warned in terms of s. 164. They must either do so on oath or by affirmation - see s. 196(3).

10. The proceedings may be stopped and the accused under 18 referred to a children's court in terms of s. 254.
11. S. 290 provides for special orders instead of punishment with reference to accused under 18 and also for accused of between the ages of 18 and 21.

6. Diversion - Part 7 Of NDPP Policy Directive On Diversion

(See also 'The Mechanics of Diversion' in Section 6.1 of this Manual and Section 6.2 for an example of "informal" diversion, for situations where no formal diversion programmes are available.)

The basic rule is that child offenders are required to accept responsibility for their actions. In very rare instances, such as those discussed under the heading 'Alternatives to Prosecution' in Chapter 12 of Part C, this is not a requirement.

In this section, the National Director of Public Prosecutions' Policy Directive no 7, dealing with diversion, is quoted in full and a copy of the relevant register that has to be maintained by prosecutors is supplied.

"PART 7 DIVERSION

1. *By "diversion" is understood the election - in suitable and deserving cases - of a manner of disposal of a criminal case other than through normal court proceedings. It usually implies the provisional withdrawal of the charges against the accused, on condition that the accused participates in particular programmes and/or makes reparation to the complainant. Diversion is preferable to the mere withdrawal of cases as the offender is charged with taking responsibility for his or her actions.*
2. *Although diversion is primarily employed in the case of juvenile offenders, there are also other diversion programmes in operation. These include victim-offender mediation programmes and performance of community service as alternatives to prosecution.*
3. *Diversion is inappropriate where the charge is one of murder, robbery with aggravating circumstances, rape or a similarly serious offence. Offenders with a criminal record and persons to whom the opportunity has been granted previously should only be included in exceptional circumstances.*
4. *The following selection criteria are not hard-and-fast rules, and should serve as a guide to the prosecutor in exercising his or her discretion to determine whether or not an offender qualifies for the programme. The accused should -*
 - (a) *have a fixed address;*
 - (b) *acknowledge liability for the offence;*
 - (c) *be prepared to participate in the diversion programme; and*
 - (d) *in the case of juvenile offenders -*
 - (i) *be between the ages of 12-18 years; and*
 - (ii) *have a parent or guardian who is prepared to take responsibility*

for his or her attendance and to be present at court.

5. *Once the prosecutor has identified a candidate, a probation officer must screen such a candidate and thereafter advise the prosecutor on the suitability of the candidate for the programme.*
6. *The prosecutor makes the final decision and is not bound by the recommendations of the probation officer.*
7. *If the prosecutor is satisfied that an offender is suitable for a diversion programme, the offender (and, in the case of juvenile offenders, his or her parents or guardian) must be made aware of the possibility of diversion. They should be advised that participation is voluntary and that, should the offender not meet all the requirements, the case will not be withdrawn.*
8. *Whilst the establishment of diversion programmes is primarily the responsibility of the Department of Welfare, prosecutors should take some initiative in this regard. Non-governmental organisations, such as NICRO (the National Institute for Crime and Rehabilitation of Offenders) may be of assistance.*
9. *After the offender has completed the diversion programmes the social worker submits a report to the prosecutor. If it is clear that the offender has cooperated and benefited from the programme, the matter is withdrawn. If not, the prosecution is to proceed.*
10. *If, at the sentencing stage of his or her trial, the situation arises where an accused appears to be a suitable candidate for a programme, the same procedure applies, with the necessary changes. The court can then consider imposing a suspended sentence with participation in the programme as one of the conditions of suspension. If the offender does not successfully complete the programme, the prosecutor must apply in the normal manner for the suspended sentence to be put into operation.*
11. *A register must be kept regarding all offenders screened for the diversion programme. The reason for the decision to divert or not must be recorded, as well as the way in which the matter was eventually disposed of - see Annexure "B".*

Annexure "B": Register: Offenders Screened For Diversion Programmes

Name of Accused	
Court Case No	
Docket CAS No	
Investigating Officer	
Age of Accused	
Address of Accused	
Charge(s)	
Reason for Diversion	
Comments of Probation Officer	
Manner of Disposal	

6.1 The Mechanics Of Diversion

Prepared by L.M. Muntingh, NICRO

In this section, Lukas Muntingh of NICRO gives an informative and matter-of-fact account of diversionary programmes. He addresses issues such as the conditions that make such programmes applicable and likely to succeed and the advantages of diversion as an alternative to prosecution. He also gives details of NICRO's positive experiences with their diversion programmes and what participants have had to say about them.

Since the early 1990s, great progress has been made in South Africa with regard to child justice and the development of programmes for children who come into conflict with the law.

The child justice campaign, started by a number of NGOs some eight years ago, will hopefully culminate in the enactment of the Child Justice Bill as drafted by the South African Law Commission (SALC). Extracts from the Bill appear in Chapter 8 of Part B of this Manual. In the absence of unified legislation regulating the treatment of children in conflict with the law, one may be tempted to ask: why a publication on child justice, if this all may change again?

This particular section of the Manual will look at diversion as a feature of the existing and future child justice system. Despite the uncertainties around the enactment of the Child Justice Bill, diversion is already widely practised in South Africa, especially in certain urban areas. It furthermore forms one of the cornerstones of the Child Justice Bill. Diversion, in fact, is a key point in the international instruments pertaining to the treatment of children in conflict with the law.

The United Nations Standards Minimum Rules for the Administration of Juvenile Justice, United Nations, New York, 1986, state clearly that where possible appropriate diversion should take place:

1.1 Consideration shall be given, wherever appropriate, to dealing with juvenile offenders without resorting to formal trial by the competent authority.

1.2 The police, the prosecution or other agencies dealing with juvenile cases shall be empowered to dispose of such cases, at their discretion, without recourse to formal hearings, in accordance with the criteria laid down for that purpose in the respective legal system and also in accordance with the principles contained in these rules.

1.3 Any diversion involving referral to appropriate community or other services shall require the consent of the juvenile, or her or his

parents or guardian, provided that such decision to refer a case shall be subject to review by a competent authority, upon application.

1.4 In order to facilitate the discretionary disposition of juvenile cases, efforts shall be made to provide for community programmes, such as temporary supervision and guidance, restitution, and compensation for victims.

The **SALC's Issue Paper on Juvenile Justice** no. 9, Project 106, 1997, p5. makes recommendations based on the Constitution of South Africa and international instruments on juvenile justice.

(2.5) ... that the overall approach should aim to promote the well being of the child, and to deal with the child in an individualised way. A key aspect should be diversion of cases in defined circumstances away from the criminal justice system as early as possible, either to the welfare system, or to suitable diversion programmes run by competent staff.

(2.7) In deciding on the outcome of any matter involving a young offender, the presiding officer should be guided by the principle of proportionality, the best interests of the child, the least possible restriction on the child's liberty and the right of the community to live in safety.

As noted above, diversion has been practised for a number of years in South Africa, especially in certain urban areas. Formal diversion programmes emerged first in Pietermaritzburg and Cape Town in 1992.

However, informal diversion options have probably been used by every prosecutor in South Africa. Asking the offender to apologise to the victim for what he or she has done *in lieu* of prosecution, is, after all, diversion. To ask the offender to pay for the damages *in lieu* of prosecution and seeing that this is done, is another form of diversion.

This section will place emphasis on the more formal diversion options without neglecting the informal ones that can be extremely useful.

In some jurisdictions of South Africa, diversion programmes are well established and personnel have received extensive training on diversion and its administration. There are, however, other jurisdictions where diversion is not an established feature. The purpose of this section is therefore twofold:

- firstly, to introduce diversion to justice officials who have not received any formal training on it; and
- secondly, to revisit some established concepts and principles to ensure that practice remains in line with the theory. A training course of this nature is

also valuable to share information and to hear how other officials have resolved problems or developed systems that assisted them in diversion.

6.1.1 Definition Of Diversion

Diversion can be defined as “the channelling of prima facie cases from the formal criminal justice system on certain conditions to extra-judicial programmes, at the discretion of the prosecution”.

Diversionary options in no way intend to make offenders less accountable or responsible for their actions, but rather to provide offenders with the opportunity to re-think their lives without getting a criminal record (Muntingh, L.M. & Shapiro, R. (1997) **NICRO Diversions - an Introduction to Diversion from the Criminal Justice System**, NICRO, Cape Town.) In principle a case is eligible for diversion when it is not in the best interests of the offender, the victim (if present), the criminal justice system and society, that the offender should be prosecuted and convicted.

Under South African criminal law the Director of Public Prosecutions has the authority to withdraw the charges against any accused person conditionally or unconditionally. This power is delegated to prosecutors at local courts and makes the diversion of cases possible. Should a person not comply with the conditions of the diversion, this will be reported to the prosecutor who will, in turn, re-institute the prosecution.

Under South African law the prosecutor is *dominus litis* and the diversion of a case has to date depended on the voluntary withdrawal of charges by the prosecutor. (**SA Law Commission: Issue Paper on Juvenile Justice**, No. 9, Project 106, 1997, p. 37.) It is also true that, at present, prosecutors exercise considerable power without any substantial checks or reviews, save that they may consult with the DPP on particular and problematic cases.

The prosecutor’s decision should be rational, balanced and just. However, to qualify as rational, balanced and just, a decision must be made with the knowledge of all possible alternatives (Albonetti, C.A. Prosecutorial Discretion - the Effects of Uncertainty, p 293, 1987). From experience we know that this is extremely difficult in practice and even more so in the South African criminal justice system. Decisions are often made based on very limited information as there is no additional input to that of the investigating officer or, where additional information is available, there is limited use or consideration of alternative options. Even where additional information is available and due consideration is given to alternative options that are available, the decision to divert rests firmly in the hands of the prosecutor whose decision is, for all practical intents and purposes, not reviewable unless representation is made to the Director of Public Prosecutions, whose decision will be final.

The decision to prosecute or divert a child is, then, influenced by a number of factors, some of which are structural and inherent to the functions of a prosecutor (such as the legal requirements of the position requiring that the strength of a case

be assessed before it is brought before a court of law). Furthermore, the prosecutor has to make a decision on what the possible result will be of a prosecution or diversion and ultimately what will achieve the most satisfactory results. It is then required of the prosecutor to make an assessment, based on available information, as to the desirability of this prosecution or diversion, based on extra-judicial factors.

The offender participating in a diversionary programme submits him or herself voluntarily to the decisions of justice officials and social workers without being convicted of any crime in a court of law. In exchange for this, the offender has the reward of not being processed further through the criminal justice system.

6.1.2 The Aims And Purposes Of Diversion

The following embody the primary aims of diversion:

- to encourage the child to be accountable for the harm caused by his or her acts;
- to promote an individualised response to the harm caused, which is appropriate to the child's circumstances and proportionate to the circumstances surrounding the harm caused;
- to promote the re-integration of the child into the family and the community;
- to provide an opportunity for reparation;
- to provide an opportunity to the person or persons or community affected by the harm caused to express their views regarding the impact of such crime;
- to identify underlying problems motivating offending behaviour;
- to prevent less serious offenders from receiving a criminal record and being labelled as criminals, as this may become a self-fulfilling prophecy;
- to provide educational and rehabilitative programmes to the benefit of all parties concerned;
- to lessen the case-load of the formal justice system; and
- to prevent the stigmatisation of a child, which may occur through exposure to the rigours of the criminal justice system.

6.1.3 Guidelines For Diversion

Every case entering the criminal justice system has its particular and often peculiar facts and it is therefore difficult to formulate guidelines for diversion. However, based on constitutional and human rights principles, the following can be stated

regarding diversion:

- in making a decision whether to divert a case or not, consideration must be given to what will be in the best interests of the child;
- no child should be unfairly discriminated against on the basis of race, gender, ethnic or social origin, sexual orientation, disability, religion, conscience, belief, culture, language, birth or socio-economic status, i.e. all children must have equal access to diversion;
- corporal punishment and public humiliation may not be elements of diversion; and
- a child under the age of 13 may not be required or permitted to perform community service or any other work as a diversion or as a condition of diversion. [See too, legislative prohibitions in this regard.]

In terms of criminal procedure, the following guidelines apply:

- the child must freely acknowledge responsibility for the alleged offence and consent to diversion without any coercion or undue pressure;
- there are reasons to believe that there is sufficient evidence for the matter to proceed to trial; and
- there is no risk of infringement of the child's procedural rights, in the event of future prosecution.

In terms of the offence allegedly committed, it is extremely difficult to formulate criteria, as each case has its own characteristics and considerations.

6.1.4 Diversion Procedure

Diversion is defined as “the channelling of prima facie cases from the formal criminal justice system on certain conditions to extra-judicial programmes, at the discretion of the prosecution”. (Muntingh, L. & Shapiro, R.: **An Introduction to Diversion from the Criminal Justice System**, NICRO, Cape Town, 1997.) An important factor emerges from this definition: namely, that it must be a *prima facie* case. In other words, should the case have proceeded, it would probably have resulted in a conviction.

The usual route that a diverted case can follow is set out in Figure 1.

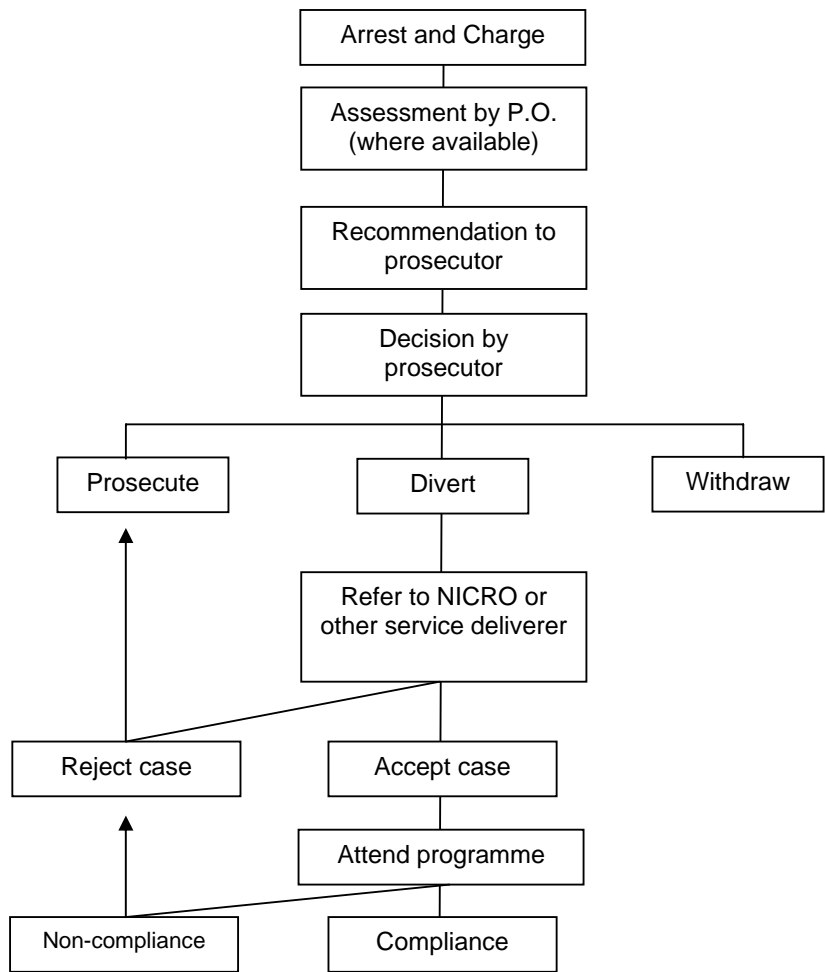


Figure 1: The usual route of a diverted case

After arrest and charge, the case is assessed by a probation officer, if such a service is available. The probation officer would verify personal details and on the basis of available information (solicited from parent or guardian if present) make a recommendation on the prosecution or diversion of the case. In summary, the criteria applied refer to the following: seriousness of offence, age, intended plea, background information, socio-economic conditions and whether there had been any prior convictions (if such information is available). The docket as well as the probation officer's report would then proceed to the prosecutor who will, based on this and, if necessary an interview with the accused, make a decision on prosecution, diversion or unconditional withdrawal.

Should the case be referred for diversion, the necessary case details will be forwarded to NICRO or any other service provider. NICRO or the other service provider will make an assessment of the case through an interview and decide on whether the case is acceptable or not, and if acceptable, to which programme it should be referred, as there are five different programmes available. If the case is not suitable, it will be referred back to the prosecutor. If the case is accepted, it

will be referred to a specific programme and progress will be monitored. Should the participant not comply with the conditions of the diversion, i.e. attendance of the programme and compliance with its requirements, this will be reported to the prosecutor who will then proceed with the prosecution as usual.

It should be emphasised that the process outlined above applies to situations where there are probation services in place, as well as diversion programmes. Where such services are not in place or not fully operational, the process will naturally run differently and extended delays may be experienced. Furthermore, it is not always possible to get a probation officer or social worker to do a pre-trial assessment and this responsibility often ends up with the prosecutor, who is not necessarily trained for it.

In most of the larger metropolitan areas, diversion runs as smoothly as indicated in Figure 1. This is, however, not to say that diversion does not occur in the smaller towns or rural areas, but rather that the process is often severely hampered by infra-structural and systemic shortcomings.

6.1.5 The Effectiveness Of Diversion

Does diversion work? Does it prevent crime? Does it teach the client anything? These are questions that are asked by sceptics and advocates of diversion alike.

In order to answer these and other questions, NICRO undertook a follow-up study of diversion programme participants who were referred to the organisation at least twelve months prior to the study being undertaken in 1998. A total of 428 children from areas where NICRO provides services were interviewed. The study collected information on the following:

- the child's biography (case history, residential situation and household structure);
- reason for attending programme;
- expectation of programme;
- retention of programme content;
- best and worst impressions of the programme;
- what was learned from programme;
- best and worst aspects of programme; and
- current opinion of programme.

The following conclusions from the research are presented below.

- The research was able to build a detailed profile of programme participants from across the country and across the different diversion programmes and is regarded as a representative sample of the total group. The typical diversion programme participant is male, aged 15 - 17 years, a first offender charged with a property crime, resides with his parents and is in his 2nd to 3rd year of secondary schooling.

- The compliance rates for all the programmes are very high: 75% and up, which is regarded as a positive indication of participants' commitment to completing the programme.
- The majority of participants are pre-trial referrals, meaning that there has not been any conviction and there will thus not be a criminal record against the child. From the outset it was an expressed aim of the Diversion Project to limit the number of children being convicted in South African courts. It appears that we have been at least partially successful in this regard, although the number of diverted cases remains relatively low compared with the number of convictions.
- Feedback from programme participants regarding programme content was strongly positive and, for most participants, the programme they attended was a memorable experience. Most respondents were able to remember a fair amount of detail of the programme content, which is indicative of impact. Experiential and adventure education techniques appear to have been used to good effect by the programme facilitators. The fact that the majority of the respondents still had a positive opinion of the programme twelve months after they participated is also indicative of the programme's effect.

Limited negative feedback was received from the interviewed participants.

- Some negative feedback did, in fact, refer to intentionally difficult processes that form part of the programme, such as discussing personal matters.
- Avoiding re-arrest and conviction was identified as the single most important reason for complying with the conditions of the diversion. However, if the other reasons are seen collectively, it appears that the 'carrot weighed more than the stick'.
- The majority of participants said that they experienced a positive personal change after the programme, with the emphasis being on more responsible decision making.
- A very small percentage of participants re-offended: 6.7% in the first twelve months after participating in a diversion programme. The average time lapse from completing the programme to re-offence was 7.2 months. Because of the low number of recidivists, it is difficult to make generalisations. There appears to be a fair degree of offence specialisation and the majority of recidivists again committed property offences.

6.1.6 Diversion Programmes Available In South Africa

The following outlines the formal diversion programme available in South Africa through NICRO.

Youth Empowerment Scheme (YES)

This is an eight-part life skills programme spread over eight weeks, one afternoon per week. The programme normally involves 15 to 25 participants. The parents or guardians participate in the first and last sessions. A number of issues are addressed such as conflict resolution, crime and the law, parent-child relationship and responsible decision-making. The programme can be used as a pre-trial diversion or as part of a postponed or deferred sentence

Pre-trial Community Service (PTCS)

In lieu of prosecution, the offender has to perform a number of hours of community service at a non-profit organisation. The number of hours is determined by NICRO in consultation with the public prosecutor. NICRO also monitors the performance of the client and reports to the prosecutor. On average, these clients have to perform between 20 and 120 hours of community service.

Victim Offender Mediation (VOM)

This programme creates the opportunity for the victim and offender to meet and work out a mutually acceptable agreement with the assistance of a mediator (from NICRO) with the aim of restoring the balance. Once an agreement is reached, this is reported to the prosecutor and the contract is then monitored by NICRO.

Family Group Conferences (FGC)

FGCs are in certain regards very similar to VOM except that they involve the families of the victim and the offender in the mediation process. The aim is also to work out an agreement with the assistance of a mediator or facilitator. Preventing recidivism is an important component of FGCs and all FGCs have to put in place plans that will prevent further offending. The involvement of significant others is central to the process.

The Journey

The Journey programme is aimed at high-risk child offenders. The programme can last between three and twelve months, depending on the needs of the client group. The programme is usually structured around a group of 10 to 15 participants. The participants are usually school dropouts with one or more previous convictions. The programme involves life-skills training, adventure education and vocational-skills training.

Provincial departments of welfare, through their probation services, are increasingly rendering diversion services and these should be investigated at local level. In addition to the existing formal diversion programmes, the Child Justice Bill also proposes a number of informal diversion options and these may also be used when and where applicable. Even though these are not legislated, they can

be used in creative ways. These are:

- an oral or written apology to the victim or victims;
- a warning by the prosecutor;
- symbolic restitution in respect of a specific object to the victim, specified person or persons of the alleged offence; and
- restitution of a specified object to a specified victim or victims of the alleged offence.

As stated above, formal diversion programmes are not available everywhere in South Africa. This, however, does not preclude these jurisdictions from operating some forms of diversion. When setting up a diversion service it is important to ensure community involvement, proper record keeping and above all, a quality service to the diverted children.

The following lists some of the questions that will assist in setting up a diversion service in a jurisdiction where there is currently none. The questions may be adapted, depending on the particular environment.

- What is available in the community in terms of interested organisations, possible programmes and other resources?
- Who are the NGOs and CBOs active in the community and who of them may be interested in becoming involved?
- Can any of them assist in setting up a diversion programme?
- Can any of them make any other contribution?
- Are there any government services available that may be of assistance?
- With what purpose in mind are we developing this diversion service?
- Is diversion the appropriate response to the problem or would a different type of intervention have a better result?
- What is the referral procedure of cases?
 - Who will inform a parent/guardian that his/her child was arrested?
 - Will somebody be able to assess the child and his/her circumstances?
 - What information is required in terms of the recommendation from the person doing the assessment?
 - If such a person is not available, how will the assessment be done?
- What does the diversion programme/option look like?
- What are the aims of the diversion option(s)?
- Who will report to whom in terms of the progress of the case if diverted?
- How will records be kept of assessed and diverted cases?
- What is the procedure in case of non-compliance?
- Who will oversee the entire diversion service and how will monitoring be done?
- How will the diversion service be evaluated?

When developing a new diversion service it is important to assess this service against the guidelines developed by the SALC. According to these a diversion programme must:

- promote the dignity and well-being of the child and the development of his or her sense of self-worth and ability to contribute to society;
- not be exploitative, harmful or hazardous to a child's physical or mental health;
- be appropriate to the age and maturity of the child;
- not interfere with a child's schooling;
- where possible and appropriate, impart useful skills;
- where possible and appropriate, include a restorative justice component that aims to heal relationships, including the relationship with the victim;
- where possible and appropriate, include an element that seeks to ensure that the child understands the impact of his/her behaviour on others, including the impact on the victims of the offence (this element may also include compensation or restitution); and
- where possible and appropriate, be presented in a location reasonably accessible to the child concerned.

6.1.7 Non-Compliance With Diversion

Most diversions are made conditionally, meaning that a counter-performance on the part of the offender is required for the case to be finalised. The conditions of the diversion should clearly spell out what exactly is required from the child and his/her parents/guardians. It is vitally important that everyone concerned have a clear understanding of what is required and what will happen should there not be compliance with the conditions of the diversion.

If there are problems with compliance, the ultimate sanction that the prosecutor can apply is to re-institute the prosecution and continue with the case through trial. Experience has shown, however, that children and their families often experience legitimate practical problems that may be interpreted as non-compliance. It is therefore important to explain the rules clearly to the child and parent/guardian. (For example, they should know that absence from a programme will only be permitted on health grounds and a medical certificate should be obtained and presented to the programme facilitators.)

For the programme facilitators, it will be of great help if the parent/guardian can phone in and inform them that the child will be absent and what the reasons are. If the programme facilitators are aware of what the situation is, contingency planning can be made so that the child does not miss any part of the programme.

Before charges against a child are reinstated, it is important to verify the facts of the non-compliance. A report, preferably in the form of an affidavit from the programme facilitators, will be of assistance. If it is clear that the child wilfully neglected to comply with the conditions of the diversion, prosecution remains as the last resort. However, experience has shown that a stern talk from the prosecutor often has the desired effect in getting the child back onto the programme.

6.1.8 Assessing And Selecting Cases

Where a probation officer is available to do assessments of arrested children, this is of great help to the prosecutors, as most probation officers have been trained to conduct assessments. There are, however, jurisdictions without probation services and this may create problems for the court. The prosecutor needs to make an informed decision about the case and the child: included in this decision will be information about the criminal case and also, the personal, social and socio-economic conditions of the child.

In the absence of a probation officer, and if at all possible, the services of a social worker should be sought to do the assessment and if a social worker is not available, assistance from a local NGO, CBO or even church organisation may be called in to gain a different perspective on the child and his/her circumstances.

The following provides a list of key information areas that are required to do a basic assessment of a child. This is by no means exhaustive but should enable the prosecutor, in the absence of a trained probation officer, to have a clearer and more balanced perspective on the case:

- biographical information (name, age, gender, address);
- education, schooling and school attendance;
- household structure;
- household income;
- level of parental/guardian supervision (If a child is in need of care, a children's court inquiry should be considered.);
- relationship with parent/guardian;
- criminal record history (not necessary to request SAP 69);
- opinion of parent or guardian on case and child;
- opinions of any other significant others on child and case;
- any previous diversion; and
- any history of substance abuse. [Referral to a rehabilitation centre also to be considered.]

6.1.9 Record keeping

For any diversion service to operate properly, it is essential that a good information system be in place. This need not be computerised as manual systems can work just as well.

Many prosecutors keep a register in the form of a book in which records are entered, and this may be supplemented by an alphabetical card system according to surname in order to access at a later stage.

One of the biggest problems encountered is that new prosecutors do not recognise children who have been arrested previously and it is therefore virtually impossible to trace children who have been diverted in the past. Developing a good information system will be of immense value in the future and, for easy

reference, a copy of the motivation should be kept on file.

A record-keeping system needs to collect information on at least the following variables:

- CAS number;
- name of prosecutor;
- motivation;
- name and aliases;
- age and date of birth;
- charge;
- decision to divert or not;
- diversion option;
- date referred to programme;
- date for report-back from programme;
- outcome of diversion; and
- name of contact person at diversion programme.

6.1.10 Cooperation With Other Role Players

Reference has been made in the above to working with other organisations and this will be key to the success of any diversion service. It is crucial that a diversion service and its programmes are recognised and supported by the community in which they are located, and that structures of civil society contribute to the diversion service.

Because diversion services deal mainly with children, it is important to consult with interested parties – for example, those organisations who deal with children across a broad spectrum of interests. If consulted and recognised, most organisations are willing to contribute something. Diversion forms only one part of a comprehensive child-care system and the cooperation of other partners can add great value to a diversion service.

At the end of this Manual (Part D), there is a list of sources and resources that may be contacted for advice and guidance if problems are experienced.

Sources Consulted

- Albonetti, C.A. 1987. *Prosecutorial Discretion - the Effects of Uncertainty*, p 293.
- Muntingh, L. & Shapiro, R. 1997. *An Introduction to Diversion from the Criminal Justice System*, NICRO, Cape Town.
- SA Law Commission. 1997. Issue Paper on Juvenile Justice, Issue Paper No. 9, Project 106, 1997, p 5. and p 37.
- United Nations. 1986. *Standard Minimum Rules for the Administration of Juvenile Justice*, United Nations, New York.

6.2 Examples Of “Informal” Diversion

Although it is not expected that prosecutors set up diversion programmes in areas where such initiatives do not exist, an all-round ‘win-win’ situation can result if prosecutors take a closer look around them and then go into partnerships with roleplayers in their areas.

The keys to any new initiatives are imagination and simplicity.

It is a well-known fact that, especially in the rural areas, formal diversion programmes are at present virtually non-existent. In many instances, because of the non-availability or lack of support from other relevant role-players, little or nothing is done to give child offenders the special attention they deserve. In the absence of a diversion programme, cases are sometimes simply withdrawn. If a prosecution is instituted, the eventual sentence imposed is usually the stereotype and inappropriate postponement or suspension.

Although it is not the prosecutor’s duty to institute, control and organise formal diversion programmes, with some ingenuity, something can be done to address this problem, which is also one of unequal treatment of child offenders.

Examples of “Informal” Diversion

Prepared by Ann Skelton

How can diversion programmes be initiated where there are no service providers available which are well known, such as NICRO? This is a question which is often asked by prosecutors working in rural areas or small towns.

Fortunately there are some good examples of “justice entrepreneurs” who have come up with their own diversion programmes.

Noupoort is a focal point

Noupoort in the Northern Cape, for example, is a small town with seemingly few resources. The magistrate’s court in Noupoort, however, is the hub of a very active diversion programme. The magistrate chairs an inter-sectoral committee which also includes teachers and volunteers from the community.

The local youth group in Noupoort attended a one-day training course run by NICRO, where the trainer travelled from De Aar to give the training. This training programme did not simply happen of its own accord: it was as a result of a request from the magistrates court in Noupoort. NICRO are now running diversion programmes on life skills training, and are also acting as “mentors” to those children who have been through the programme. The interesting thing about this

project is that although it at first seemed as if there were no resources or skills available in Noupoot, this was found to be a false assumption – resources and skills were available or, with the help of role-players such as NICRO, were made possible.

The inter-sectoral committee has grown to include people from a drug rehabilitation centre in Noupoot, who are offering the use of their workshops and skills training equipment. A trained psychologist in the town is offering counselling to young people. The project has been so successful that the programmes on life skills are now being conducted at the local school for children who are identified as being “at risk”. This means that the programme has been extended to include crime prevention as well as diversion.

Conservation gives children something to care about

In Port Shepstone in KwaZulu-Natal, the prosecutor started a diversion programme involving the natural coastal and wildlife environment as a focus point. In this programme, young people are diverted to a programme with the Parks Board Conservation Services, in which the young people must help to “clean up” the environment. In the process they are exposed to a great deal of information about the environment and the passion for conservation issues is demonstrated to them by the people they are working with. The project boasts a great success rate – many children volunteer to go on helping with conservation work after their diversion has been completed. One boy’s life was turned around very positively by this experience: he went on to become head-boy of his school. This project has been widely recognised and the prosecutor who started it was nominated for a Conservation Services Award.

Role-players can be called upon to help

There are other examples where prosecutors have pulled in the local Alcohol and Drugs counselling organisations to help run diversions specifically for children charged with drugs. Other ideas, such as getting the children to write an essay or a letter of apology to the victim, have also been used.

Simplicity and innovation are the keys

These examples show that prosecutors can be innovative and can come up with ideas to create or mobilise successful and meaningful diversion programmes. These types of initiatives are particularly powerful when they are done in partnership with community organisations that exist in the area.

Ensure that standards are met with any diversion programme

It is also advisable to involve the local office for Social Development, as this department has experience and access to training in the field of diversion. Care must obviously be taken to make sure that any diversion programmes or projects that are started in this way should conform to the objective and minimum standards for diversion. (See the two previous sections of this Manual.)

6.3 Relevant Case Law

Given the high success rate of diversion, it cannot be approached in a haphazard way or recommended inconsistently.

This section presents an interesting substantiation of the statement made above.

An excellent exposé of cases dealing with diversion is to be found in the following article that appeared in an edition of **De Jure (2001) vol 1**. The article, entitled “Reviewing the prosecutorial decision not to divert: M v The Senior Public Prosecutor, Randburg and another” (Case 3284/00 WLD, unreported) by Associate Professor Julia Sloth Nielsen, BA LLB LLM, Children’s Rights and Advocacy Project, Community Law Centre, University of the Western Cape, is reproduced here.

The desirability of diverting children accused of offences away from criminal courts to appropriate alternative programmes has been a signal feature of the development of juvenile justice during the past decade. Commencing in 1992, NICRO (National Institute for Crime and the Reintegration of Offenders) has played a seminal role in offering alternatives to prosecution to an ever-increasing number of children. In 1999, more than 10 000 children benefited from the life skills and educational programmes, mediation services and community service orders convened under NICRO’s auspices, in lieu of receiving a criminal conviction and punishment. The recidivism rate is evidently extremely low, with the first follow-up study suggesting that only 6.7% of children who attended programmes re-offended within the first year (Muntingh “Does diversion work?” vol 1 no 3 (1999) Article 40 Community Law Centre, University of the Western Cape).

Academic writers have reacted favourably to the notion of diversion (Louw and Van Oosten 1998 (61) THRHR 123; Terblanche and van Vuuren 1997 (10) SACJ 170) and diversion has formed a central theme of the deliberations of the South African Law Commission Project Committee on Juvenile Justice (Project 106). The 1997 Issue Paper No 9 (in chapter 7), the 1998 Discussion Paper no 79 (in Chapter 8) and the final Report on Juvenile Justice released by the Commission on 8 August 2000 all contain detailed proposals for new statutory regulation of diversion, largely aimed at entrenching this as a central facet of juvenile criminal procedure.

The benefits of diversion have been alleged to be numerous, including the fact that children who are diverted avoid the stigma of criminal proceedings and any ensuing criminal record, which can brand a child for life; that diversion results in simpler and speedier processing of cases, and that diversion programmes are more effective in

encouraging children to accept accountability for their offences than conventional criminal trials (Sloth Nielsen 'Child Justice and Law Reform' in CJ Davel (ed) '**An Introduction to Child Law in South Africa**' (Juta and Co, 2000, forthcoming).

South African case law on diversion, however, has until now been in short supply. This is, perhaps, not surprising given the traditional judicial reluctance to interfere with prosecutorial decisions (**Gillingham v Attorney General** 1909 TS 572). Traditionally, the prosecuting authority cannot be ordered to take a specific decision unless *mala fides* or gross unreasonableness is shown (see also Du Toit, De Jager, Paizes, Skeen and Van der Merwe '**Commentary of the Criminal Procedure Act**' (Juta and Co, 1993, with loose leaf updates, 1-4N). Further, a prosecution commenced in good faith will not be stopped or interfered with on review unless there is evidence of the improper exercise of discretion.

Also, it must be borne in mind that the underlying rationale for arriving at individual diversion decisions is rarely made public. Often, it seems as though diversion comes about through corridor negotiations with attorneys or parents of accused children, or by the simple good fortune of appearing in a jurisdiction in which the prosecutor is familiar with (and eager to promote) diversion.

The first judicial reference to diversion came about (somewhat uncomfortably) in **S v D** 1997 (2) SACR 673 (C) (discussed in Sloth-Nielsen and Muntingh "1998 Juvenile Justice Review" (1999) 12 SACJ 65). The case involved four children arrested for possession of dagga at 08h00 (before school) and required to plead at 11h00 on the same day. The application for special review did not turn on this, but on the allegation that some weeks earlier a substantially similar matter had been diverted, thereby avoiding the acquisition of a criminal record by the children concerned. It was also noted that in this jurisdiction it was established practice to divert cases of this nature, where first offenders faced charges of possession of small quantities of drugs. In essence, the Cape High Court was sympathetic to the magistrate's difficulty with his conviction of the children, and found that it was possible that their rights had not been properly explained to them. However, expressing sympathy for the idea of diversion, the court nevertheless said that the prosecutor, as *dominus litis*, had the right to proceed with criminal charges against the children (at 673 h-i).

Again, diversion was referred to in a positive vein in the landmark case on juvenile sentencing, **S v Z en vier ander sake** 1999 (1) SACR 427 (EC). Erasmus J cited with apparent approval the guidelines on diversion issued by the Director of Public Prosecutions (Eastern Cape), and, as a general principle, suggested that the court should, before commencement of trials involving juveniles, advance the referral of

accused children to diversion programmes in appropriate cases (at 440i).

The unreported High Court decision in **M v The Senior Public Prosecutor, Randburg and another** constitutes a further advance in the march towards formalising the diversion process as a legitimate phase of criminal proceedings involving children. The application for review in this case was brought to the magistrate's court by the guardian of a minor girl (M), who had been convicted of shoplifting. There was no effort to establish any irregularity in the guilty plea that she lodged, in the process of her conviction or in relation to the sentence imposed. Instead, the argument was launched on the basis of a similar set of facts, involving another girl (T, the 'co-culprit') arrested in like fashion for shoplifting clothing. Both participated in the same theft. In T's case, diversion was assented to by the prosecution.

This application, therefore, challenged the exercise of prosecutorial discretion in deciding to prosecute M. The imputation, the court explained, was that the prosecutor in M's case did not consider diversion. As the prosecutor did not respond to the papers filed for the review, whether he actually considered diversion is unknown. Also, the court mentions that if the prosecutor had responded with an affidavit to explain what he did, and indicating that he did consider diversion, the outcome of this review may well have been different. But, in the absence of any such explanation, the inference had to be drawn that 'on facts which require that the question of diversion should at least come into the equation, diversion was not considered.' (line 15, page 4 of the judgement). This, the High Court held, implied that there was not a proper exercise of discretion, and, in the absence of any explanation or reasons for proceeding with the charge, the implication was that the prosecutor did not apply himself properly and fully to the content of what was before him. It was concluded that this gave reason to set the conviction aside, and to refer the matter back to the stage where the prosecutor 'does bring the prospects of and the possibility of diversion into the consideration before him' (line 27-8, page 4 of the judgement).

The basis for this, Flemming DJP said, was not related to any constitutional issue. Rather, 'the court has always reviewed administrative decisions which are vitiated by mala fides or other considerations where that is appropriate' (lines 16-18 page 2 of the judgement). The decision turned, in other words, on the High Court's inherent power to review administrative decisions, and to overturn them where the person who exercised the power displayed bad faith, or failed to apply his or her mind to the matter. And, although the judge says that 'for those who want to call this type of prosecutorial decision a 'decision to "divert" there is the freedom to use that term' (line 13 page 3 of the judgement), he is clearly of the view that what is really at stake is a decision not to prosecute, juxtaposed (on the same set of facts) with a decision to prosecute, which latter decision was thus reviewable.

The case is obviously of immediate relevance for children who are co-accused for the commission of the same offence: if these children are not treated alike, reasons for adopting a different course of action may have to be furnished by prosecutors, lest decisions be challenged on appeal or on review. But also, on the principle that 'like cases should be treated alike', there is scope to argue that within a broad margin of discretion, diversion - and prosecution - must be applied relatively consistently within a jurisdiction. This is alluded to in the judgement, as Flemming DJP maintains that if on the 'total picture,' the facts suggest that (within the approach of the Director of Public Prosecutions) one child be given diversion, then it follows that on identical facts, diversion should be considered for others.

