

# The final curtain call for the 'Minimum Sentences Act'

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## 1 INTRODUCTION

'In a practical and an entirely unsentimental sense, children embody society's hope for, and its investment in, its own future.'<sup>1</sup>

The sentimentality of this statement may not be entirely true, especially in South Africa where there has been the frequent occurrence of very violent crimes perpetrated by the youth.

'The side effect of this has meant a mushrooming increase in awaiting youth trial prisoners. The reasons for this include a higher level of serious offences which warrant detention in prison and the hardening community attitudes towards alleged criminals.'<sup>2</sup>

Since then the justice system has been shrouded with a cloud of negativity. The leading proposed solution to the problem of sending juvenile offenders to prison is diversion. 'Diversion is a system described as a process wherein a youth offender instead of appearing before a presiding officer at trial, appears before a presiding officer in an informal environment where the presiding officer pursues other options. In practice there is not much of an emphasis on this.'<sup>3</sup> 'Diversion was introduced into the criminal justice system in the early 1990's and has become a steadfast feature of the criminal justice system since. It has only recently been legislated for in the Child Justice Act and legal framework for diversion and other processes such as assessment, there have been more restrictive measures introduced to curb the commission of heinous crimes by young offenders and adults.'<sup>4</sup> The pre-eminent example of this has been the introduction of the Minimum Sentences Act.<sup>5</sup>

This article elaborates on the position that international legal instruments have taken when focusing on the issue of punishment of youth offenders. It also provides some constitutional interpretation as to how juvenile offenders

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1 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC) para 37.

2 Muntingh L 'Alternative sentencing' in Sloth-Nielsen J & Gallinetti J (eds) *Child Justice in Africa: A guide to good practice* (2004) chap 8.

3 *Ibid.*

4 For a brief history of law reform and the Child Justice Act, see Gallinetti J 'What happened to the Child Justice Bill? The process of law reform relating to child offenders' (2006) 17 *SA Crime Quarterly* 7-12 and Skelton A & Gallinetti J 'A long and winding road: The Child Justice Bill, civil society and advocacy' (2008) 25 *SA Crime Quarterly* 3-9.

5 Criminal Law Amendment Act 105 of 1997.

should be dealt with. It specifically deals with the constitutional challenge brought in relation to the 'Minimum Sentences Act' regarding the sentencing of juvenile offenders under the Act. This discussion includes an examination of the history of the Act and the constitutional challenge.

## 2 THE INTERNATIONAL AND CONSTITUTIONAL LAW FRAMEWORK ON THE RIGHTS OF YOUTH OFFENDERS

### 2.1 International law

Although there are a number of provisions in the United Nations Convention on the Rights of the Child (CRC) which create a framework for dealing with children in the criminal justice system, this article will briefly examine Articles 2 and 37 of the CRC in relation to the sentencing of children.

'Article 3 of the United Nations Convention on the Rights of the Child (CRC) categorically states that in all actions concerning the child, courts of law, administrative authorities or legislative bodies must make the best interests of the child a primary priority, but it is submitted that the preferred definition of the best interests of a child is that they are the physical, emotional and intellectual care development interests, to enter adulthood as far as possible without disadvantage, autonomy interests, especially the freedom to chose a lifestyle of their own.'<sup>6</sup>

It is rather unfortunate that the CRC as well as international authorities do not shed light on what constitutes the best interests of the child and that it is a rather indeterminate standard. At the same time international authorities also seem to differ on what constitutes the best interests of a child.

It is difficult to determine a stringent checklist for what constitutes a child's best interests. The open-endedness of the phrase strongly suggests that the interests of a child are subject to each unique circumstance, and that in any situation the needs of the child must be of first priority. The relevance of the term 'the best interests of a child' in relation to the punishment of juvenile offenders is of optimum importance as it requires an individualized approach to sentencing, and also takes into account the fact that imprisonment is the most restrictive option, and as such is not desirable.

'Article 37(b) of the(CRC), states that no child shall be subjected to torture or other cruel, inhuman treatment or punishment or life imprisonment without the possibility of release shall be imposed for offences committed by persons below the age of 18 years. The provision further provides that the imprisonment of a child shall be a measure of last resort and for the shortest period of time.'<sup>7</sup> The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) also deal with the sentencing of child offenders, and place emphasis on the proportionality of the circumstances and

6 Freeman M 'Article 3: The best interests of the child' (2007). (Volume 3 of Alen A et al (eds) *A commentary on the United Nations Convention on the Rights of the Child*).