M v Senior Public Prosecutor, Randburg does not establish a right to be considered for diversion in every case or even every petty case. But the decision shows an acknowledgement of the benefits of the diversion process (Flemming DJP refers in general to the correctness of decisions not to prosecute taken in this type of situation because of the human potential of the child and the harm which prosecution does to children who are immature. He mentions 'people who are immature and sometimes make the most peculiar decisions arising from their undeveloped state of mind' (line 24 page 3 of the judgement)). Also, the judgement provides a basis for future challenges when obvious candidates for diversion are taken, instead, through the criminal process. Most pertinently, maybe, is that it demands of all prosecutors to apply their minds to the diversion possibilities when dealing with accused children lest they be called later to account. This should encourage amongst prosecutors a deeper awareness of the variety of diversion options on offer, and the potential for diversion in each region.

Finally, the actual incident which led to the review application being launched appears to lend weight to the view that it is undesirable that diversion decisions continue to take place behind closed doors in such haphazard a fashion. This unease lies at the heart of the recommendation of the South Africa Law Commission that a distinct pre-trial procedure, termed the preliminary inquiry, be mandatory before any child accused appears in court (South African Law Commission '**Report on Juvenile Justice**' Chapter 8). Amongst the aims of this procedure would be to consider whether diversion is appropriate, and to formulate the content of such diversion option.

...the Commission deems it necessary that both magistrate and prosecutor be present, together with other relevant persons, so that a round-table discussion can ensue. If only the prosecutor was present, an imbalance might result, and decisions could then be taken by one role-player. In the Commission's view, the presence of both parties will contribute towards a form of case conference where no single view dominates' (Report par 8.30).

*The facts in **M v Public Prosecutor, Randburg**, it is submitted, support both the idea of a distinct step at which diversion can be considered, and the goal of broader involvement in this important phase - referral to diversion - as is provided for in the Report and the draft Bill that it contains.*

Sources to be consulted for further reading

A copy of the Judgement is Available on the Community Law Centre Website at:
www.sn.apc.org/users/clc/children/index.htm.

The Department of Justice indicated informally that the Child Justice Bill would probably be introduced into the parliamentary process after May 2001. In Chapter 8 of Part B of this Manual, some information on this draft legislation is provided.

7. Manner Of Dealing With Child Offenders If Prosecuted

Prepared by Basil King

This chapter focuses on the complex process of sentencing a child who has been convicted of a crime.

Basil King details the function of children's courts, alternative sentencing to imprisonment or a stay in a reformatory, and the roles played by probation officers and custodians of child offenders in the sentencing procedure.

Prosecutors have a duty to ensure that a suitable sentence is imposed and should, therefore, always address the court on the most suitable sentencing option. Unimaginative sentences, such as ones that are merely suspended on condition that a crime is not committed or that are simply postponed, will rarely have any positive effect on the child offender. The prosecutor can propose suitable conditions of suspension. These may include the attendance of responsibility-training programmes and the performance of community service.

The aims and purpose of diversion and the relevant diversion programmes are relevant and should be taken into account also when dealing with the subject of sentence. (See the various sections of Chapter 6 of Part B.) The judgement in **S v Z and four other cases**, 1999(1) SACR 427, laying down new standards for juvenile sentencing, must be studied *in toto*. In this matter, innovative and imaginative sentencing is encouraged and a sentence that effectively ends the minute the child walks out of the court is noted as seldom suitable. It is also stated that, in principle, imprisonment for youthful offenders is to be avoided. (See **S v D** 1999(1) SACR 122 NC; **S v Kwalase** 2000(2) SACR 135 CPD and **S v Peterson en 'n ander** 2001(1) SACR 16 SCA).

7.1 Extracts Relevant To Child Offenders

In approaching the matter of dealing with child offenders who are prosecuted, the comments that follow apply to all accused persons who are under the age of 21 years at the time of conviction. South African law recognises two categories of juveniles: those under the age of 18 years and those over the age of 18 years but under the age of 21 years.

South African law further provides for alternative methods of dealing with juvenile offenders brought before the criminal courts. These methods ought to be investigated in order to give the juvenile a chance of proper rehabilitation.

The following extracts serve as examples of the Supreme Courts' attitude and guidance in this regard.

In **R v Smith** 1922 TPD 199 Wessels J stated:

... the State should not punish a child of tender years as a criminal and stamp him as such throughout his after life, but it should endeavour by taking him out of his surroundings, to educate and uplift him and to make him gradually understand the difference between good conduct and bad conduct.

In **S v Adams** 1971 (4) SA 125 (C) 126H Steyn J stated:

Die regspleging verg steeds die grootste voorsorg en versigtigheid by die vastelling van 'n geskikte straf, maar dit verg dit in 'n besondere mate waar met jeugdiges gehandel word. Die moontlikheid van hervorming is by die jeug soveel meer aktueel en die gevolge van 'n onoorwoë uitoefening van diskresie deur die voorsittende amptenaar kan soveel meer onherstelbare skade meebring in die geval van 'n jeugdige.

In **S v Jansen** 1975 (1) SA 425 (A) 427H-428A Botha JA stated:

In the case of a juvenile offender it is above all necessary for the court to determine what appropriate form a punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society.

In **S v T** 1993 (1) SACR 468 (C) Marais J stated:

The mere fact that a teenager has not been at school for two years and has not sought or found work does not show that he is living the life of an adult, particularly when he is still living with his mother and is in receipt of maintenance for his upkeep. Nor does the fact that he had rendered a girl pregnant show that he is living the life of an adult. It was largely on account of this finding plus the fact that the accused was no longer interested in attending school and furthering his education that the magistrate ruled out the possibility of sending the accused to a reformatory ... it was open to us to reconsider the question of sentence afresh as a consequence of this material misdirection on the magistrate's part...

7.2 Age Determination

The age of the accused must be established and a finding in this regard must be made on record. The reasons for this are two-fold:

- different types of punishment are often related to specific ages; and

- age is a factor that determines the length of the term of detention that one must undergo in certain instances.

The general rule is that the best admissible evidence must be used to determine a juvenile accused's age. (See **S v Ngoma** 1984 (3) SA 666 (A) and the cases cited there.)

The following can be used:

- a birth certificate;
- evidence of the parents;
- evidence of family or other persons knowing of the birth of the accused;
- expert evidence (Medical evidence regarding the physical development and even X-Rays.) (Evidence by a person of his own age is hearsay; **S v C** 1955 (1) SA 380 (C)); and
- estimating age: see section 337 of the CPA, 1977.

Section 337 of the CPA, 1977 (Act 51 of 1977) reads as follows:

“Estimating age of person –

If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless -

- (a) it is subsequently proved that the said estimate was incorrect; and*
- (b) the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.”*

An estimation of age may only be made once it is established that no or insufficient evidence is available

In **S v Swartz** 1970 (2) SA 240 (NC) the court stated that seldom ought there be no evidence available in a magistrate's court as the help of the district surgeon or any other doctor can be invoked.

In **S v Sibisi** 1976 (2) SA 162 (N) James JP stated: "... it is not only desirable but essential that, in all cases in which the age of the accused becomes relevant... the magistrate should ... record what his finding is in regard to the age of the accused; and ... he should further record briefly his grounds for (his) finding..."

In **S v Swato** 1977 (3) SA 992 (O) the court held that the section could only be applied when it had been established that "no or insufficient evidence is available" and that it could not be invoked merely to avoid inconveniencing the district surgeon.

In **S v Khumalo** 1991 (2) SACR 694 (W) the court stated that in all cases where the age of an accused was of material importance, either in respect of conviction or in regard to sentence, magistrates should properly record everything so that the method by which the accused's age was determined appeared adequately from the record.

7.3 Referral To A Children's Court

The three issues listed below deal with sections relating to the statutory provision for referral to a children's court, the effect of an order and the suggested wording of an order, also in relation to referrals to children's courts.

7.3.1 Statutory Provision

Section 254 of the CPA, 1977 (Act 51 of 1977) reads as follows:

“Court may refer juvenile accused to children's court

(1) If it appears to the court at the trial upon any charge of any accused under the age of eighteen years that he is a child as referred to in section 14(4) of the Child Care Act, 1983 (Act 74 of 1983), and that it is desirable to deal with him in terms of sections 13, 14 and 15 of that Act, it may stop the trial and order that the accused be brought before a children's court mentioned in section 5 of that Act and that he be dealt with under the said sections 13, 14 and 15.

(2) If the order under subsection (1) is made after conviction, the verdict shall be of no force in relation to the person in respect of whom the order is made and shall be deemed not to have been returned.”

This section deals with the category of juveniles under the age of 18 years facing any charge. As a starting point the juvenile accused's age will have to be determined before even considering the provisions of section 14(4) of the Child Care Act, 1983. Once it has been determined that the accused is under the age of 18 years the court will then have to determine whether this juvenile falls within the ambit of section 14 (4) of the Child Care Act, 1983.

Section 14 (4) reads as follows:

“(4) At such inquiry the children's court shall determine whether the child before the court is a child in need of care in that-

(a) the child has no parent or guardian; or

(aA) the child has a parent or guardian who cannot be traced; or

(aB) the child-

has been abandoned or is without visible means of support;

displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;

lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;

lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child;
is in a state of physical or mental neglect;
has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or
is being maintained in contravention of section 10."

Proof as to the existence of any such situations ought not to present a problem. Section 254 in any event speaks of whether "... it appears to the court...."

Section 10 of the Child Care Act, 1983 (referred to in section 14 (4)(aB)(vii) *supra*) merely stipulates which persons may receive and maintain a child apart from his or her parents.

Various factors need be considered before invoking the provisions of this section. This is illustrated by our case law. See for example:

S v Jodwana 1968 (4) SA 367 (E) - the child was clearly a "child in need of care" (the requirement under the repealed Children's Act, 33 of 1960) who then ought rather to be under proper control, to be disciplined and trained, rather than be sent to a reformatory.

S v Shange 1972 (2) SA 555 (N) - a "child in need of care" may well be one who has acted in a criminal or irresponsible manner.

S v L 1978 (2) SA 75 (C) - the child required supervision and control rather than reformatory punishment.

S v T 1992 (2) SACR 168 (C) - a person who has already served a prison sentence cannot be sent to an industrial school (referral order made in terms of section 254 set aside).

S v L 1993 (1) SACR 386 (C) - only in exceptional cases should a juvenile be committed to a reformatory for his first offence; despite the person having previously been referred to an industrial school pursuant to a Children's Court enquiry and having absconded, there was nothing preventing him being sent a second time or being re-admitted.

Section 5 of the Child Care Act merely stipulates that every magistrate's court is a children's court for its area of jurisdiction. Section 13 and 14 deal with the procedure during the subsequent inquiry. (The College note on the Child Care Act, 1983 can be consulted for further information regarding such inquiries.)

Section 15 (1) reads as follows:

- “15. Powers of children's courts after inquiry -
- (1) A children's court which, after holding an inquiry in terms of section 13, is satisfied that the child concerned is a child in need of care may -
- (a) order that the child be returned to or remain in the custody of his parents or, if the parents live apart or are divorced, the parent designated by the court or of his guardian or of the person in whose custody he was immediately before the commencement of the proceedings, under the supervision of a social worker, on condition that the child or his parent or guardian or such person complies or the parents of the child comply with such of the prescribed requirements as the court may determine; or
- (b) order that the child be placed in the custody of a suitable foster parent designated by the court under the supervision of a social worker; or
- (c) order that the child be sent to a children's home designated by the Director-General; or
- (d) order that the child be sent to a school of industries designated by the Director-General.”

It will become apparent from the discussion of Section 290 of the CPA that a magistrate's court may order that a juvenile be sent to a reform school whilst a children's court can send a child to a children's home or to a school of industries.

In an unreported decision from the Transvaal Provincial Division (B, A341/95) Strydom J, however, made use of the provisions of Section 297 (1)(a)(i)(ff) of the CPA, making the attendance for education and training at a specified school of industries a condition of postponing the passing of sentence. (It was not clear from the judgment if the court enquired into whether the accused fell within the ambit of section 14(4) or not. *In casu*, the probation officer had recommended that the accused be sent to a school of industries and the magistrate had ordered he be sent to a reformatory, which order was set aside and replaced with the postponed order).

7.3.2 The Effect Of The Order

Stopping the trial in terms of section 254 of the CPA means just that: once the order is made that the accused be taken before a children's court the criminal proceedings cease.

The order can be made before or after the conviction. In the latter instance the verdict is "...of no force..." and is deemed "...not to have been returned." (Section 254 (2) *supra*).

In **S v T** *supra* the court, on review, set aside the section 254 (1) order which then resulted in the conviction being *revived* and the matter was referred back to the trial court for it to proceed with the trial.

7.3.3 Suggested Wording Of Order

The suggested wording of the order reads:

“In terms of section 254 (1) of Act 51 of 1977 the trial of the accused is stopped as it appears that the accused is a child as referred to in section 14 (4) of the Child Care Act, 1983 (Act 74 of 1983) and it is ordered that the accused be brought before a children's court in...”

The Afrikaans equivalent is as follows:

“Kragtens artikel 254(1) van Wet 51 van 1977 word die verhoor gestaak daar dit blyk dat die beskuldigde 'n kind is soos in artikel 14(4) van die Wet op Kindersorg 1983 (Wet 74 van 1983) bedoel, en word beveel dat die beskuldigde voor die kinderhof te gebring word.”

7.4 Manner Of Dealing With A Convicted Child

The issues listed below deal with sections relating to the statutory provision for the manner of dealing with a convicted child, the orders for juveniles to be placed under the supervision of a probation officer, a correctional officer or a suitable person, as well as instances of sending a juvenile to a reform school. The last issue in this section relates to the suggested wording of an order.

7.4.1 Statutory Provisions

Section 290 of the CPA, 1977 (Act 51 of 1977) reads as follows:

"290 Manner of dealing with convicted juvenile

- (1) Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence -
 - (a) order that he be placed under the supervision of a probation officer or a correctional official; or
 - (b) order that he be placed in the custody of any suitable person designated in the order; or
 - (c) deal with him both in terms of paragraphs (a) and (b); or
 - (d) order that he be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983.)
- (2) Any court which sentences a person under the age of eighteen years to a fine may, in addition to imposing such punishment, deal with him in terms of paragraph (a), (b), (c) or (d) of subsection (1). [My underlining]
- (3) Any court in which a person of or over the age of eighteen years but under the age of twenty-one years is convicted of any offence may, instead of imposing punishment upon him for that offence, order that he be placed under the supervision of a probation officer or a correctional official or that he be sent to a reform school as defined in

- section 1 of the Child Care Act, 1983.*
- (4) *A court which in terms of this section orders that any person be sent to a reform school, may direct that such person be kept in a place of safety as defined in section 1 of the Child Care Act, 1983, until such time as the order can be put into effect."*

Section 290 creates three different situations or categories; these being:

- "(i) juveniles under the age of eighteen years who can be dealt with **instead** of punishment, being imposed;*
- (ii) juveniles under the age of eighteen years who are fined, and;*
- (iii) juveniles of or over the age of eighteen years but under the age of twenty-one years who can be dealt with **instead** of punishment being imposed."*

Section 291 of the CPA, 1977 (Act 51 of 1977) provides for the duration of Section 290 orders, emphasising again the necessity of an accurate and proper age determination. The period is set at two years unless the court, at the time of making the order, determines a shorter period.

Section 291(5) reads as follows:

- "(a) Where a court has dealt with a person under section 290 (1) or (3) and such a person is later found not fit to be subject to such an order, such person may be dealt with mutatis mutandis in accordance with the provisions of section 276A (4).*
- (b) For the purposes of the provisions of paragraph (a) the expression 'a probation officer or the Commissioner' in section 276A (4) shall be construed as the probation officer or correctional official or person concerned, or the person at the head of the reform school concerned or a person authorized by him, as the case may be."*

It is important to note that this subsection refers only to a person dealt with in terms of section 290(1) or (3) and who is *later* found to be "not fit to be subject to such an order".

It cannot be utilised for instance where a juvenile is referred to a reform school and it subsequently transpires that the school no longer exists or that the school cannot accommodate him or her. In such instance the matter will have to be referred to the High Court for special review (even if the matter has already been confirmed on review) with a request to set aside such order and refer it back for further adjudication in regard to another suitable punishment.

7.4.2 Order That Juvenile Be Placed Under The Supervision Of A Probation Officer Or A Correctional Official

Orders as provided for in Section 290 (1) and (3) are not regarded as punishment.

Such an order is made "instead of imposing punishment" and it can be made in

Issue 1

respect of any offence even where an Act provides for a compulsory minimum sentence; that is, if the accused qualifies in terms of the age stipulation. (See **S v Hattingh** 1978 (2) SA 826 (A).)

The intention of the legislature was obviously to provide for the compulsory supervision and control of a juvenile in cases where his or her criminality arose from the lack of discipline.

The order provides for the possibility of restricting the juvenile from further criminal conduct particularly "naughtiness."

The probation officer or correctional official ought to create a relationship of trust with the juvenile to improve his or her social environment as well as his or her attitude towards society.

It is necessary to accurately determine the age of the juvenile as the period of supervision and/or custody is dependant thereon; section 291 and **S v Mncwabe** 1968 (4) SA 27 (N); **S v Job** 1978 (1) SA 736 (NC); **S v Hattingh** 1978 (2) SA 826 (A) and **L** 1991(2) SACR 297 (C).

Should the court wish to determine a period less than that provided for in Section 291, i.e. 2 years, it would have to stipulate the duration of the order. (This would obviously depend largely on the recommendation of either the probation officer or correctional official.)

Suggested wording of order:

"In terms of section 290 (1)(a) [or (3)] of Act 51 of 1977 it is ordered that the accused be placed under the supervision of a probation officer or correctional official as the case may be, from _____ and for purposes of this order it is determined that the accused's date of birth is _____."

The Afrikaans equivalent is as follows:

"Ingevolge artikel 290(1)(a) [of (3)] van Wet 51 van 1977 word gelas dat die beskuldigde onder die toesig van 'n proefbeampte of korrektiewe beampte soos die geval mag wees, geplaas word vanaf _____ en vir die doeleindes van hierdie bevel is dit vasgestel dat die beskuldigde se geboortedatum _____ is."

7.4.3 Order That Juvenile Be Placed In The Custody Of A Suitable Person

This order, as with those discussed under 4.2 *supra*, is, as mentioned, not regarded as punishment as it is made "instead of imposing punishment."

Other than those discussed under 4.2 *supra* this order is available only in respect of juveniles under the age of 18 years.

For obvious reasons reliance will have to be placed on the recommendation of a probation officer as to the suitability of the custody in whom the juvenile is ordered to be placed.

7.4.4 Order That A Juvenile Be Sent To A Reform School

Section 290 (1)(d) provides that an 18 year old can be sent to a reform school as defined in the Child Care Act, 1983 (Act 74 of 1983) instead of punishment being imposed on him.

Section 290 (3) similarly provides for the same order in respect of a juvenile who is of or over the age of 18 years but under the age of 21 years.

Section 290 (2) provides that, in the case of a person under the age of 18 the order that he or she be sent to a reformatory can be made in addition to a sentence of a fine.

Referral to a reformatory is a drastic measure and ought to be carefully considered. A factual basis for such a decision is necessary before the court makes this order. The Supreme Court has set out various guidelines over the years. See **R v Langeveldt** 1957 (4) SA 365 (C); **R v Rabotapi** 1959 (3) SA 837 (T); **S v Zungu** 1962 (1) SA 377 (N); **S v Motsoaledi** 1962 (4) SA 703 (O); **S v Mvulha** 1965 (4) SA 113 (O); **S v Maasdorp** 1967 (2) SA 93 (G); **S v Mkwanzazi** 1969 (2) SA 246 (N); **S v Bosman** 1969 (4) SA 217 (NC); **S v H** 1978 (4) SA 385 (E); **S v T** 1987 (2) SA 508 (C); **S v Willemse** 1988 (3) SA 836 (A); **L** 1993(1) SACR 386 (C); **S v M** 1998(1) SACR 384 (C); **S v Z and others** 1999(2) SACR 427 (E); and **S v P** 2001(1) SACR 70.

The following ought to be borne in mind:

- (i) The reform school is no place for first offenders, as he or she will come into contact with negative elements. He or she may be deterred by other forms of punishment so alternatives should always be investigated and considered.
- (ii) Sending a juvenile to a reform school is a desirable alternative to direct imprisonment where the conviction arose from a serious offence.
- (iii) It does not serve any real purpose sending someone who has already spent a lengthy period in prison to a reform school.
- (iv) The age of the accused must be established and a finding in this regard must be made on record.
- (v) The report of a probation officer is almost indispensable. (See the Justice College note on "The role of the probation officer in regard to sentencing" in this regard).

In **S v H** 1978 (4) SA 385 (E) the court set out the following as the procedure that ought to be followed prior to sentencing a juvenile, particularly where a probation officer is called (see Chapter 5 of Part B of this Manual)

- (a) ensure the presence of the accused's parents or, at least, the mother of the accused;
- (b) ascertain from the probation officer:
 - (i) what services and supervision can be afforded the accused within his or her present environment to provide him or her with the necessary guidance and discipline he or she may need, and to boost his or her confidence;
 - (ii) to what extent such services and supervision are likely to prove beneficial to the accused;
 - (iii) what facilities exist at a reformatory for catering for the particular needs of the accused;
 - (iv) what negative influences are present at a reformatory, and what role such negative influences are likely to play in the case of the accused;
- (c) allow the parent or parents of the accused the opportunity of questioning the probation officer in relation to his or her investigations and recommendations;
- (d) afford the parent or parents of the accused the opportunity of giving or leading evidence relative to the recommendations of the probation officer;
- (e) call for such further evidence or investigation as the court considers necessary to arrive at a proper sentence;
- (f) consider the appropriate punishment to be imposed in the light of all the circumstances, bearing in mind that to send an accused to a reform school is a drastic measure which should not lightly be embarked upon, and is generally undesirable in the case of a first offender.

Although Section 73 (3) (assistance to an accused) and Section 74 (parent or guardian to attend) of the CPA, 1977 refer to accused under the age of 18 years, no statutory provision provides for an accused over 18 years of age but not yet 21 years to be assisted. It is, however, desirable that the parents of such accused attend the proceedings and have a say in the decision.

In **S v Yibe** 1964 (3) SA 502 (E) Wynne J quoted with approval the following passage from Gardiner & Lansdown **South African Law and Procedure** 6th edition Vol. 1 at 711:

The main purpose of a reformatory is to secure the reformation of a juvenile delinquent and the correction of his maladjustment to society, ends which might be hopeless of attainment if he was associated with criminals. Before, however, a sentence of reformatory detention is passed, care should be taken to see that the accused is a fit subject for a reformatory. His offence may have been really a boyish prank, his character may be good and there may be no need for a reformation, he may be in charge of parents or fit persons to look after him, and he may as a general rule be amenable to their control. In such circumstances it would be wrong and might cause incalculable harm to the boy, to send him to a reformatory. A whipping or even a caution might be quite

sufficient to deter him from committing an offence again. It must be borne in mind that any sentence of detention in a reformatory is bound to be drastic. It removes a boy from his relatives for at least two years, and whatever care be taken in regard to the classification, it is bound to bring him into contact with some boys of vicious tendencies. Before deciding therefore upon detention in a reformatory, the Court should take into consideration the nature and circumstances of the offence, and if sufficient information is not disclosed by the evidence in the case, should make enquiries as to the accused's character, his home life, and should determine whether his case is one for which reformatory treatment is needed. [Whipping is, of course, no longer a viable sentencing option.]

7.4.5 Suggested Wording Of Order

"In terms of section 290 (1)(d) [or 290 (3), as the case may be] of Act 51 of 1977 it is ordered that the accused be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983).

For purposes of this order it is determined that the accused's date of birth is _____, [or, that he (or she) will attain the age of _____ years on _____. It is further ordered that the accused be detained in _____ pending his [or her] removal to the designated reformatory."

The Afrikaans equivalent is as follows:

"Ingevolge artikel 290 (1)(d) [of 290(3), soos die geval mag wees] van Wet 51 van 1977 word dit gelas dat die beskuldigde na 'n verbeteringskool, soos omskryf in artikel 1 van die Kinderwet 1983, Wet 74 van 1983, verwys word. Vir die doeleindes van hierdie bevel is dit bepaal dat die beskuldigde se geboortedatum _____ is [of dat hy (of sy) die ouderdom van _____ jaar sal bereik op _____]. Ingevolge artikel 290(4) van Wet 51 van 1977 word gelas dat die beskuldigde in 'n plek van bewaring (_____ soos omskryf) aangehou word tot tyd en wyl aan hierdie bevel gevolg gegee kan word."

Bear in mind that the order is subject to review in the ordinary course, see section 302 (1)(a) of the CPA, 1977 (Act 51 of 1977) and that the accused's rights in this regard also have to be explained to him or her and his or her parents.

See **Z and four others** 1999(1) SACR 427 (E) for an extensive exposition of the principles governing and options available in sentencing juvenile offenders.

Sources consulted

Du Toit - Commentary on the Criminal Procedure Act (loose-leaf edition).
Ferreira - Strafproses in die Laer Howe (1979)
Kriegler - Hiemstra Suid-Afrikaanse Strafproses (1993)
Krugel en Terblanche - Praktiese Vonnisoplegging (1990)

8. Proposed Child Justice Bill

At the time of compilation of this Manual, the Child Justice Bill had not been enacted yet. It was highly debated in parliament and there is a proximate likelihood that the Bill will not be enacted in its present form. However, the general purport of the Bill as set out in the preamble is unlikely to be affected. After enactment by parliament, the Bill will come into operation on a date proclaimed by the President in the Government Gazette.

To give prosecutors a sense of the draft Bill, the preamble and the South African Law Commission (SALC) press release on the Bill is set out below:

“To establish a criminal justice process for children accused of committing offences which aims to protect the rights of children entrenched in the Constitution and provided for in international instruments; to provide for the minimum age of criminal capacity of such children; to delineate the powers and responsibilities of members of the South African Police Service and probation officers in relation to such children; to provide for the detention of such children and their release from detention; to incorporate diversion of cases away from formal court procedures as a central feature of the process; to establish assessment of children and a preliminary inquiry as compulsory procedures in the new process; to create special rules for a child justice court; to extend the sentencing options available in respect of such children; to entrench the notion of restorative justice; to establish appeal and review procedures; to provide for legal representation of children; to create monitoring mechanisms to ensure the effective operation of this legislation; and to provide for matters incidental thereto.”

In a media statement of 8 August 2000, issued by the Secretary of the South African Law Commission, a concise summary of what is intended with the draft Bill on a proposed new child justice system is given. Since these developments are deemed to be of interest to prosecutors, the press statement is quoted in full:

“Media Statement By The South African Law Commission Concerning Its Investigation Into Juvenile Justice (Project 106)

The South African Law Commission has approved a report containing its final recommendations and a draft Bill on a proposed new child justice system at its meeting on 27 July 2000. The report will be handed to the Minister for Justice and Constitutional Development for consideration of the recommendations relating to a new structure to govern children under the age of 18 years who are accused of having committed offences.

In essence, the proposed system aims to ensure that children accused of less serious offences will be afforded the opportunity to pay their debts to society without obtaining a criminal record through a process known as diversion. Diversion is the referral of cases away from the formal criminal justice system to

an approved programme or plan. The Commission therefore envisages a cohesive child justice system which strives to prevent children from entering deeper into the criminal justice process while holding them accountable for their actions by means of various diversion options and programmes. These options and programmes embody restorative justice principles, which focus on reconciliation and restitution rather than on retribution and punishment, and lay emphasis on compensation to the victim by the offender with the object of successfully reintegrating both victim and offender as productive members of safe communities. The proposed system does, however, provide for the criminal prosecution of children who are accused of serious or violent offences as well as those who repeatedly commit offences. The system also allows for the secure containment of children who are assessed to be a danger to others. The imprisonment of children awaiting trial will be permissible in certain defined circumstances, but the proposals accord with the constitutional provisions that imprisonment of children should be a measure of last resort and for the shortest appropriate period of time.

The recommendations are based on international human rights standards and constitutional principles. The proposed draft Bill contains a body of principles to guide those who will be tasked with the implementation of this legislation in the future.

The proposed system further aims to encourage a degree of specialisation in child justice practice. In so doing, the Commission is giving effect to a long standing call from service providers and non-governmental organisations for a distinct and unique system of criminal justice that treats children differently, in a manner appropriate to their age and maturity, and which develops mechanisms and processes designed to achieve that goal. For instance, a specialised child justice court at the district court level is proposed. Further, specialisation in relation to the role of the probation officer builds on practical developments in the field of child justice since 1994. It has become increasingly clear that probation officers will be pivotal to the future child justice system, and this notion accords with views expressed by policy-makers as well as with the views of probation workers concerning their own conceptualisation of their duties in a future child justice system.

Some degree of specialisation is also proposed in the area of legal representation (through a system of registration), as advocacy for children entails a heightened responsibility and commitment to serve the best interests of children, as well as an ability to communicate in a manner that a child can understand.

The proposed child justice system hinges on a new process which aims to address effectively the problems that have been experienced in the administration of child justice, particularly in relation to diversion and pre-trial release of children from custody. This is the insertion of the proposed preliminary inquiry as a compulsory pre-trial procedure presided over by a magistrate at district court level. The preliminary inquiry provides a formal step, prior to charge and plea, to maximise the use of diversion and to provide safeguards regarding the use of pre-trial detention.

The draft Bill finally aims to extend the range of sentencing options available to the proposed specialised child justice court and to other courts in which child offenders are tried, and to create mechanisms to ensure the effective monitoring of the legislation, both at district and national level.

*The Commission's proposals strive to encompass a vision for, and define the characteristics of a coherent and self contained child justice **system**, as distinct from a series of procedural provisions which spell out powers and duties for various role-players who can nevertheless operate in isolation from one another.*

*The report and draft Bill is available on the Internet at the following address:
www.law.wits.ac.za/salc/salc.html.....*

**CONTACT PERSON FOR ENQUIRIES IN RESPECT OF MEDIA STATEMENT:
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RESOURCE GUIDE TO
A PROPER APPROACH TO JUVENILE OFFENDERS
IN THE REGIONAL COURTS

PART C

SENTENCING OF JUVENILES

JUSTICE COLLEGE



SENTENCING: JUVENILE OFFENDERS

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SENTENCING: JUVENILE OFFENDERS

1. INTRODUCTION

The comments that follow apply to all accused persons who are under the age of 21 years at the time of conviction. Our law recognizes two categories of juveniles; those under the age of 18 years and those over the age of 18 years but under the age of 21 years.

Our law further provides for alternative methods of dealing with juvenile offenders brought before the criminal courts. These methods ought to be investigated in order to give the juvenile a chance of proper rehabilitation.

The ‘best interests of the child’ in article 3 of the Convention on the Rights of the Child (CRC) and echoed in section 28(2) of the Constitution is as much a sentencing principle as any other, and the child's well-being is not merely a ‘primary consideration’, but ‘must be ensured’ according to article 40(4) of that treaty.

Section 28 of the Constitution reads:

“28 Children

(1) Every child has the right-

- (a) to a name and a nationality from birth;*
- (b) to family care or parental care, or to appropriate alternative care when removed from the family environment;*
- (c) to basic nutrition, shelter, basic health care services and social services;*
- (d) to be protected from maltreatment, neglect, abuse or degradation;*
- (e) to be protected from exploitative labour practices;*
- (f) not to be required or permitted to perform work or provide services that-*
 - (i) are inappropriate for a person of that child's age; or*
 - (ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;*
- (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;*
- (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and*
- (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.*

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years."

The objective of sentencing of juvenile offenders that is apparent from international law, is the desirability of 'promoting the child's reintegration and assuming a constructive role in society', (Article 40(1)). Article 40(4) of the Convention on the Rights of the Child requires that 'a variety of dispositions such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care' should be ensured by the States' Party. Similarly, rule 18.1 of the Beijing Rules calls for a 'large variety of disposition measures...allowing for flexibility so as to avoid institutionalisation to the greatest extent possible'.

Of special relevance for South Africa is the international law principle that detention should be a matter of last resort, and when imposed, used for the shortest appropriate period of time. This particular provision has been subsumed in domestic law through the provisions of section 28(1)(g) of the Constitution, which is to the same effect. It therefore applies directly via the children's rights clause of the Constitution.

Obviously the factors specific to sentencing of children are supplemented by a vast body of precedent relating to other principles of sentencing, which would apply in addition to

those highlighted above.

It is not that this is entirely new. Through the years emphasis has been placed on 'care and rehabilitation' rather than the punishment.

The following extracts serve as examples of the Supreme Courts' attitude and guidance in this regard.

In *Smith* 1922 TPD 199 Wessels J stated: "... the State should not punish a child of tender years as a criminal and stamp him as such throughout his after life, but it should endeavour by taking him out of his surroundings, to educate and uplift him and to make him gradually understand the difference between good conduct and bad conduct."

In *Adams* 1971 (4) SA 125 (C) the court commented on the role that the probation officer should play in assisting the court to fulfil its sentencing function.

In *Jansen* 1975 (1) SA 425 (A) 427H-428A Botha JA stated: "In the case of a juvenile offender it is above all necessary for the court to determine what appropriate form a punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society."

In *T* 1993 (1) SACR 468 (C) Marais J stated: "The mere fact that a teenager has not been at school for two years and has not sought or found work does not show that he is living the life of an adult particularly when he is still living with his mother and is in receipt of maintenance for his upkeep. Nor does the fact that he had rendered a girl pregnant show that he is living the life of an adult. It was largely on account of this finding plus the fact that the accused was no longer interested in attending school and furthering his education that the magistrate ruled out the possibility of sending the accused to a reformatory ... it was open to us to reconsider the question of sentence afresh as a consequence of this material misdirection on the magistrate's part ...".

In *Z* 1999(1) SACR 427 (E) the Court embarked upon an extensive enquiry into the principles governing, and the options available for, the imposition of sentence upon youthful offenders, particularly in the area of jurisdiction of the Eastern Cape Division of the High Court. The enquiry included a report prepared by the Deputy Director of Public Prosecutions (Eastern Cape), a visit to a juvenile detention facility at a prison, interviews with officials of the Department of Correctional Services, and consideration of a circular instruction issued to prosecutors by the Director of Public Prosecutions (Eastern Cape). The following general guidelines for sentencing juvenile offenders were thereupon laid down:

- (i) Before commencement of the trial the court must, in appropriate cases, promote the enrolment of the accused in a juvenile diversion programme (ie, one of the rehabilitation programmes offered by NICRO, in respect of accused who had successfully completed it and in respect of which the Director of Public Prosecutions had authorised the withdrawal of charges).
- (ii) For the purposes of sentencing the court must properly determine the age of an accused charged as a juvenile, also in borderline cases. If it appears that the age of the accused has been incorrectly recorded in the charge sheet, the court must rectify the record to ensure that his true age is reflected in the warrant of committal, and in other documentation concerning sentence. Because the Department of Correctional Services detains juveniles separately (from adults) on the basis of their age as reflected in the aforesaid documents, and because, for the purposes of the Department, 'juveniles' are persons under the age of 21, it is necessary to determine the age of all prisoners under 21 years, and not only of those who are under 18 years.
- (iii) The court must act dynamically to obtain full particulars about the accused's personality and personal circumstances. Where necessary the court must obtain a pre-sentence report from a probation officer and/or a correctional officer. Such a report is necessary where the accused has committed a serious offence, or where he has previous convictions. It is inappropriate to impose a sentence of imprisonment, including suspended imprisonment, unless such a pre-sentence report has been obtained.
- (iv) The court must exercise its wide discretion sympathetically and imaginatively, to determine a sentence which is suited to the accused, in the light of his personal circumstances and of the crime of which he stands convicted. This entails, firstly, the determination of the most appropriate form of punishment and, secondly, the adaptation

of that punishment to suite the needs of the particular accused.

(v) 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) that the younger the accused, the less appropriate imprisonment will be, (b) that imprisonment is inappropriate in the case of a first offender, and (c) that short-term imprisonment is rarely appropriate. The court should thus always consider the appropriateness of other sentencing options. However, if, in all the relevant circumstances and upon a consideration of the objects of sentencing, imprisonment appears to be the appropriate sentence, the court must impose it.

(vi) The court must not impose suspended imprisonment where imprisonment is inappropriate for the particular accused.

In *Kwalase* 2000(2) SACR 135 (C) Van Heerden J stated:

“The importance of a pre-sentence report in the process of sentencing young offenders has been repeatedly emphasised by our courts.”

She referred, at 137, to and quoted from Terblanche, *The Guide to Sentencing in South Africa*, (1999) at 378:

“Although not statutorily required, it is a requirement of common sense that the sentencing court should be even more fully informed regarding the person of a juvenile offender. Pre-sentence reports can provide the necessary background to the juvenile offender and attempt to explain commission of the crime, enabling the court to find the most appropriate sentence for that offender. The purpose is therefore to individualise the sentence, not with the idea that a light sentence should be imposed, but to find a sentence which is fair both to the young offender and to society.”

The court also referred, at 138, to the fact that the post-1994 constitutional and international legal dispensation in South Africa must of necessity also be borne in mind by South African courts in the determination of appropriate sentences for youthful offenders. Section 28(1)(g) of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996), provides that every child has the right *'not to be detained except as a*

measure of last resort' and then only for *'the shortest appropriate period of time'*. This constitutional provision applies to all persons under the age of 18 years (see s 28(3)). The judge also referred to the fact that on 16 June 1995, South Africa ratified the United Nations Convention on the Rights of the Child (1989) ('CRC') and, by so doing, assumed an international legal obligation to put into effect in its domestic law the provisions of this Convention (see article 4). He stressed that “*Various provisions in CRC 'underline the policy that children under the age of 18 years who are accused of committing offences should, as far as possible, be dealt with by the criminal justice system in a manner that takes into account their age and special needs'*”.

The judge also referred to **Jansen** 1975 (1) SA 425 (A) where that court, years earlier, had emphasised the importance of Court's properly taking into account the personal circumstances of the offender in the determination of sentence and the salutary practice of calling for a probation officer's report in respect of juvenile offenders. In that case Botha JA remarked as follows at 427H:

“In determining the appropriate sentence to be imposed upon an accused person in any particular case, it is the duty of the Court to have regard, not only to the nature of the crime committed and the interests of society, but also to the personality, age and circumstances of the offender . . . In the case of a juvenile offender it is above all necessary for the Court to determine what appropriate form of punishment in the peculiar circumstances of the case would best serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned to society. To enable a Court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice in the Courts to call for a report on the offender by a probation officer in, at least, all serious cases”.

In **M and another** 2005 (1) SACR 481 (E), the magistrate was criticized for not taking an active role in establishing the whereabouts of the juvenile offenders' parents nor

clarifying the length of time it took awaiting a probation officer's report, (a report which was never forthcoming). Pickering J stated:

“It does not appear on the record that the magistrate made any enquiry as to why the probation officer's report was not timeously forthcoming. In this regard, all that the magistrate states in response to a query on review is that 'the court was not informed as to what steps had been taken to obtain the report - also as to why the report was not available'. This, of course, begs the question as to why the magistrate himself did not ask the prosecutor as to what steps had been taken or as to why the report was not available. The magistrate should not have sat back supinely and accepted the position in this regard.” (at 483).

The judge referred to *Peterson* 2001 (1) SACR 16 (SCA), where it was held that it was expected of the court to play a dynamic role in obtaining full details of an accused's personality and circumstances when it came to the imposition of sentence.

2. AGE DETERMINATION

The age of the accused must be established and a finding in this regard must be made on record. The reasons are two-fold:

- different types of punishment are often determined according to specific ages; and
- age is a factor that determines the length of the term of detention that one must undergo in certain instances.

Section 51(6) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), for example, specifically excludes a juvenile under the age of 16 years at the time of the commission of the offence from the operation of prescribed minimum sentences and section 51(3)(b) of the same Act provides for a different approach to an accused over the age of 16 years but under the age of 18 years.

The general rule is that the best admissible evidence must be used to determine a juvenile accused's age. See *Ngoma* 1984 (3) SA 666 (A) and the cases cited therein.

The following can be used:

- A birth certificate;
- Evidence by the parents;
- Evidence of family or other persons knowing of the birth of the accused;
(Evidence by a person of his own age is hearsay; C 1955 (1) SA 380 (C)).
- Expert evidence (Medical evidence regarding the physical development and even X-Rays).

In the absence of any evidence the court is entitled to estimate age: see section 337 of the Criminal Procedure Act, 1977.

Section 337 of the Criminal Procedure Act, 1977 (Act 51 of 1977) reads as follows:

“Estimating age of person. - If in any criminal proceedings the age of any person is a relevant fact of which no or insufficient evidence is available at the proceedings, the presiding judge or judicial officer may estimate the age of such person by his appearance or from any information which may be available, and the age so estimated shall be deemed to be the correct age of such person, unless -

- (a) *it is subsequently proved that the said estimate was incorrect; and*
- (b) *the accused at such proceedings could not lawfully have been convicted of the offence with which he was charged if the correct age had been proved.”*

An estimation of age may only be made once it is established that no or insufficient evidence is available.

In *Swartz* 1970 (2) SA 240 (NC) the court stated that seldom ought there be no evidence available in a magistrate's court as the help of the district surgeon or any other doctor could be invoked.

In *Sibisi* 1976 (2) SA 162 (N) James JP stated: *“... it is not only desirable but essential that, in all cases in which the age of the accused becomes relevant ..., the magistrate should ... record what his finding is in regard to the age of the accused; and ... he should*

further record briefly his grounds for (his) finding..."

In *Swato* 1977 (3) SA 992 (O) the court held that the section could only be applied when it had been established that "*no or insufficient evidence is available*" and that it could not be invoked merely to avoid inconveniencing the district surgeon.

In *Khumalo* 1991 (2) SACR 694 (W) the court stated that in all cases where the age of an accused was of material importance, either in respect of conviction or in regard to sentence, magistrates should properly record everything so that the method by which the accused's age was determined appeared adequately from the record.

3. REFERRAL TO A CHILDREN'S COURT

3.1 STATUTORY PROVISION

Section 254 of the Criminal Procedure Act, 1977 (Act 51 of 1977) reads as follows:

"Court may refer juvenile accused to children's court

- (1) *If it appears to the court at the trial upon any charge of any accused under the age of eighteen years that he is a child as referred to in section 14(4) of the Child Care Act, 1983 (Act 74 of 1983), and that it is desirable to deal with him in terms of sections 13, 14 and 15 of that Act, it may stop the trial and order that the accused be brought before a children's court mentioned in section 5 of that Act and that he be dealt with under the said sections 13, 14 and 15.*
- (2) *If the order under subsection (1) is made after conviction, the verdict shall be of no force in relation to the person in respect of whom the order is made and shall be deemed not to have been returned."*

This section deals with the category of juveniles under the age of 18 years facing **any** charge. As a starting point the juvenile accused's age will have to be determined before even considering the provisions of section 14(4) of the Child Care Act, 1983. Once it has been determined that the accused is under the age of 18 years the court will then have to determine whether this juvenile falls within the ambit of section 14 (4) of the Child Care

Act, 1983.

Section 14 (4) reads as follows:

"(4) At such inquiry the children's court shall determine whether the child before the court is a child in need of care in that-

- (a) the child has no parent or guardian; or*
- (aA) the child has a parent or guardian who cannot be traced; or*
- (aB) the child-*
 - (i) has been abandoned or is without visible means of support;*
 - (ii) displays behaviour which cannot be controlled by his or her parents or the person in whose custody he or she is;*
 - (iii) lives in circumstances likely to cause or conduce to his or her seduction, abduction or sexual exploitation;*
 - (iv) lives in or is exposed to circumstances which may seriously harm the physical, mental or social wellbeing of the child;*
 - (v) is in a state of physical or mental neglect;*
 - (vi) has been physically, emotionally or sexually abused or ill-treated by his or her parents or guardian or the person in whose custody he or she is; or*
 - (vii) is being maintained in contravention of section 10."*

Proof as to the existence of any such situations ought not to present a problem. Section 254 in any event speaks of whether *"... it appears to the court...."*

Section 10 of the Child Care Act, 1983 (referred to in section 14 (4)(aB)(vii) *supra*) merely stipulates which persons may receive and maintain a child apart from his or her parents.

Various factors need be considered before invoking the provisions of this section; this is illustrated by our case law, see for example:

Jodwana 1968 (4) SA 367 (E) - the child was clearly a "*child in need of care*" (the requirement under the repealed Children's Act, 33 of 1960) who then ought rather to be under proper control, to be disciplined and trained, rather than be sent to a reformatory.

Shange 1972 (2) SA 555 (N) - a "*child in need of care*" may well be one who has acted in a criminal or irresponsible manner.

L 1978 (2) SA 75 (C) - the child required supervision and control rather than reformative punishment.

T 1992 (2) SACR 168 (C) - a person who has already served a prison sentence cannot be sent to an industrial school (referral order made in terms of section 254 set aside).

L 1993 (1) SACR 386 (C) - only in exceptional cases should a juvenile be committed to reformatory for his first offence; despite the person having previously been referred to an industrial school pursuant to a Children's Court enquiry and having absconded, there was nothing preventing him being sent a second time or being re-admitted.

Section 5 of the Child Care Act merely stipulates that every magistrate's court is a children's court for its' area of jurisdiction. Section 13 and 14 deal with the procedure during the subsequent inquiry. (The College note on the Child Care Act, 1983 can be consulted for further information regarding such inquiries.)

Section 15 (1) reads as follows:

"15. Powers of children's courts after inquiry. -

(1) *A children's court which, after holding an inquiry in terms of section 13, is satisfied that the child concerned is a child in need of care may -*

(a) *order that the child be returned to or remain in the custody of his parents or, if the parents live apart or are divorced, the parent designated by the court or of his guardian or of the person in whose custody he was immediately before the commencement of*

- the proceedings, under the supervision of a social worker, on condition that the child or his parent or guardian or such person complies or the parents of the child comply with such of the prescribed requirements as the court may determine; or*
- (b) *order that the child be placed in the custody of a suitable foster parent designated by the court under the supervision of a social worker; or*
- (c) *order that the child be sent to a children's home designated by the Director-General; or*
- (d) *order that the child be sent to a school of industries designated by the Director-General."*

It will become apparent from the discussion of section 290 of the Criminal Procedure Act *infra* that a magistrate's court may order that a juvenile be sent to a reform school whilst a children's court can send a child to a children's home or to a school of industries.

In an unreported decision from the Transvaal Provincial Division (**B**, A341/95) Strydom J made use of the provisions of section 297 (1)(a)(i)(ff) of the Criminal Procedure Act making the attendance for education and training at a specified school of industries a condition of the postponing the passing of sentence. (It was not clear from the judgment if the court enquired into whether the accused fell within the ambit of section 14(4) or not. *In casu* the probation officer had recommended that the accused be sent to a school of industries and the magistrate had ordered he be sent to a reformatory, which order was set aside and replaced with the postponed order).

3.2 The Effect of the Order

Stopping the trial in terms of section 254 of the Criminal Procedure Act means just that; once the order is made that the accused be taken before a children's court the criminal proceedings cease.

The order can be made before or after the conviction. In the latter instance the verdict is "... of no force ..." and is deemed "... not to have been returned." (Section 254 (2) *supra*).

In *T supra* the court on review set aside the section 254 (1) order which then resulted in the conviction being "revived" and the matter was referred back to the trial court for it to proceed with the trial.

3.3 Suggested Wording of Order

"In terms of section 254 (1) of Act 51 of 1977 the trial of the accused is stopped as it appears that the accused is a child as referred to in section 14 (4) of the Child Care Act, 1983 (Act 74 of 1983) and it is ordered that the accused be brought before a children's court in"

The Afrikaans equivalent is as follows:

"Kragtens artikel 254(1) van Wet 51 van 1977 word die verhoor gestaak blykens die beskuldigde 'n kind is soos in artikel 14(4) van die Wet op Kindersorg 1983 (Wet 74 van 1983) bedoel, en word beveel dat die beskuldigde voor die kindershof te gebring word."

4. MANNER OF DEALING WITH A CONVICTED JUVENILE

4.1 Statutory Provision

Section 290 of the Criminal Procedure Act, 1977 (Act 51 of 1977) reads as follows:

"290 Manner of dealing with convicted juvenile

- (1) Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence -
- (a) order that he be placed under the supervision of a probation officer or a

- correctional official; or*
- (b) *order that he be placed in the custody of any suitable person designated in the order; or*
- (c) *deal with him both in terms of paragraphs (a) and (b); or*
- (d) *order that he be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983.)*
- (2) *Any court which sentences a person under the age of eighteen years to a fine may, in addition to imposing such punishment, deal with him in terms of paragraph (a), (b), (c) or (d) of subsection (1).*
- (3) *Any court in which a person of or over the age of eighteen years but under the age of twenty one years is convicted of any offence may, instead of imposing punishment upon him for that offence, order that he be placed under the supervision of a probation officer or a correctional official or that he be sent to a reform school as defined in section 1 of the Child Care Act, 1983."*
- (4) *A court which in terms of this section orders that any person be sent to a reform school, may direct that such person be kept in a place of safety as defined in section 1 of the Child Care Act, 1983, until such time as the order can be put into effect."*

Section 290 creates three different situations or categories; these being:

- (i) Juveniles under the age of 18 years who can be dealt with **instead** of punishment, being imposed;
- (ii) Juveniles under the age of 18 years who are fined, and;
- (iii) Juveniles of or over the age of 18 years but under the age of 21 years who can be dealt with **instead** of punishment being imposed.

Section 291 of the Criminal Procedure Act, 1977 (Act 51 of 1977) provides for the duration of section 290 orders, emphasizing again the necessity of an accurate and proper age determination. The period is set at two years unless the court, at the time of making the order, determines a shorter period.

Section 291(5) reads as follows:

“(a) Where a court has dealt with a person under section 290 (1) or (3) and such a person is later found not fit to be subject to such an order, such person may be dealt with mutatis mutandis in accordance with the provisions of section 276A (4).

(b) For the purposes of the provisions of paragraph (a) the expression 'a probation officer or the Commissioner' in section 276A (4) shall be construed as the probation officer or correctional official or person concerned, or the person at the head of the reform school concerned or a person authorized by him, as the case may be.”

It is important to note that this subsection refers only to a person dealt with in terms of section 290(1) or (3) and who is later found to be ‘not fit to be subject to such an order’. It cannot be utilized for instance where a juvenile is referred to a reform school and it subsequently transpires that the school no longer exists or that the school cannot accommodate him or her. In such instance the matter will have to be referred to the High Court for special review (even if the matter has already been confirmed on review) with a request to set aside such order and refer it back for further adjudication in regard to another suitable punishment.

4.2 Order that juvenile be placed under the supervision of a Probation Officer or a Correctional Officer

Orders as provided for in section 290 (1) and (3) are not regarded as punishment.

Such order is made *"instead of imposing punishment"* and it can be made in respect of any offence even where an act provides for a compulsory minimum sentence, that is, if the accused qualifies *via* the age stipulation. See *Hattingh* 1978 (2) SA 826 (A).

The intention of the legislative was obviously to provide for the compulsory supervision and control of a juvenile in cases where his or her criminality arose from the lack of discipline.

The order provides for the possibility of restricting the juvenile from further criminal conduct particularly "*naughtiness*."

The probation officer or correctional official ought to create a relationship of trust with the juvenile to improve his or her social environment as well as his or her attitude towards society.

It is necessary to accurately determine the age of the juvenile as the period of supervision and/or custody is dependant thereon; section 291 and *Mncwabe* 1968 (4) SA 27 (N); *Job* 1978 (1) SA 736 (NC); *Hattingh* 1978 (2) SA 826 (A) and *L* 1991(2) SACR 297 (C).

Should the court wish to determine a period less than that provided for in section 291, i.e. 2 years, it would have to stipulate the duration of the order. (This would obviously depend largely on the recommendation of either the probation officer or correctional official.)

Suggested wording of order:

"In terms of section 290 (1)(a) [or (3)] of Act 51 of 1977 it is ordered that that accused be placed under the supervision of a probation officer or correctional official as the case may be, from _____ and for purposes of this order it is determined that the accused's date of birth is _____."

The Afrikaans equivalent is as follows:

"Ingevolge artikel 290(1)(a) [of (3)] van Wet 51 van 1977 word gelas dat die beskuldigde onder die toesig van 'n proefbeampte of korrektiewe beampte soos die geval mag wees, geplaas word vanaf en vir die doeleindes van hierdie bevel is dit vasgestel dat die beskuldigde se geboortedatum is."

4.3 **Order that juvenile be placed in the custody of a suitable person**

This order, as with those discussed under 4.2 *supra*, is, as mentioned, not regarded as punishment as it is made "*instead of imposing punishment.*"

Other than those discussed under 4.2 *supra* this order is available only in respect of juveniles under the age of 18 years.

For obvious reasons reliance will have to be placed on the recommendation of a probation officer as to the suitability of the custody in whom the juvenile is ordered to be placed.

4.4 **Order that juvenile be sent to a reform school**

Section 290 (1)(d) provides that an accused under the age of 18 years can be sent to a reform school as defined in the Child Care Act, 1983 (Act 74 of 1983) instead of punishment being imposed on him.

Section 290 (3) similarly provides for the same order in respect of a juvenile who is of or over the age of 18 years but under the age of 21 years.

Section 290 (2) provides that, in the case of a person under the age of 18 years, the order that he or she be sent to a reformatory can be made in addition to a sentence of a fine.

Referral to a reformatory is a drastic measure and ought to be carefully considered. A factual basis for such a decision is necessary before the court make this order. Various guidelines have been set out over the years by the supreme court; see *Langeveldt* 1957 (4) SA 365 (C); *Rabotapi* 1959 (3) SA 837 (T); *Zungu* 1962 (1) SA 377 (N); *Motsoaledi* 1962 (4) SA 703 (O); *Mvulha* 1965 (4) SA 113 (O); *Maasdorp* 1967 (2) SA 93 (G); *Mkwanazi* 1969 (2) SA 246 (N); *Bosman* 1969 (4) SA 217 (NC); *H* 1978 (4) SA 385 (E); *T* 1987 (2) SA 508 (C); *Willemse* 1988 (3) SA 836 (A); *L* 1993(1) SACR 386 (C); *M* 1998(1) SACR 384 (C) and *Z and others* 1999(2) SACR 427 (E).

The following ought to be borne in mind:

- (i) The reform school is no place for first offenders as he or she will come into

contact with negative elements. He or she may be deterred by other forms of punishment so alternatives should always be investigated and considered.

- (ii) Sending a juvenile to a reform school is a desirable alternative to direct imprisonment where the conviction arose from a serious offence.
- (iii) It does not serve any real purpose sending someone who has already spent a lengthy period in prison to a reform school.
- (iv) The age of the accused must be established and a finding in this regard must be made on record.
- (v) The report of a probation officer is almost indispensable. (See the College note on "*The role of the probation officer in regard to sentencing*" in this regard).

In *H* 1978 (4) SA 385 (E) the court set out the following as the procedure that ought to be followed prior to sentencing a juvenile, particularly where a probation officer is called:

- (a) Ensure the presence of the accused's parents or, at least, the mother of the accused;
- (b) ascertain from the probation officer:
 - (i) what services and supervision can be afforded the accused within his or her present environment to provide him or her with the necessary guidance and discipline he or she may need, and to boost his or her confidence;
 - (ii) to what extent such services and supervision are likely to prove beneficial to the accused;
 - (iii) what facilities exist at a reformatory for catering for the particular needs of the accused;
 - (iv) what negative influences are present at a reformatory, and what role such negative influences are likely to play in the case of the accused;
- (c) allow the parent or parents of the accused the opportunity of questioning the probation officer in relation to his or her investigations and recommendations;
- (d) afford the parent or parents of the accused the opportunity of giving or leading evidence relative to the recommendations of the probation officer;
- (e) call for such further evidence or investigation as the court considers necessary to

arrive at a proper sentence;

- (f) consider the appropriate punishment to be imposed in the light of all the circumstances, bearing in mind that to send an accused to a reform school is a drastic measure which should not lightly be embarked upon, and is generally undesirable in the case of a first offender.

Although section 73 (3) (assistance to an accused) and section 74 (parent or guardian to attend) of the Criminal Procedure Act, 1977 refer to accused under the age of 18 years, no statutory provision provides for an accused 18 years of age but not yet 21 years to be assisted. It is however desirable that the parents of such accused attend the proceedings and have a say in the decision.

In *Yibe* 1964 (3) SA 502 (E) Wynne J quoted with approval the following passage from Gardiner & Lansdown *South African Law and Procedure* 6th edition Vol. 1 at 711:

"The main purpose of a reformatory is to secure the reformation of a juvenile delinquent and the correction of his maladjustment to society, ends which might be hopeless of attainment if he was associated with criminals. Before, however, a sentence of reformatory detention is passed, care should be taken to see that the accused is a fit subject for a reformatory. His offence may have been really a boyish prank, his character may be good and there may be no need for a reformation, he may be in charge of parents or fit persons to look after him, and he may as a general rule be amenable to their control. In such circumstances it would be wrong and might cause incalculable harm to the boy, to send him to a reformatory. A whipping or even a caution might be quite sufficient to deter him from committing an offence again. It must be borne in mind that any sentence of detention in a reformatory is bound to be drastic. It removes a boy from his relatives for at least two years, and whatever care be taken in regard to the classification, it is bound to bring him into contact with some boys of vicious tendencies. Before deciding therefore upon detention in a reformatory, the Court should take into consideration the nature and circumstances of the offence, and if sufficient information is not disclosed by the evidence in the case, should make enquiries as to the accused's character, his home life, and should determine whether his case is one for which reformatory treatment is needed."

4.5 Suggested wording of order

"In terms of section 290 (1)(d) [or 290 (3), as the case may be] of Act 51 of 1977 it is ordered that the accused be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983).

For purposes of this order it is determined that the accused's date of birth is _____, [or, that he (or she) will attain the age of _____ years on _____]

It is further ordered that the accused be detained in _____ pending his [or her] removal to the designated reformatory."

The Afrikaans equivalent is as follows:

"Ingevolge artikel 290 (1)(d) [of 290(3), soos die geval mag wees] van Wet 51 van 1977 word dit gelas dat die beskuldigde na 'n verbeteringskool, soos omskryf in artikel 1 van die Kinderwet 1983, Wet 74 van 1983, verwys word.

Vir die doeleindes van hierdie bevel is dit bepaal dat die beskuldigde se geboortedatum is [of dat hy (of sy) die ouderdom van jaar sal bereik op].

Ingevolge artikel 290(4) van Wet 51 van 1977 word gelas dat die beskuldigde in 'n plek van bewaring (soos omskryf) aangehou word tot tyd en wyl aan hierdie bevel gevolg gegee kan word."

Bear in mind that the order is subject to review in the ordinary course, see section 302 (1)(a) of the Criminal Procedure Act, 1977 (Act 51 of 1977) and that the accused's rights in this regard also have to be explained to him or her and his or her parents.

5. GENERAL

In *Nkosi* 2000(2) SACR 94 (T) the court stressed the need for rehabilitation when it came to sentencing juveniles. The translated headnote reads:

“It will naturally not always be possible to give priority to rehabilitation as an aim of punishment or to care and control as social ideals. In the case of juveniles and young children however attempts must be made to achieve this. This means that in a case where the accused are in addition unrepresented and do not have the assistance of their guardians the court must be fully informed before sentence is imposed. This applies also in the case of a suspended sentence because it is possible that such a sentence will later have to be served. The information which the court requires for this purpose must not only be aimed at the usual aims of punishment but, where applicable, also at the structuring of a sentence which can give direction and assistance to a young life which C has gone off the rails. This information can best be gleaned by calling for a probation officer's report and by determining the circumstances of the children, including their exact ages. Although there are often practical problems standing in the way of achieving such a goal and in certain cases, as a result of human weakness, attempts at rehabilitation and support will be a waste of time, this does not mean however that it should not be D strived for and, as a point of departure, be properly investigated.”.

In *J* 2000(2) SACR 310 (C) the court reiterated the need for a pre-sentence report. The court found that an assessment record and a pre-sentence report prepared by probation or correctional officer are two different things and that, in the circumstances, it was insufficient for the magistrate to have relied on the former.

In *P* 2001(1) SACR 70 (C) the court remarked that the probation officer's report was an important tool in the hands of the Court as it provided the presiding officer with valuable information concerning the accused and his or her social environment to enable the court to understand the problems of the accused and to determine the most appropriate form of punishment.

In *Kwalase* 2000 (2) SACR 135 (C) the court reiterated the importance of a pre-sentence report and noted that in terms of the post-1994 constitutional and international legal dispensation in South Africa had also to be borne in mind by South African courts in the determination of appropriate sentences for youthful offenders. The court remarked that section 28(1)(g) of the Constitution Act 108 of 1996 provided that every child had the right 'not to be detained except as a measure of last resort' and then only for 'the shortest appropriate period of time', adding that South Africa had also ratified the United Nations Convention on the Rights of the Child (1989) and, by so doing, assumed an international legal obligation to put into effect in its domestic law provisions of this convention.

Various provisions in the convention underline the policy that children are should, as far as possible, be dealt with by the criminal justice system in a manner that takes into account their age and special needs. The approach to the treatment of juvenile offenders set out in s 28(1)(g) of the Constitution and in the articles of the Convention on the Rights of the Child were echoed in the Beijing Rules, rules 5 and 16 of which were particularly significant. In terms of rule 5(1), the aims of a juvenile justice system were to 'emphasise the well-being of the juvenile and ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence'. Rule 16 required that, in all cases except those involving minor offences, 'the background and circumstances in which the juvenile was living or the conditions under which the offence had been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority'.

The court concluded that the provisions of the South African Constitution governing the treatment of children in conflict with the penal law had to be interpreted having due regard to the provisions of the above-mentioned international instruments relating to juvenile justice. The judicial approach towards the sentencing of juvenile offenders therefore 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 and the needs of society, but which was also appropriate to the nature and interests of the juvenile offender. If at all possible, the court stated, the sentencing judicial officer had to structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community.

In *Peterson* 2001(1) SACR 16 (SCA) the court set out a court's duties in respect of

obtaining information regarding sentence. *In casu* no probation officers' reports were tendered because of the dangers involved in visiting the area where the accused lived. The SCA set aside the sentence imposed and ordered that such reports be obtained.

In *Nkosi* 2002(1) SACR 135 (W) the court, after examining the relevant constitutional provisions, laid down the following principles to be applied in guiding a court's discretion when deciding upon the suitable form of punishment for a child offender:

- “(i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.*
- (ii) Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.*
- (iii) Where imprisonment is considered appropriate it should be for the shortest possible period of time having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and interests of the child offender.*
- (iv) If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his/her family or community.*
- (v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.”.*

In *N* 2005(1) SACR 201 (CkH) the accused, a 16-year-old unrepresented youth, was found guilty of housebreaking with the intent to steal and theft. A probation officer's report was requested. According to the record the contents of the report were brought to the attention of the accused, who had no objection to it being handed in without the calling of the probation officer. The probation officer's report stated that, although the accused had previously been convicted, she was of opinion that his behaviour could be controlled if he were to be placed under correctional supervision. The accused was

sentenced to 18 months' imprisonment.

On review the High Court held that the role of the probation officer was to provide all available information which would assist the court in determining an appropriate sentence. It was therefore important, especially in circumstances where there was doubt as to whether the unrepresented accused and his guardian fully understood the consequences of not questioning the probation officer, to call the probation officer to testify.

See too, *M and another* 2005 (1) SACR 481 (E), where the court ruled that the magistrate erred in proceeding with the sentencing of the accused in the absence of a probation officer's report. The High Court held that the magistrate should have launched an enquiry into the reasons for the unacceptable delay in the compilation of the report and should have taken the matter further. It was found unacceptable, especially in the case of the accused, a 15-year-old offender, that he should have been sentenced to a term of imprisonment on the basis of the paltry evidence before the court as to his personal circumstances.

In *Kolobe* 2005 (1) SACR 203 (T) it was again emphasized that the presiding officer should play a far more proactive role when it came to sentencing, particularly of juvenile offenders. *In casu*, the nature of the community service which the accused could do was not investigated by the social worker who prepared the pre-sentence report. Her recommendation was more a reference to the concept of community service without trying to establish the content thereof. The information available to the Court was not enough to find that a satisfactory form of community service or other condition of suspension, which would not interfere with the accused's scholastic duties, could not be found. The court found that there was no effort by the social worker to investigate the nature, scope and practical feasibility of community service, taking into account the accused's scholastic duties, and set aside the imposed sentence and referred it back to the magistrate for reconsideration.

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RESOURCE GUIDE TO
A PROPER APPROACH TO JUVENILE OFFENDERS
IN THE REGIONAL COURTS

PART D

ALTERNATIVE SENTENCING



Alternative Sentencing Review

by

Ann Skelton

CSPRI Research Paper Series No 6, May 2004

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The Civil Society Prison Reform Initiative is a joint project of NICRO (National Institute for Crime Prevention and the Reintegration of Offenders) and the Community Law Centre (CLC) of the University of Western Cape.

The aim of CSPRI is to improve the human rights of prisoners through research-based lobbying and advocacy and collaborative efforts with civil society structures. The key areas that CSPRI examines are developing and strengthening the capacity of civil society and civilian institutions related to corrections; promoting improved prison governance; promoting the greater use of non-custodial sentencing as a mechanism for reducing overcrowding in prisons; and reducing the rate of recidivism through improved reintegration programmes. CSPRI supports these objectives by undertaking independent critical research; raising awareness of decision makers and the public; disseminating information and capacity building.

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Alternative Sentencing Review

by

Ann Skelton

1. Background

Four out of every 1000 South Africans are in prison¹. Given the competing priorities for spending in South Africa, money should be spent on the country's developmental needs such as education, health care, housing and job creation. If the government is to spend more money on dealing with crime, it should be in the areas of crime prevention and detection. Instead of warehousing offenders, there is a need to find ways to make them repay the community for their crimes through community service, restitution, and compensation.² In this endeavour, community-based alternatives to imprisonment move to centre stage. The Civil Society Prison Reform Initiative (CSPRI) views the promotion of alternative sentencing as a cornerstone of its approach to prison reform. Alternatives to prison sentences are important because they treat offenders as individuals and, in circumstances that are appropriate, offenders are given an opportunity to redress the wrongs they have committed by contributing to society. In most forms of alternative sentencing, this obviates the need to reintegrate them back into the community, as they will have remained there throughout. It also means that they are not exposed to the criminalising influences that abound within a prison environment.

2. The objective of the study

The purpose of this Alternative Sentencing Review is to contribute to the capacity of the CSPRI to further its goal of increasing access to non-custodial sentencing. This is achieved through an analysis of the strengths and weaknesses of the existing legal and structural framework for alternative sentencing and an examination of the impediments to the use of alternative sentences arising from the field research undertaken. The study culminates in a set of recommendations for addressing problems in the imposition of alternative sentences identified through the research, and how the potential for strengthening access to alternative sentences should be realised. The recommendations include general recommendations as well as specific suggestions for pilot projects to promote the use of non-custodial sentencing.

¹ Judicial Inspectorate of Prisons, **Annual Report** 2002/2003.

3. Research method used

This study adopted a qualitative approach with an aim to explore, compare, and describe. The study was rooted in legal research and analysis. Current law, law that has been passed but not yet implemented and case law were surveyed in order to establish a clear understanding of the legal framework in which alternative sentencing operates in South Africa. Legislative reform was not a focus of the study, as CSPRI commissioned the research on the assumption that the legislative framework for alternative sentencing was adequate. The study found this assumption to be well founded, and consequently no recommendations are made regarding law reform. Published and unpublished literature is reviewed in part 6 and is drawn upon and cited where relevant.

The study report is based primarily on field research, and focuses to a large degree on investigating the practical impediments to the use of non-custodial sentencing. For the field research, interviewees were purposively selected, and interviewed according to a semi-structured interview technique using questionnaires. The information obtained during this process was then thematically analysed. The key impediments to the use of alternative sentences are described, a number of findings are identified and recommendations made.

Interviews were held at national level with representatives of the Department of Correctional Services (Community Corrections) and the Department of Social Development (Probation Services). A representative of the Sexual Offences and Community Affairs Unit of the National Prosecuting Authority was interviewed, as were representatives of the South African Police Service (Social Crime Prevention). An interview was also held with representatives of Justice College, who are responsible for training magistrates and prosecutors in sentencing. From the non-governmental sector, representatives of the Restorative Justice Centre (RJC), the Centre for the Study of Violence and Reconciliation (CSVR) and the National Institute for Crime Prevention and Reintegration of Offenders (NICRO) were interviewed.

The following sites were purposively selected:

- Pietermaritzburg in KwaZulu-Natal,
- Polokwane in Limpopo,
- Benoni in Gauteng, and
- Ga-Rankuwa in North West Province.

At the sites, interviews were carried out with magistrates, prosecutors, probation officers, correctional services officials and non-governmental organisations providing access to community-based sentencing options.

² S Pete "The Good, the Bad and the Warehoused" vol. 13, 2000 **South African Journal on Criminal Justice** 1.

Margaret Roper undertook the site visits and interviews, as well as the majority of interviews with role players at national level. Ann Skelton undertook some of the interviews at national level and authored this report.

4. Terminology and alternative sentencing

There are various terms used in relation to alternative sentencing that people tend to employ inter-changeably, but which do not dovetail precisely with one another. The term “alternative sentencing” is used interchangeably with “non-custodial sentencing”, yet both concepts refer to the same thing – sentences that are alternatives to imprisonment and that avoid the use of custody. (However, some alternative sentences are not completely non-custodial – such as the version of correctional supervision that involves a period of imprisonment).

The Department of Correctional Services uses the term “community corrections” to cover all forms of sentences served in the community, including offenders who have been sentenced by a court to correctional supervision, prisoners placed out of prison under correctional supervision, and persons who have been placed under the supervision of a correctional official. This is broad enough to also include the release of an awaiting-trial prisoner albeit under the supervision of a correctional official before trial as an alternative to pre-trial custody³. The meaning of the term “community corrections” therefore is broader than that of the term “alternative sentencing”, hence these terms cannot be used interchangeably.

The term used in the UN Standard Minimum Rules for Non-custodial Measures⁴ is “non-custodial measures”, which refers to measures used at the pre-trial, trial, sentencing and reintegration stages.

This report is confined to the issue of alternative sentencing, meaning sentences of which the whole or greater part is served in the community.

5. Legal framework for alternative sentencing

5.1 International rules

³ In terms of section 62(f) of the Criminal Procedure Act no 51 of 1977, and section 71 of the same Act in relation to children.

⁴ Also known as the Tokyo Rules, the UN General Assembly adopted these rules by resolution 45/110, December 1990.

The UN Standard Minimum Rules for Non-Custodial Measures provide the international legal framework. This instrument provides a set of basic principles that promote the use of non-custodial measures, as well as minimum safeguards for persons subject to alternatives to imprisonment. The Rules are intended to promote greater community involvement in the management of criminal justice, and to promote a sense of responsibility towards society amongst offenders. The rules stress the importance of having social inquiry reports (such as a probation officer's pre-sentence report) to inform sentencing. The rules provide a list of non-custodial dispositions that can be used⁵. The instrument also provides guidance in implementing non-custodial measures, particularly supervision, duration and conditions.

5.2 South African statutory law

Numerous South African writers have remarked that the domestic law framework for alternative sentencing is more than adequate⁶. The Criminal Procedure Act no. 51 of 1977 and the Correctional Services Act 8 of 1959 currently provide the legal context for alternative sentencing⁷, in particular Chapter VIII dealing with Correctional Supervision. Sections 84 to 84E deal with matters such as the treatment of probationers, non-compliance with conditions, the appointment of sufficient numbers of suitable persons to act as temporary or voluntary correctional officials, and the mechanics of the application of correctional supervision. These provisions are due to be repealed and replaced with the chapter on Community Corrections in the Correctional Services Act 111 of 1998⁸.

Recent amendments to the Probation Services Act 116 of 1991 provide new opportunities for probation officers and assistant probation officers to become involved in alternative sentencing. The Child Justice Bill also provides for extended opportunities for family- and community-based sentencing.

⁵ The measures included in the Rules are: (a) verbal sanctions, such as admonition, reprimand and warning; (b) conditional discharge, (c) status penalties, (d) economic sanctions, (e) confiscation or expropriation, (f) restitution or compensation to victim, (g) suspended or deferred sentence, (h) probation and judicial supervision, (i) community service order, (j) referral to attendance centre, (k) house arrest, (l) any other mode of non-institutional treatment and (m) some combination of the listed measures.

⁶ J Sloth Nielsen "Overview of Policy Developments in South African Correctional Services 1994 – 2002". CSPRI Research Paper Series, No. 1 July 2003. L Muntingh "Alternative sentencing in South Africa – an update. NICRO, April 2002.

⁷ The operation of legislation is supported by regulations drafted by the Commissioner of Correctional Services, Chapter VII: Correctional Supervision, which provides detailed guidelines on matters such as pre-sentence reports, procedures after sentencing, setting of conditions in terms of sections 84 of the Correctional Service Act of 1959, control over probationers, the use of volunteers, violation of conditions, complaints and requests, health services, patrimonial loss in terms of section 89B of the Correctional Services Act of 1959, delegated powers and the holding of forums to promote correctional supervision.

⁸ Although the Act was passed some time ago, it was not yet in full operation by February 2004.

According to the Criminal Procedure Act no. 51 of 1977 the following non- custodial sentences are available:

- S 276(1)(h) (read with S 276A) provides for a sentence to correctional supervision not exceeding 3 years. This sentence is served entirely at home, with no period of imprisonment. A report is required from a correctional official or a probation officer prior to sentence being passed, and the sentence is available in respect of any offence.
- S 276(1)(i) (read with S 276A) provides for a sentence of imprisonment not exceeding 5 years, from which such a person may be placed under correctional supervision at the discretion of the Commissioner⁹. A report is required from a correctional official or a probation officer prior to sentence being passed, and the sentence is available in respect of any offence.
- S 276A(3)(a) provides that in the case of a prisoner who has been sentenced to less than 5 years¹⁰ (or his or her release date is less than 5 years in the future) the Commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court a quo in order to reconsider said sentence. The court has an option to convert the sentence into correctional supervision on the conditions it may deem fit.
- S 287(4)(a) deals with the situation of where a person has been sentenced to pay a fine with an alternative of imprisonment not exceeding 5 years, and such person is unable to pay the fine. Upon the start of the imprisonment or any time thereafter the Commissioner has the discretion (unless the court directed otherwise at the time of passing sentence) to convert the sentence into correctional supervision, as if the sentence had been imprisonment as referred to in s 276(1)(i), or to make an application to the court a quo following the procedure set out in section 276A(3).
- S 287 (4) (b) deals with a situation where a person has been sentenced to pay a fine with an alternative of imprisonment not exceeding 5 years, and such person is unable to pay the fine. The matter may be referred back to the court a quo to set a new sentence of correctional supervision.
- S 290 provides for a person under the age of 18 years to be placed under the supervision of a probation officer or a correctional official for a period of two years.

⁹ "The Commissioner" refers to the Commissioner of Correctional Services, who may use this discretion after a person has served at least one sixth of his or her sentence.

- S 296 allows the court, in addition to or in lieu of any sentence (but not in addition to a sentence of imprisonment), to order that the person be detained in a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992¹¹.

- S 297 makes provision for the conditional or unconditional postponement or suspension of sentence, and caution or reprimand. These apply to all offences other than those for which a minimum sentence is prescribed. The conditions that are included are
 - compensation
 - the rendering of a specific benefit or service in lieu of compensation
 - the performance without remuneration and outside the prison of some service for the benefit of the community ¹²
 - submission to correctional supervision
 - submission to instruction or treatment
 - submission to the supervision or control of a probation officer
 - compulsory attendance or residence at some specified centre for a specified purpose
 - good conduct
 - any other matter.

If the sentence is postponed with conditions, a court must be satisfied that the conditions have been observed, in which case the court shall discharge him or her without the passing of a sentence.

If the sentenced is postponed unconditionally and the person has not been called to appear before the court again during the postponement period, such person is deemed to have been discharged¹³.

- Section 300 provides that where a person is convicted of an offence that has caused damage to or loss of property (including money) belonging to some other person, the court may, upon the application of the victim or of the prosecutor acting on the instructions of the victim, forthwith award the injured person compensation for such damage or loss.

¹⁰ This is applicable once the prisoner has served one quarter of his or her sentence.

¹¹ This may be seen as an atypical alternative sentence for the reason that it is in itself custodial, but it is included here because it is clearly intended as an alternative to imprisonment. In addition, because the section does not set any minimum time limits, it can be used flexibly, for a short custodial period and in combination with follow-up outpatient programmes.

¹² This is referred to generally as "community service". The Criminal Procedure Act limits this kind of sentence to persons who are 15 years and older, and prescribes a minimum number of 50 hours.

¹³ The discharge in relation to both conditional and unconditional sentences still leaves the person with a criminal record.

To fully understand how these provisions work once the offender is serving his or her sentence in the community, they have to be read in conjunction with sections 84 to 84E of the Correctional Services Act no. 8 of 1959. Briefly summarised, these sections deal with the following matters:

- Section 84 provides that every probationer shall be subject to such monitoring, community service, house arrest, placement in employment, performance of service, payment of compensation to the victim and rehabilitation or other programmes as determined by the Court or the Commissioner, and to any other form of treatment, control or supervision, including supervision by a probation officer after consultation with the social welfare authority concerned.
- Section 84B says that if the Commissioner is satisfied that a probationer has failed to comply with any condition he may issue a warrant for the arrest of such probationer, which serves as authorisation for detention of such probationer in a prison until he is lawfully discharged or released, placed under correctional supervision again, or referred back to court with 72 hours for trial or to put into operation any suspended or postponed sentence.
- 84E lists the kind of programmes that the probationer can be involved with, these are
 - (a) observation or supervision
 - (b) community service
 - (c) compensation to victims
 - (d) reintegration back into the community
 - (e) rehabilitation
 - (f) collection of funds, including the costs arising from the execution of the sentence
 - (g) any other matter considered necessary or expedient.

These sections clearly visualise a partnership between the Departments of Correctional Services and Social Development as well as with non-governmental organisations, as mention is made several times to working together with “any social welfare authority or other body”.