7 Schabas argues that interference with personal liberty, as a fundamental aspect of the child's development, should be limited to the absolute minimum, with the ultimate goal of avoiding deprivation of liberty. This is the essence of the various international UN standards developed in the 1980's and 1990's, stressing the need for specific treatment of children. Any intended restriction of personal liberty must pass a specific impact assessment with a view to minimizing harm to a child's development and maximizing respect for his rights. Schabas W & Sax H 'Article 37: Prohibition of torture, death penalty, life imprisonment and deprivation of liberty' (2006). (Volume 3 of Alen A et al (eds) *A commentary on the United Nations Convention on the Rights of the Child*).

gravity of the offence and the needs of society as factors to be taken into account in the sentencing of children.<sup>8</sup>

'Van Buuren suggests that a child must be shown how to re-integrate constructively in society. The emphasis by the Convention on the Rights of the Child places lies in respecting the child's dignity. International law views the institutionalization of children as the least favored method of disciplining a youth offender because institutionalization creates unwanted negative effects and it is not undone by treatment. It is better to re-integrate youth offenders into the community because institutionalization alienates them from society. International law requires that any reaction against offenders should always be in proportion to the circumstance of the juvenile offender and the offence. The overriding principle is that the imprisonment of a child should be a measure of last resort and for the shortest period of time.'<sup>9</sup>

It is encouraging to see that there has been a consistent commitment by international law to treat children in a manner which minimizes harm to the child's development and maximizes respect for their rights

## 2.2 The South African Constitution

In South Africa section 28 of the Constitution dedicates itself to the protection of the rights of children. Section 28(1)(g) specifically deals with juvenile detention, the purpose of which is to place a burden on the state to ensure that children are not ordinarily held in detention unless as a measure of last resort.<sup>10</sup> This provision translates the standard adopted in the international approach and imports it into the South African Constitution.

The principle of detention as a measure of last resort, and for the shortest appropriate time, has been subject to many interpretations, especially regarding the imposition of suspended sentences or imprisonment of children under 18 years old. In *S v Kwalase* the court stated that

'the judicial approach towards the sentencing of juvenile offenders must be appraised to promote an individualized 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 of and interests of the juvenile offender. If at all possible the sentencing by the judicial officer must structure the punishment in such a way as to promote the re-integration of the juvenile concerned into his family or community.'<sup>11</sup>

The requirement enshrined in section 28(1)(g) of the Constitution which states that children must be imprisoned only as a measure of last resort and only for the shortest appropriate period of time, is also found in Article 37(b) of the CRC. Since the advent of the Bill of Rights our courts have been obliged to consider international law when interpreting the provisions of the Bill of Rights. This means that the Bill of Rights may be interpreted in light of international instruments such as the CRC and the Beijing Rules. The consequence of this is that the judicial approach in sentencing of juvenile offenders must be developed to promote an individualised approach, which in turn

8 UN Standard Minimum Rules for the Administration of Juvenile Justice Article A/RES/40/33.

9 Van Buuren G *The international law on the rights of the child* (1998) 183.

10 Section 28(1)(g) specifically provides: Every child has the right – 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...

11 *S v Kwalase* 2000 (2) SACR 135 (C) para 139G – H.

is primarily concerned with proportioning the needs and the interests of a juvenile offender as well as those of the broader community.

Prior to the Constitution it was still undesirable to treat children in the same way as adults. The common law recognised the youthfulness of an offender as a weighty factor in the consideration of the moral culpability of such an accused. However, since the Constitution came into effect, proportionality, amongst other things, is required when sentencing all accused persons.<sup>12</sup>

In light of the provisions relating to child offenders in the Constitution, the following principles have been suggested when sentencing a juvenile 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.<sup>13</sup>

It is comforting to learn that international instruments are eager to prevent youth offenders from ending up in prison.<sup>14</sup> Law enforcement organisations are still of the opinion that children must be treated with the same vigour as adult offenders, and that the offences they commit should be punished. There is a lack of education about the rights of children in the justice system. It is encouraging to see that there has been a consistent commitment in international law to treat children in a manner which minimizes harm to the child's development and maximizes respect for their rights. Section 28(1)(g) of the Constitution seeks to protect the child against any harsh adult punishment, and to this extent it seems to be in line with the international standard of protecting the interests of the child and making the best interests of the child paramount. The jurisprudence on the rights of the child in South Africa also favours the notion of the best interests of the child, especially when considering that imprisonment should be a measure of last resort.

### 3 THE CONSTITUTIONAL CHALLENGE

#### 3.1 Brief overview of the 'Minimum Sentences Act'

'The Minimum Sentences Act' of 1997 (the Act) came into operation on 1 May of 1998. It prescribed the sentences which the courts could impose for

12 Friedman A, Pantazis A & Skelton A 'Children's rights' in Woolman S, Roux T, & Bishop M (eds) *Constitutional Law of South Africa* Vol 3 2 ed Chapter 47.