These legal provisions for alternative sentencing are quite revolutionary. As described above, the Criminal Procedure Act provides a set of sentencing tools that is both broad and flexible. Firstly, section 276A (3)(a) and section 287(4)(b) allow the judicial officer to change his or her own sentence, which is contrary to the general rule of sentencing. Usually judicial officers cannot substitute or change their own sentences; the Criminal Procedure Act only allows errors to be corrected immediately after they have been made¹⁴. Section 276A also allows a judicial officer to change the sentence of another judicial officer, because it gives this power to “a court, whether constituted differently or not.”

¹⁴ Section 298 of the Criminal Procedure Act.

Secondly, whilst sections 276A (3)(a) and section 287(4)(b) give discretion to the Commissioner of Correctional Services to put matters back on the court roll, section 287(4)(a) goes even further, giving the Commissioner the discretion, in relation to cases where a person is in prison because of failure to pay a fine, to make a decision to convert the sentence to one of correctional supervision without taking the matter back to court.

The other remarkable point about these provisions is that they are not linked to categories of offences. The way the provisions are phrased indicates that they are available to be used in relation to any offence, and that doing so is at the discretion of the judicial officer and, in some instances, the Commissioner. The Commissioner's discretion is limited by the length of imprisonment, the amount of time already served in prison or the proximity of the release date. Providing such wide-ranging powers of discretion was obviously envisioned by those who drafted the series of amendments that introduced most of the alternative sentencing options, between 1987 and 1993. This discretion has been affected, of course, by the introduction of minimum sentences brought about by the Criminal Law Amendment Act no. 105 of 1997, which amended section 51 of the Criminal Procedure Act. Section 51(1) requires that the High Court sentence a person who has been convicted of an offence referred to in Part 1 of Schedule 2, to imprisonment for life. Section 51(2) prescribes other minimum sentences, which are linked to offences and to the offender being either a first, second or subsequent offender. Subsection 51(3)(a) allows a court to impose a lesser sentence if it is satisfied that substantial and compelling circumstances exist that justify this¹⁵.

The extent to which minimum sentences affect alternative sentencing is not easy to determine – but it is clear that prior to their introduction there was a wider discretion for judicial officers to use alternative sentences. Alternative sentences can no longer be used in relation to the offences listed in the schedules to the Act, unless the court finds that there are substantial and compelling reasons to depart from the prescribed minimum sentence, in which case the full range of sentencing options are then available, including alternative sentences. Even where courts depart from the minimum sentence, they often use a shorter period of imprisonment rather than an alternative sentence, and it is submitted that the introduction of minimum sentences has “cranked up” the length of prison sentences generally.

5.3 New Developments in Statutory Law

The Correctional Services Act no 111 of 1998¹⁶ leaves the provisions of the Criminal Procedure Act mentioned above in place, but Chapter VI, entitled “Community Corrections”,

¹⁵ Minimum sentences do not apply to children under the age of 16 years, and the courts have generally found reasons not to apply the minimum sentences for 16 and 17 year olds. However, they have generally substituted fairly lengthy prison terms, given the seriousness of the offences in the reported cases. See further *S v Mofokeng* and another 1999 (1) SACR 502 (W), *S v Nkosi* 2002 (1) SACR 135 (W).

¹⁶ See note 9 regarding status of the Act.

brings together in one chapter all the provisions relating to community corrections (including pre-trial community measures such as those provided for in sections 62(f) and 70 of the Criminal Procedure Act). The chapter deals with the following matters, amongst others:

- Objectives of community corrections
- Conditions relating to community corrections
- Serving of community corrections
- Supervision and supervision committees
- Supervision committees
- Non-compliance and change of conditions
- Complaints and requests
- House detention, community service, compensation
- Programmes
- Monitoring

The general approach is much the same as that followed under the current law. The chapter seeks to organise the procedures into a coherent structure. It also incorporates numerous aspects that are currently included in the regulatory framework (the Community Corrections Service Orders Chapter VII). This will lead to more certainty, but also to less flexibility.

The Probation Services Act 116 of 1991 was recently amended¹⁷. The Act defines and empowers probation officers, and a new category of worker, the assistant probation officer has now been included. The Act provides that the Minister of Social Development may introduce programmes aimed at the performance of community service, the observation, treatment and supervision of persons, the compensation of victims of crime and restorative justice as part of appropriate sentencing. The Act introduces the concept of home-based supervision for a child who has been diverted or sentenced (or as an alternative to pre-trial detention).

The Child Justice Bill¹⁸ will introduce a range of diversion options – both individual plans to be supervised within the home and community, as well as structured programmes with a set, organised content. These options are also available as sentencing options. In addition, the Bill introduces restorative justice processes such as family group conferencing and victim offender mediation, which can be used before the trial, during the trial and at the stage of sentencing. The most recent version of the Child Justice Bill does not remove the operation of the provisions in the Criminal Procedure Act relating to alternative sentences, it simply adds more options. The development of programmes for diversion and sentencing in the Child Justice sector is, ultimately, likely to have a positive effect on the possibilities for adults in the criminal justice system as well.

¹⁷ Probation Services Amendment Act 35 of 2002.

5.4 South African Case Law

A significant case regarding community service as a sentence was *S v Abrahams*¹⁹ in 1990. Conradie J held that community service is not a sanction that can only be applied as a sentence for less serious offences. Whilst this type of sentence is not suitable for all offenders, there are some offenders who have committed serious offences but who would nevertheless be suitable for community service. As far as they are concerned, the Judge was of the view that the courts should use imprisonment as a means of punishment only if the offence is so serious that non-custodial punishment would discredit the criminal justice system with the community.

*S v Mogara*²⁰ in that year determined that a sentence of community service need not be restricted to first-time offenders. In the following year, *S v Russouw*²¹ found that although community service is “a valuable weapon in the fight against crime” it was not normally appropriate for offenders suffering from some or other form of personality disturbance or for recidivists. On the facts of the case the court found that community service was not suitable for a second offender who had been convicted of theft and fraud relating to a large amount of public money.

The debate about when a sentence of community service is appropriate continued into the early 1990s. In the case of *S v De Bruin*²², the court declined to sentence an offender with three relevant previous convictions to community service. In *S v Miners*²³, the court declined the use of community service on the grounds that the offender was aggressive and uncooperative. In *S v Van Vuuren*, however, the court applied correctional supervision for a female first offender that had stolen over R73 000 from her employer, a bank).

In 1994, *S v Sikhunyana*²⁴ established that a proper investigation into all relevant issues was essential in determining whether community service was appropriate and that although there were administrative and practical difficulties associated with carrying out community service, courts should not allow themselves to be unduly hamstrung by such difficulties. Also in 1994, the Constitutional Court struck down the sentence of corporal punishment in *S v Williams*²⁵, in which Justice Langa reviewed the range of sentencing options available on the statute books. He found that there was a wide legal framework for creative alternative sentences, and

¹⁸ Bill no. 49 of 2002 was introduced into Parliament in August 2002, but at the time of writing had not yet been finalised.

¹⁹ *S v Abrahams* 1990 (1) SACR 172 (C).

²⁰ *S v Mogara* 1990 (2) SACR 9 (T).

²¹ *S v Russouw* 1991 (1) SACR 561 (C).

²² *S v De Bruin* 1991 (2) SACR 158 (W).

²³ *S v Miners* 1992 (2) SACR 359 (c).

²⁴ *S v Sikhunyana* 1994 (1) SACR 206 (Tk).

²⁵ *S v Williams* 1995 BCLR 861 (CC).

commented that correctional supervision constituted ‘a milestone in humanising the criminal justice system’.

*S v Leeb*²⁶ was the first case in which the power of a court to alter a sentence to correctional supervision in terms of section 276A(3) was brought before the court. Unfortunately, the case came before the court via the clumsy route of a written motivation submitted by a major in the Department of Correctional Services who, the court decided, was in effect asking for “theoretical” advice about the kind of cases that should be referred to the courts, but who used as his vehicle a matter of murder involving a considerable amount of violence and cruelty, for which the offender had been sentenced to 8 years’ imprisonment, and which sentence had been set prior to the new legislation coming into operation in that area²⁷. The Court had no hesitation in saying that it was not a case in which it would have considered correctional supervision, even if correctional supervision had been available as a sentence at that time. The *Leeb* case turned out to have set an unfortunate precedent because it discouraged the Commissioner (and his delegates) from referring cases in terms of section 276A(3) back to court²⁸.

However, the commissioner’s confidence regarding their discretion to convert sentences handed down in terms of section 276 (1) (i) was given a boost by the Appellate Division in *S v Stanley*²⁹. In this case, it was found that courts must take care when handing down a sentence in terms of section 276 (1) (i) not to set any measures that would interfere with the discretion of the Commissioner of Correctional Services – and in particular that the total period of the sentence must not exceed 5 years.

The discretion of the Commissioner of Correctional Services was also under the spotlight in *Roman v Williams NO*³⁰, which tested the constitutionality of the Commissioner’s power to re-imprison a probationer in terms of section 84B(1) of the Correctional Services Act no. 8 of 1959. The court found that this power was in line with the Constitution, because it was necessary to preserve the “crucial penal character” of correctional supervision, and to maintain public respect for this sentence as an effective punishment and deterrent.

Other cases that are relevant in relation to correctional supervision were also brought before the courts during the 1990s. For example, *S v Omar*³¹ went into some detail about the kind of information that should be provided by the correctional official or probation officer to assist the court in determining appropriate conditions. The judgement also remarked on the importance

²⁶ *S v Leeb* 1993 (1) SACR 315 (T).

²⁷ The introduction of Correctional Supervision was phased in by district over a period of time.

²⁸ The Acting Head of Community Corrections still cites *Leeb* as being the reason why the majority of conversions to correctional supervision do not go via the court, with the commissioners preferring to use those sections that give them discretion. (Interview with Mr E Kriek, February 2004.)

²⁹ *S v Stanley* 1996 (2) SACR 570 (A).

³⁰ *Roman v Williams NO* 1997 (2) SACR 754 (C).

of retaining flexibility in the operation of correctional supervision, and that a programme should be able to be relaxed or ameliorated at the discretion of the Commissioner. The Appellate Division matter of *S v R*³² decided that correctional supervision was an appropriate sentence for a man convicted of a sexual offence involving a 15-year-old boy, despite the man having a relevant previous conviction. This is because a sentence in terms of section 276 (1) (h) allowed him to obtain the necessary therapeutic support he needed. The court found that the sentence was particularly suitable, because the offender was young (32 years old), had strong family ties and a stable work pattern. His criminality had its origins in personality defects that responded favourably to therapy, whereas imprisonment would have had a negative impact on these defects and would interrupt the therapy. A similar approach was evident in another judgement handed down by the Appellate Division later in the same year. *S v Williams*³³ established that sentencing involving rehabilitative treatment such as treatment of drug addiction would have much greater success if the offender remained in the community, where he could continue being employed and living with his family. Thus the matter was referred to correctional supervision for conversion after due compliance with the provisions of Section 276 A (1)(a).

The principles relating to the sentencing of a child offender were expounded on in *S v Kwalase*³⁴. The court found that the magistrate had erred in not asking for a pre-sentence report. Referring to the UN Convention on the Rights of the Child, the Beijing Rules for the Administration of Juvenile Justice and the Constitution, the Court found that imprisonment in terms of section 276 (1)(i) would have been appropriate.

In two recent decisions by the Supreme Court of Appeal (SCA), correctional supervision in terms of section 276(1)(i) was found to be appropriate in cases involving fairly serious offences. In *S v Mc Millan*³⁵, the court set aside a ten-year term of imprisonment and replaced it with a sentence of imprisonment for five years in terms of section 276(1)(i) of the Criminal Procedure Act. The court based its decision on the principle of consistency. It found that although the offence was considered serious (indecent assault on three young boys), the sentence was too severe in comparison to sentences handed down in equivalent cases that had been confirmed on appeal. Days later, the SCA handed down another positive judgement relating to correctional supervision in terms of section 276(1)(i). In *S v Sithole*³⁶, the offender (who had three previous convictions for drunken driving) was convicted of two counts of drunken driving. The trial court had imposed three years' direct imprisonment on both counts. This sentence was overturned by the Provincial Division and substituted with a sentence of four years' imprisonment under section 276(1)(i) of the Criminal Procedure Act. In a further

³¹ *S v Omar* 1993 (2) SACR 5 (C).

³² *S v R* 1993 (1) SACR 209 (A)

³³ *S v Williams* 1993 (2) SACR 674 (A)

³⁴ *S v Kwalase* 2000 (2) SACR 135 (C).

³⁵ *S v Mc Millan* 2003 (1) SACR 27 (SCA).

³⁶ *S v Sithole* 2003 (1) SACR 326 (SCA).

appeal, the SCA upheld the sentence of correctional supervision, saying that although the seriousness of the offence coupled with the previous convictions did indicate that the offender could not avoid imprisonment altogether, the original sentences (at least when cumulatively applied) had been too severe, and that the discretion that the court *a quo* had used in imposing a fresh sentence could not be faulted.

Although section 300 of the Criminal Procedure Act, which allows for compensation to victims, did not elicit much interest from people interviewed at the sites, a fair amount of case law on this section has emerged³⁷. Most of these have attempted to identify the types of cases in which compensation should be considered, as well as what factors should be taken into account when such compensatory orders are being considered.

6. Overview of Current Practice

6.1 African context

Alternative sentencing has gained ground in other countries in Africa in the last decade. For example, a Community Service Scheme was started in Zimbabwe in 1992, because of a project carried out by the Zimbabwean government and an international organisation called Penal Reform International (PRI). Statistics show that by December 2000, in Zimbabwe, 41 000 offenders had been sentenced to a community service order instead of to prison³⁸. On the strength of this success, PRI obtained further funding from the European Union to help with the implementation of Community Service in Kenya, Malawi, Uganda, Zambia, Burkina Faso, Congo-Brazzaville, the Central African Republic, and Mozambique. The approach that was followed entailed holding a national seminar first, followed by setting up a National Committee on Community Service – comprising government officials, professionals, non-governmental organisations and community-based organisations.

A conference entitled “International Conference on Community Service Orders in Africa” organised by PRI, in collaboration with the Zimbabwe National Committee on Community Service, took place in Kadoma in 1997. The conference produced the Kadoma Declaration and Plan of Action on Community Service, together with a Code of Conduct for National Committees on Community Service.

6.2 South African situation

³⁷ S v Baadjie en 'n Ander 1991 (1) SACR 677 (0), S v Stanley 1996 (2) SACR 570 (A), S v Medell 1997 (1) SACR 682 (C), S v Lombaard 1997 (1) SACR 80 (T), S v Brand 1998 (1) SACR 296 (C).

³⁸ “PRI support to Community Service programmes in Africa” <http://www.penalreform.org>.

The Criminal Procedure Act of 1977 provided an opportunity for community service orders through the conditions relating to the postponed and suspended sentences that it included³⁹. Limited use was made of these provisions because the procedures for the operation of the provisions were not very clear. There was an amendment to the Act in 1986⁴⁰, which provided guidelines for the operation of community service. The Cape Town branch of NICRO initiated community service orders in 1980.

In 1997, the Human Sciences Research Council published a study of community service orders, written by Lukas Muntingh⁴¹. The study presented the findings arising from an evaluation of 1 447 cases supervised by NICRO in Cape Town between 1983 and 1994. Based on the number of referrals, the study concluded that people handing down sentences were sceptical about non-custodial sentences. They did not truly regard this type of sentence as an alternative to incarceration. It must be noted, however, that the kind of cases for which incarceration would commonly be used in all likelihood would not have resulted in a custodial sentence being handed down. Therefore, the author concluded "community service remains a peripheral option that is used for exceptional cases rather than the run-of-the-mill cases that fill the court roll every day"⁴².

At the time of the aforementioned study by Muntingh, NICRO had initiated community service orders, and members of its staff had supervised offenders. Muntingh observed that correctional supervision (which had been phased in over a period following its introduction in 1991) also involved community service, and he recommended that the situation "should be re-assessed with the aim of transferring the supervision function to a government department such as the Department of Correctional Services, which is better geared to the supervision of offenders." In fact, the department of Social Development (at that time named the Department of Welfare and Population Development) took over the responsibility of community service orders from NICRO. This was included in the White Paper for Welfare and Population Development⁴³, as a responsibility of Probation Services.

Muntingh⁴⁴ outlines the procedure for community service orders as follows:

- after conviction the court may request that the offender be assessed for community service and the case be postponed to a later date;
- a probation officer and a NICRO social worker then conduct an assessment interview with the offender, and his or her parents (in the case of a child);

³⁹ Sections 297(1)(a) and (b)(i)(cc).

⁴⁰ Criminal Procedure Amendment Act no 33 of 1986.

⁴¹ L Muntingh "Community Service Orders: An evaluation of cases supervised in Cape Town between 1983 and 1994" HSRC, Cape Town, 1997.

⁴² Ibid, at 49.

⁴³ The White Paper for Welfare and Population Development was published in 1996.

⁴⁴ L Muntingh "Alternative sentencing in South Africa – an update" NICRO, April 2002.

- the assessment interview will focus on the stability of the offender's life style, personal circumstances, etc. and his or her willingness to do community service;
- the probation officer will make a recommendation to the court regarding the offender's suitability for community service and the suggested duration and placement;
- if the court agrees with the recommendation it will specify the total number of hours, the number of hours and total duration, minimum number of hours per month and the details of the placement, usually all as conditions to the suspended or postponed sentence;
- a probation officer will then monitor the community server's performance (prior to the mid 1990s a NICRO social worker performed the task of monitoring);
- should the server fail to comply with the conditions of sentence, he or she is entitled to one written warning after which the court is informed of the situation and the postponed or suspended sentence may be put into operation.

Johann Smit describes the term "community corrections" as being a collective term for all forms of sentences served in the community⁴⁵. He includes the following categories in this definition: offenders who have been sentenced by a court to correctional supervision, prisoners placed out of prison under correctional supervision, persons placed under the supervision of a correctional official and persons who have been placed out of prison on parole. Smit places emphasis on the usefulness of community corrections in dealing with the problem of overcrowding. He states that community corrections play an important role in reducing the prison population, and quotes statistics that show that the ratio of those in community corrections to those in prison (based on daily averages) rose slightly from 2000 to 2001⁴⁶. Statistics provided under 6.3 below show that the figures for correctional supervision are coming down. Lukas Muntingh⁴⁷ provides a different perspective on this issue. He says: "The expectation that non-custodial sentencing will decrease prison numbers is perhaps unrealistic in the light of overall sentencing trends. There is a definite shift towards longer prison terms and less prisoners are being admitted for terms of less than six months." Graphs provided hereunder at 6.3 bear out the trend towards longer prison terms. Of course, reducing the prison population is just one benefit to the system that might be expected. However, Muntingh also pours a measure of cold water on the other commonly cited benefit – cost-reduction. On this matter he comments as follows: "The minor reductions in the prison population through non-custodial sanctions will, however, have virtually no impact on the maintenance costs of prisons. For example, if each prison had 10 percent fewer prisoners, this would have very little if any effect on the amount of personnel needed, programme costs or on the daily management of the prison." His comments are based on the reality that South

⁴⁵ J Smit "Community Corrections as an alternative to imprisonment in South Africa" Paper presented to the Annual Central Eastern Southern Correctional Heads of Africa Conference, Belle Mare, Mauritius, 3-8 August 2003.

⁴⁶ Smit provides figures from DCS indicating that there were 169 559 prisoners (including unsentenced prisoners), and 69 814 persons in the community corrections system (including pre-trial release, correctional supervision and parole) and that in the previous year the figures had been 166 334 (in prison) and 62 746 (under community corrections).

African prisons are currently very over-crowded, and therefore staff to prisoner ratios are unreasonably stretched. Therefore, the overcrowding problem tends to undo the cost reduction argument.

There are still good reasons for promoting alternative sentencing, however. Muntingh identifies the issue of appropriateness. In some cases, imprisonment is not appropriate, and alternatives must be found. In addition, reintegration into the community proves to be a major challenge, and if offenders remain in the community, this difficulty is obviated. The actual harm or damage done by imprisonment is thus avoided⁴⁸.

In his description of the practice of Community Corrections in South Africa, Smit⁴⁹ records that in order to be considered for a sentence or conversion of sentence to correctional supervision the offender must pose a low risk to the community, have a fixed, verifiable address and have means of support or be financially independent. At the pre-sentence stage, a monitoring official will visit the home where the offender intends to reside during the sentence, and this together with other information will be included in the report to court. He goes on to explain that a supervision committee made up of a correctional supervision official, a monitoring official and a vocational official will collaborate to constantly evaluate and monitor a probationer. In addition, this committee can make recommendations for setting or altering conditions, which the Head of Community Corrections can act upon.

When probationers violate a condition, action can be taken in the form of a verbal, written or final warning. The Commissioner also has the power to arrest and detain the probationer in a prison for 72 hours. Smit identifies absconding as a major challenge. Over the past five years, 12 660 probationers absconded, of which 9 080 (72 percent) have been traced. Inadequate supervision is obviously a factor in the number of prisoners who abscond, and Smit provides some insight into the difficulties by providing staffing figures from 2003, which show that the Department of Correctional Services employs a total of 33 285 personnel members, whilst the total number of staff stationed at community correctional offices nationwide is 561⁵⁰. Put differently, only 2 percent of the staff work directly with probationers and parolees at community correction offices. The ratio of probationers and parolees to the number of staff directly involved with them is approximately 67:1, whereas the ratio of staff members working with prisoners (unsentenced and sentenced) is approximately 5:1. Of course, the cost-effectiveness arguments in favour of community-based sentencing rests on the fact that you need fewer staff, but the differences between these ratios indicate a lack of human resources support for community corrections.

⁴⁷ L Muntingh "Alternative sentencing in South Africa – an update" NICRO, April 2002.

⁴⁸ Zvekic calls this avoiding "prisonisation" important because it promotes rehabilitation and reintegration and because it is more humane. See further U Zvekic "International Trends in non-custodial sanctions" in *Promoting Probation Internationally*, Publication no. 85, UNICRI, Rome, 1997 at 36.

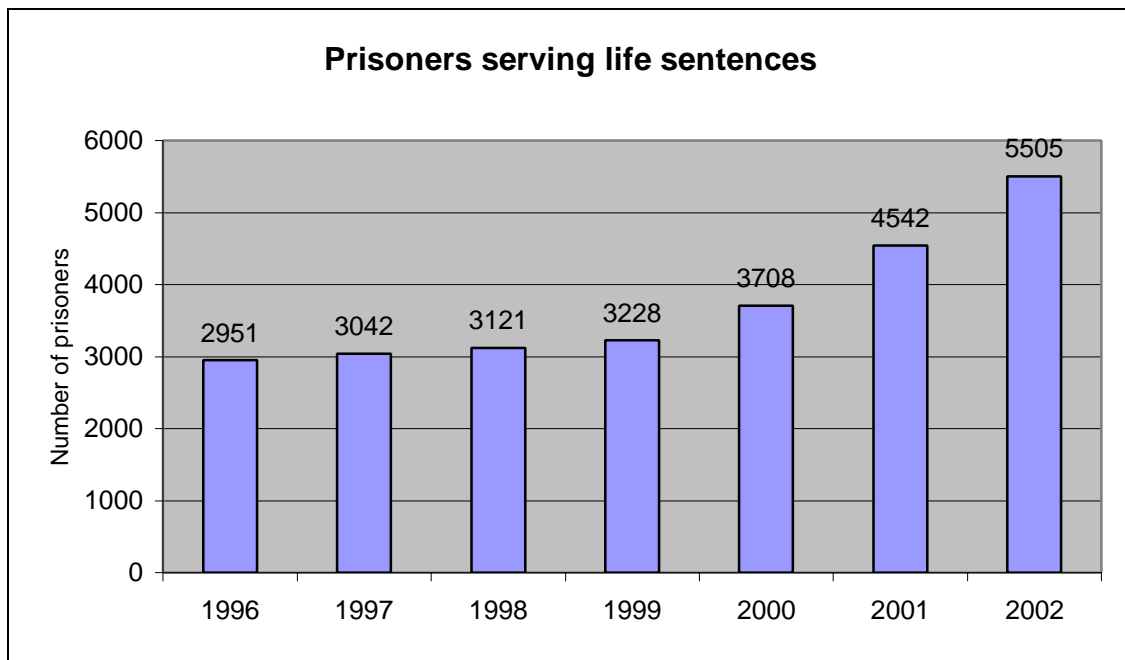
⁴⁹ J Smit 2003 see note 19 above.

⁵⁰ Smit cites Groenewald, Directorate of Human Resources, as his source for this information

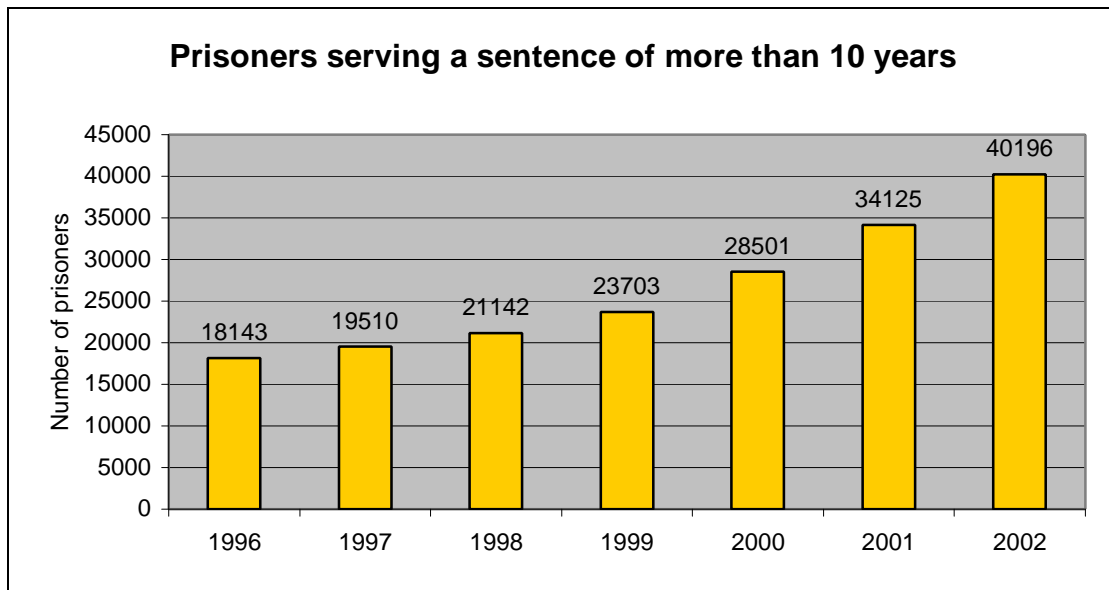
6.3 Statistics

6.3.1 Increase in long prison sentences

According to the Inspecting Judge of Prisons, the numbers of persons sentenced to long periods of imprisonment is rising. This is graphically demonstrated in the Annual Report of the Inspecting Judge of Prisons 2002/2003. The two graphs set out below are reproduced from the Annual Report⁵¹.



⁵¹ Graph 1 appears on page of 29 of the Annual Report, and Graph 2 on page 30.

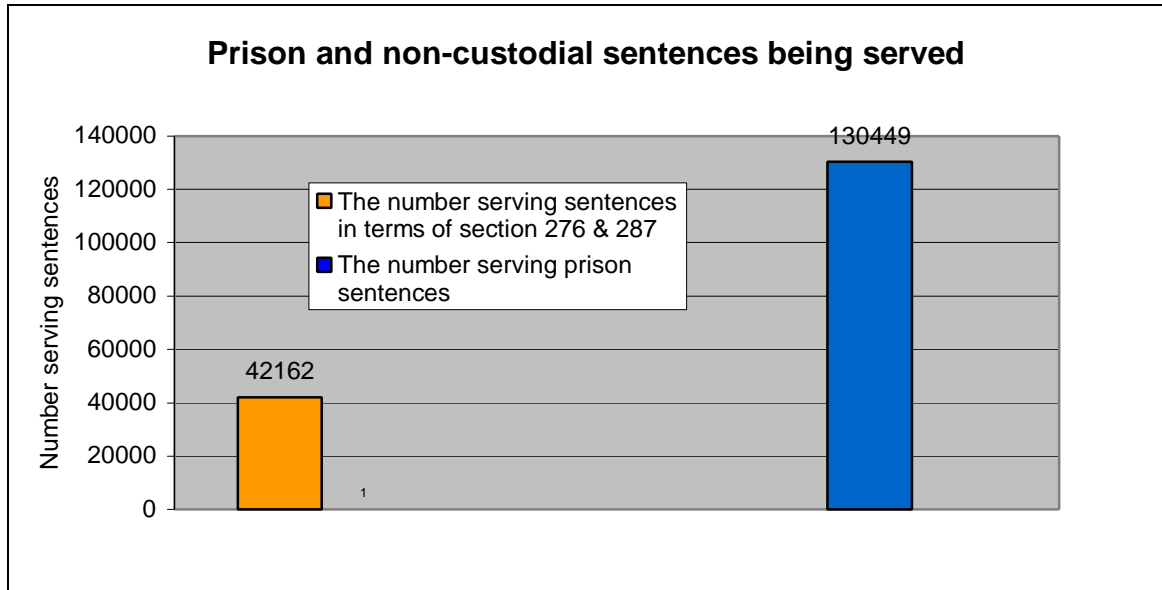


The graphs above demonstrate the effect of the minimum sentencing laws on prison numbers, and as Muntingh has observed⁵², this discounts the argument that alternative sentences are likely to contribute significantly to reducing the number of people in prison in the years to come. Muntingh also pointed out that although short-term prisoners (serving sentences of 6 months or less) make up nearly half of the annual admissions to prison, they represent only 5 percent of the daily average number of prisoners serving sentences. Prisoners serving short sentences obviously are prime candidates for alternative sentences, and although targeting them will reduce the number of admissions, it is unlikely to have much of an impact on the daily average number of people in prison.

6.3.2 Comparison of numbers serving sentences

In graph 3, below, the number of probationers serving sentences of correctional supervision in the community is compared with the number of prisoners serving sentences inside prison. The two figures were gathered on different dates, two months apart, but these dates are close enough for the purpose of an estimated comparison.

⁵² See note 42, above.



6.3.2 Correctional supervision statistics 2000, 2001, 2002

RSA	Section 276(1) (h) Admitted	Section 276(1) (i) Converted	Section 276 A (3) Converted	Section 287 (4) (a) Converted to 276 (1) I	Section 287 (4) (b) Converted to 276 A (3)
PC EASTERN CAPE	903	264	115	4871	64
PC FREE STATE	828	368	17	1911	6
PC GAUTENG	785	564	28	763	16
PC KWAZULU-NATAL	1055	472	43	2551	15
PC LIMPOPO	504	127	4	3575	1
PC MPUMALANGA	379	93	9	1811	5
PC NORTH WEST	843	153	7	1474	19
PC NORTHERN CAPE	297	200	4	1624	2
PC WESTERN CAPE	1630	1404	14	4557	2
All RSA	7224	3645	241	23137	130

RSA	Section 276(1) (h) Admitted	Section 276(1) (i) Converted	Section 276 A (3) Converted	Section 287 (4) (a) Converted to 276 (1) I	Section 287 (4) (b) Converted to 276 A (3)
PC EASTERN CAPE	1025	272	2	5006	1
PC FREE STATE	758	365	4	1804	5
PC GAUTENG	907	584	39	805	10
PC KWAZULU-NATAL	1078	479	45	2570	8
PC LIMPOPO	448	116	2	2867	9
PC MPUMALANGA	558	123	7	1994	8
PC NORTH WEST	864	187	15	1479	5

PC NORTHERN CAPE	313	195	4	1481	7
PC WESTERN CAPE	1504	1293	13	4186	8
All RSA	7455	3614	131	22192	61

RSA	Section 276(1) (h) Admitted	Section 276(1) (i) Converted	Section 276 A (3) Converted	Section 287 (4) (a) Converted to 276 (1) I	Section 287 (4) (b) Converted to 276 A (3)
PC EASTERN CAPE	1008	344	2	5405	12
PC FREE STATE	879	420	4	1852	6
PC GAUTENG	952	694	51	1247	7
PC KWAZULU-NATAL	1159	472	26	3083	4
PC LIMPOPO	393	226	4	2889	6
PC MPUMALANGA	595	116	7	1665	3
PC NORTH WEST	984	224	20	1316	3
PC NORTHERN CAPE	404	228	5	1157	3
PC WESTERN CAPE	1414	1361	9	3957	4
All RSA	7788	4085	128	22571	48

The figures provided by the Department of Correctional Services set out in the tables below give a useful overview of the different referral mechanisms applicable to Correctional Supervision. It is striking that by far the majority of people serving sentences to correctional supervision are not sentenced to that option by the courts. Section 287(4)(a) is a conversion at the discretion of the Commissioner, which is used in cases where a person has been sentenced to imprisonment not exceeding 5 years with the option of a fine. The conversion may be done at any time after sentencing unless the court directs otherwise. Obviously, people with the option of a fine do not end up in prison unless they are too poor to pay the fine. The fact that the Commissioner (and his delegates) is managing to convert so many of these cases in a year is a tribute to their efforts, but raises serious questions about sentencing officers in the courts who are setting prison terms with the option of a fine without ascertaining whether the sentenced person can pay the fine or not. The time and money being spent on housing prisoners for a period of time, and on the administration brought about by these conversions could be saved if prisoners were sentenced to correctional supervision in the first place. The other trend that these tables reveal is the fact that the numbers in each category dropped steadily over the years 2000 to 2002 – every year fewer people were being sentenced to, or having their sentences converted to, correctional supervision. The only exception was 2002, when more conversions were made in terms of section 287 (4)(a) than in 2001. This aside, the numbers dropped over the three-year period in question. This is a worrying trend.

6.4 Benefits of Alternative Sentencing according to those interviewed

The National Department of Correctional Services states⁵³ that, in contrast to imprisonment, alternative sentencing has the following advantages:

The probationer:

- Stays within the community and is exposed to the normal influences of the community;
- Is not exposed to the negative influences of hardened criminals;
- Is able to care for and accept responsibility for himself and his own family, and
- Keeps his job and still contributes to the economy.

According to representatives of the National Department of Social Development who were interviewed, alternative sentencing promotes family preservation. It aims to break cycles of crime and violence by not bringing low-risk offenders into contact with high-risk offenders. It also benefits the family financially and promotes moral reintegration.

The site interviews provided a wide range of benefits of alternative sentencing that are listed here:

- ?? Addresses causal factors of criminal involvement
- ?? Family bonds and other interests such as sport can continue to be positive influencing factors
- ?? Victim is given chance for compensation or restoration
- ?? If offender is working, he or she continues to pay tax so we all gain
- ?? Can treat drug and alcohol problems
- ?? Avoids “contamination” by others in prison.
- ?? Reduces stigma
- ?? Can build on offender’s potential
- ?? Creates an opportunity for offender to change his or her behaviour
- ?? Allows offender to demonstrate remorse and make reparation
- ?? Improves relationships in the community
- ?? It is about real justice between victim and offender
- ?? Increasing respect through apologies and explanation of why offence was committed and how people are feeling
- ?? Can integrate tribal/traditional approaches

Certain benefits of the system were identified. The use of alternative sentencing would “contribute to building a healthier country.” Those who believed that alternative sentencing

⁵³ “Correctional Supervision” see <http://www.dcs.OffenderManagement/CorrectionalSupervision.htm>

could be linked to plea-bargaining observed that if this could be done it would reduce the number of trials.

6.5 Description of the current practice of alternative sentencing as provided during site interviews.

6.4.1 Benoni

The representative of the Department of Correctional Services (Benoni) reported that the majority of community corrections sentences were brought about by the Commissioner using the discretion afforded him by sections 276 (1)(i) and 287(4)(a). These parolees or probationers made up the majority of clients. If the conditions of the sentence are breached, a written warning is issued. The procedures that are to be followed are clear. If the conditions relating to a sentence handed down in terms of section 276(1)(h) are breached, a written warning is given. The fourth time that the probationer breaches the conditions he or she may be detained for 72 hours, whereafter the supervision committee sits to consider if the person is "fit for the sentence". The probationer is then either released or taken to court for another sentence to be imposed⁵⁴, and if it is found that he or she is not fit or able to fulfil the conditions of the sentence, the Commissioner can revoke the sentence.

The Benoni district, which covers a large area, has 12 staff members who carry out monitoring of people serving alternative sentences. They share a caseload of about 900 between them. The district also has administrative staff to support the monitoring, as well as social workers (two posts were recently advertised).

In terms of options for placing people in community service, the Benoni district makes use of about 20 – 30 institutions in the area, such as schools, police stations, and the Daveyton Association for the Disabled. The institution is evaluated before it is selected. The ability of each institution to manage community service participants⁵⁵ is monitored continuously. Community support for the schemes appears to be growing.

The Department of Correctional Services (hereafter referred to as DCS) is concerned because the number of these sentences has declined over the past few years. The representative who was interviewed suggested that there were fewer referrals because role-players in the justice system did not trust the community corrections system. This may be

⁵⁴ As provided for in section 84B of the Correctional Services Act no. 8 of 1959.

⁵⁵ There is some concern about the suitability of some of the placement options. Police stations, for example, are not considered ideal. This problem is not confined to Benoni. However, it is an issue that needs to be addressed as a matter of national policy.

because community corrections got off to a bad start in 1991 because there were no guidelines, which resulted in about 800 absconders, and the statistics relating to these absconders were broadcast throughout the system. However, since 1997 there have been stricter guidelines and less absconders (on average no more than four in a month). The new system, which is computerised and used nationally, facilitates the tracking of offenders, even if they have used false names.

Set monitoring conditions are followed in the Benoni district. Contact is made with the probationer or parolee four times a month, but in some areas, where there are long distances to be covered contact may be less frequent than this. Satellite offices have been established at police stations, community halls, and other similar venues, where meetings are scheduled. This reduces expenses for both probationers and parolees, and is more efficient and effective for staff.

There used to be areas that were considered 'non-monitoring' areas, such as informal settlements, but now these areas have become accessible because community support has been achieved following discussions with community leaders.

The types of programmes offered by community corrections social workers in the Benoni district include:

- ?? Social life skills programme called "Free to go". This includes self-esteem, conflict handling, communication, assertiveness, and human relations.
- ?? Drug and alcohol programme
- ?? Responsibility
- ?? Reintegration – adjustment for longer-term prisoners
- ?? Restorative justice is understood and promoted as a concept, but it is recognised that training is needed before restorative justice programmes can be carried out.

These programmes are all delivered in the form of group therapy. The Community Corrections office in Benoni also provides individual counselling and works with the family where necessary, especially in the area of conflict management.

The staff also monitor community work, offer crime prevention awareness and undertake tours to prisons. Those working in the field observe that community-based sentences definitely work for some, especially for first-time offenders. Such probationers or parolees develop as people, carefully examine their thoughts and feelings, and become equipped with skills to address their problems.

The Benoni district DCS collaborates with some NGOs. For example, it refers probationers with marital problems to Famsa, and child offenders (mostly for diversion) to NICRO or

Khulisa. It also uses NICRO for training in business skills. These arrangements used to be very informal, but there are now guidelines and contracts with NGOs. The contracts include a requirement that the effectiveness of the programmes be evaluated.

6.4.2 Pietermaritzburg

A Magistrate of the district court in Pietermaritzburg stated that the court is guided by *S v R*⁵⁶, which provides guidelines for when correctional supervision is appropriate. According to the Magistrate, the courts generally have an open mind, and prefer not to send people to prison if possible, but they feel restricted by problems of infrastructure. Correctional supervision is considered a good option and the court in which this particular Magistrate serves has only had two cases brought back to court in the last four years. Therefore, it appears that these sentence options are working quite well, despite a lack of staff to monitor the programmes properly. It is important to stress the importance of accountability and ensure that the community does understand that this is not a soft option.

The procedures used by the DCS include the use of satellite police stations for reporting and telephoning. This helps to reduce the transport costs of both the department and the parolee or probation officer. A "tracing unit" linked to computer systems is used to help re-arrest absconders.

In the past, probation officers and social workers completed pre-sentence assessments and reports at court, but the DCS in Pietermaritzburg has advanced plans for this task to be taken over by DCS officials.

The conditions of sentence determine which programmes are used. The programmes can be geared to include life-skills, substance abuse, marital counselling and domestic violence.

Interviewees reported that there had been difficulty in getting community corrections off the ground in all areas in KwaZulu-Natal (KZN) due to violence in communities. This meant that officials could not enter certain communities because of it being unsafe to do so. Moreover, working in rural areas is difficult because some parts cannot be accessed by road without the use of a four-wheel drive vehicle, especially in the rainy season. Homes are difficult to find because there are not fixed addresses, streets are not named, and often landmarks that are provided along with directions tend to change, such as a sugarcane field that is merely an empty field after the harvest.

The issue of electronic monitoring was discussed with representatives of the DCS (Pietermaritzburg). It was reported that trials were held, but that nothing had ever come of

⁵⁶ *S v R* 1993 (1) SACR 209 (A).

them. It would appear that the project is now on hold, probably because of the initial cost, as well as the fact that the system is linked to telephones. Therefore, it can work only where there are telephones. In any event, the correctional officials were of the view that electronic monitoring could only be used for monitoring, not to replace programmes. If it were available, electronic monitoring would reduce the time it took to track, monitor a person, and would reduce transport costs. However, human contact is an important part of monitoring, and without it there may be less change in the person.

A probation officer in Pietermaritzburg expressed the view that alternative sentencing worked. This was because the rate of recidivism tended to decrease if a person was taken through an intensive process rather than having to face the challenges of life in prison, which often made an offender's behaviour worse. It is fair for the offenders, and also for the victims because they have more say and can benefit from compensation in some cases.

According to the prosecutor in Pietermaritzburg, various sentencing options are available that would fall within the ambit of "alternative sentencing". Community service is used, but the prosecutor stressed that there must be some link between the crime that was committed and the rehabilitation programme. Other options that are used include fines, postponed and suspended sentences (with or without conditions), as well as correctional supervision. Sometimes losses can be made good to the complainant through the offender paying him or her back, giving them something or performing a service for that person.

The diversion of child offenders is a major focus of the various role-players at the Pietermaritzburg court. There was a clear understanding amongst those interviewed of the difference between diversion (pre trial) and alternative sentencing (post plea or trial.) However, the magistrate pointed out that many of the ideas and programmes used in diversion can be adopted in adult court for less serious offences.

6.4.3 Ga-Rankuwa

The Ga-Rankuwa magistrates' court has a fledgling alternative sentencing project in partnership with a non-governmental organisation called the Odi Community Law Centre (OCLC). The Restorative Justice Centre (RJC) is involved and their staff were responsible for training the staff of OCLC. A referral system was developed next. One magistrate is very involved, and makes sure that many cases are referred to them. However, the option is not widely used by the other magistrates at the court. The magistrate interviewed believes that this may be due to the fact that alternative sentencing is seen as more work, and it forces one to think a step further. The current project targets both the pre-trial and pre-sentence stages. An opportunity is given for the matter to stay on the court roll whilst the parties are referred for a Victim-Offender Conference (VOC). If the conference fails, the trial continues. If the VOC is

successful in a pre-trial matter, the Prosecutor considers the withdrawal of the case. If the person has already been convicted, the VOC is used to inform sentence. The OCLC follows up and must report to the court on whether the sentence has been complied with.

Other practical issues were discussed relating to forms that need to be filled in by the Prosecutor. Details relating to how the VOC will be held are very important, and the venue and date need to be set and clearly communicated beforehand. Problems with transport (costs and distance) have made it difficult to bring people together. Although the Magistrate said that he would like to see accommodation being made available at the court for the VOCs, but there is no space available for this purpose at the court in Ga-Rankuwa. It would also be helpful to have a full-time co-ordinator to do the paperwork and help the Prosecutor. The magistrate noted that “it would be wonderful to have a 1-stop shop of services here”.

In rural areas such as Phyllis and the Jericho Court, there is an exceptionally high success rate for the completion of VOCs. These are tribal areas and there is enthusiasm for sorting problems in the community without going to court. This is a very natural process, with the people involved using quasi-traditional approaches; they have not been fully trained by the RJC. The magistrate interviewed observed that it is a very African way of resolving disputes. The Chiefs are not involved, but that could be achieved if there were more funding for the NGOs to set up networks with community leaders properly. The Magistrate said that he had noticed that restorative justice processes worked better with people who were from rural areas. A city dweller was less likely to forgive and was under no pressure from the community to resolve problems peacefully. Therefore, although the choice may be available, the majority of people living in urban areas would not opt for an alternative that focused on restoring relationships and putting matters right.

6.4.4 Polokwane

The staff at the Polokwane magistrates' court indicated that some options had been developed in their area for diversion and alternative sentencing. Diversion was being used on children, and it would appear that there had been considerable emphasis on creating diversion opportunities for child offenders in the past few years. Suspended or postponed sentences were sometimes used, with assistance from NICRO.

The magistrate mentioned that periodical imprisonment, as provided for in section 285, had been used in the past for offences such as drunken driving or failure to pay maintenance, but that its use had decreased in recent years. It proved effective for failure to pay maintenance,

and the magistrate was of the view that its use should be continued⁵⁷. However, it increased the burden on the DCS because extra people were required over weekends or in the evenings, when the prisons were often short-staffed. Therefore, although it has some merit, the magistrate is of the view that it does not help reduce the problem of overcrowding.

According to the magistrate, the tactic of postponing the passing of sentence is often used, and for all sorts of cases, but it is particularly useful for child offenders. Sentences of correctional supervision are used for less serious matters or for offenders who are considered less dangerous. Attorneys often request its use. However, the court must first wait for the report from the DCS. Consequently, concern was expressed that this caused matters to stay on the roll longer, which was something that the Department of Justice was trying to avoid.

In response to a specific question, the magistrate indicated that section 300, which allows for compensation to be made where the crime has resulted in damage, is not often used because of a lack of financial means of the offender. However, the thought was expressed that it could be used more, and if a proper investigation were carried out into the circumstances of the accused, this could be utilised as an appropriate sentence, or be linked to another sentence, such as a postponed sentence.

There is a procedure in place that dictates what happens if the conditions relating to the sentences are breached or not completed satisfactorily. The people who have been appointed to supervise the offender in the community give evaluation reports to the prosecutor or probation officer. If there is a problem, the probation officer writes a report and the matter returns to court. Depending on the reason for the failure, another alternative sentence is sometimes recommended.

6.4.5 NICRO (Braamfontein):

Although Johannesburg was not one of the sites targeted for this research, it was suggested that the work of NICRO (Braamfontein) should be considered, as it appeared to be working very well. An interview with Thys De Coning, a representative of NICRO (Braamfontein) revealed that that office makes many recommendations to court regarding alternative sentencing options. The following options are used:

- ✍ Correctional supervision: there is an excellent system in the district but there are too many cases and the DCS is understaffed, which affects the service they are able to render.

⁵⁷ Since this interview took place, the Supreme Court of Appeal has upheld a sentence of periodic imprisonment for a maintenance defaulter, in *Visser v S* SCA-361/03 as yet unreported. The judgement was handed down on 1 December 2003.

- ✍ Statutory supervision by Probation Officer: this is used more frequently. This option has been under-utilised in the past, but is relatively easy to organise and is effective.
- ✍ NICRO programmes are used, especially for young adults.
- ✍ Sentence to rehabilitation programmes or treatment centres.
- ✍ Suspended sentences with specific conditions such as attendance of programmes or community service. There are endless possibilities for conditions that can be recommended for an individual.

7. Structural framework for alternative sentencing: Problems and opportunities

7.1 Institutional constraints

7.1.1 The Legal Framework

There was broad agreement amongst the interviewees that the current law provided sufficient opportunities for alternative sentencing⁵⁸. The interviewees demonstrated a good knowledge of the different sections in the Act that allowed for alternative sentencing.

The Prosecutor in Pietermaritzburg pointed out that recent amendments to the Criminal Procedure Act that allowed for plea and sentencing agreements could increase the use of alternative sentences, because “plea bargaining” partly involves sentence options. This could be used as an opportunity to move away from the usual standard sentences and do something different.

The magistrate in Ga-Rankuwa made the point that although the law existed, magistrates were not generally encouraged to use it. Although they included the relevant legal provisions in their training, the Justice College did not really promote the use of alternative sentences from a philosophical or contextual perspective.

The representative from NICRO (Braamfontein), Thys de Coning, observed that the new law on minimum sentences was a major obstacle to the use of alternative sentences. However, he went on to say: “We have been quite successful by concentrating, in our recommendations to court, on the issue of substantial and compelling reasons why the court should not impose

⁵⁸ Act 62 of 2001 amended the Criminal Procedure Act by inserting a new section, s 105A to provide for the first time a legal framework for plea and sentencing agreements. The amendments allow the prosecutor to make an agreement with any accused who is legally represented. Postponed and suspended sentences can be part of the agreed-upon sentence, and the conditions can thus include community-based alternative measures. This procedure is referred to colloquially as “plea bargaining”.

the minimum sentence. In some cases, the law requires that first offenders be given a minimum sentence of 15 years; but we have managed to get the court to bring that down to 5 years. In the beginning it was hopeless as the court was very stereotypical in its approach to sentence, but we are now being successful. A lot of Probation Officers don't realise that this can be done. You have to make a specific recommendation, and state the section of the Act so that it is officially on record and make an official recommendation. If the magistrate does not support this and the case is appealed, the magistrate must have addressed all points raised."

According to Mike Batley of the Restorative Justice Centre, generally speaking, the legislation is adequate, and covers options for using Restorative Justice as part of a sentence, such as compensation, restitution, apology and community service. One grey area concerning the practice of Restorative Justice is what must happen if the process is not completed, for example failure to make the very last payment. The law is not clear about what must happen in such cases. The other issue is whether legal representatives are allowed by law to get involved with restorative justice processes such as victim-offender conferencing. Practice has shown that unless they are specially trained, legal representatives tend to hinder restorative justice processes.

7.1.2 The service delivery infrastructure

A problem identified by staff at the magistrates' court in Pietermaritzburg was that there was a lack of infrastructure and support services, and the mechanisms were not fully operational. This applied to both the DCS and the Department of Social Welfare. This lack of infrastructure leads the court to have reservations about using alternative sentences. For example, the Alcohol Safety School of the Department of Transport for people convicted of driving whilst under the influence of alcohol was not running because of a lack of social workers.

The court considered monitoring to be very important, because "community service is not a holiday". Therefore, the court wanted a guarantee that the person was being monitored and it required a report on this matter. The court lacked Probation Officers to supervise people who were sentenced to supervision or community-based sentences in terms of section 290 and 297 of the Criminal Procedure Act. Concerning children, it was observed that although the new amendments to the Probation Services Act demanded assessment of each child before the first court appearance, this was not being done because of a shortage of probation officers.

Several interviewees expressed the feeling that community service placements were rather unimaginative, with most of them being referrals to government departments. It was pointed out that opportunities for developing a type of community service that really benefited the

community in which the offender or the victim lived were being missed. This would also show the victims that the offenders were paying back their debt to the community.

Thys de Coning of NICRO (Braamfontein) pointed out that there is a major problem concerning Rehabilitation Centres (for treatment of substance abuse) because of the complex procedures and red tape involved in having a person admitted. In addition, there is no proper aftercare service especially for drug dependence. Without aftercare the rehabilitation process means nothing. In Johannesburg, NICRO (Braamfontein) is working on these problems and things have improved during the past five months.

Probation services is the function of the Department of Social Development, but now in the case of adult offenders these services are often outsourced to organisations such as NICRO (in Johannesburg) and the Restorative Justice Centre (in Pretoria) for adult probation services⁵⁹. These organisations are now promoting their professional services, and the number of cases being referred is rising.

The staff of the Polokwane magistrates' court placed emphasis on the lack of programmes to which offenders can be referred. There was also a feeling that there were insufficient numbers of staff to carry out effective monitoring of community-based sentences. The probation officer pointed out, however, that diversion programmes could also be used for sentencing purposes, but that this was not done regularly.

Mike Batley of the Restorative Justice Centre pointed out that the DCS could follow the lead taken by the Department of Social Development in outsourcing the running of programmes to appropriate non-governmental organisations. However, he observed that the DCS seemed nervous about funding non-governmental organisations to do such work. He speculated that this might be because they would feel there had been a loss of control on the part of the department. Alternatively, perhaps it was just simply that they did not have in place procedures or mechanisms to outsource programmes.

The lack of capacity to monitor and supervise probationers was also an issue that was raised as an aspect of lack of infrastructure. Amongst the staff at the Pietermaritzburg magistrates' court, there was an impression that the DCS did not have the capacity to monitor people serving correctional supervision sentences. On the issue of whether electronic monitoring could help, the magistrate in Pietermaritzburg said that he would rather retain the human element, and that taking away jobs from people was inconsistent with a crime-prevention approach.

⁵⁹ However, probation services for children are managed within the Department of Social Services in Gauteng.

The representatives of Justice College who were interviewed also highlighted this issue of monitoring and supervision. Supervision is very important, and where this fails, the magistrates lose faith in community-based sentence options. The Act assumes that the infrastructure is now in place throughout the country, but judging from what magistrates say this is not the case.

7.2 Attitudinal constraints

The magistrate at Ga-Rankuwa stressed the fact that one of the reasons why most magistrates are not very creative when it comes to sentencing is that they do not want to spend time calling for reports from probation officers or DCS officials. This is because they are under pressure to “perform” in terms of how many cases they finish in a month. A court is supposed to run about 70 cases per month. A prosecutor is supposed to have a high number of cases and achieve a conviction rate of 80 percent. It is in this demand for “productivity” that the key to encouraging alternative sentences lies. If alternative sentences were seen as a way of getting cases off the roll – for example, referring them to a restorative justice process to work out a sentence, - the court would achieve a high conviction rate. Consequently, it would be possible to allocate more time to the serious cases that would stay on the roll. However, it must also be understood that sometimes spending time to get the right result, even in a petty case, is worth the effort. At magistrates’ forums, there is such a focus on “quotas” and “performance indicators” that there is little if no exploration of new ideas about sentencing. It is positive that ARMSA⁶⁰ decided to hold a training workshop on restorative justice in 2003, but there is still a long way to go.

The Prosecutor in Pietermaritzburg echoed some of the comments above, pointing out that the focus in courts is on finalising cases and reducing backlogs. Quotas have been set, for example, two cases per day in district courts, and one case per day in a regional court. In the High Court, the average length of a case is three days. The prosecutor said that the negative attitude towards alternative sentencing was linked to the fact that it was less work to send someone to prison than to come up with an alternative sentence. Requiring probation officer reports, or giving a victim the opportunity to get involved with the solution deviated from the norm.

Clearly, however, there are problems beyond the pressure to perform, and in some cases attitudinal problems run deeper. One of the magistrates interviewed in Pietermaritzburg wanted to bring back corporal punishment. His comments indicated that he was stuck in the retributive mode. He thought that community-based sentencing was soft on offenders. Meting out physical pain seemed a better solution, in his opinion.

⁶⁰ Association of Regional Court Magistrates of South Africa.

Thys de Coning of NICRO (Braamfontein) also maintains that some magistrates who are “from the old school” reject alternative sentencing. He said: “We know which courts are not supportive but we continue to promote alternative sentences if that is what is in the best interest of the individual. We know that eventually in appeals, or review by judges, the magistrates will be required to give feedback where they must explain why they ignored our recommendation.”

There are attitudinal problems concerning not only alternative sentencing, but also the roles of probation officers, officials of the DCS and non-governmental organisations. The probation officer in Pietermaritzburg said that there was a “...perception that each time a probation officer enters the court they are only on the side of the accused.”

Officials of the DCS in Pietermaritzburg said that it had been a battle to get the Department of Justice on board in some areas because they were not aware of the alternative sentencing options and they had to be educated. They tend to see community corrections as a “rather soft option”. An observation was made that magistrates often “hide behind the independence of the judiciary”, saying that they do not have to follow recommendations, as sentencing is at their discretion solely.

The staff at the Polokwane magistrates’ court raised the issue of the community’s attitude. They said that the community would not be happy with community-based sentencing because they wanted to see justice done, therefore it was necessary to work with communities on alternative sentencing and restorative justice and get them to understand it. It was recognised that traditional approaches to justice were more restorative, and this could be used to positive effect in marketing efforts.

Amanda Dissel of the Centre for the Study of Violence and Reconciliation said that when members of the public were aware of options – best shown by examples - they were usually supportive. People think of worst case scenarios and harsh punishment because of a lack of awareness. She said that more criminal justice role players were becoming aware of the advantages of alternative sentencing and restorative justice options but in many instances they were entrenched in the adversarial role and it was difficult for them to change.

Mike Batley of the RJC observed that the mind set of legal people was either retributive or rehabilitative; they took time to come around to the idea of restorative justice which was a third option, where the offender was held accountable in a constructive way. If practitioners could learn that having to confront accountability and to make restitution could be very hard for the offender, they would realise that restorative justice was not a soft option.

The representative of the National Prosecuting Authority who was interviewed said that alternative sentencing requires a different kind of mind set from the current way of the thinking. The concept of “social context” is important and training in this is required to deal with prejudice, diversity and understanding people in their own context. Through social context training it is possible to bring about a new culture, and in this way prosecutors can play a role in assisting presiding officers in reaching a just sentence. The role of the prosecutor at sentencing stage is to provide sound arguments and give the opinion of the state and the victims, which is crucial to reaching a just sentence. The prosecutor can also lend meaningful assistance to probation officers by giving them space to testify in court regarding the content of their reports and sentence options.

The DCS representative in Benoni said that they had worked on getting the support of all the role-players in different departments by holding bi-monthly special monitoring actions to which magistrates, lawyers and social workers were “invited to come and see the type of work we are doing. We visit about 20 clients and everyone interacts. Then we come back to the office and hold a discussion”.

7.3 Practical problems

Thys de Coning of NICRO (Braamfontein) reports that there are avoidable delays in court cases where correctional supervision is to be used as a sentence. When the court wants to consider a sentence of correctional supervision, whether a probation officer is involved or not, the court must call upon a correctional supervision official for assessment and to see if they qualify according the Act. In Johannesburg, the courts sometimes request the probation officer’s report and neglect to call for a report by a correctional supervision official, which causes delays when the case must be postponed again so that the latter may present their report. This process has been streamlined in the Pretoria magistrates’ court, where there is good liaison between Probation Services and the DCS.

The DCS (Benoni) is concerned about the safety of officials carrying out community corrections work. They are vulnerable because using government vehicles makes them very visible. The community must know what role correctional officials play, but this must be weighed up against the privacy of the person sentenced. Practical solutions include switching over to private number plates and not using DCS stickers on car doors. Another solution is for the SAPS to be made aware of the work performed by community corrections officials in their areas so that they can be called on to help if necessary.

Other practical problems with monitoring were discussed. The issue of electronic monitoring came up in the interviews. The interviewees were not of the view that it would be a great

asset to the system. They felt it might work in less serious cases, and in urban areas, but only if it was also backed up with human contact from time to time.

On the issue of the breakdown of cases (breach of sentencing conditions), the probation officer in Pietermaritzburg noted that people under house arrest who did not attend programmes were more likely to breach conditions. Teenagers were more likely to breach conditions than adults were, perhaps because they grew bored, or because “the time seems too long for them”. The probation officer in Polokwane also observed that children tended to breach conditions more, as did substance abusers⁶¹.

Mike Batley said that if the sentence is linked to a restorative justice process, breakdown or breach of sentence occurs less frequently. He says that this is because of the way that the parties engage under the direction of a skilled facilitator. He or she must build trust between self and others so that each person feels understood. The facilitator must be involved but impartial. Then, if there is a breakdown in the process, the facilitator is able to contact the parties easily, and find out the reasons for the breach or breakdown and address the situation. This is because it is through the relationships with one another that the parties are committed to the process.

7.4 Offender qualification and disqualification

The interviews revealed a range of different opinions on which types of offender should qualify for alternative sentences. Rather than dividing them up according to sites, the opinions are listed below under two headings, namely “People/cases that qualify” and “People/cases that are disqualified”. They are reflected here as a “general approach” but interviewees indicated that it would also depend on surrounding circumstances. The interviewees tended to favour the idea of sentencing discretion, and indicated that they did not believe in a one-size-fits-all approach. Members of the DCS (Benoni) pointed out that according to the law all offenders qualify, but that it is a matter for the discretion of the court. The point was also made that if there were specialised programmes (such as programmes aimed at sexual offences, or substance abuse programmes for people addicted to scheduled drugs) to which people could be referred, even crimes that were usually excluded could also be brought into the alternative sentencing arena.

People/cases that qualify

⁶¹ The views expressed by those interviewed in Pietermaritzburg echo the findings by Muntingh in his study on community service orders (see note 41). Muntingh observed that “those with strong family and community ties and good support systems (such as married and employed persons) were more likely to complete a CSO. The highest completion rate was among older persons and those convicted of victimless crimes.”

- those who have responsibilities
- people who have a family
- adults committing drunken driving
- shoplifting
- theft
- housebreaking, depending on circumstances
- Culpable homicide (but there must be support from the community)
- Petty offences where the value of items stolen or damaged is less than R500

People/cases that are disqualified

- murder, rape, armed robbery
- people who have committed several crimes
- crimes that have elicited a big public outcry
- crimes where the victims are children
- crimes where there are aggravating circumstances
- people who live in areas where it is not possible to monitor sentences

These lists do not include all offences, and presumably offences falling into the “grey” area in between might well be considered suitable for alternative sentences depending on the particular circumstances. It is interesting to note that according to the interviews a previous conviction does not appear to “disqualify” a person – although a person who has committed “several crimes” would not be considered suitable⁶².

Over and above these general thoughts, the interviews raised other interesting matters. The magistrate in Pietermaritzburg said that he had experienced two cases where the accused had just wasted away during process because of HIV/AIDS. At the beginning of case, the magistrate would have sentenced them to prison but they were not fit for it by the end of the case. Consequently, he opted for correctional supervision instead, but could not impose community service because the offenders would not have been able to perform physical labour.

The link between guilty pleas, “plea bargaining” and alternative sentencing was made by a number of interviewees. It will be possible to bring a broader range of offenders, charged with various offences into the alternative sentencing system through plea and sentencing agreements. This has been happening informally for decades, but now there is a proper structure for it⁶³, which gives court officials more confidence to apply it. The formal system is very new and has not really taken off yet, but systems and norms will be established as the practice develops.

⁶² This accords with Muntingh’s finding in the study published in 1997 (see note 41) that a surprisingly high percentage (50.7%) of those sentenced to CSOs had a previous conviction.

The prosecutor at Ga-Rankuwa provided figures from a study undertaken in the Pretoria North Court during the 1990s, which indicated that in assault cases 80 percent of the victims knew the offender well. These kinds of cases would be well served by the use of alternative sentencing options, particularly restorative justice options, or correctional supervision with treatment or counselling aspects.

Mike Batley (RJC) pointed out that restorative conferencing had been used in many domestic violence cases in Pretoria where it had been able to break the history, cycle and breakdown in relationships.

7.5 Knowledge gaps

According to representatives of Justice College who were interviewed, the shift to using alternative sentencing requires a “mind set change”. The challenge lies in the fact that when training magistrates one deals with individuals who are trained as lawyers, not social scientists. The best method for bringing about this sort of change in mind set is social context training of the type used by Law, Race and Gender⁶⁴. In addition, however, magistrates will need to be confident about the legal principles, what the law allows, and what the perimeters are. It is unfortunate that not all law graduates do “penology” or “principles of sentencing” as part of the law degree. However, it is not far-fetched to promote its inclusion in basic training in future.

According to the representative of the NPA who was interviewed, court personnel do not know the details and fear that alternative sentencing programmes may not work. People with expert knowledge about the programmes must be available to attend court to testify. Such expert witnesses must be able to measure the impact of the programmes and they must be objective. In fact, it is better to use outsiders to undertake evaluations as the court personnel are more likely to afford more weight to such evaluations. The department currently provides prosecutors with no training in alternative sentencing, but the NPA would be open to such training being offered.

Personnel members of the Pietermaritzburg court observed that the level of experience of magistrates and prosecutors was falling and therefore that they were not experienced. Very few of them would have been working in the courts when these sentencing options first came into operation and there was presumably a lot of publicity about them. The DCS must start promoting these options afresh; it is a mistake to presume that magistrates and prosecutors know about them.

⁶³ See note 58.

The probation officer in Ga-Rankuwa said that training magistrates about areas of work outside the strict letter of the law really bears fruit. She gave the example of one magistrate she works with who went through Developmental Assessment Training (relating to children) and is now implementing it with success.

On the issue of gaps in the knowledge of probation officers, it was pointed out that a probation officer must be a qualified social worker. The problem is that probation work is not emphasised in the course of acquiring a social work degree, therefore additional training is needed for such a graduate to be an effective probation officer. Four universities now offer honours degrees in probation work and as from 2004, an undergraduate degree will be offered, as it is clear that more knowledge is required. Funding has been allocated to support a Professional Board for Probation Officers, which is being established. It should be operational by June 2004 as part of the Council for Social Work Professions.

The probation officer in Pietermaritzburg complained that probation officers in her area had never been educated about new laws: "we must teach ourselves on it and what the court expects from us". The issue of pre-sentence reports was raised: very often, the reports fail to meet court requirements. Probation officers feel that what they place before the courts is often not really taken seriously and at times it feels that their work is "just being used to satisfy procedure". Magistrates need to understand what goes into the interviewing and assessing that lie behind a report.

It is evident that that the DCS, and in particular community corrections officials, are knowledgeable about community corrections in relation to sections 276 and 287 of the Criminal Procedure Act, but there is a gap when it comes to sentences in terms of sections 290 and 297 of the Criminal Procedure Act. Moreover, no one seems to be driving this. The first community service orders were initiated and monitored by NICRO from 1980 to the mid-1990s. The Department of Social Development then took over as the lead department in this regard, but in recent years probation officers have concentrated a great deal on child offenders and diversion. This is very important work and much has been achieved in this area in the past decade. However, there are signs that the time invested in those successes may have been at the expense of alternative sentencing.

There was much said about the knowledge gaps in communities and how these impeded the use of community-based sentencing options. The representatives of the National Department of Social Development who were interviewed gave the example of Excelsior in Pinetown, where the department upgraded a place of safety to be used as a secure care facility for

⁶⁴ Law, Race and Gender is a training organisation, based at the University of Cape Town, which specialises in social context training for justice officials.

children awaiting trial. The community was very resistant and the municipality actually launched a legal action to prevent the Department from carrying out its plans, due to the fact that they had not been consulted. This case shows how community support can make or break a strategy. In the case of Excelsior, although the children were not able to move about freely in the community, but were locked up, the community still did not want them there. In the end, however, as some community members got more involved, there came gradual acceptance. One of the neighbourhood schools used the secure care facility's swimming pool for their learners, and allowed some of the children in the secure care facility to have access to their computer training facilities. This demonstrates that communities need to be well prepared for a new approach with offenders, but most importantly, they need to become actively involved in working with the offenders or service providers. In addition, if the community can see a benefit for themselves in any form, they will be that much more accepting.

Police, as do probation officers, work in a very close relationship with the community. The representatives from the SAPS who were interviewed said that the lack of understanding at community level about the fact that a person could be sentenced and continue to live within the community was very difficult for police to deal with. Communities may see this as a failure on the part of the police, because a matter was reported by the community to the police and, in their view, "nothing has been done" to the perpetrator. This in turn means that police officers have to understand alternative sentences well and be convinced of their usefulness, so that they can help communities to see them in a different way. If members of the police are confident about and comfortable with alternative sentencing, they will be able to convey this to the communities they work with. Police are very important role players when it comes to ensuring the involvement of victims in alternative sentencing, particularly in processes of restorative justice such as victim offender mediation or family group conferencing. Because they are the first line of support to victims of crime, it is vital that they understand concepts of restorative justice.

The interviewees also commented that there were gaps in the knowledge of traditional leaders. It was said that they must be involved, particularly in rural areas. They have a lot of knowledge about conflict resolution and communities trust their judgement in many things. However, they would need to be taught about the modern approach to criminal justice and have to identify how their traditional approaches might link up or fit in with the larger criminal justice framework. It was observed that traditional leaders in general were willing to get involved, but it was necessary to set up meetings in line with the correct protocol, and spend time talking to them about it. They said, for example, that in Pongola there were eight amakhosi who were invited to DCS meetings and events. They were already involved with the DCS in a community partnership strategy, but they could play an even larger role.

The majority of interviewees seemed to recognise the concept of Restorative Justice, although their knowledge of it was superficial in most cases. Descriptions of restorative justice given included the following statements:

- “it deals with feelings and emotions, responsibility and accountability”
- “It focuses on reconciliation, and causes us to see a change in offenders”
- “it involves remorse and forgiveness and includes elements of restitution, reform”
- “it can be used for compensation of victims”
- “community service is restorative because people see the offender working in the community to pay back for his crimes”

There was a great deal of interest in restorative justice, and interviewees expressed a desire to learn more about it so that they could incorporate it into their work. A probation officer interviewed in Ga-Rankuwa said that they were already holding family group conferences, victim-offender mediation for diversion, and that this could be used for sentencing as well. It was conceded that ongoing training was important, even for those already undertaking restorative justice work. It was something new, and everyone in South Africa was still learning about it.

A final area in which there appears to be a knowledge gap relates to the question of how the impact of alternative sentencing is measured. There is a lack of information, in particular longitudinal studies, which may provide indications about the impact of alternative sentences on recidivism. There has been minimal independent evaluation of alternative sentencing structures and programmes ⁶⁵.

7.6 Networking and relationship gaps

There is a lack of communication between DCS community correction officials and probation officers employed by the DSD. Both are called upon to carry out evaluations and assessment of offenders. The processes need to be streamlined so that there is no duplication of work.

This is linked to a broader complaint of a lack of inter-sector collaboration around sentencing. This would appear to be in breach of clause VII (3)(21) of the Community Corrections Service Orders, which require that the Community Corrections officer set up forums for the promotion of correctional supervision. These must meet at least once a quarter. It would appear that this is not done in all areas, although the same role players meet in many other forums such as the Integrated Justice System meetings or Child Justice Forums. However, sentencing is rarely discussed at those meetings, which tend to focus on pre-trial and trial matters, and on

⁶⁵ Muntingh (2000) points out that studies into recidivism undertaken to prove whether alternative sentences work better to prevent re-offending are fraught with difficulty because of differences in offences and offenders and also because it is virtually impossible to obtain baseline data for purposes of comparison.

over-crowding in prisons because of prisoners awaiting trial. Although alternative sentencing can also contribute to reducing prison numbers, for some reason it does not generally get on to the crowded agendas of these meetings.

The DCS officials interviewed indicated that the forums vary at local level. In Mpumalanga, there has been consistent involvement from social development and the forums have credibility and understand the positions of other criminal justice role players. However, there are many areas where the forums are just not operating at all.

Many of the issues regarding problems with community networking have been discussed above, but the fact that this work is time-consuming causes it to be put onto the back burner. Nevertheless, there were positive examples of community involvement. For example, in Pietermaritzburg community volunteers are very involved in finding placement opportunities for community service, and in Tugela Ferry the community has even assisted by transporting victims of crime to court by taxi free of charge.

On the issue of the government and non-governmental sectors working together, it was agreed that there was very good co-operation. The view was expressed by a magistrate in Pietermaritzburg that the state had become too reliant on NGOs. He gave the example that there used to be four State-employed probation officers at the magistrates' court, but because NICRO has started doing an increasing amount of the work, the staff has been reduced. Now there is only one state-employed probation officer at the court. It was agreed that there should not be reliance on donor funding because eventually this would disappear. The state departments had to take financial responsibility. This did not mean that they should not outsource some of their responsibilities, however.

On the issue of inter-sectoral work and operating as a team at court, some issues were identified. The representatives of Justice College raised the issue of the independence of the judiciary which, in their view, meant that magistrates could not be seen to be part of a team relating to sentencing because they had to remain independent. The other role players could form the team, which could give sufficient information on which to base a proper sentence, to inform the court of possibilities, and to give enough information for court to substantiate sentence. However, the approach of the DCS is that although magistrates cannot be part of a team deciding on a particular sentence, they should nevertheless be included in a team that aims to develop an overall approach to sentencing, to understanding what resources there are and how they can be used optimally. Therefore, the official requirement is that a meeting with criminal justice officials, including magistrates, is supposed to take place quarterly. Those areas that manage to do this, and those areas where magistrates are persuaded to attend and physically see what is done (the placements, the monitoring and the structured programmes) manage to get a higher number of referrals.

There seemed to be some deep problems with the way in which some probation officers felt they were seen and how the other role players, especially magistrates, treated their work. One poignant input by a probation officer captures the spirit of this difficulty in professional relationships:

“Some magistrates ask for our reports and our opinion for recommendations for sentence but they make us feel sad because they say whatever they want and look down on us: we are not trained to give sentences, only to give information and a clear insight into the offender. We would like to be respected...We don't want to go and talk to them because they make us embarrassed. Magistrates don't always give reasons or explain why they give a sentence so we don't develop relationships”.

8. Key Findings and recommendations

8.1 Findings and recommendations related to under-utilisation of alternative sentences

Finding: There is a sound statutory framework for alternative sentences, and numerous positive precedents in case law.

Finding: The statistics provided by the DCS indicate that the number of sentences of correctional supervision being handed down dropped in the years from 2000 to 2001 and again from 2001 to 2002.

Finding: The majority of cases (by a wide margin) arise from conversions by Commissioners in terms of section 287 (4) (a) from sentences of imprisonment of less than 5 years with the option of a fine.

Finding: There is insufficient information available regarding the use of community service orders, but their utilisation appears to be on the decline. The “value” of community service appears to be diminishing, and the placements (mostly in government departments) are unimaginative.

Finding: Magistrates are not utilising alternative sentencing options on a very wide scale, still tending to set short terms of imprisonment (which make up half of the intake of sentenced prisoners during the course of a year), sometimes with an option of a fine which subsequently remains unpaid. This reluctance to use alternatives appears to be due to a number of factors:

- Firstly, there are negative attitudes about alternative sentences, which are driven by a law enforcement oriented, tough-on-crime perspective. Several of the interviewees indicated that magistrates believe alternative sentences are a “soft option”.
- Secondly, a lack of knowledge about and lack of confidence in the operation of the sentences in practice seems to be a major reason for judicial officers not using alternative sentences. This is borne out by the fact that where they are involved in forums for the promotion of community corrections, and have been taken out to physically witness the work that is being done, they are more likely to apply alternative sentences. It must be borne in mind that many of the court personnel have been appointed or promoted in recent years and were not in their current positions when new sentencing options became available.
- Thirdly, a powerful disincentive for the use of alternative sentences arises from the pressure on magistrates to work according to certain “quotas” and “performance indicators”. This causes them to be reluctant to depart from the normal route, call for pre-sentence reports and keep matters on the roll for longer. Their pragmatic response to this situation is to sentence people to fines or short periods of imprisonment. A different set of indicators would need to be agreed upon with regard to the promotion of alternative sentencing.

Recommendations:

The Department of Correctional Services (Community Corrections should revitalise alternative sentencing through:

- The production of a booklet on community corrections, setting out the law, case examples, programmes, positive stories, relevant statistics and contact details of relevant persons.
- A Memorandum of Understanding, which should be entered into between the Department of Justice and Constitutional Development (specifically, Justice College), Department of Social Development (Probation Services) and Department of Correctional Services that magistrates will receive social context training in alternative sentencing.
- Representatives from the Departments of Correctional Services, Social Development (Probation Services) and Justice and Constitutional Development, together with content experts should collaborate on providing a suitable training programme.
- Revitalise, and where necessary establish the Forums for Promotion of Correctional Supervision as required in terms of Chapter VII (3) (22) of Correctional Supervision Rules. Also add prosecutors and attorneys from the legal aid board justice centres to the list of persons who should attend those forums.

8.2 Findings and recommendations relating to the lack of incentives in the criminal justice system for alternative sentencing

Finding: There are few incentives in the criminal justice system for the use of alternative sentences. Organising such a sentence takes time and creativity, whereas prosecutors and magistrates are being put under pressure to finalise cases as quickly as possible. This differs from pre-trial diversion, where the prosecutors see a systemic benefit to divert cases, because every case that is diverted means one more case off the roll.

Recommendation: Create an incentive for alternative sentencing in some cases by linking alternative sentencing to the newly established legal procedure for plea and sentencing agreements. This will obviate the need for a trial, which would be a good trade-off for the time spent on calling for and hearing a pre-sentence report.

Recommendation: The Legal Aid Board is running a project to promote the use of plea and sentencing agreements, as these agreements are only available to legally represented individuals. The Department of Correctional Services and the Department of Social Development (Probation Services) should meet with the Legal Aid Board to agree on ways to ensure that a full understanding of alternative sentencing is factored into the training and activities linked to the promotion of plea and sentencing agreements.

Recommendation: Plea and sentencing agreements always involve a legal representative. It is important therefore to inform members of the private legal profession about this initiative through a publication that they read, such as *De Rebus*.

Recommendation: The Department of Justice should reconsider performance indicators and quotas in view of the important need to promote alternative sentences. A more flexible approach would allow for the greater use of such sentences.

8.3 Findings and recommendations relating to the practical problems besetting alternative sentences

Finding: Numerous practical problems were identified

- Delays in pre-sentence reports
- A high number of people abscond
- Insufficient supervision of probationers
- Lack of programmes to which probationers may be referred

Finding: The number of staff members carrying out community corrections (562) is minimal compared to the number of staff members working in prisons (33 285).

Recommendations

- The Justice, Crime Prevention and Security Cluster should undertake a study to examine the implications of current sentencing trends and investigate different scenarios such as the increased use of alternative sentencing, and the introduction of the sentencing framework contained in the Sentencing Report of the South African Law Reform Commission.

- The Community Corrections Directorate needs to undertake a highly professional national planning exercise to determine properly the cost of and therefore the budget required for the service that they should be delivering. This should include all relevant costs: personnel, volunteers, programmes (including the costs of outsourcing) transport, etc. This plan and budget should then be entered into the Department of Correctional Services MTEF process so that the system can be supported with adequate resources. This plan and budget report should include a cost-benefit analysis (even though it is conceded that with current levels of overcrowding actual savings may be difficult to obtain).

8.4 Findings and recommendations relating to Probation Services

Finding: Probation Services is no longer taking a strong lead in promoting sentences in terms of section 290 and 297 of the Criminal Procedure Act. Consequently, that this type of sentencing option appears to be used less often. This is probably due to the fact that Probation Officers have become very involved in the development of diversion for child offenders over the past few years. This has caused them to shift their attention away from adult probation work as well as from sentencing work generally.