13 *Sv Nkosi* 2002 (1) SA 494 (W).

14 See extract from Van Buuren G (n 9 above) 183 cited in the text at n 9.

certain offences.<sup>15</sup> Initially the Act was intended as a short term measure, but it was eventually extended by government. The relevant section for this discussion is section 51, which was a very contentious section purely because of the fact that it prescribed minimum sentences for child offenders. The section listed schedules of offences for which certain sentences could be imposed for first, second and subsequent offenders who were either adults or child offenders. However, the application of the Act was problematic due to the differing interpretations of section 51. The jurisprudence of our courts reflects the problems encountered in relation to child offenders, and in particular the cases of *S v B*, *S v Malgas* and *S v Nkosi*.

In the *Malgas* case the Supreme Court of Appeal interpreted section 51 as requiring that the sentencing courts consider the sentences prescribed in the Act as the point of departure, and that these prescribed sentences should be ordinarily imposed and not be departed from lightly. It is only when the imposition of a prescribed sentence would result in injustice can a court imposing a less serious offence.<sup>16</sup>

In the *Nkosi* case<sup>17</sup> a 16 year old offender committed murder a crime for which the Act prescribed a sentence of life imprisonment. The court a quo held that it was obliged to impose a life sentence upon the child unless there were substantial and compelling circumstances justifying the imposition of a lesser sentence. In assessing the correctness of the sentence imposed by the court a quo Cachalia J looked at both the Constitution and the Act. He held that:

'Although the court is obliged to impose a minimum sentence unless substantial and compelling reasons are shown, no mention is made of this in section 51(3)(b) when sentencing juvenile offenders who are between the ages of 16 and 18. The reasons advanced by a court to impose a particular type of sentence ought to be recorded. The court went on to say that no limit on the courts discretion could be inferred from the Act, but that young offenders could be treated with more leniency. A court is free to impose the usual sentencing criteria in respect of offenders who are between the ages of 16 and 18.'

In *S v B* the Supreme Court of Appeal held that

'the mere fact that an offender was under 18 years although over 16 years at the time of the offence automatically conferred discretion on a sentencing court to approach the prescribed minimum sentences. So when the court imposes a sentence it starts with a clean slate and imposed the prescribed sentences which had a weighty effect.'<sup>18</sup>

Subsequent to the case of *S v B* the courts then stopped applying the 'Minimum Sentences Act' to child offenders.

15 Schedule 2 Part I: Murder by a person, group of persons or syndicate acting in the execution or furtherance of a common purpose or conspiracy.

Schedules 2 Part II: Offences in this schedule include murder and robbery with aggravating circumstances. A High Court or Regional Court may impose 15 years for a first offender, 20 years for a second offender, and 25 years for a third or subsequent offender.

Schedule 2 Part III: Offences include rape, indecent assault on a child under the age of 16 years involving the infliction of bodily harm, and assault with intent to do grievous bodily harm on a child under the age of 16 years. A Regional Court or High Court can impose 10 years for a first offender, 15 years for a second offender, or 20 years for a third or subsequent offender.

16 *S v Malgas* 2001 (1) SACR 469 (SCA).

17 2002 (1) SACR 135 (WLD).

18 *S v B* 2006 (1) SACR 311 (SCA), [2005] 2 ALL SA 1 (SCA) para 24.

On 31 December 2007 the legislature introduced the Criminal Law (Sentencing) Amendment Act 38 of 2007 (Amendment Act) which made provision for minimum sentences of 5, 10, 15 and 20 years, and life imprisonment, for certain offences committed by children who were between 16 and 17 years old. This version was similar to that passed in 1997; however, it did not contain the interpretation problems which had plagued the 1997 Act.<sup>19</sup> As a consequence the Centre for Child Law brought an application in its own interest in an effort to uphold children's rights, as well as in the public interest. The application was first served before the then Transvaal Provincial Division High Court.<sup>20</sup> The argument put forward by the Centre focused on the fact that the Amendment Act violated the provisions of section 28 of the Constitution, as it made minimum sentences applicable to 16 and 17 year olds convicted of very serious offences. The Centre argued that the effect of the Amendment Act was that it subjected child offenders to very long prison sentences as a first resort, thereby infringing the constitutional mandate that detention should be a measure of last resort, and for the shortest appropriate period of time. The Centre further argued that the Amendment Act negated the approach followed in *S v B*, wherein the court held that, when faced with the sentencing of child offenders aged 16 and 17, it must start with a clean slate. This approach meant that, where a court sentenced a child offender for a very serious offence, it would be at liberty to impose any sentence, while being guided by the constitutional principle that, when dealing with child offenders, imprisonment is a measure of last resort, and for the shortest appropriate period of time. Opposing the application, the Minister of Justice and Constitutional Development contended that the Amendment Act was not unconstitutional, purely because the courts still maintained their sentencing discretion, and the Amendment Act does not subject children to the same harshness applied to adult offenders. The argument centred on the contention that courts are always at liberty to consider youthfulness as a mitigating factor when imposing sentence; therefore, the question whether the courts start with a 'clean slate' or not is purely academic.<sup>21</sup>