Finding: The positive aspect of the aforementioned finding is that the work that has gone into the development of diversion programmes is not lost to the field of alternative sentences. For example, a programme could be accessed either as a diversion option or as an alternative sentencing option. Therapeutic programmes, skills development programmes, mentoring programmes and community service all lend themselves ideally to sentencing, and could be accessed as the programme component of correctional supervision, or as a condition relating to a postponed or suspended prison sentence.

Finding: There is some confusion over roles and even duplication of work when a probation officer prepares a pre-sentence report and the court decides to consider correctional supervision, which requires the involvement of a correctional official.

Finding: Probation officers feel hamstrung by their lack of status in the criminal justice system. Making probation services more professional needs to be worked at continually. Probation officers expressed the need for more training in a number of areas to help them work better in the area of alternative sentencing.

Recommendation: The Department of Social Development (Probation Services) needs to enter into a memorandum of understanding with the Department of Correctional Services (Community Corrections), which should set out the exact roles and areas of work, plans for collaboration and streamlining. The memorandum should identify training needs and set out a plan for the training of probation officers and correctional officials. Because all the role players need to understand the perspective and professional responsibilities of the other role players involved, inter-sector training is recommended.

Recommendation: The up-dated training of Probation Officers in alternative sentencing and the writing and delivery of pre-sentence reports is urgent. The Department of Social Development must undertake or initiate this as a matter of urgency. It is imperative that pre-sentence reports placed before the courts be delivered promptly and be of such a standard that the courts treat probation officers in a professional manner.

Recommendation: The Department of Correctional Services (Community Corrections) should have discussions with the Department of Social Development (Probation Services) on the issue of funding arrangements for programme delivery. The Department of Social Development has considerable experience in the use of a number of different models for delivering programmes through public private partnerships, service level agreements, subsidies, and other methods. This learning should feed into the planning and budgeting process recommended in 8.3 above.

8.5 Findings and recommendations relating to the involvement of community members and traditional leaders

Finding: A number of those interviewed recognise that the opportunities provided by alternative sentencing resonate with traditional African approaches to conflict resolution, particularly in relation to restitution, compensation, and restoring harmony. Already there are some examples of traditional leaders becoming involved, but this is not widespread.

Finding: Community members do not understand alternative sentencing, but where they do become involved they are supportive. The police play an important role in community acceptance of alternative sentencing because they are the interface between the community and the criminal justice system. Currently, police do not have enough information about alternative sentencing and therefore probably do not project confidence in such options.

Finding: There is a broad, if superficial, understanding about restorative justice amongst those interviewed. There is enthusiasm for the idea of more incorporation of restorative justice concepts and practice into alternative sentencing work, and a call for training in this regard.

Recommendation: Restorative Justice components should be introduced into the content of alternative sentences. This can be achieved through more training in restorative justice and the development of new processes and programmes for alternative sentencing.

Recommendation: The national Department of Correctional Services (Community Corrections) and the national Department of Social Development (Probation Services) should initiate a meeting to discuss the involvement of traditional leaders with the National Council of Traditional Leaders. At local level, Traditional Leaders need to be drawn into the Forums to Promote Correctional Supervision.

Recommendation: Involvement of the South African Police Service in the Forums to Promote Correctional Supervision. The confidence of the police in alternative sentencing needs to be boosted through their involvement and through training.

8.6 Findings and recommendations relating to measuring the impact of alternative sentencing

Finding: There is a lack of information available about the impact of alternative sentences. There have been some evaluations, but they have tended to concentrate more on the successful “completion” of alternative sentences, which is different from measuring the longer-term impact such as changes in the offender, victim satisfaction and recidivism rates. These studies are difficult to undertake, they require the long-term commitment of resources, and finding comparable baseline data is difficult. For such studies to be credible there needs to be a degree of independence in the evaluation process.

Finding: There was a view amongst many of the interviewees that if such information were available it would contribute enormously to boosting the confidence of courts, police, and communities in alternative sentencing.

Recommendation: Notwithstanding the challenges, there is a need to develop a model to test the impact of research. Such work has been done in other countries in Africa, and it is recommended that technical assistance be requested from Penal Reform International (given their impressive work in alternative sentencing in Africa) and from UNICRI (Rome), which has a solid track-record in alternative sentencing work.

9. Recommendations for pilot projects

To promote the use of alternative sentencing, the Civil Society Prison Reform Initiative has proposed that pilot projects be undertaken in three centres. Of the sites visited for the purposes of this study, Polokwane, Pietermaritzburg, and Ga-Rankuwa, all present themselves as possible sites for pilot projects. They all have personnel who show sufficient enthusiasm about alternative sentencing to sustain a project, and yet all require development, which indicates that pilot projects at these sites would improve services whilst testing new methods and ideas. Alternative sentencing seems to be running smoothly in Benoni, which could be used as a learning site. The work being done by NICRO Braamfontein in adult sentencing, and the work being done by the Restorative Justice Centre in adult probation and restorative justice work with child offenders should all be included in the learning.

It is recommended that the following modus operandi be followed in setting up such pilot projects:

1. The first step is to revitalise or establish the Forum to Promote Correctional Supervision at the selected sites, in line with Chapter VII (3)(22) of the Rules for Correctional Supervision. The forum should be asked to appoint from its ranks an executive project committee, with the power to co-opt any additional members it deems necessary. Probation officers, prosecutors, and legal aid justice centre lawyers who are not currently listed in Chapter VII (3)(22) must be included, as they are essential role players.
2. The scope of this committee ranges wider than correctional supervision, as all forms of alternative sentencing will be included in the scope of the pilot project.
3. A project manager should be appointed to co-ordinate and drive the project. The role of such a project manager would include:
 - Undertaking a rapid assessment of current practices and gaps in alternative sentences and of resources available in the area
 - Developing a detailed, time-framed plan for the alternative sentencing project
 - Developing systems for collecting, documenting and analysing the information arising from the pilot project

- Liaising with all role players from government and non-government departments, and getting their approval for the plans
- Ensuring that the plan, once agreed to by the stakeholders, is properly implemented
- Ensuring that the role players are trained and ready for the implementation of the project
- Overseeing the day-to-day running of the pilot project
- Recording and reporting on the successes and challenges of the project
- Trouble-shooting problems within the project
- Ensuring that targets and deadlines are met
- Preparing for succession planning in the final phase of the project to ensure sustainability.

4. Essential elements to be included in the pilot project are:

- Working inter-sectorally to promote the use of alternative sentencing
- Marketing alternative sentences effectively
- Increasing the referrals to all categories of alternative sentencing
- Involving community members and traditional leaders in the project
- Including plea bargaining as an important feature of the project
- Including restorative justice processes and outcomes in alternative options
- Incorporating new legal developments such as the recent amendments to the Probation Services Act and the Child Justice Bill
- Strengthening and developing the programmes for alternative sentencing, and widening the menu of such options
- Clarifying roles and removing duplication, particularly between Probations Services (DSD) and Community Corrections (DCS)
- Shortening delays in the development and presentation of pre-sentencing reports
- Developing plans for long-term sustainability by working with departments to plan and budget so that they can incorporate the work of the pilots in their general service delivery, in partnership with non-governmental organisations
- Monitoring sentencing trends and the possible impact thereof on the prison population.

* * *

SHAMING AS A FORM OF RESTORATIVE JUSTICE - A POSSIBLE SOUTH AFRICAN APPLICATION

L H CLAASSEN¹

Justice should not only be done, but should manifestly and undoubtedly be seen to be done."

- Lord Hewart"

Introduction

Some of the problems besieging the South African Criminal Justice system are the overcrowding of prisons and the strain on the court system to deal with ever increasing crime. Irrespective of what the courts do it seems that they will receive criticism from one or other source.

Initially criticism was levelled against the courts for failing to reduce the amount of outstanding cases and also the amount of awaiting trial prisoners. To alleviate these problems the Department of Justice and Constitutional Development have employed retired magistrate on contract to reduce the court rolls.

Although this system was effective, criticism was levelled that current District Magistrates were not utilized and hence were deprived of the opportunity to gain experience. The system of re-hiring retired magistrates was abolished and replaced with one where district magistrates or attorneys were appointed. This system is yet again criticized for the slow pace at which cases are finalized.

The law of unintended consequences now dictates that if there are more courts more cases are finalized and consequently the prison population increase or prisoners are converted from awaiting trial prisoners to sentenced prisoners.

On a recent visit to prisons by members of the portfolio Committee on Correctional Services

¹ Regional Magistrate Limpopo – Private Bag X4010 Tzaneen 0850.

severe criticisms were levelled against magistrates for imposing direct imprisonment for certain offences.² The Portfolio Chairperson was very animated in the criticisms he levelled. Some of the more flowery comments he made were reported as follows:

"Magistrates are wasting taxpayers' money by sending women to prison for calling others "witches" or "lizards". "It's true, this is a reality. Women are sitting in prison for this," he said after visiting Thohoyandou Prison in Limpopo. "We will save millions for taxpayers if these women received alternative sentencing instead of going to prison."³

The fact that several persons in the Limpopo Province have been killed after being pointed out as witches or wizards, as well as the prevalent belief in the supernatural and witchcraft seem to be lost on the honourable member of the Portfolio Committee.

Further criticisms of similar nature were also reported in the following fashion:

".... I spoke to some of the women and found that many had been imprisoned for petty offences. "One woman stole perfume valued at R16. She is in prison for four months because she could not pay a R2 000 fine. "Another woman is in prison for six months because she called another woman 'a witch'. "Yet another is in for six months because she called somebody 'a lizard'. She did not get an option of a fine. She also has a baby.

Apparently it is not only magistrates that erred in the sentences they impose. That is patently clear from the following:

".....magistrates, and to a certain extent judges, had to come to terms with the extreme poverty facing some South Africans." Limpopo is a poor province. Most of these are economic offences."

One cannot objectively comment on the criticism levelled, without perusing the circumstances the magistrate took into account prior to sentencing. There may be valid reasons why the Magistrate imposed sentence as he or she did. Canvassing the "facts"

² The Star newspaper page 6 2005-05-11 edition

³ Whether the criticisms levelled in this regard have any substance is a debatable one. The *ratio* for sending people to jail for offences of this nature can be attributed to the Witchcraft Suppression ACT 3 OF 1957 which increase the jurisdiction of District

and reasons for sentencing from the accused seem to be a dangerous pursuit as there is no validation for the correctness of their recollection or version of the “truth”.

The only inference that can be drawn from the above mentioned criticism is that certain members of the executive arm of Government regard economic offences as trivial and do not share the view that such perpetrators should be incarcerated in suitable cases.

The question however is not whether one agrees with the above mentioned criticism or not. The root cause for the criticism is the overcrowding of prison accommodation. The judiciary bear a double burden in this regard:

Firstly there is a legal duty on the judiciary to impose a suitable sentence that would comply with all or most theories on sentencing and;

Secondly the judiciary should strive to limit political interference and political solutions to judicial problems.

To alleviate overcrowding the Department of Correctional Services may in terms of the Correctional Service Act 111 of 1998 release prisoners in terms of the so- called “bursting” provisions.⁴

These measures are both contentious and de-motivating from a judicial point of departure. Irrespective of how well the Magistrate has motivated his reasons for sentence, the functionary who reduces the sentence is totally oblivious to the reasons for sentence or the seriousness of the specific offence.

In recent history we have experienced a mass release of Prisoners in South Africa. There was a varied reaction from the different political parties as to the prudence of the

Magistrates to imprisonment up to five (5) years for offences of this nature.

⁴ See Sections 81 & 82

release.^{5 6}

It is submitted that the only way the Judiciary can prevent or reduce the need for political intervention in the sentences the court imposes is to be creative in the sentence the court imposes and to send accused to jail only as a sentence option of last resort.

Other sentence options do exist that a court may impose under the current legislative framework. These options however may require a more involved approach. Better results may be achieved if presiding officers are willing to have a paradigm shift in their approach as to what a suitable sentence may be.

ALTERNATIVE SENTENCING OPTIONS:

Although the concepts of Restorative Justice and Shaming are not often taught at university level and are almost foreign to handbooks on sentencing, shaming as a form of retribution and punishment manifests itself in various and diverse ways from the earliest of times.

The Roman law paid scant regard to insolvent persons. They were made to stand naked on the town square for three (3) days shouting that they were insolvent, before they were sold into slavery to defray the loss suffered by their creditors.

Several examples of shaming are also present in modern day South Africa. The following examples emanate from local newspapers.

- Recently a shoplifter was handcuffed to a lamp post with a notice reading "I've been caught while stealing"⁷
- The names of Home Affairs officials found to have committed serious acts of misconduct, have been released by the Department of Home Affairs.⁸
- The University of Pietermaritzburg displays the names of "cheats" on notice boards⁹.

⁵ See in this regard The Mercury Newspaper P3 June 2 2005

⁶ www.iol.co.za – "Department has to answer for freeing 'rapist' - 2005-08-11 13:20:56

⁷ www.news24.co.za – "Shoplifter shamed at his post" – 5 May 2005

⁸ www.news24.co.za – "Graft officials named, shamed" - 18/07/2005

⁹ www.news24.co.za – "Cheats 'named and shamed' – 22/02/2004

- Courts also have taken notice of the effect of naming and shaming of offenders, this is evident from the following “A British paedophile has escaped a jail sentence when the judge said he had suffered after being identified by the News of the World tabloid.”¹⁰

It is in this regard that it is submitted that the hypothesis of Restorative Justice and Shaming as an equitable sentence option needs to receive closer scrutiny.

Accordingly I will now deal with each of these concepts.

Definitions:

Before one can deal with the notions of Restorative Justice or Shaming it is necessary to determine what is meant by this terminology. The subject matter does not seem to have a universally accepted definition of the above mentioned terminology. The lists seem not to be exhaustive.

The following are advanced as possible definitions:

Restorative justice:¹¹

- ...” A very different way of thinking about traditional notions such as deterrence, rehabilitation, incapacitation and crime prevention ... It also means transformed foundations of criminal jurisprudence and of our notions of freedom, democracy and community”.
- “Restorative justice is a philosophical approach to responding to crime aimed at repairing the harm caused by a criminal act and restoring the balance in the community affected by the crime”.¹²
- “Restorative justice is a theory of criminal justice that focuses on crime as an act against another individual or community rather than the state. The victim plays a

¹⁰ www.news24.co.za - 'Named and shamed' paedophile avoids jail" – 11/08/2000

¹¹ <http://www.aic.gov.au/rjustice/rise/working/risepap1.html>

¹² http://www.gov.bc.ca/prem/popt/service_plans/srv_pln/pssg/appen_a.htm

major role in the process and receives some type of restitution from the offender.”¹³

- “Restorative justice assumes that the victim or their heirs or neighbours can be in some way restored to a condition “just as good as” before the criminal incident. Substantially it builds on traditions in common law and tort law that require all who commit wrong to be penalized. In recent time these penalties that restorative justice advocates have included community service, restitution, and alternatives to imprisonment that keep the offender active in the community, and re-socialized him into society.”¹⁴

Shaming:¹⁵

- “All social processes of expressing disapproval which have the intention or effect of invoking remorse in the person being shamed and or condemnation of the offence by others who become aware of the shaming”
- “... The use of shame or shaming as mechanisms to evoke remorse”
- “Through the method of shaming, the criminal justice system meant more to teach a lesson than simply punish the offender.”

Shame¹⁶

Shame differs from embarrassment in that it does not necessarily involve public humiliation; one can feel shame for an act known only to oneself, but in order to be embarrassed, one's actions must be revealed to others. Also, shame carries the connotation of a response to actions that are considered morally wrong, whereas one can be embarrassed regarding actions that are morally neutral but socially unacceptable (such as an accident).

Shame as a method of sentencing in practice:

As set out above, “shame” and “embarrassment” may be synonymous with each other but

¹³ http://en.wikipedia.org/wiki/Restorative_justice

¹⁴ http://en.wikipedia.org/wiki/Criminal_justice

¹⁵ <http://www.restorativejustice.org/resources/docs/morris>

¹⁶ <http://en.wikipedia.org/wiki/Shaming>

not in all cases. Whether the use of shame as a “tool” in sentencing will also embarrass will depend on how and under which circumstances the shame is applied. One of the most prominent proponents of shaming is the Australian academic Professor John Braithwaite. He proposed a system of Re-integrative shaming.

Stigmatic Shaming v Re-Integrative Shaming

Professor Braithwaite has defined two different kinds of shame. One kind is stigmatic shaming, which disintegrates the moral bonds between the offender and the community. The other is re-integrative shaming, which strengthens the moral bonds between the offender and the community.

Stigmatic shaming is what American judges employ when they make an offender post a sign on his property saying "a violent felon lives here", or a bumper sticker on his car saying "I am a drunk driver". Stigmatic shaming is designed to set the offender apart as an outcast for the rest of the offender's life. By labelling him or her as someone who cannot be trusted to obey the law, stigmatic shaming says the offender is expected to commit more crimes.

Professor Braithwaite's alternative to stigmatic humiliation is to condemn the crime, not the criminal. It gives offenders the opportunity to re-join their community as law-abiding citizens. In order to earn that right to a fresh start, offenders must express remorse for their past conduct, apologise to any victims and repair the harm caused by the crime. The Braithwaite's model was applied by the Canberra police.

The Canberra Re-integrative Shaming Experiments (RISE)¹⁷

This experiment includes the following re-integrative measures:

- Diverting confessed offenders from court to a more intense, personal (and lengthy) alternative known as Diversionary Conferencing. In these conferences, which are

¹⁷Lawrence W Sherman of the University of Maryland is an Adjunct Professor of Law at the Research School of Social Sciences, ANU and Scientific Director of the Re-integrative Shaming Experiments (RISE). Heather Strang is a Research Fellow in the Law Program at the Research School of Social Sciences, ANU, and Project Manager of RISE.

convened by a police officer, offenders, their family and friends, and their victims or a community representative all actively participate.

- With one small exception, Canberra does not employ the "wrong" kind of shame - the humiliation that is growing so rapidly in the US. The names of all convicted drink drivers in The Canberra Times is a modest form of public humiliation, but the stigma may be short-lived
- The "no-shame" (or limited shame) approach, are aimed at the offenders' acts and not their character. Thus succeeding in making offenders feel ashamed of what they have done without making them into shameful people. This is sometimes difficult to achieve because of the anger that victims and their supporters may feel and their temptation to humiliate the offender.

Clearing the slate

Re-integrative shaming aims to prevent crime by allowing offenders to put their crimes behind them. Before this can happen it is essential that they repay society and their victims the costs their crimes have incurred, material and emotional. Statistics show that since the introduction of the RISE – system offences targeted by this process generally showed a decline by as much as 5 to 10% in the age groups targeted.

Models of restorative conferencing in other countries¹⁸

Conferencing with offenders in a process of restorative justice is by no means novel to the Canberra Police. The following examples are indicative of what happens in other parts of the world.

Victim-offender mediation

This process has operated since the mid 1970's throughout North America and Europe. Offenders are referred to the process as a means of diversion from the formal justice system, and this option is generally undertaken in relation to property offenders and young people for whom diversion is the most appropriate option. Cases involving violence and

¹⁸<http://www.aic.gov.au/rjustice/models.html>

serious offences may only be referred on a discretionary basis (at the victim's request).

Community reparative boards

Community reparative boards are comprised of community members who are seeking reparation for crimes committed by non-violent adult offenders, and convene to determine a range of appropriate sanctions and monitor the offenders' compliance. The process operates at a probationary level and aims to ensure community involvement in justice procedures, victim involvement and satisfaction with the justice system, and encourages the offender to take responsibility for their actions.

Family group conferencing

This process primarily targets juvenile offenders and operates as a diversionary measure. In the New Zealand model, all young offenders are eligible for enrolment (with the exception of those charged with murder and manslaughter), and the foundations of this approach are centred in Maori sanctioning and dispute resolution procedures.

Circle sentencing

Adult and juvenile offenders may be referred to the process, either as a diversionary mechanism or as an alternative to a formal court hearing. All offenders are eligible for involvement, provided that they have expressed their guilt and desire for reform. Similarly, the entire range of offences may be dealt with, including those that may be considered serious and violent.

The South African Reality

Diversion programmes are not unknown to the South African judicial system and are currently implemented solely at the discretion of the Prosecutorial Authority¹⁹. In terms of the policy manual for prosecutors issued by the Director of Public Prosecutions (DPP) diversion programmes are defined as ***“...the election in suitable & deserving cases a manner of disposal of a criminal case other than through normal court proceedings”***

¹⁹ Policy Directives for Prosecutors, Part 7 page B12 + B13.

The DPP clearly regard diversion programmes as trivial as it only pays a cursory view to the subject matter at hand. The “guidelines” as to the selection criteria for suitable cases that should “guide” the prosecutor are set out as follows:²⁰

- “The following selection criteria are not hard and fast rules, and should serve as a guide to a prosecutor in exercising his discretion to determine whether or not an offender qualifies for the (diversion) programme. The accused should:-
- have a fixed address
- acknowledge liability for the offence
- be prepared to partake in the diversion programme, and in the case of juvenile offenders:
 - be between 12 – 18 years old
 - have a parent or guardian who is prepared to take responsibility for his or her court appearance, and to be present in court.

Diversion is regarded as inappropriate for the following offences:²¹ Murder, Rape, and Robbery with aggravating circumstances, or a similarly serious offence. Offenders with a previous conviction should only be included in exceptional circumstances.”

This system is also plagued by its own problems:

- Only juvenile offenders benefit from it.²²
- The system only applies to offenders who indicate that they intend to plea guilty,²³
- Young adults do not benefit from it.
- There is a total lack of transparency as to whom or how the system is applied or not.
- The establishment of a diversion programme remains the responsibility of the Department of Welfare. Prosecutors and NICRO may be of assistance.²⁴
- Diversion programmes in South Africa currently do not deal with re-integration,

²⁰ Page B14 paragraph 4 supra

²¹ Page B14 paragraph 3 supra

²² Section 28(3) of the Constitution of South Africa Act 108 /1996 defines a child as a person younger than 18 years.

²³ If faced with a possibility of a fine or even a prison sentence it is highly improbable that any juvenile would not “indicate” that he/she intend to plead guilty, in order to be refer to a diversionary program as an alternative.

²⁴ Page B13 paragraph 8 supra.

victim-offender mediation or any community involvement.

- The diversion programme in South Africa does not allow for the shaming of the offender.
- The program only reduces the number of “first offenders” as they are not formally charged, convicted or sentenced. This system does nothing to reduce prison population as the juveniles referred to the diversion program are not there as result of a sentence but rather to avoid being sentenced.
- Upon completion of the diversion program the prosecutor is supplied with a report. If the accused have “co-operated and it appears to the prosecutor that the accused have benefited from the programme the matter is withdrawn. If not prosecution proceeds.”²⁵
- No records are kept officially of offenders who were subjected to a diversion programme. A case is withdrawn against the offender upon completion of the diversion programme. In practise a juvenile offender therefore can commit several offences and each time just “indicate” that he/she intends to plea guilty and then “escape” prosecution.²⁶
- Upon conviction of an accused in court there is currently no mechanism to refer an accused to any form of restorative justice conference or diversion programme.
- The implementation of diversion programs depends on the active involvement of the prosecutor. During an impromptu survey of ten magistrate courts in central Limpopo it was found that in only three (3) of those courts a diversion program was running.
- The reason for the non-existence of such programs in other courts was not forthcoming.²⁷

Re-Integrative Shaming: a Possible South African Application

On a daily basis members of the public are vociferous in the criticism they level towards the

²⁵ Page B13 paragraph 9 *supra*. The question that begs an answer is what happens if the accused have co-operated and despite his co-operation he did not benefit from the programme. There is no benchmark which can be employed to measure co-operation and or benefit. Clearly this will depend on either the social worker or prosecutor's perception of the notions.

²⁶ Prosecutors are instructed to keep a register of persons referred to Diversion Programs, there is however no database of persons who completed such programs.

²⁷ Only in Tzaneen, Ritavi and Phalaborwa Courts diversion programs exist. Courts like Lulekani, Namakgale, Bolebedu, Naphuno, Bushbuck Ridge and Mhala no diversion programs exist. Even in the courts where such a program exist the local prosecutor were unable to inform as to the content of the diversion program. It appears that NICRO were responsible for the running of the program and its content.

Criminal Justice System. It seems that society experiences the legal system as one that “protects” the criminal and pays “no attention” to the victim.

Most of the criticism levelled against the Judiciary is founded on a lack of information and understanding regarding the cases being dealt with by the courts and the sentences imposed. It is common cause that newspapers only report on matters that are either very sensational or gruesome in nature. Cases which do not comply with these prerequisites do not make good reading and are hence not reported. This lack of reporting perpetuates the notion that crime pays.

In perusing the Re-integrative Shaming Experiments (RISE) proposed by Braithwaite (supra) it is clear that the main aim is restorative justice and to a very limited extent shaming. It is submitted that neither shaming nor restorative justice in isolation can render the same results as a combination of both. The efficiency of both exceeds the sum of the individual parts.

The questions that now need to be answered are whether it is possible in South Africa under the current legislative procedures to impose any sentence that encompasses the principles of shaming and restorative justice which is above all fair to the offender and satisfies the victim’s quest for justice & restoration

The hallowed words of Lord Hewart that “Justice should not only be done, but should manifestly and undoubtedly be seen to be done” bely the rational of the element of shaming in any sentence. That is also the reason why whenever possible trials are conducted in open courts.

No system exists where the victims in particular and the society at large can express their views as to a suitable sentence. This is “disempowering” to society, as they are not active participants in the sentencing phase of the trial.

By means of creative sentencing the court can empower offenders and involved society by

the application of section 297(1) (a) (i) of the Criminal Procedure Act 51/1977. This section reads as follows:

§ 297 (1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, ***the court may in its discretion-***

(a) ***postpone for a period not exceeding five years the passing of sentence and release the person concerned-***

(i) ***on one or more conditions***, (my italics) whether as to-

(aa) compensation;

(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss;

(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision or control of an organization or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service);

(ccA) submission to correctional supervision;

(dd) submission to instruction or treatment;

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991

(Act 116 of 1991);

(ff) the compulsory attendance or residence at some specified centre for a specified purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period;

If applied correctly this section grant exceptional flexibility and options to a presiding officer. Not only can he or she incorporate certain restorative justice principles in his sentence but he or she can also monitor the rehabilitation process of the accused.

Sections 297 (1) (a) (i) (aa) – (cc) are clearly aimed at the principles of Restorative Justice. The court can attempt to restore the harm done by the accused not only by ordering him to pay compensation but also by rendering a benefit or performing a duty free of charge in lieu of the payment of compensation. Often courts are faced with unemployed offenders or juvenile offenders who own no assets and earn no money. This section creates an alternative form of restitution in the absence of the payment of compensation.

Sections 297(1) (a) (i) (ccA)-(ff) make it possible for the court to enforce measures that are aimed at the rehabilitation of the accused. If the accused fails to comply with these provisos, the court can always reconsider the sentence of the accused.

By ordering the accused to appear before the court at the expiration of a relevant period the court can now monitor the accused compliance with the conditions upon which the imposition of sentence was deferred.

Sections 297(1) (a) (i) (hh) make it possible for the court to impose any other condition it may deem necessary. It is this section that makes it possible for the court to impose conditions that may “shame” the accused.

In the application of section 297(1) (a) (i) shaming can be effected directly or indirectly. The endless possibilities in imposing a suitable sentence and the amount of community involvement can create the situation that the accused cannot hide. He cannot just appear in court or pay an admission of guilt fine. Sentences of this nature can be highly visible. The community can see the accused whilst doing community service. In small towns where the community is a close nit one the sentence become even more effective if the local newspaper report on the offence. In this regard the indirect consequence of conditions imposed has the effect that the community take note of the conviction as well as the

suspensive conditions imposed.

It is submitted that nothing prevents the court in terms of section 297(1) (a) (i) (hh) from ordering the accused to comply with “American styled shaming conditions”. These conditions may depend on the offence the accused has been convicted of. Although this kind of shaming is regarded as stigmatising it may serve several purposes. It may serve as a warning to society that the accused may be dangerous. It may serve as a deterrent to other would be offenders in that it instils fear in their minds of suffering a similar fate.

Benefits of applying Section 297 act 51/1977.

The creative application of this section has benefits for all parties involved.

Benefits to society:

- Society in general does not derive any benefit from the direct imprisonment of convicted accused. Only in those cases where the court has no other option other than removing the accused from society as a preventative measure does society benefit from the incarceration in the sense that society is in theory a safer place.
- Both shaming and restorative justice strive to rehabilitate the accused within the community. The community can be both actively involved in the execution of the sentence and also see that justice is done.
- Depending on the conditions imposed, the court can create a lot of community involvement in the execution of the sentence. In this way it will both inform society at large and educate society as well.
- It is suggested that all complainants seek victim restoration and or retribution for the harm done to them. The rehabilitation is not always a priority in the mind of that part of society which suffers the effects of crime.
- Victim restoration and retribution are not mutually exclusive and both aims can be realised by an appropriate sentence. In imposing a sentence that contain both elements of shaming and restorative justice the accused can be rehabilitated, the harm done to society can be restored, and society’s sense of retribution can also be

satisfied.

Benefits to the presiding officer:

In focusing on repairing the harm done as well as empowering the victim whilst also causing justice to be seen to be done the courts will:

- reduce the prison population
- create active community participation in the manner the accused repay society for his actions
- lend credibility to the judicial process
- shift the mindset on sentencing
- The benefits for the presiding officer is that he or she can be extremely creative in the sentence he /she impose other than direct imprisonment.
- In sentencing an accused to jail the court serve no other purpose other than removing the accused from society. The court can at most hope that it's sentence serve the purpose of rehabilitation, prevention and retribution. There is no way in which the court can measure the outcome of direct imprisonment.
- Hence if the court has any other objective in sentencing other than removing the accused from society, there is no way in which the court can measure the outcome or achievement of the goal it set itself in sentencing the accused.
- However if the court utilize the opportunities which section 297 affords it the court can set measurable goals. The court itself can define the parameters & conditions within which the imposition of sentence is suspended. The court can measure and ensure that the accused complies with these conditions.
- If the accused does not comply with the conditions imposed by the court the court can act and still sentence the accused to jail should it be prudent to do so.
- If the court sentences the accused to direct imprisonment or Correctional Supervision in terms of section 276 of act 51/1977 the court is dependant on the Department of Correctional Services and its members to give effect to the court sentence. Due to maladministration, a lack of resources, poor monitoring and evaluation, lack of skills and lack of capacity sentences of this nature often achieve nothing. Courts often have to wait months for the compilation of a correctional officer

report. All these factors lead to the courts entertaining other sentencing options in an effort to follow the path of least resistance.

- The implementation of section 297 of Act 51/1977 does not limit the court or force the court to make use of the resources of the Department of Correctional Services. The court can make use of non-governmental organizations like NICRO or even the Community Policing Forums (CPF's) to monitor the compliance with the conditions the court imposes.
- In employing other recourses, other than those supplied by the state, the court also reduce the cost of rehabilitation to the taxpayer. The cost of rehabilitating the accused within the community: there is little or no cost to society. The accused can repay society in the form of free community service. In this way the accused is paying for his own rehabilitation whilst repaying the debt to society.

Benefits to the accused:

- Sentence in terms of this section can be imposed on all accused. It is also irrelevant whether the accused have pleaded guilty or not guilty.
- The accused if he/she is a first offender also benefit from a sentence of this nature as his /her previous conviction will fall away as a previous conviction if a period of 10 years has elapsed after the date of conviction, unless during that period such person has been convicted of an offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine.²⁸
- Imposition of any sentence in terms of this section is extremely effective when dealing with first offenders, juveniles and young adults. It often happens that juveniles and young adults commit serious offences out of mischief or peer pressure or due to the abuse of alcohol or drugs. If direct imprisonment is imposed whether it is suspended or not, it disqualifies such a person from practising certain professions. It often seems unjust that one "mistake" due to bad judgement can mar the career of an individual for the rest of his or her life.

²⁸ Section 271 Act 51/1977.

Examples from practise:**S v Taylor²⁹**

The accused in this matter was 17 years old at the time of the commission of the offences. The accused lost his father and two step fathers before his 16th birthday. As a result a trust fund was established in his name to the sum of R2 000 000. Mr. Taylor left school on his own volition in Grade 9 and became a self-styled menace to society. His new lifestyle included parties with woman of low moral values and an excess of liquor. All this created the impression in Mr. Taylor's mind that he was untouchable and "bullet proof."

On one fateful night Mr. Taylor took his own 4 x 4 vehicle and he and his friends took it for an outing through the town. The South African Police spotted the vehicle travelling at high speed and swerving over the road. After several unsuccessful attempts to stop the vehicle the police set up a road block where they apprehended Mr. Taylor.

Mr. Taylor did not co-operate, he swore at the arresting officers, he also assaulted a police captain. When he was taken to the hospital so that his blood could be drawn he also assaulted the doctor. Mr. Taylor was duly charged and subsequently released in the care of his mother, pending the blood results.

Whilst awaiting trial in the care of his guardian Mr. Taylor took a rifle and shot his neighbour's cat. At this stage Mr. Taylor was arrested again and was referred to the Regional Court together with all the traffic offences.

Mr. Taylor was yet again released in the care of his mother. This time the court placed him under house arrest and ordered that he may only leave his house in the presence of his mother. Less than a week later Mr. Taylor was again arrested for assault and reckless driving and a plethora of road traffic offences.

Mr. Taylor and his guardian were back in court again. The State requested that he is kept in custody. His mother also informed the court that she is unable to look after him as he ignores any instructions from her and does as he likes. Mr. Taylor was clearly not impressed with this admission of his mother and he even swore at her in court.

At that stage Mr. Taylor was remanded in custody pending the laboratory results on his intoxication. After seven (7) days the accused was requisitioned to court at the request of

²⁹ Tzaneen Case RC 856/2000

his legal representative and pleaded guilty to all counts levelled against him.

Prior to sentencing two School Principals testified that both of them had requested the accused to leave their schools because of his lack of discipline. It also transpired that he left school at the end of Grade 7 with an aggregate of 37% for all his subjects.

Mr. Taylor's sentence was subsequently deferred in terms of section 297(1) (a) (i) act 51/1977 under the following conditions:

- he was placed under house arrest and was not allowed to leave the house except to attend school or church or if he was in the company of his guardian.
- he was ordered to attend school until such time he reached Grade 12 or the age of 21 years, whichever came first.
- he was ordered to perform community service at a rate of 16 hours per month at the local hospital.
- he was ordered not to use any liquor or drugs unless prescribed by a registered medical practitioner.
- he was ordered to appear in court after every term and submit his school report for scrutiny by the court. The accused's house arrest, community service and other privileges were adjusted each term in accordance with his scholastic performance and his adherence to the conditions imposed.
- The Community Policing Forum undertook to monitor the compliance with the conditions the court imposed for the deferment of sentence.

The local press reported through out the whole process extensively on the conditions of the deferment of sentence as well as the accused's compliance with the said conditions and his scholastic achievements

After three (3) years Mr. Taylor successfully completed High School and obtained a university exemption and an average of 70% aggregate for all his subjects. He also obtained provincial colours for Gymkhana Mr. Taylor currently successfully runs his own business and arranges workshops for young business leaders in the community.

S v Olivier³⁰

The accused pleaded guilty in the Regional Court on a charge of assault of her stepson. It transpired that she was convicted and sentenced to a suspended sentence the previous year on a similar offence where the stepson was also the victim. An expert witness testified that the complainant is a hyperactive child and the accused an immature stepmother. At the time of her conviction the child had already been removed from the care of the complainant and placed in foster care. The court deferred the imposition of sentence.

The accused sentence was deferred on condition that she:

- submit herself to psycho therapy,
- that she perform community service
- that she actively participate in rehabilitation programs prescribed by a clinical psychologist who is paid for by the accused.
- the accused is also placed under correctional supervision.
- The accused is placed in the care of a social worker in private practise for whose services the accused paid.
- Both the Clinical Psychologist and Social Worker submit progress reports to court on a six monthly basis, upon which the conditions of the accused correctional supervision and community service are adjusted in accordance with her co-operation.

After eighteen (18) months of intensive therapy the stepson was removed from foster care and placed back within the family on the advice of a panel consisting of the Social Worker, Psychologist and the accused's attorney who acted on an ***amicus curiae*** basis. After three (3) years of monitoring no incident of family violence was reported by either the Social Worker or Psychologist.

S v Labuschagne³¹

³⁰ Phalaborwa RC 15/2002

³¹ Tzaneen Case no A74/2004

The accused was part of the local rugby team. One evening the rugby club held a braai (after a disastrous season which could only be matched by that of the national soccer team). During this social interaction large quantities of liquor were consumed.

At the conclusion of the meeting the accused and some fellow players drove into town damaging the grass of unsuspecting home owners by spinning their motor vehicles tyres on the neatly manicured lawns of suburbia.

One of the aggrieved home owners gave chase and found the accused on another lawn busy creating a "donut" in the grass. The complainant walked up to the car and noticed that the accused was under the influence of alcohol. The complainant removed the keys of the accused's car to prevent him from causing any further damage or injury to either himself or the property. The accused took extreme exception to this and attacked the complainant by kicking him and beating him severely. The complainant suffered severe head injuries which had to be repaired cosmetically at a cost of R18 000.

Upon conviction the court deferred the imposition of sentence on the following conditions:

- the accused is placed under correctional supervision.
- the accused is ordered to perform community service on Saturday afternoons whilst his former team mates play rugby.
- the accused is ordered to pay compensation in the amount of R18 000 to the complainant in instalments of R1000 per month.
- In addition the accused's licence is cancelled in terms of the Road Traffic Act and the court ordered that he may only apply after 12 months to obtain a learner's licence again.
- the accused is ordered to appear quarterly in court so that the court can adjust his conditions of house arrest and correctional supervision in accordance with his compliance with the conditions of deferment.
- The Community Police Forum conducts monitoring to see if the accused comply with the conditions of the deferment of sentence.

The local newspaper had from the outset reported in full on the matter and the conditions of the deferment of the sentence. Members of the community have welcomed the sentence in letters addressed to the editor.

After 14 months the accused was allowed to return to the rugby field, his community service has been changed to a day on which it would not interfere with rugby matches or practises. The accused has complied with all the conditions of the deferment of sentence.

Conclusions:

- Although this section is available to all presiding officers few seem to make use of it.
- Although this section allows for great creativity & flexibility in the sentences the courts impose it is also true that it is not a miracle cure for all offences and that it can only be imposed in offences of a less serious nature.
- Although the above examples paint a picture of success, there were also those matters where the accused did not comply with the conditions of deferment. In all cases where this court deferred sentence and the accused did not comply with the conditions of deferment these were cases where the accused had committed the initial offences to sustain a drug habit.
- Sentences of this nature task the creativity of the presiding officer and call for a prolonged involvement by the court in each case.
- This section makes it possible for the courts to impose a sentence with a measurable outcome; it also affords the court the opportunity to impose a suitable sentence if the accused does not comply with the conditions imposed in the deferment of the sentence.
- Sentences in terms of this section are beneficial to all parties concerned.



RESOURCE GUIDE TO
A PROPER APPROACH TO JUVENILE OFFENDERS
IN THE REGIONAL COURTS

PART E

RECENT RELEVANT CASE LAW



REPUBLIC OF SOUTH AFRICA

***IN THE SUPREME COURT OF APPEAL
OF SOUTH AFRICA***

**Reportable
Case Number : 513 / 03**

In the matter between

JAN HENDRIK BRANDT

APPELLANT

and

THE STATE

RESPONDENT

Coram : CAMERON, MTHIYANE, BRAND JJA, PATEL and PONNAN AJJA

Date of hearing : 9 NOVEMBER 2004

Date of delivery : 30 NOVEMBER 2004

SUMMARY

Sentence – s51(3)(b) of the Criminal Law Amendment Act 105 of 1997 interpreted – suitability of imprisonment for life as a sentencing option for child offenders considered.

J U D G M E N T

PONNAN AJA:

[1] The principal issue in this appeal is a sentence of life imprisonment imposed on the appellant for a murder he committed when he was 17 years and 7 months old. This brings into question the application of the minimum sentence legislation to offenders under 18. High courts have given conflicting decisions on this issue, which the appeal requires us to resolve.

[2] The appellant was convicted, pursuant to his plea of guilty, by Sandi AJ in the High Court at Grahamstown of three charges: murder, robbery with aggravating circumstances and attempted robbery. Applying the minimum sentencing legislation (Criminal Law Amendment Act 105 of 1997) without regard to the appellant's age, the trial judge sentenced him to life imprisonment. An appeal against sentence to a full court, with the trial court's leave, was dismissed. The members of the court differed on the interpretation of the minimum sentencing legislation and its application to the appellant's case. This further appeal is with the special leave of this Court.

[3] At his trial the appellant entered a lengthy plea explanation that indicated that before the events in issue he became a member of a satanic coven in Port Elizabeth. On 12 June 2000 he hitch-hiked to his parents' home in Hofmeyr, journeying with the express purpose of killing

his parents. That, he had been told by members of the satanic sect, would elevate him to the status of a high priest within the coven. For that purpose he had purchased a knife in Cradock for the sum of R45,00. When he arrived at his parental home, however, he was unable to go through with the deed. He then sought refuge in brandy and dagga. Realising that he required money and a motor vehicle to return to Port Elizabeth, he decided to rob the deceased, a 75 year old female neighbour. He called on the deceased (who was known to him and his family and who was alone at the time) on the pretext that he had been sent by his parents to borrow recipes. He claimed – an account the trial court rightly rejected – that to appease members of his coven (who according to him would have been disgruntled by the abandonment of his plan to kill his parents) he then decided to kill the deceased instead. He dealt the deceased a single, fatal blow to her neck with the knife that he had purchased, and then stage-managed the scene to create the impression that she had committed suicide. To calm himself he smoked more dagga and consumed more brandy. He then removed a portable radio, the deceased's car keys and the sum of R300,00. He went to the garage only to discover that the deceased's car was not there. He was arrested on 28 July 2000 and had been in custody for approximately seven months when he was convicted.

[4] Central to the appeal is the construction to be placed on s51 of the Criminal Law Amendment Act 105 of 1997 ('the Act'), which provides:

'51 Minimum sentences for certain serious offences

(1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall –

- (a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or
- (b) If the matter has been referred to it under s 52(1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2,

sentence the person to imprisonment for life.

(2) Notwithstanding any other law but subject of subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in –

- (a) Part II of Schedule 2, sentence the person, in the case of –
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) Part III of Schedule 2, sentence the person, in the case of –
 - (i) a first offender, to imprisonment for a period not less than ten years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(c) Part IV of Schedule 2, sentence the person, in the case of –

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than ten years

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection.

(3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.

(b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.

.....

(6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.'

[5] Applying s51(3)(a) only, Sandi AJ asked himself whether 'substantial and compelling circumstances' were present, and concluded that there were none. He therefore imposed the statutorily prescribed

minimum sentence of life imprisonment for the murder. Taking the second and third charges as one for the purposes of sentence, he sentenced the appellant to imprisonment for a minimum term of 15 years. Sandi AJ granted the appellant leave to appeal against sentence to the full court of the Eastern Cape Division. The majority of the court (Liebenberg J, Parker AJ concurring) considered the application of s51(3)(b), but concluded that although, since the appellant's age had been overlooked in the trial court, it was entitled to impose sentence afresh, the sentence of life imprisonment was appropriate. In dismissing the appeal, the majority held that the interpretation of s51(3)(b) by Cachalia J (Blieden J and Jordaan AJ concurring) in *S v Nkosi* 2002 (1) SACR 135 (W) was wrong and declined to follow it. In his dissent Pillay J followed *Nkosi*.

[6] At the hearing of the appeal, Mr Pretorius on behalf of the appellant, somewhat surprisingly, disavowed reliance on *Nkosi* or for that matter the minority judgment of Pillay J in the court *a quo*. Instead he favoured the construction placed on s51 by Liebenberg J. Further support for such an interpretation, he submitted, was to be found in the later judgment of *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja* 2004 (2) SACR 1 (T). *Makwetsja*, a full bench decision of the Transvaal Provincial Division, declined to follow *Nkosi* and also the

approach adopted by Van Heerden J in *S v Blaauw* 2001 (2) SACR 255 (C).

[7] In *Blaauw*, Van Heerden J suggested that a Court was not obliged in terms of s51(3)(b) to impose the minimum sentence on a child who at the time of the commission of the offence was 16 or 17 years old unless the State satisfied the Court that the circumstances justified the imposition of such a sentence. In *Nkosi* (at 141 g-j), Cachalia J held:

‘The distinction between s51(3)(a) and s51(3)(b) lies in the nature of the discretion that a court has when considering the positions of the two classes of offender. In the former case a Court should *ordinarily* impose the prescribed sentence unless there is some weighty justification for the imposition of a lesser sentence. The Legislature has therefore limited the discretion of a Court to depart from the minimum sentence (see *S v Malgas* (supra para [25]...)). In the latter case there is no reference at all to *substantial and compelling circumstances*. The express wording of the section only requires a Court to justify a decision to impose the prescribed sentence by entering its reasons on the record. It does not limit a Court’s discretion to impose an appropriate sentence on this class of offender’.

[8] *Makwetsja*, like the majority in the court *a quo*, declined to subscribe to the interpretation of the section advanced in *Blaauw* and *Nkosi*. The reasons advanced in each instance for not doing so may be summarised as follows: Whilst the statutorily prescribed minimum sentence should be imposed on offenders between the ages of 16 and 18 only in extreme cases, that did not mean that the Legislature did not

intend those sentences to apply to all offenders above the age of 16 years. If the legislature did not in fact intend the minimum sentences to apply to child offenders aged 16 and 17 it would have explicitly excluded that category of offender as it had children below the age of 16 (s51(6)). Section 51(1) decrees that the minimum sentence must be imposed, subject to ss3(a) and (b). Youthfulness *per se* would ordinarily constitute a substantial and compelling circumstance. If a sentencing court intends to impose the prescribed minimum then s51(3)(b) envisages that it set out clearly its reasons for doing so. The scheme of the section serves to remind a sentencing court to make 'doubly sure' that a youthful offender, who has to be sentenced with caution, is deserving of the prescribed minimum.

[9] The minimum sentencing legislation must be read in the light of the values enshrined in the Constitution and interpreted in a manner that respects those values. Section 51 distinguishes between adult offenders and child offenders. Section 28 of the Constitution defines a child as a person under the age of 18 years. Two categories of child offenders are envisaged by the Act: first, those below the age of 16; and, second, those between the ages of 16 and 18. The section does not apply at all to a child who was under the age of 16 years at the time of the commission of the offence (s51(6)). For adult offenders, the legislature has ordained life imprisonment or one of other prescribed

minimum sentences unless substantial and compelling circumstances are found to exist (s51(1) read with s51(3)(a)).

[10] The notional starting point of the enquiry for the two categories of offenders to whom the Act does apply thus differs. For adult offenders the starting point is the minimum sentence prescribed by the legislature. That sentence, which is intended to be a severe and standardised one, may only be departed from if there is weighty justification therefor (*S v Malgas* 2001 (1) SACR 469 (SCA) para 25). It is for the adult offender to establish that substantial and compelling circumstances justifying a departure are present.

[11] For child offenders between the ages of 16 and 18, the sentencing court starts with a clean slate. Subject to the weighting effect of the statutorily prescribed minimum sentences, the sentencing court is free to impose such sentence as it would ordinarily have imposed. It may decide in the exercise of its sentencing discretion to impose the minimum sentence prescribed by s51(2) for an offence of the kind specified in Schedule 2. That a discretion to impose the minimum sentence does indeed exist is clear from the use of the words 'decides' and 'decision' in s51(3)(b). The sentencing court is called upon in the exercise of its discretion to make a decision as to whether or not to impose the minimum sentence prescribed by the Act. But it is not

obliged to impose the statutorily prescribed minimum sentence: and, if it does do so, it is required to enter its reasons for its decision on the record of the proceedings. (See *Sv Nkosi* supra at 141b-j; and *S v Blaauw* supra at 263e-264j.)

[12] The effect of the provision is thus that s51(3)(b) automatically gives the sentencing court the discretion that it acquires under s51(3)(a) only where it finds substantial and compelling circumstances. It follows that the 'substantial and compelling' formula finds no application to offenders between 16 and 18. A court is therefore generally free to apply the usual sentencing criteria in deciding on an appropriate sentence for a child between the ages of 16 and 18. As in a case where s51(3)(a) finds application, the court in arriving at an appropriate sentence must, however, not lose sight of the fact that offences of the kind specified in Schedule 2 of the Act have been singled out by the legislature for severe sentences. The gravity of the offence must accordingly receive recognition in the determination of an appropriate sentence.

[13] The Constitution, read with the various international instruments that have a bearing on the subject of the rights of young people in conflict with the law, furnishes the backdrop to this approach. Section 28(2) of the Constitution provides: '[A] child's best interests are of

paramount importance in every matter concerning the child'. That statement of general principle is the clearest indication that child offenders are deserving of special attention. More so, it would seem, in the sphere of sentencing. The ideal is that no child should ever be caged,¹ though in practice there will always be cases that are so serious that imprisonment would be the only appropriate punishment.²

[14] The recognition that children accused of committing offences should be treated differently to adults is now over a century old.³ Historically, the South African justice system has never had a separate, self-contained and compartmentalised system for dealing with child offenders. Our justice system has generally treated child offenders as smaller versions of adult offenders.⁴ In *S v Williams and others*⁵ 1995 (3) SA 632 (CC) para 74 the Constitutional Court in abolishing whipping sounded 'a timely challenge to the State to ensure the provision and execution of an effective juvenile justice system'.

[15] The traditional aims of punishment, particularly in respect of child offenders, therefore have to be re-appraised and developed to accord

¹ Julia Sloth-Nielsen 'No child should be caged – closing doors on the detention of children' 1995 (8) SACJ 47.

² S S Terblanche *The Guide to Sentencing in South Africa* para 3.4.

³ The Illinois Juvenile Court Act, which is widely credited as providing the first example of legislation establishing a separate juvenile justice system celebrated its centenary in 1999. See Prof Julia Sloth-Nielsen 'The role of international human rights law in the development of South Africa's legislation on juvenile justice' 2001 (1) 5 *Law, Democracy & Development* 59.

⁴ Ann Skelton 'Developing a juvenile justice system for South Africa: International instruments and restorative justice' 1996 *Acta Juridica* 180.

⁵ Also reported at 1995 (2) SACR 251 and 1995 7 BCLR 861.

with the spirit and purport of the Constitution. International documents on child justice emphasise the re-integration of the child into society. Indeed the aims of re-socialisation and re-education must now be regarded as complementary to the judicial aims of punishment applicable to adult offenders.⁶ A child charged with an offence must be dealt with in a manner which takes into account his/her age, circumstances, maturity as well as intellectual and emotional capacity.

[16] International law has ushered in what has been described as a 'revolution' for the administration of child justice.⁷ Four key international instruments that deal with children in conflict with the law are the United Nations Convention on the Rights of the Child (CRC),⁸ and three sets of non-binding rules: the United Nations Guidelines for the Prevention of Juvenile Delinquency (the Riyadh guidelines);⁹ the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);¹⁰ and, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (the JDL's).¹¹ The provisions of these international instruments are supplemented, closer to home, by the

⁶ Julia Sloth-Nielsen 'Child Justice and Law Reform' in C J Davel *Introduction to Child Law in South Africa* para 22.9.

⁷ Davel *op cit* para 22.1.2.

⁸ The United Nations Convention on the Rights of the Child (Resolution 44/25) was adopted by the UN General Assembly on 20 November 1989 and ratified by the South African Parliament on 16 June 1995 whereafter the formal instrument of ratification was deposited with the Secretary-General of the UN on 30 June 1995 and has been in force in South Africa since 30 July 1995. (See Skelton *op cit Acta Juridica* at 180.)

⁹ Resolution 45/112 adopted by the UN General Assembly on 14 December 1990.

¹⁰ Resolution 40/33 adopted by the UN General Assembly on 29 November 1985.

¹¹ Resolution 45/113 adopted by the UN General Assembly on 14 December 1990.

African Charter on the Rights and Welfare of the Child.¹² The principles fundamental to these instruments have found articulation in our Constitution.

[17] The rules and guidelines set out in these international instruments are detailed and provide specific suggestions for the realisation of the broad goals that it embodies. Since its introduction the CRC has become the international benchmark against which legislation and policies can be measured. Traditional theories of juvenile justice now have a new 'framework within which to situate juvenile justice: a children's rights model'.¹³

[18] The principle that detention is a matter of last resort (and for the shortest appropriate period of time) is the *leitmotif* of juvenile justice reform.¹⁴ Those principles are articulated in international law¹⁵ and are enshrined in s28(1)(g) of the Constitution which reads: '[E]very child has the right not to be detained except as a measure of last resort, in which case the child may be detained only for the shortest appropriate period of time,'.

[19] Guiding principles must therefore include the need for proportionality (see *S v Kwalase* 2000 (2) SACR 135 (C)). The

¹² The Charter was ratified by the South African Parliament on 18 November 1999.

¹³ Sloth-Nielsen op cit *Law, Democracy and Development* at 66.

¹⁴ Sloth-Nielsen op cit *Law, Democracy and Development* 78.

¹⁵ Article 37(b) of the CFC; Beijing Rule 17.1

overriding message of the international instruments as well as of the Constitution is that child offenders should not be deprived of their liberty except as a measure of last resort and, where incarceration must occur, the sentence must be individualised with the emphasis on preparing the child offender from the moment of entering into the detention facility for his or her return to society.

[20] In sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles: including the principle of proportionality; the best interests of the child; and, the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time. Adherence to recognised international law principles, must entail a limitation on certain forms of sentencing such as a ban on life imprisonment without parole for child offenders.

[21] The Project Committee of the South African Law Commission on Juvenile Justice (Project 106) has since 1997 produced an issue paper,¹⁶ a discussion paper,¹⁷ and, finally a report¹⁸ and a Bill on juvenile justice which was released on 8 August 2000.¹⁹ The Child Justice Bill, which was introduced in Parliament on 3 August 2002 and debated

¹⁶ South African Law Commission Issue Paper Number 9 (1996).

¹⁷ Discussion Paper Number 79 (1998).

¹⁸ Report on Juvenile Justice (2000).

¹⁹ Sloth-Nielson op cit *Law, Democracy and Development* at 72.

during 2003, *inter alia* prohibits the sentence of life imprisonment for children who commit offences whilst under the age of 18.

[22] This background reinforces the interpretation given to s51(3)(b) above. If the notional starting point for the category of offender envisaged in ss3(b) is that the minimum prescribed sentence is applicable, as the majority in the court *a quo* and the full bench in *Makwetsja* suggest, then imprisonment (the prescribed sentence) would be the first resort for children aged 16 and 17 years in respect of offences covered by the Act instead of the last resort. It is true that the full court in *Makwetsja* emphasised that on its interpretation the legislature sought to make 'doubly certain' that the sentencing court found the prescribed minimum sentence appropriate, and suggested that a court would 'readily' conclude that the youth of an offender between 16 and 18 was in itself a substantial and compelling circumstance (para 47). Nevertheless, on the approach of the majority in the court *a quo* and of the Transvaal Provincial Division in *Makwetsja*, a sentencing court would be unable to depart from the statutorily prescribed minimum *unless* the child offender establishes the existence of substantial and compelling circumstances. To this extent the offender under 18 would be burdened in the same way as an offender over 18. This would infringe the principle that imprisonment as a sentencing option should be used for child offenders as a last resort and only for the shortest appropriate

period of time²⁰ (see *V v United Kingdom* 30 E.H.R.R. 121 para 118). It would also conflict with the by now well-established sentencing principles of proportionality and individualisation (see *S v Kwalase* at 139 e-l; *V v United Kingdom* para 123 and 126).

[23] From this point of view the approach adopted in *Nkosi* and *Blaauw* is preferable. I would however qualify what was said in those judgments by adding that the fact that the legislature has ordained the minimum sentences (*S v Malgas* 2001 (1) SACR 469 (SCA) para 25) must receive recognition in determining the actual sentence. So qualified, the reasoning in *Blaauw* and *Nkosi* in my view accords generally with internationally recognised trends and constitutionally acceptable principles relating to the sentencing of child offenders. Importantly it ensures that the duty remains on the prosecution – where it ought to in the case of child offenders – to persuade a sentencing court that the minimum sentence should be imposed.

[24] To summarise:

(a) The legislative scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers a discretion on the sentencing court which is without more free to depart from the prescribed minimum sentence.

²⁰ Ann Skelton 'Juvenile justice reform: children's rights and responsibilities versus crime control' in CJ Davel *Children's Rights in a Transitional Society* (1999) 88 at 99-100.

(b) In consequence the sentencing court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence.

(c) The offender under 18 though over 16 does not have to establish the existence of substantial and compelling circumstances because s51(3)(a) finds no application to him or her.

(d) By contrast with the class of offender under 16, however, the statutory scheme requires that the sentencing court should take into account the fact that the legislature has ordinarily ordained the prescribed sentences for the offences in question. This operates as a weighting factor in the sentencing process.

(e) It follows on this approach that where the provisions of s51(2) apply the regional court retains its competence to finalise the matter contrary to the conclusion in *Makwetsja*.

[25] Returning to the facts of the present appeal: the evidence in mitigation reveals a childhood characterised by neglect, ill-discipline and ineffective parenting. The appellant was raised in an atmosphere of social and emotional deprivation. Alcohol and substance abuse were the order of the day and clashes with the law were commonplace at an early age, followed inevitably by admission to a place of safety and an industrial school. Two attempts at suicide followed. Little wonder then that Satanism and its ritualistic practices appeared attractive to his still impressionable, immature mind. The tale is woeful. It is of a child failed

by his parents (both of whom appear to be low-functioning individuals), his community and society generally: one that is not entirely uncommon in this country.

[26] On the other hand, the offence itself is particularly heinous. The deceased, a defenceless elderly lady, was murdered in the sanctity of her home by the appellant who entered under some false pretext in order to perpetrate a robbery. The trial court, as also the court *a quo*, held that the appellant's motive in killing the deceased was to avoid detection, as he was known to her. In that conclusion neither can be faulted. These are all strongly aggravating factors. To his credit, in pleading guilty the appellant expressed contrition and remorse. Against the enormity of the crime and the public interest in an appropriately severe punishment, must be weighed the personal circumstances of the appellant that are strongly mitigating. Given the appellant's relative youthfulness rehabilitation remains a real prospect even after a fairly long period of imprisonment. In my view, taking all this into account, and not losing from sight that the legislature has ordained that the ordinarily appropriate sentence for murder is life imprisonment, a term of 18 years' imprisonment is appropriate.

[27] In the result the appeal against sentence succeeds to the extent that:

- (a) the sentence of life imprisonment on count 1 is set aside;
- (b) there is substituted for it a sentence of imprisonment for a term of 18 years;
- (c) the sentence of 15 years' imprisonment on counts 2 and 3 will run concurrently with the sentence of 18 years on count 1.

V M PONNAN
ACTING JUDGE OF APPEAL

CONCUR:

CAMERON JA
MTHIYANE JA
BRAND JA
PATEL AJA

GAGU V THE STATE [2006] SCA 5 (RSA)**CONFIRMING THE POSITION ON MINIMUM PRESCRIBED SENTENCES FOR JUVENILES AGED 16 – 17 AND THE PRESIDING OFFICER'S ACTIVE ROLE DURING SENTENCING**

Anette van der Merwe¹

JUDGMENT

Both the accused pleaded guilty to rape in the East London Regional Court and their legal representatives' submitted s 112(2) statements in terms of the Criminal Procedure Act 51 of 1977. These statements, in addition to the information contained in the charge sheet served as the only evidence before court. The regional court imposed 15 years imprisonment on both accused, seemingly under the impression that the Criminal Law Amendment Act 105 of 1997 prescribed 15 years as the minimum sentence for this type of offence. They were both youthful at the time of the commission of the crime, namely first appellant was 17 years old and second appellant 18 years old. According to statements from the bar, both the accused were under the influence of liquor and also had remorse about their acts of rape.

The case took six years to reach the Supreme Court of Appeal. On a first appeal against the imposed sentences the Grahamstown High Court held that life imprisonment was the applicable sentence and referred it to the East London High Court for sentencing in terms of s 52(1)(a)(i) of the Criminal Law Amendment Act 105 of 1997. The reasoning was that the charge was one of rape as listed in Schedule 2 Part I, namely committed with common purpose, and the regional court magistrate thus had no authority to decide on the presence of substantial and compelling circumstances in terms of s 51(3) (a), thereby justifying discretion to impose a lesser sentence than that prescribed by the Act. The East London High Court disagreed and suggested the present appeal to solve matters.

The Supreme Court of Appeal held that all the elements of rape as listed in Schedule 2 Part I, namely 'rape – when committed ... by more than one person, where such persons acted

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in the execution or furtherance of a common purpose or conspiracy' had not been established before conviction [*S v Legoa* 2003 (1) SACR 13 (SCA)]. Therefore the offence for which the accused had to be sentenced was rape as listed in Schedule 2 Part III, carrying the prescribed penalty of 10 years for first offenders. The case was referred back to the regional court in order to obtain more information on both the victim and the two accused in order to impose a proper sentence.

The Supreme Court of Appeal pointed out the following misdirections:

- The magistrate misinterpreted Schedule 2. The offence in this case resorted under Part III of Schedule 2 and not Part II.
- The first appellant was only 17 years old during the commission of the rape. The court confirmed the judgment in *Brandt v S* [2005] 2 All SA 1 (SCA) par 12, that the Criminal Law Amendment Act 105 of 1997 is not applicable to offenders aged between 16 and 18 because of the special dispensation created by s 51(3)(b) of the Act. The court is thus free to apply the usual sentencing criteria in deciding on the appropriate sentence. The court must however not lose sight of the fact that offenders of the kind specified in Schedule 2 of the Act have been singled out by the Legislature for severe sentences. No finding of substantial and compelling circumstances is thus necessary in order to impose a lesser sentence than the prescribed minimum.
- Rape without a condom should not be taken into account as aggravating.
- A court cannot sentence on the mere allegations in the charge sheet. The presiding officer should take the final responsibility to request more information (facts and circumstances) – particularly, as in this case, where the offence is serious and a lengthy prison sentence is considered for youthful offenders.

COMMENT

The case of *Gagu* raises a few important issues. Firstly, it highlights the problem of interpretation and implementation of the much-criticised Criminal Law Amendment Act 105 of 1997 with specific regard to s 51(3)(b) of the Act. Secondly, it illustrates the difficulty some judicial officers have with adapting to the more inquisitorial and active role that they

should assume during sentencing, especially after a plea of guilty, to ensure that all relevant information is available in order to impose a proper sentence. In addition, the need for more formal guidance with regard to which factors should be accepted as aggravating (or mitigating) in specific offence categories, is illustrated. This note will focus on the first and second issues.

Interpretation of s 51(3) (b) of the Criminal Law Amendment Act 105 of 1997

Judicial debate prior to the Supreme Court of Appeal judgments of Brandt and Gagu

Section 51(3)(b) of the Criminal Law Amendment Act 105 of 1997 refers specifically to the situation where prescribed sentences are imposed on juvenile offenders, aged 16 to 17, and provides as follows:

‘If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.’

In contrast to s 51(3)(a) which requires the explanation of any substantial and compelling circumstances justifying a lesser sentence than the prescribed one, s 51(3)(b) requires explicit reasons when the prescribed sentence is indeed imposed in this age category. With regard to the applicability of minimum sentences to offenders aged 16 and 17, the high court has adopted different interpretations since the legislation came into operation in 1998. In *S v Blaauw* 2001(2) SACR 255 (C), Van Heerden J remarked in passing that the court is not obliged in terms of s 51(3) (b) to impose a minimum sentence on an accused who, at the time of committing the offence, was 16 or 17 years, unless the state satisfies the court that the circumstances justify the imposition of such a sentence. The state must thus provide evidence to show why the prescribed sentence should be imposed and that must be recorded. In *S v Nkosi* 2002 (1) SACR 135 (W), Cachalia J, delivering the judgment of the full bench, confirmed the responsibility of the state to persuade the court that the minimum sentence should be imposed. He concluded:

‘[D]espite the peculiar wording of s 51(3)(b), the legislature intended children aged between 16 and 18 years of age to be treated more leniently than those

offenders who have turned 18 and are consequently deemed to be more mature.’ (at 142c-d)

In contrast to the previous two decisions, the court in *Director of Public Prosecutions, Transvaal v Makwetsja* 2004 (2) SACR 1 (T) at 13f, held that, although the statutorily prescribed minimum sentence should be imposed on offenders between the ages of 16 and 18 only in extreme cases, this did not mean that the legislature did not intend those sentences to apply to all offenders above the age of 16 years. If the legislature did not intend the minimum sentences to apply to offenders aged 16 and 17 as a starting point, it would have explicitly excluded that category of offender, as it has children below the age of 16 in s 51(6) of the Criminal Law Amendment Act 105 of 1997. Requiring the court to set out clearly its reasons for imposing the prescribed minimum sentence on a youthful offender in this category serves as a reminder to the court to be cautious and to make ‘doubly sure’ that the young offender is deserving of the prescribed minimum sentence.

The result of this approach would require the child offender to establish the existence of substantial and compelling circumstances, thereby burdening such offender in the same way as an offender over 18. In addition, all offenders older than 16 years had to be referred to the high court for their cases to be finalised by a court without having had the benefit of ‘being steeped in the atmosphere’ of the trial (*S v Gqamana* 2001 (2) SACR 28 (C)). The recalling of victims and other witnesses in terms of s 52(3) (d) of Act 105 of 1997 could also lead to further traumatisation caused by reliving the trauma of the offence or by being exposed to the criminal justice system once again.

Brandt v S [2005] 2 All SA 1 (SCA)

The outcome in *Makwetsja* was criticised by the Supreme Court of Appeal in *Brandt v S supra* and the position was then clarified by giving preference to the approach adopted in *Nkosi (supra)* and *Blaauw (supra)*. Based on international trends in child justice and constitutional values (see par 16 -18), it was held that s 51(3) (a) finds no application in the case of the offender aged 16 to 18 (*Brandt supra* par 24). This decision was however qualified. The court held that the fact that the legislature has ‘ordinarily ordained the

prescribed sentences for the offences in question' should operate as a 'weighting factor in the sentencing process'. Bearing this in mind, the sentencing court is thus free to apply the usual sentencing criteria in deciding on the appropriate sentence for offenders aged between 16 and 17 who have been convicted of offences listed in any part of Schedule 2 of the Criminal Law Amendment Act 105 of 1997.

The result of *Brandt (supra)* and *Gagu (supra)* is thus that cases dealing with offences contained in Schedule 2, Part I to Part IV, such as pre-meditated murder, child rape, gang-rape, indecent assault inflicting bodily harm, where the offender is 16 and 17 of age, may now be finalised by the regional court if the appropriate sentence falls within its sentencing jurisdiction. The existence of 'substantial and compelling circumstances' is not relevant to this age group anymore. The offender's circumstances, maturity as well as intellectual and emotional capacity should be taken into account (*Brandt supra* par 15). Ponnar AJA further held in *Brandt supra* par 20, that the presiding officer must be guided by the principle of proportionality, the best interests of the child, and, the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time. The sentence should thus be individualised with the emphasis on preparing the child offender from the moment of entering the detention facility for his or her return to society (*Brandt supra* par 19).

Despite these lofty ideals, it is clear that in its earlier- mentioned qualification, the Supreme Court of Appeal accepts that the minimum sentencing legislation's approach of creating a new, more severe norm for serious offences listed in Schedule 2 (*S v Malgas* 2001 (1) SACR 469 (SCA) at 482f), should also influence juvenile sentencing. This raises the question as to what extent previous precedents can still serve as guidance to present sentencing decisions. The practice, in cases where factors of substance justify a lesser sentence in terms of s 51(3) (a), to consult precedents prior to the enactment of the General Law Amendment Act 105 of 1997 with regard to the length of imprisonment, was explicitly amended by *S v Abrahams* 2002 (1) SACR 116 (SCA) at 126b (it concerned an incestuous child rape case). By implication the same principle would be applicable when considering the length of prison sentences in cases of serious offences for offenders aged 16 to 18.

Thus, although the usual sentencing criteria must be applied, judicial officers should keep in mind that guidance may be sought from previous judgments only with regard to the type of factors that should be considered as aggravating and mitigating. In the case of *Brandt supra* the appropriate sentence, keeping in mind that the ordinarily appropriate sentence for the particularly heinous murder is life imprisonment, was a term of 18 years imprisonment. Rehabilitation was considered to be a real prospect even after a fairly long period of imprisonment (par 26). In *Blaauw supra*, the appropriate sentence imposed for the rape of a five-year-old girl was 25 years. Despite these sentences being lengthy periods of imprisonment, the practical implication of their terms of imprisonment will be regulated by recently introduced parole rules (see Proc R38 GG 26626 of 30/7/2004). Juvenile imprisonment will thus be for substantially shorter periods as opposed to adult cases meriting life imprisonment where parole may only be considered after a period of 25 years. In the light of our prison conditions and the general influence of prison life, the successful preparation of the juvenile offender for his return to society, as envisaged by Ponnar AJA in *Brandt supra*, should however be questioned.

Fact finding in the sentencing phase

The court in *Gagu supra*, experienced the dilemma of not having enough information for sentencing purposes after a plea of guilty. Though the regional court was prepared to proceed with sentencing nevertheless, the Supreme Court of Appeal refused to embark on the task, and referred the case back to the regional court to request more information.

In order to address the situation of the court a quo in *Gagu*, the Criminal Procedure Act 51 of 1977 provides the court with two possible ways of obtaining evidence for the determination of an appropriate sentence. Firstly, with regard to the procedure after a plea of guilty, s 112(3) provides that, notwithstanding the prosecutor's opportunity to present evidence on any aspect of the charge, the court may, with regard to sentence, hear evidence or a statement by or on behalf of the accused, or question the accused on any aspect of the case. Secondly, s 274(1) provides that the court may, before passing sentence, hear such evidence as it thinks fit in order to inform itself as to the proper sentence to be passed. These provisions place the court at the centre of the sentencing

stage (Law Commission *Sentencing (A New Sentencing Framework)* Discussion Paper 91 Project 82 (2000) 83). A similar provision is also proposed in s 47(1) of the draft Sentencing Framework Bill 2000 dealing with evidence on sentencing. What should be further emphasised is that a quasi-inquisitorial approach prevails during the sentencing phase, which requires more flexibility and a much *more active role* on the part of the *presiding officer*. Terblanche (*The Guide to Sentencing in South Africa* (1999) 99) emphasises that the duty to sentence is that of the court, which implies that the court must decide what information is necessary to fulfil that duty. By not having all the relevant information available, the court may select an inappropriate punishment, something which would be contrary to the interests of justice (Terblanche *supra*). Despite the above, it would however appear that only in some instances have courts in fact adopted an active approach, for example, when they refused to proceed with sentencing without being provided with further information on relevant matters i.e. the effect of the offence on the complainant (*S v L* 1998 (1) SACR 463 (SCA)); or requested an expert report (*S v W* 1994 (1) SACR 610 (A)) or even conducted their own research (*Abrahams supra* at 125).

Yet, even where the court adopts an active approach and accepts the final responsibility for requesting more information, the question arises as to what kind of information is relevant for sentencing purposes. In *Gagu supra* the court rightly remarked that in the case of juvenile offenders, a pre-sentence report regarding their personal circumstances, would always be extremely relevant. Further, at the very least, an enquiry into obtaining any medical report pertaining to the complainant was expected (par 13). Regrettably, the learned judge elected not to elaborate on the phrase 'at the very least'. It is submitted that the court had foregone a useful opportunity to provide guidance with regard to equally important aspects in this regard. In addition to focussing on physical harm in the determination of the seriousness of the crime, there is also an increased recognition of the importance of psychological harm caused by the commission of the crime to the victim, as reflected by the Supreme Court of Appeal, draft legislation and the Victims' Charter of 2004.

In *Rammoko v Director of Public Prosecutions* 2003 (1) SACR 200 (SCA) at 205, it was held that not only does the objective gravity of the crime play an important role, but also the

present and future impact of the crime on the victim in a rape case. It would appear that, in the absence of evidence of harm, no fair decision could be taken in cases where minimum sentences are applicable (compare *S v Ncheche* 2005 (2) 386 (W) for the view that a rape case may be serious enough to warrant life imprisonment without evidence on harm). Though *Rammoko* dealt with the suitability of the imposition of a life sentence on an adult offender convicted of child rape, it can be accepted that the impact of the crime on the victim is a relevant consideration in all cases where harm is caused through the commission of an offence. Section 17(b) of the Criminal Law (Sexual Offences) Amendment Bill 2003 provides that evidence of the impact of sexual offences may be presented to court, to prove, for the purpose of imposing an appropriate sentence, the extent of harm suffered by the person concerned. Section 3(2) of the Draft Sentencing Framework Bill 2000 provides that the degree of harmfulness, or risked harmfulness, to the victim as a result of the offence, should be one of two factors determining the seriousness of an offence (the other factor being the offender's degree of culpability). Clause 2 of the Victims' Charter 2004 refers to the victim's right to offer information during sentencing in order to bring the impact of the crime to the court's attention.

Evidence establishing harm experienced by the victim may include expert testimony on the emotional and psychological long-term effects of the offence on the victim and the presiding officer should request the reports where the prosecutor presents nothing. When evidence about harm is unchallenged, the testimony of relatives and other about trauma symptoms experienced by the victim may also be accepted (*Abrahams supra* at 124).

CONCLUSION

The Criminal Law Amendment Act 105 of 1997 is not applicable to offenders aged between 16 and 18 because of the special dispensation created by s 51(3) (b) of the Act. By clarifying that the minimum prescribed sentences are not applicable to juveniles aged 16 – 17, these cases are no longer divided into two parts and the regional court as the trial court can resume its rightful position in finalising these cases by deciding on an appropriate sentence. As Broom J stated five-and-a-half decades ago in *Rex v Conway* 1948 NPD 880 at 883, the severity of the punishment as well as the choice of punishment 'are all matters

within the discretion of the magistrate who, having dealt with the whole case, is in a much better position in regard to punishment than we are'.

The final responsibility being placed upon the presiding officer to request information to impose a proper sentence was reiterated in *Gagu's* case. The court is required to have sufficient and relevant facts and circumstances for consideration. It is submitted that these facts should also include evidence on the psychological harm caused by the commission of the crime to the victim. The ultimate aim in a criminal trial is the determination of an appropriate punishment proportionate to the seriousness of the crime, and that can only be done holistically.



**THE SUPREME COURT OF APPEAL OF SOUTH
AFRICA**

**REPORTABLE
CASE NO: 363/2005**

In the matter between

**THE DIRECTOR OF PUBLIC PROSECUTIONS
KWAZULU-NATAL**

APPELLANT

and

P

RESPONDENT

**CORAM: HARMS, STREICHER, MTHIYANE JJA,
COMBRINCK and NKABINDE AJJA**

HEARD: 9 NOVEMBER 2005

DELIVERED: 1 DECEMBER 2005

Summary: Sentence – appeal by state against sentence imposed on a 14 year old girl upon conviction for murder of her grandmother and theft – whether postponement of the passing of sentence coupled with 36 months of correctional supervision in terms of s 276(1)(h) of Act 51 of 1977 on certain conditions appropriate, given the severity of the offence – traditional and post-constitutional approach to sentencing with respect to a child offender (under 18 years old) considered. Appellate court’s entitlement to interfere also considered.

JUDGMENT

MTHIYANE JA:

MTHIYANE JA:*Introduction*

[1] This is an appeal by the state, with the leave of this court, against the sentence imposed by Swain J, sitting in the High Court, Pietermaritzburg, in KwaZulu Natal, upon the conviction of P, a 14 year old girl (the accused), for the murder of her grandmother (the deceased) and theft. The passing of sentence was postponed for a period of 36 months on condition that the accused complies with the conditions of a sentence of 36 months of correctional supervision in terms of s 276(1)(h) of the Criminal Procedure Act 51 of 1977. These conditions include provisions relating to house arrest, schooling, therapy, supervised probation, and the performance of community service.

The Facts

[2] During the evening of 14 September 2002, some time after 20:00, the accused, who was then 12 years and 5 months old, approached two men, Mr Vusumuzi Tshabalala and Mr Siphon Hadebe, who were under the influence of liquor, in the street in the vicinity of the house of the deceased and asked them to help her to kill her grandmother who, she alleged while crying, had killed both her parents. She promised that they

could remove whatever they wished from the house and even promised the one to have sexual relations with him in return for killing the deceased. They followed her into the house, where she again asked them to kill the deceased who was lying on a bed asleep. The accused had earlier placed sleeping tablets in tea that she had made for the deceased. The accused supplied them with kitchen knives. Hadebe strangled the deceased, resulting in her death, from what was described by the state pathologist, Dr Dhanraj Maney, in the post-mortem report as 'manual strangulation'. Not satisfied, the accused insisted that the throat be cut, which was done.

[3] The accused gave Tshabalala and Hadebe some jewellery and permitted them to take a video recorder, a satellite decoder and clothing in return for having murdered the deceased. Tshabalala and Hadebe were arrested and charged with the murder of the deceased, to which they both pleaded guilty on 2 October 2002 and were each sentenced to twenty five years' imprisonment.

[4] The accused's explanation for her participation in the killing was that she had done so on the instructions of an erstwhile boyfriend of the deceased's daughter, who offered her money to kill the deceased. Her evidence was that the plan how to kill the deceased had been hatched by

this person. Swain J rejected the accused's version and found that she had acted of her own volition, with no external coercion. On the evidence as a whole there is no reason to doubt the correctness of this finding. Despite the rejection of her version, the accused persisted in it to the end. To this day her motive for the murder is not known. After her father had committed suicide she chose out of her own will to live with the deceased in preference to living with her mother. The only motive one can surmise is the fact that the deceased and she had an argument about her relationship with a man of 20, whom she phoned, running up a telephone bill of about R2 000 during one month.

[5] On appeal the sentence was attacked by the state as being too lenient given the gravity of the offences committed by the accused. The state argued that the learned trial judge had failed to exercise his discretion properly and misdirected himself in a number of respects. It was submitted by counsel for the state that, given 'the compelling aggravating features peculiar to the murder', direct imprisonment should have been imposed upon the accused, notwithstanding her youth.

[6] In the view which I take of the matter I do not consider it necessary to deal with each argument raised in this regard. Suffice it to say that, having had regard to the evidence and the trial judge's assessment of it, I

am satisfied that the judge gave due and careful, if not anxious, consideration to the matter. I am not persuaded that, save in one material respect, he misdirected himself.