In its decision the High Court held that 'the Minimum Sentences Act made the minimum sentences a first resort for 16 and 17 year olds and therefore was inconsistent with section 28(1)(g) of the Constitution'.<sup>22</sup>

Once the decision of the High Court was handed down it was sent to the Constitutional Court for confirmation. The Constitutional Court examined the history of the minimum sentences legislation, as well as the jurisprudence of our courts regarding the provisions of the 1997 Act. Referring to *S v Malgas*, Cameron J noted that the decision reached in that case had two effects. First, that the prescribed minimum sentences were ordinarily to be imposed by the

19 Ngidi R 'Minimum sentences legislation for child offenders found unconstitutional' (2008) 10:3 *Article 40* 1 – 3.

20 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (11214/08TPD) para 26.

21 Ngidi R (n 19 above) 1 – 3.

22 *Centre for Child Law* (supra) para 26.

courts; and, secondly, that even if the minimum sentences were not imposed because of the presence of substantial and compelling reasons, the legislation nevertheless had a 'weighting effect'.<sup>23</sup> The relevance of this statement was that the legislation had a weighty effect on children as well. The court then examined section 28 of the Constitution and found that it creates a restriction on Parliament, officials and judicial officers as to how they should treat children.

The court held that section 28 of the Constitution creates a distinction between children and adults for practical reasons which inter alia include the fact that children are physically and psychologically vulnerable. The court went further and mentioned that children 'are generally more capable of rehabilitation than adults'.<sup>24</sup> The court drew a link between section 28 and the sentencing of juvenile offenders in terms of the Amendment Act, and went further to state that children's incapacities stem from their disabilities with regard to judgment and insight, which warrant their constitutional protection against the harshness of adult punishment. Justice Cameron further recognised that the constitutional injunction that a child's best interests are of paramount importance in every matter concerning the child, does not preclude sending child offenders to prison. However, in interpreting the Amendment Act against the backdrop of section 28, the court held that the principle that detention should be a measure of last resort and only for the shortest appropriate period of time, meant that section 28(1)(g) requires an individuated judicial response to sentencing, which required a particular focus on the child who is being sentenced, instead of the rigid starting point which the Amendment Act requires. The final determination of sentencing was the preserve of the courts.<sup>25</sup> The assessment of each child's individual sentencing requirements was held to give constitutionally compliant effect to the requirement of the best interests of the child.

Further, in drawing a contradistinction between the Amendment Act and section 28 of the Constitution, the court summed up the scheme of the Act:

'First, it orientates the sentencing officer at the start of the sentencing process away from options other than incarceration. Second, it de-individuates sentencing by prescribing as a starting point the period for which incarceration is appropriate. Third, even when not imposed the prescribed sentences conduce to longer and heavier sentences by weighing on the discretion.'<sup>26</sup>

The Constitutional Court held that the first two effects of the Amendment Act went against the direct injunctions of the children's rights provisions. As a result the Constitutional Court found that the Amendment Act violated the provisions enshrined in section 28.

23 *Centre for Child Law v Minister of Justice and Constitutional Development and Others* (n 1 above) para 17.

24 At para 27.

25 At paras 31 – 44.

26 At para 46.

#### 4 DISCUSSION

The decision reached by the Constitutional Court is a most welcome one. It highlights a very important principle relating to juvenile offenders, namely, that imprisonment is not always a solution for juvenile offenders, and that, once children are detained, the prospects of rehabilitation are very slim. This has to be seen against the backdrop of public opinion that perceives the crime rate as being high, particularly crimes which are committed by children. However, this perception does not mean that children must be treated, and subjected to the same types of punishment, as adults. The Constitutional Court's judgement, therefore, endorses the approach that the sentencing of children should be taken in relation to the individual circumstances of each child, and that detention should be a measure of last resort and for the shortest appropriate period of time. The decision is grounded in sound, constitutional reasoning.

#### 5 CONCLUSION

Upholding constitutional supremacy in any democratic country will always require society to be open to diversity, and to respect the circumstances of others. The premise for this statement stems from the notion that the Constitution is an open-ended document which accommodates all the major stakeholders in society and which protects their interests. Children are indeed the future leaders of society; to ill-treat them serves no purpose.

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