[7] The trial judge, in my view, did not approach the evidence of the witnesses dealing with sentence with the necessary degree of objectivity and accepted their say-so without considering whether they had a factual basis for their opinion. This caused him to place too much emphasis on the personal circumstances of the accused, under-emphasising the other material considerations. The evidence of Prof Sloth-Nielsen was in part inadmissible. Courts do not need professors of law to tell them what the law is or should be. The trial judge was especially taken in by the evidence of Mrs Joan van Niekerk who, without any factual basis, came to the conclusion that the accused's childhood had shaped her to commit the crimes in question. He also failed to consider that her evidence, as that of some of the others, was not objective and was based on what the accused had told them, while he knew (and they should have known) that the accused was a callous liar, prepared without compunction to concoct a version, create a false alibi and weave a web of falsehoods in order to implicate others. After the murder she was able for months on end to hide her complicity. This, according to the expert opinion of Mrs van Niekerk, was all due to the fact that her father had committed suicide, that the

relations between the deceased and her mother were bad, that the grandmother led a not exemplary life and that the accused hated her grandmother, ignoring the fact that her version to others was that she loved her.

[8] It might be the right opportunity to have regard again to the words of Rumpff CJ when he dealt with a related matter in *S v Loubscher*:¹

‘In hierdie stadium moet gemeld word dat Dr Hayden, wat nie 'n psigiater of sielkundige is nie, 'n opinie uitgespreek het oor die waarskynlike verminderde toerekeningsvatbaarheid van die beskuldigde sonder dat hy enigsins sy opinie geknoop het aan die spesifieke feite van hierdie saak. Ook is dit opmerklik dat die deskundige getuies, wie se verklarings ek nog sal noem, versuim om dit te doen.’

‘Mens vra jousef af wat die waarde van hierdie "doppelgänger"-assumpsie [a theory advanced by the experts] is in die lig van die antwoord van die beskuldigde.’

‘Die deskundiges wat die verklarings gemaak het, weet baie goed, of behoort te weet, dat getuienis oor die geestestoestand van 'n beskuldigde, wat aan moord skuldig bevind is, alleen dan behoorlik oorweeg kan word wanneer die besonderhede van die moord in aanmerking geneem word. Hulle weet, of behoort te weet, dat 'n Hof nie staat kan maak op bewerings van 'n algemene aard wat nie in verband gebring word met die feite van die spesifieke geval nie.’

‘Indien die deskundiges die getuienis van die beskuldigde gelees het, soos dit hulle plig was om te doen, moes hulle tot die konklusie gekom het dat in die getuienis daar geen indikatie hoegenaamd was dat beskuldigde anders as 'n "normale"

¹ 1979 (3) SA 47 (A) at 57.

misdadiger opgetree het nie en dat uit die getuienis as 'n geheel geneem, en uit die pleeg van die daad self en die ander misdade, daar geen rede geblyk het nie waarom die beskuldigde as verminderd toerekeningsvatbaar beskou moes word.'

'Die kritiek wat op die getuienis van die deskundiges in hierdie saak uitgespreek is, moet gesien word in die lig van die begeerte van die juris dat daar samewerking behoort te wees oor die probleem van toerekeningsvatbaarheid en aanspreeklikheid in verband met 'n misdaad tussen die juris aan die een kant, en die psigiater of die sielkundige of die neuroloog aan die ander kant, met erkenning van mekaar se grondliggende benadering en probleme.

Hierdie begeerte is reeds uitgespreek in 1967 in die Report of the Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters. Ná verwysing na voorbeelde van sekere uiterste gevalle van onaanvaarbare opinies deur juriste en medici word die volgende gekonstateer in paras 1.19 en 1.20:

"1.19. It is these extreme views which call for a coolheaded approach to the problems which are not to be evaded by the psychologist and the psychiatrist, on the one hand, and the jurist on the other, but must be solved by the co-operation of both parties in the best interests of society.

1.20. What is required of the psychiatrist and the psychologist is a sense of responsibility towards the views of society and the purpose and essence of punishment, and what is required of the jurist and the public is appreciation for the development of psychiatric and psychological knowledge."

Hiervolgens rus daar 'n plig op die juris sowel as op die geestesdeskundige en dit is die plig van 'n geestesdeskundige om in 'n strafsak nie slegs algemene opinies uit te spreek nie, wat miskien op mediese gebied as verantwoord beskou kan word,

maar om sy opinies te lewer met behoorlike inagneming van wat die taak van 'n verhoorhof is by die toepassing van die strafreg en veral by die oorweging van toerekeningsvatbaarheid en strafregtelike aanspreeklikheid.'

[9] The accused, in my view, and in spite of her age and background, acted like an 'ordinary' criminal and should have been treated as such. She had no mental abnormalities and, something the judge had noted, was able to pass herself off and in many respects acted like someone of about 18 years of age. That is what at least one witness thought her age was. All the guesswork about her mental and physical age in contradistinction to her actual age pales into insignificance.

[10] That is, however, not the end of the matter. What troubles, is whether the sentence (if postponement of sentence can be regarded as a sentence) imposed was appropriate in the circumstances of this case. The test for interference by an appeal court is whether the sentence imposed by the trial court is vitiated by irregularity or misdirection or is disturbingly inappropriate. (See *S v Rabie*)². Even in the absence of misdirection, it would still be competent for this court to interfere if it

² 1975 (4) SA 855 (A) at 857D-F; See also *S v Pillay* 1977 (4) SA 531 (A); *S v Pieters* 1987 (3) SA 717 (A); *S v Sadler* 2000 (1) SACR 331 (SCA); *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA).

were satisfied that the trial court had not exercised its discretion reasonably³ and imposed a sentence which was not appropriate.

The Issue on Appeal

[11] In my view the issue on appeal can therefore be narrowed down to whether the sentence imposed by the trial court was appropriate, given that court's duty to have regard to the seriousness of the offence and the interests of society as well as the true character of the accused. This issue must of course now be considered not only with reference to the so-called traditional approach to sentencing but also with due regard to the sentencing regime foreshadowed in s 28 (1) (g) of the Constitution and international developments as reflected in, for instance, instruments issued under the aegis of the United Nations.

[12] There can be no question that at the best of times the sentencing of a juvenile offender is never easy and is far more complex than the sentencing of an adult offender (*S v Ruiters*⁴; SS Terblanche *The Guide to Sentencing in South Africa* (1999)⁵). It is even worse if the youthful offender concerned is a child,⁶ as in this case. As pointed out in *Brandt v*

³ *S v Pieters* at 734H.

⁴ 1975 (3) SA 526 (C) at 531E-F.

⁵ (1999) ch 12 375.

⁶ Section 28 (3) states: 'child' means a person under the age 18 years.

*S*⁷ our criminal justice system has never treated the sentencing of a child offender as a ‘separate, self contained and compartmentalised’ field of judicial activity. The youth of the offender has, however, always been recognised at common law as a mitigating factor for purposes of sentence. (*S v Jansen*;⁸ *S v Lehnberg en`n ander*⁹)

The Traditional Approach

[13] The so-called traditional approach to sentencing required (and still does) the sentencing court to consider the ‘triad consisting of the crime, the offender and the interests of society’ (*S v Zinn*¹⁰). In the assessment of an appropriate sentence, the court is required to have regard to the main purposes of punishment namely, the deterrent, preventive, reformative and the retributive aspects thereof (*S v Khumalo*¹¹). To these elements must be added the quality of mercy,¹² as distinct from mere sympathy for the offender. As noted by this court in *Brandt* ‘the traditional aims of punishment have been affected by the Constitution’.

The Constitution and the International Instruments

⁷ [2005] 2 All SA 1 (SCA) at para 14.

⁸ 1975 (1) SA 425 (A).

⁹ 1975 (4) SA 553 (A).

¹⁰ 1969 (2) SA 537 (A) at 540G.

¹¹ 1984 (3) SA 327 (A) at 330D.

¹² *S v Rabie* supra at 861D-F and 866A-C.

[14] With the advent of the Constitution the principles of sentencing which underpinned the traditional approach must, where a child offender is concerned, be adapted and applied to fit in with the sentencing regime enshrined in the Constitution, and in keeping with the international instruments which lay ‘emphasis on *reintegration* of the child into society’.¹³ The general principle governing the sentencing of juvenile offenders is set out in s 28 (1) (g) of the Constitution. The section reads:

‘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; . . .’

[15] Section 28 has its origins in the international instruments of the United Nations. Of relevance to this case is the United Nations Convention on the Rights of the Child (1989) which South Africa ratified on 16 June 1995¹⁴ and thereby assumed an obligation under International Law to incorporate it into its domestic law.¹⁵ Various articles under the convention provide that juvenile offenders under the age of 18 years

¹³ Report on Juvenile Justice (Project 106) at 150.

¹⁴ In South Africa the 16 June is recognized as Children’s Day and is a public holiday.

¹⁵ *S v Kwalase* 2000 (2) SACR 135 (C) at 138g.

‘should as far as possible be dealt with by the criminal justice system in a manner that takes into account their age and special needs.’¹⁶ Also of relevance is article 40 (1) of the Convention which recognizes the right of the child offender ‘to be treated in a manner consistent with the promotion of a child’s sense of dignity and worth, which reinforces the child’s respect for human rights and fundamental freedom of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.’¹⁷ Section 28 (1) (g) of our Constitution appears to be a replica of s 37 (b) of the Convention which provides that children in conflict with the law must be arrested, detained or imprisoned ‘only as a matter of last resort and for the shortest appropriate period of time.’¹⁸

[16] The Convention has to be considered in conjunction with other international instruments. Most of these instruments are referred to extensively in *Brandt*.¹⁹ Of particular relevance in this case, however, is the United Nations *Standard Minimum Rules for the Administration of Juvenile Justice* (1985) (‘Beijing Rules’), in particular rule 5 (1). The rule recommends that a criminal justice system should ‘ensure that any reaction to juvenile offenders shall always be in proportion to the

¹⁶ *S v Kwalase* at 138g.

¹⁷ *S v Kwalase* at 138g.

¹⁸ *S v Kwalase* at 138i.

¹⁹ Para 16.

circumstances of both the offender and the offence’.²⁰ The rule should, however, not be read in isolation because rule 17 (1) (a) provides that:

‘The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as the needs of society’

The commentary notes that it is difficult to formulate guidelines because of the unresolved conflicts of a philosophical nature including rehabilitation versus just deserts, assistance versus repression and punishment, merits of the case versus protection of society in general and general deterrence versus individual incapacitation.

The South African Law Commission

[17] In July 2000 the South African Law Commission Project Committee on Juvenile Justice (Project 106) released a Discussion Paper embodying a draft Child Justice Bill. On the sentencing of child offenders there is unqualified support for the principle that ‘detention should be a matter of last resort.’²¹ It also recommended that ‘the sentence of imprisonment for children below a certain age (14) years be excluded.’ Following the Beijing Rules, in particular rule 17 (1) (c) thereof the committee recommended that imprisonment should only be imposed

²⁰ *S v Kwalase* at 139c-e.

²¹ S A Law Commission Report on Juvenile Justice (Project 106) 153 footnote 16.

upon children who have been convicted of serious and violent offences.²²

These recommendations have not as yet been adopted by Parliament and can have but peripheral value at this stage.

[18] Having regard to s 28 (1) (g) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is ‘not to be detained except, as a measure of last resort’ and if detention of a child is unavoidable, this should be ‘only for the shortest appropriate period of time’. This of course applies to a juvenile offender who is under the age of 18 years as provided for in s 28 (1) (g) of the Constitution. Furthermore if the juvenile concerned is a child as described, he or she should be kept separately from persons over the age of 18 years and the sentencing court will have to give directions to this effect, if it considers that the case before it warrants detention. This follows from s 28 (2) of the Constitution which provides that a child’s best interests are of paramount importance in every matter concerning the child.

²² *Op cit.*

[19] It must be remembered that the Constitution and the international instruments do not forbid incarceration of children in certain circumstances. All that it requires is that the ‘child be detained only for the shortest period of time’ and that the child be ‘kept separately from detained persons over the age of 18 years.’ It is not inconceivable that some of the courts may be confronted with cases which require detention. It happened in the United Kingdom not so long ago in the case of *R v Secretary of State for the Home Department, ex parte Venables*; *R v Secretary of State for the Home Department, ex parte Thompson*²³ where two boys aged ten were convicted of the murder of a two year old boy in appalling circumstances. Leaving aside the details relating to the appeal processes, they were sentenced to ten years.

[20] I turn now to consider the facts relevant to the sentence of the accused. The strongest mitigating factor in favour of the accused is her youthfulness: she was 12 years and 5 months’ old at the time of the offence. A second most important factor is that she has no previous conviction. This is an important factor because even the Beijing rules (rule 17 (1) (c)) provide for incarceration of a child who has committed ‘a serious violent act against another person and or persists in committing

²³ [1997] All ER 97.

other serious offences'²⁴ albeit as a measure of last resort and for the shortest period of time.

[21] As against the above mitigating factors (to which of course her personal circumstances must be included) are the aggravating features of the case which prompted the trial judge to remark that if he were to look only at the gravity of the offence committed by the accused, there was no doubt that the imprisonment of the accused might be regarded as the only appropriate punishment. The accused arranged for the brutal murder of her grandmother at the hands of two strangers who now languish in prison, each serving sentences of imprisonment of twenty five years. The killing was particularly gruesome: the deceased had her throat cut in her bedroom and was slaughtered like an animal. The accused provided the killers with knives. She stood watching while the killers carried out her evil command and even callously allowed her 6 year old brother to enter the room when her sordid mission had been accomplished. Mercifully, the deceased was unaware of what was happening because the accused had drugged her by putting sleeping tablets in her tea. The murder was premeditated. One would expect a person of that age to have been remorseful. Not the accused. While the killers were still in the house after the murder she telephoned her boyfriend – a twenty year old – to try and

²⁴ *Op cit* footnote 16.

fabricate an alibi. As if that was not bad enough she rewarded the killers with a number of household goods belonging to the deceased, as indicated earlier in the judgment. One can go on and on. Every chapter of this sordid tale reveals the evil mindedness of the accused. One of the more worrying aspects of the case is that no motive was given for the killing, which makes it imperative for this court to consider a sentence that would to some extent ensure that those who come into contact with her are protected.

[22] Although Swain J gave anxious consideration to the matter, I agree with counsel for the state that he failed to have sufficient regard to the gravity of the offence. The postponement of the passing of sentence even when coupled with correctional supervision was, in my view, inappropriate in the circumstances and leaves one with a sense of shock and a feeling that justice was not done. Even in the case of a juvenile as already indicated the sentence imposed must be in proportion to the gravity of the offence. If this case does not call for imprisonment of a child, I cannot conceive of one that will. Admittedly in his judgment the learned judge did allude to the principle of proportionality but, I believe, he failed to give due and sufficient weight to it, and this court is therefore at large to interfere and impose what it considers to be an appropriate

sentence. In *Brandt*²⁵ and *Kwalase*²⁶ the court reiterated that proportionality in sentencing juvenile offenders was required by the Constitution. Of course proportionality in sentencing is not meant to be in the sense of an ‘eye for an eye’ as was cautioned by Harms AJA in a dissenting judgment in *S v Mafu*²⁷ where he noted that proportionality does not imply that punishment be equal in kind to the harm that the offender has caused.

[23] If I had been a judge of first instance I would have seriously considered imposing a sentence of imprisonment. The court below was very concerned about the accused’s reintegration into society should she be sent to prison. It is a valid concern but the fact that she could not study what she wishes and that the schooling facilities are not ideal, are in my view factors of limited value. The present case is, however, far from simple. We know that the Department of Correctional Services, in detaining children, does not comply with either the Constitution or the provisions of its Act. There is also no indication that, in this case, it would. There appears to be a general unwillingness to accept the fact that there are children that have to be detained in prison-like facilities, and there are none for their purposes. All the other detention options are as

²⁵ At para 19.

²⁶ At 139f.

²⁷ 1992 (2) SACR 494 (A) at 497d.

bad or non-existent. The court below was told that there is some kind of provincial facility in the Western Cape but it will not accept children from other provinces unless those are prepared to pay, which the relevant province apparently cannot or will not.

[24] Although prison conditions are generally not a matter with which a sentencing court should concern itself – since it is a matter for the government, the Ministry of Correctional Services and the Prison authorities to rectify – and although it is not for the sentencing court to first undertake an investigation as to whether there is accommodation available in prison for a juvenile offender each time it considers passing a custodial sentence, we cannot close our eyes to the facts as we know them.

[25] In spite of my reservations about the duty of a sentencing court to investigate prison conditions and the like, I have to refer to the fact that the witnesses from Correctional Services misled the court below. When correctional supervision was introduced, courts embraced it enthusiastically as a real sentencing option, something that will have a substantial effect on the prison population in this country. As time went on courts became more sceptical but I am now completely disillusioned. We asked for a report from Correctional Services to determine the nature

and scope of their supervision since the judge had requested that the accused should be visited at least four times per week at irregular intervals. Without proper supervision house arrest has no value. The affidavit indicates that although the accused was sentenced on 17 December 2004, there were no visits during the festive season, in January there were 9, in February 3, in March 2, then one per month and, suddenly when the appeal was enrolled, there were 6 during October. Although a telephone had been installed, there were six telephone contacts in all. More disturbing is the fact that the visits and contacts were all during office hours, leaving the accused free to do what she wishes after hours and during week-ends. We have invited counsel for the state to provide us with proposals of how to make the house arrest effective, but they have failed to file any suggestions. However, one cannot fault the trial judge for having imposed this sentence, carefully crafted as he did, and it has to stand subject to minor amendments that speak for themselves.

[26] It is the postponement of sentence that has to be reconsidered. It is too late to impose a sentence of direct imprisonment but the interests of justice will be served by imposing a term of imprisonment but suspending it on certain conditions, which if breached might result in the accused having to serve time in prison. In this way, I believe, recognition will be

given to the interests of society in the sense that it would be protected against her, and she against society, which might wish to seek revenge.

[27] Since the state was substantially successful, the accused is not entitled to an award of costs.

[28] In the result the appeal is allowed. The sentence imposed by the trial court is replaced with the following:

‘The accused is sentenced to:

1. Seven years’ imprisonment, the whole of which is suspended for 5 years on condition that the accused is not again convicted of an offence of which violence is an element, committed during the period of suspension and for which she is sentenced to a term of imprisonment without the option of a fine.
2. Thirty-six months of correctional supervision in terms of section 276(1)(h) of the Criminal Procedure Act on the following conditions:
 - (a) that she be placed under house arrest, in the care and custody of her mother and legal guardian for the duration of thirty-six months, on the conditions set out below;

- (b) that she be confined to the flat occupied by her mother save and except in the following circumstances:
- (i) that she attend school during ‘normal school hours’. For these purposes ‘normal school hours’ means one (1) hour prior to the commencement of school and one (1) hour after the conclusion of school, for the purpose of travelling to and from school;
 - (ii) that she attend official school activities falling outside of ‘normal school hours’ as sanctioned by the principal of the school;
 - (iii) that she attend the NICRO program known as ‘Journey’, other life skills training and therapeutic courses, activities or counselling as prescribed by Mrs Joan van Niekerk and/or the correctional officer;
 - (iv) that she receive medical and/or dental treatment as determined by a medical doctor or dentist;
 - (v) that she be in the building of which the flat forms a part, but outside the confines of the flat itself for one hour between 16:00 and 17:00 during school term, and for two (2) hours in

total respectively between 10:00 and 11:00 and between 15:00 and 16:00 during school holidays;

- (c) that she receive regular support therapy from Mrs Joan van Niekerk, or any other suitable professional designated by her, and that she co-operate fully in receiving such therapy;
- (d) that she render one hundred and twenty (120) hours per year of community service, as approved by Mrs Joan van Niekerk and the correctional officer, in addition to her school curriculum activities, when she attains fifteen (15) years of age;
- (e) that she be permitted visitors at the flat where she lives, as approved by the accused's mother and Mrs Joan van Niekerk, only in the presence of her mother;
- (f) Mrs Joan van Niekerk or the correctional officer are requested to submit quarterly reports to the Director of Public Prosecutions, briefly setting out the progress being made by the accused and the general compliance by the accused with the terms of this order;

- (g) that correctional officer is ordered to visit the flat where the accused will be living at least four times per month, including weekends and after office hours, at irregular intervals to ensure compliance by the accused with the terms of her confinement. The correctional officer is also ordered to telephone the accused, once a telephone has been installed in the flat, at irregular intervals and after hours to ensure compliance by the accused;
- (h) the Director of Public Prosecutions, Mrs Joan van Niekerk and/or the correctional officer, are given leave to approach this Court at any time, for a variation of the terms of this order;
- (i) In the event of any breach by the accused of any of these conditions, the correctional officer is directed to immediately report such breach on affidavit to the Director of Public Prosecutions who may then apply for the necessary relief.'

KK MTHIYANE
JUDGE OF APPEAL

CONCUR:

**HARMS JA
STREICHER JA
COMBRINCK AJA
NKABINDE AJA**

CASE NO AR 359/2006
AR 360/206

IN THE HIGH COURT OF SOUTH AFRICA
NATAL PROVINCIAL DIVISION

In the matter between

THAMSANQUA NGCOBO

First Applicant

BHEKI MCHUNU SHANGI

Second Applicant

and

THE STATE

Respondent

REASONS FOR JUDGMENT

LEVINSOHN DJP :

Both these cases were set down before this Court on 24th August 2006 as a matter of urgency. Each applicant sought the same relief, namely that the sentence that they be detained in a reform school be set aside. Precisely the same issue arises in each case and accordingly it was convenient that they be heard together. The Centre for Child Law, an

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organisation committed to promote the best interests of children, particularly in regard to legal issues, applied for leave to join in the proceedings as an *amicus curiae*. This application was granted in the absence of objection from the applicants. The *amicus* was represented by Mr Budlender and the Court is indebted to him and to his client for the very helpful contribution they have made in these proceedings. The Director of Public Prosecutions of KwaZulu-Natal was represented by Ms Blumrick. We too are indebted to her for her input.

After hearing argument we ordered that they be released forthwith from custody. We indicated that reasons for this decision would be furnished later. These are the reasons.

The salient background facts in each case are the following.

- [1] Thamsanqua Ngcobo. In October 2004 this applicant was arrested on a charge of contravening section 36 of Act 62 of 1955. He was found in possession of a jacket and a microphone which were suspected to have been

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stolen. On 22nd February 2005 he was arraigned before a magistrate, pleaded guilty and was found guilty as charged. On 30th March 2005 he was sentenced to be detained in a reform school in terms of section 297(1)(d) of Act 51 of 1977. Pending transfer to a reform school he was to be detained in Westville Gaol. As at the date of the application he was still in detention there. In effect this applicant had spent approximately twenty-two months in gaol, part of this awaiting trial and the remaining period awaiting placement in a reform school.

- [2] **Bheki Mchunu Shanghi.** This applicant stated that he was 17 years of age. This is not possible since he gives his date of birth as 6th June 1987. He has been in custody at the Westville Prison since October 2004. On 21st January 2005 he was convicted of housebreaking with intent to steal and theft and sentenced to be detained in a reform school. As at the date of the application he had

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not been placed in a reform school and has remained incarcerated in the Westville Prison.

The Criminal Procedure Act, No 51 of 1977, provides that a juvenile offender can be sentenced to be detained in a reform school. In given circumstances this is a most appropriate form of punishment. The amicus has pointed out that reform schools are administered by the respective provincial departments of education. They are not like prisons. Children have access to educational and recreational programmes in what the amicus describes as a "therapeutic environment". The amicus also points out and I quote from her affidavit : -

"26.7 They are permitted to move freely within the parameters of the school, they are also allowed out with special permission, and can go home for school holidays. This is part of the process of reintegration, to ensure that they can return to the community after their sentences are completed. They have direct access to the assistance of social workers and psychological support services."

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A further point that was emphasised by the amicus is that the Criminal Procedure Act provides that pending placement in a reform school the Court may order that the child in question be detained in a place of safety. It turns out that nowadays offenders are remanded to prisons to await placement. As is evident from the present cases they spend long periods there without being afforded any educational facilities whatsoever.

According to the amicus's affidavit there is a major shortage of reform schools in the country. Manifestly this is a most unsatisfactory and undesirable state of affairs. It calls for drastic and urgent attention by the executive. Mr Budlender emphasised during the course of his argument that this type of sentence should not be turned into a dead letter. He drew attention to the constitutional duty of the executive to assist the judiciary in properly carrying out its functions. That means of course that resources must urgently be made available to establish new reform schools.

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We were satisfied that both the failure to cause the applicants to be transferred to a reform school coupled with their prolonged incarceration in prison proclaimed that they should obtain relief. Counsel for the amicus referred us to the case of State v Z and 23 Similar Cases 2004 (1) SACR 400, a judgment of the Full Bench of the Eastern Cape Division. In that case the Court dealt with the problems which we have encountered in casu. The Court considered that it was entitled to deal with these matters on special review in terms of section 304. With great respect I agree entirely with the reasoning of Plasket J which is set forth at pages 414 to 416 of the report.

Accordingly we accept the principle that notwithstanding the fact that the lower court imposed a competent sentence if subsequent events occur which reveal that the sentence imposed is incapable of being carried into effect this Court can interfere on review.

It seemed to us that in the interests of justice it was inappropriate to set aside the sentence

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imposed for manifestly that was a competent and appropriate one. The justice of the case however demands that both the applicants who have been detained for a grossly unreasonable period should be released. For these reasons, we made the order indicated above.

To avoid a situation where juvenile offenders languish in gaol pending placement in a reform school, the Department of Justice and Constitutional Development is respectfully urged to cause magistrates to implement an administrative system whereby the progress made by the relevant authorities to place offenders in a reform school is constantly monitored. It seems to us that these cases can be diarised by the clerk of the court for a given period. When the date occurs the case can then be placed before the particular magistrate or another magistrate in order for such magistrate to consider submitting the case for special review. We do not think that the suggested monitoring system will be place an undue administrative burden on the magistracy. It is further envisaged that the

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magistrate will call for reports from the authorities
and in the light of those reports he/she may take
steps to place the matter before a judge on special
review in terms of section 304. The Registrar is
 directed to send a copy of this judgment to the
 Regional Office of the Department of Justice and
 Constitutional Development for its information.



JAPPIE J :

I agree.



for Jappie J.



RESOURCE GUIDE TO
A PROPER APPROACH TO JUVENILE OFFENDERS
IN THE REGIONAL COURTS

PART F

USEFUL TELEPHONE NUMBERS

SECURE CARE FACILITIES

PROVINCE	DSD FACILITIES CURRENTLY ACCOMMODATING CHILDREN AWAITING TRIAL			
	NAME	PHYSICAL ADDRESS	TEL NR	SAPS SERVICE AREA
MPUMALANGA	<ul style="list-style-type: none"> Hendrina Child and Youth Care Centre (SC.1) (Hendrina) BEING RENOVATED 	Farm 1, Birmingham, Hendrina	(013) 2937290	SAPS: Whole Mpumalanga
KWAZULU-NATAL	<ul style="list-style-type: none"> Excelsior Place of Safety in Pinetown (SC.2) CP 74 	Bamboo Lane 24, Pine Town	(031) 7025371	SAPS: CR Swart, Pinetown
	<ul style="list-style-type: none"> Valley View Place of Safety in Sydenham Durban (CR Swart, Phoenix, Verulum) CP 20 	178 Clare Road, Sydenham	(031) 2072519	SAPS: Umlazi, Chatsworth, Pinetown, Durban
	<ul style="list-style-type: none"> Ocean View Place of Safety in Bluff Durban CP 15 	850 Marine Drive, Bluff, Beach, Austerville, Pinetown, Inanda, Chatsworth	(031) 4685415	SAPS: Durban, CR Swart, Ntuzuma, Brighton
	<ul style="list-style-type: none"> Greenfield's place of Safety in Greytown CP 10 	Greytown	(0331) 5011630/1	SAP: Greytown
	<ul style="list-style-type: none"> Pata Place of Safety in Pietermaritzburg CP 35 	Pata Location	(0331) 81646	SAPS: Pietermaritzburg, Whole Midlands
EASTERN CAPE	<ul style="list-style-type: none"> Enkuselweni Secure Care Centre in PE (WSC.3) CP 60 	Mbilini Road, Kwazakhele	(041) 4661661	SAPS: Kwazakela
	<ul style="list-style-type: none"> Erica Child and Youth Care Centre in PE CP 50 	Bob Price Street, Hillside	(041) 4562112	SAPS: Galvondale
	<ul style="list-style-type: none"> Protea Child Care Centre in PE 	Blackthorn Avenue, Forest Hill	(041) 5858577	SAPS: Humemood
	<ul style="list-style-type: none"> Maluti POS/SC John X Merriman in East London CP 25 			
GAUTENG	<ul style="list-style-type: none"> Dyambu Youth Centre in Randfontein CP 500 	10 Tom Muller Drive, Wesrand, Krugersdorp	(011) 6606227	SAPS: Randfontein

PROVINCE	DSD FACILITIES CURRENTLY ACCOMMODATING CHILDREN AWAITING TRIAL			
	NAME	PHYSICAL ADDRESS	TEL NR	SAPS SERVICE AREA
	<ul style="list-style-type: none"> Walter Sisulu Child and Youth Care Centre in Noordgesig CP 90 Protém Detention Centre in Cullinan CP 120 Jabulani Detention Centre in Soshanguwe CP 130 Norman House Place of Safety in Edenvale, JHB CP 5 Tutela Place of Safety in Pretoria North CP 5 Van Rhyne Place of Safety Benoni CP 60 	<p>Modder Street, Noordsig</p> <p>Sonderwater Road, Cullinan – Rayton Road</p> <p>Soutpan Road, Soshanguwe</p> <p>C/o First avenue and Fourth Street, Edenvale</p> <p>162 Tolbos Street, Pretoria North</p> <p>Tesessebe Street Apex, Benoni</p>	<p>(011) 9355505</p> <p>(012) 7341027</p> <p>(012) 7978302</p> <p>(011) 4537803</p> <p>(012) 5460640/44</p> <p>(011) 4223183</p>	<p>SAPS: Orlando</p> <p>SAPS: Cullinan</p> <p>SAPS: Soshanguwe</p> <p>SAPS: Edenvale</p> <p>SAPS: Pretoria North</p> <p>SAPS: Benoni</p>
LIMPOPO	<ul style="list-style-type: none"> Polokwane Secure Care CP 70 MALES 	Plot 303, Sterkloop	(015) 2931181	SAPS: Whole Province
NORTHERN CAPE	<ul style="list-style-type: none"> Molehe Mampe Secure Care Centre in Galeshewe, Kimberley (SC.6) CP 60 Marcus Mbetha Sindisa Secure Care Centre in Upington CP 40 Lerato Place of Safety in Kimberley CP 50 	<p>420 Tshangaan Street, Galeshewe, Kimberley</p> <p>65 Toermalyn Street, Belvue, Upington</p> <p>Ether Street</p>	<p>(053) 8711151</p> <p>(054) 3392260/1</p> <p>(053) 8711251</p>	<p>SAPS: Whole Kimberley, De Aar</p> <p>SAPS: Upington, Calvinia, Springbok</p> <p>SAPS: Whole Kimberley, De Aar</p>
FREE STATE	<ul style="list-style-type: none"> Tshirilotsong Place of Safety in Bloemfontein CP 48 Matete Matches Secure Care Centre in Kroonstad (SC.8) 	<p>Maphisa Road, Phahameng</p> <p>Smaldeel Road, Kroonstad</p>	<p>(051) 4353319</p> <p>(056) 2123445/6</p>	<p>SAPS: Whole Free State – less serious offences</p> <p>SAPS: Whole Free State – serious offences</p>

PROVINCE	DSD FACILITIES CURRENTLY ACCOMMODATING CHILDREN AWAITING TRIAL			
	NAME	PHYSICAL ADDRESS	TEL NR	SAPS SERVICE AREA
	CP 40			
NORTH WEST	<ul style="list-style-type: none"> Reamogetswe Secure Care Centre in Bruits (SC.9) CP35 Pabalelo Place of Safety in Garankuwa CP 20 	<p>Sonop, BRITS</p> <p>2829 Sedumedi Street, Garankuwa</p>	<p>(012) 2566141/3</p> <p>(012) 7033563</p>	<p>SAPS: Bruits, Whole North West</p> <p>SAPS: Garankuwa, Odi and whole North West</p>
WESTERN CAPE	<ul style="list-style-type: none"> Bonnytoun House in Wynberg, Cape Town CP 190 Outeniekwa House in George (mainly) CP77 MALES The Horizon Youth Centre in Faure (SC.10) (Klawer mainly but whole W.Cape) CP 185 MALES Vredelust House in Elsies River CP 10 FEMALES Lindelani Place of Safety, Stellenbosch CP 60 MALES Clanwilliam secure Care Centre CP 50 MALES 	<p>Mimosa Complex, 41 Rosmead Avenue, Wynberg</p> <p>Gold Street, Parkedene, George</p> <p>C/o Old Faure Road and Spine Road, Extension Eerste River</p> <p>C/o 16th Avenue and 26th Street, Leonsdale, Elsies River</p> <p>Eisenburg Road, Koerenhof</p> <p>Park street,Clanwilliam</p>	<p>(021) 7615057</p> <p>(044) 8750402</p> <p>(021) 8433860</p> <p>(021) 9310233</p> <p>(021) 8822634</p> <p>(021) 4821900/1/2</p>	<p>SAPS: Wynberg and CT Central</p> <p>SAPS: George, Oudtshoorn, Beaufort West</p> <p>SAPS: Mfuleni, Mitchell's Plain, CT Central</p> <p>SAPS: Elsies River</p> <p>SAPS: Stellenbosch</p>



RESOURCE GUIDE TO
A PROPER APPROACH TO JUVENILE OFFENDERS
IN THE REGIONAL COURTS

PART G

DISCUSSION QUESTIONS

(6) (a) At his or her first appearance in court a person contemplated in subsection (1) (a) who-

(i) was arrested for allegedly committing an offence shall, subject to this subsection and section 60-

(aa) be informed by the court of the reason for his or her further detention; or

[Sub-para. (aa) substituted by s. 3 (b) of Act 34 of 1998.]

(bb) be charged and be entitled to apply to be released on bail,

and if the accused is not so charged or informed of the reason for his or her further detention, he or she shall be released; or

60 Bail application of accused in court

(1) (a) An accused who is in custody in respect of an offence shall, subject to the provisions of section 50 (6), **be entitled to be released on bail at any stage preceding his or her conviction** in respect of such offence, if the court is satisfied that the interests of justice so permit.

(11) Notwithstanding any provision of this Act, where an accused is charged with an offence referred to-

(a) in Schedule 6, the court shall order that the accused be detained in custody until he or she is dealt with in accordance with the law, unless the accused, having been given a reasonable opportunity to do so, adduces evidence which satisfies the court that exceptional circumstances exist which in the interests of justice permit his or her release;

12) The court may make the release of an accused **on bail** subject to conditions which, in the court's opinion, are in the interests of justice.

71 Juvenile may be placed in place of safety or under supervision in lieu of release on bail or detention in custody

If an accused under the age of eighteen years is in custody in respect of any offence, and a police official or a court ***may in respect of such offence release the accused on bail under section 59 or 60***, as the case may be, such police official or court may, ***instead of releasing the accused on bail or detaining him in custody, place the accused in a place*** of safety as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983), or place him under the supervision of a probation officer or a correctional official, pending his appearance or further appearance before a

court in respect of the offence in question or until he is otherwise dealt with in accordance with law.

5. In view of these sections do you still maintain your answer on question 3 *supra*?

Please study the following article

72 Accused may be released on warning in lieu of bail Cases

(1) If an accused is in custody in respect of any offence and a police official or a court may in respect of such offence release the accused on bail under section 59 or 60, as the case may be, such police official or such court, as the case may be, may, in lieu of bail and if the offence is not, in the case of such police official, an offence referred to in Part II or Part III of Schedule 2 –

(a)

[Para. (a) substituted by s. 7 (a) of Act 33 of 1986.]

(b) ***in the case of an accused under the age of eighteen years who is released under paragraph (a), place the accused in the care of the person in whose custody he is, and warn such person to bring the accused or cause the accused to be brought before a specified court at a specified time on a specified date and to have the accused remain in attendance at the proceedings relating to the offence in question and, if a condition has been imposed in terms of paragraph (a), to see to it that the accused complies with that condition.***

6. Subsequent to the bail application bail is denied by the court. The State requests a remand of the case for a period of:
- (a) One month
 - (b) Three weeks
 - (c) Two weeks
 - (d) Seven days

Which applications do you grant and why do you grant or refuse to grant them?

(a)

(b)

(c)

(d)

7. In the alternative the State requests that the case should be remanded for trial for a date 3 months in the future being the first available trial date. Do you concede to this request?

If so, do you attach any conditions to the remand?

8. Please study the following articles

Section 29. Act 111/2000 **Detention of unconvicted young persons and women**

(1) Notwithstanding anything to the contrary in any law contained-

- (a) but subject to subsection (2), an unconvicted person under the age of 14 years;
- (b) but subject to subsections (2) and (5), an unconvicted person who is 14 years or older but under the age of 18 years, shall not be detained in a prison or a police cell or lock-up.

(2) A person referred to in paragraph (a) or (b) of subsection (1) maybe detained in a police cell or lock-up after his or her arrest until he or she is brought before a court within a period **not exceeding 24 hours** in respect of a person referred to in paragraph (a) of that subsection and not exceeding 48 hours in respect of a person referred to in paragraph (b) of that subsection, if-

- (a) such detention is necessary and in the interests of justice; and

- (b) the person concerned cannot be placed in the care of his or her parent or guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983), for the period in question.

[Sub-s. (2) amended by s. 1 (a) of Act 14 of 1996.]

(3) Where a person is detained in a police cell or lock-up as contemplated in subsection (2) the member of the South African Police Service or the peace officer responsible for ordering such detention shall-

- (a) provide the court before which the person first appears with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up and to keep him or her there until his or her first appearance before the court; or
- (b) if the person is released before he or she appears in a court, provide the magistrate of the magisterial district in which the detention took place with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up.

(4) The report referred to in subsection (3) (b) shall be submitted to the magistrate referred to in the said subsection not later than one court day of the person concerned being released from detention.

(5) (a) ***A person referred to in subsection (1) (b) who is accused of having committed an offence shall before his or her conviction and sentence, not be detained in a prison or a police cell or lock-up unless the presiding officer has reason to believe that his or her detention is necessary in the interests of the administration of justice and the safety and protection of the public and no secure place of safety, within a reasonable distance from the court,*** mentioned in section 28 of the Child Care Act, 1983 (Act 74 of 1983), is available for his or her detention: Provided that such a person may only be detained in a prison (but not a police cell or lock-up) if he or she is accused of having committed an offence or category of offences mentioned in Schedule 2, or any other offence, in circumstances of such a serious nature as to warrant such detention: **Provided further that such a person shall be brought before the court that made the order of such detention every 14 days to enable such court to reconsider the said order.**

(b) In the absence of the said presiding officer any other presiding officer of that court may, after consideration of the evidence recorded and in the presence of the said person, make such order as the presiding officer who is absent could lawfully have made in the proceedings in question if he or she had not been absent.

- 9. Does this article alter your answers in 6 (a) – (d) supra in any way?
- 10. Do you comply with these provisions in your court?