



UNIVERSITY OF KWAZULU-NATAL

Sentencing juveniles according to the Child Justice Act: A critical evaluation of application of the principle that 'detention must be a measure of last resort and for the shortest possible period of time' in the case law.

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DECLARATION:

I, Juanita Gurahoo, do hereby declare that this project is an original piece of work which is made available for photocopying and for inter-library loan.

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EXECUTIVE SUMMARY

The 1990s gave momentum to the Child Justice Movement motivated by the need for a separate criminal justice system to deal with juvenile delinquency. The movement's focus was on law reform, child detention, and restorative justice.

International instruments endorsed by South Africa contributed to the promulgation of children's rights under the Constitution. The Constitution brought about change regarding the treatment of juvenile delinquents in conflict with the law. Section 28 emphasises that the best interests of the child is of paramount importance, apropos of every matter that affects the child, including detention.

The main objective of the CJA is to divert juvenile delinquents away from the criminal justice system by means of restorative justice conditioning to prevent re-offending. However, the CJA acknowledges that diversion may be unsuitable, inadequate, and unsuccessful, hence the creation of child justice courts to sentence juvenile delinquents.

The CJA does not only set out the rights of children, but also it lays down when imprisonment may occur, the various sentences that may be imposed, and the benefits of treating children differently from adults. The guiding principle behind the CJA is that children should not be treated more severely than adults; and one must have regard to international instruments which state that detention should always be a measure of the last resort and for the shortest possible period.

Despite these fundamental legislative changes, the research has indicated that the majority of sentencers have imposed lengthy detention sentences for juveniles who have committed serious crimes in violation of the constitutional principle that juvenile detention must be a measure of last resort and for the shortest possible period. It was found that the principle: 'juvenile detention should be a measure of last resort and for the shortest possible period' is not only

vague, but creates inconsistency during sentencing because of its inability to give objective sentencing guidelines and the operation of excessively wide judicial discretion. This results to numerous appeals and reviews of sentences, while children's rights are not upheld in the most stringent manner as required by the Constitution and international instruments.

These juvenile rights violations can be attributed to the fact that the seriousness of the offence was found to be overemphasised at the expense of the youthfulness of the accused. Furthermore, it was found that there is little deviation in the length of sentences imposed under the CJA and that of the CPA. Similarly, there seems to be little deviation between the sentences imposed on juveniles and those that are imposed on adults. All the while restorative justice is ignored.

The aim of this dissertation was to investigate the legislative sentencing principles for juveniles aged 14 years and older who have committed serious crimes. This dissertation questioned whether the constitutional entrenchment of juvenile rights and the promulgation of the CJA had made any substantial difference in the types of sentences and sentence duration imposed on juveniles who commit serious crimes.

It was recommended that the legislature should provide an objective juvenile sentencing guideline to limit the operation of excessively wide judicial discretion and combat the vagueness sentencers experience of the principle that juvenile detention should be a measure of last resort and for the shortest possible period. The Dutch are renowned worldwide for their liberal sentencing regime promoting restorative justice practices. Hence, it was recommended that the legislature should opt to create an objective juvenile sentencing guideline which is based on the Dutch *bos-polaris* sentencing guidelines.

Furthermore, it was recommended that restorative justice sentences should be emphasised and endorsed amongst sentencers. The CJA is primarily based on the premise that restorative justice

will allow for the rehabilitation and reintegration of juvenile offenders. This premise is supported by academics who have frequently asserted that juveniles are more prone to rehabilitation than adults; and that research has found juvenile rehabilitation to be highly successful.

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GLOSSARY OF TERMS

ACRWC:	African Charter on the Rights and Welfare of a Child OAU Doc CAB/LEG/24.9/49 (1990)
Ad hoc:	for a specific purpose
Beijing Rules:	United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985
<i>Bos-polaris</i> :	Dutch sentencing guidelines utilised by the prosecution to suggest an appropriate sentence to the sentencer
CC:	Constitutional Court
CJA:	Child Justice Act 75 of 2008
CLAA:	Criminal Law Amendment Act 105 of 1997
CPA:	Criminal Procedure Act 51 of 1977
CST:	Consistent Sentencing Database
DPP:	Director of Public Prosecutions
para:	paragraph
SA:	South Africa
SACR:	South African Criminal Reports
SALR:	South African Law Reports
SCA:	Supreme Court of Appeal
The Constitution:	Constitution of the Republic Of South Africa, Act 108 of 1996
UN:	United Nations
UNCRC:	United Nations Convention on the Rights of a Child, 20 November 1989
UNGPJD:	United Nations Guidelines for the Prevention of Juvenile Delinquency, 14 December 1990
UNRPJDL:	United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990
v:	versus

1. CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1. Outline of Research Problem

South Africa, as with other foreign jurisdictions, has developed a piece of legislation which deals primarily with juveniles in conflict with the law. The purpose of this research is to investigate the standard of sentence consistency imposed by the Child Justice Act 75 of 2008 (hereafter the CJA) when sentencing juveniles: those who have been convicted of serious crimes according to the international standards endorsed by South African law that ‘juvenile detention should be a measure of last resort and for the shortest possible period.’ The researcher will examine some of the arguments proposed by academic commentators in relation to the operation of the CJA.¹ More specifically, the researcher will consider the typical factual scenarios in which the operation of minimum and mandatory sentences of s 51(6) of the Criminal Law Amendment Act 105 of 1997 (hereafter the CLAA) is consulted by sentencers before imposing a sentence on a juvenile. The researcher will then continue to consider whether the recent case law in the sentencing of juveniles for serious offences in accordance with the principle of ‘juvenile detention as a measure of last resort and for the shortest possible period’ may require a separate sentencing guideline to be used by sentencers for juveniles in conflict with the law. This possible need will be examined in the light of continuous appeal and review of sentences imposed by trial courts.

In short, the researcher will examine whether it will be feasible and constitutionally correct to suggest a sentencing guideline which may be utilised by sentencers when imposing consistent and alternative restorative sentences for serious offences committed by juveniles.

¹ Act 75 of 2008 (hereafter the CJA)

1.2. Rationale for the Study

The rationale for the study is the investigation of the inconsistency which courts have demonstrated during the sentencing of juvenile delinquents convicted of serious crimes; this in light of the principle of ‘juvenile detention should be a measure of last resort and for the shortest possible period.’ A further issue will be whether a sentencing guideline is necessary, apropos of recent developments. Positive steps have been taken by the courts, assessing the underlying intention of the principle that ‘juvenile detention should be a measure of last resort and for the shortest possible period.’ This intends to create sentencing consistency and the application of restorative justice, by proper calculation of the seriousness of the offence, the harm incurred, and the mitigating and aggravating factors of each case.

1.3. Research Questions

This dissertation seeks to examine the standard of sentence consistency the CJA² provides within the South African context.

The researcher seeks to answer the question of whether the international principle that ‘juvenile detention should be a measure of last resort and for the shortest possible period’ is an efficient and effective sentencing guideline in itself. This possibility will be examined in conjunction with case law illustrating the difficulty experienced by sentencers when assessing the vague and ambivalent principle that ‘juvenile detention for juvenile delinquents should be a measure of last resort and for the shortest possible period of time.’

Furthermore, the research will seek to answer the question whether South Africa is in need of a sentencing guideline to assist sentencers when sentencing juvenile delinquents convicted of serious crimes.

² Act 75 of 2008

The research will go further by investigating the Dutch *bos-polaris* sentencing guidelines. The research will seek to answer whether such a sentencing guideline will sufficiently assist the sentencer to sentence the juvenile delinquent consistently and according to restorative justice practices, while being able to individualise each case by means of the point system equation.

In essence, the research questions posed by the study are:

- Does the CJA provide the assurance of sentence consistency within trial courts?
- Is the international principle that ‘juvenile detention should be a measure of last resort and for the shortest possible period’ a consistent sentencing guideline in itself?
- Is South Africa in need of a sentencing guideline to assist sentencers when sentencing juvenile delinquents convicted of serious crimes?
- Will the Dutch *bos-polaris* sentencing guideline sufficiently assist the sentencer to sentence the juvenile delinquent consistently and according to restorative justice practices, while being able to individualise each case by utilising the point system equation?

1.4. Background Information

The 1990s gave momentum to the Child Justice Movement motivated by the need for a separate criminal justice system to deal with juvenile delinquency.³ The movement’s focus was on law reform, child detention, and restorative justice.⁴

International instruments endorsed by South Africa contributed to the promulgation of children’s rights under the Constitution.⁵ These international instruments, namely the African Charter on the Rights and Welfare of a Child,⁶ United Nations Convention on the Rights of a

³ A Skelton ‘A Long and Winding Road’ (2008) 25 *SA Crime Quarterly* 2

⁴ *Ibid*

⁵ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 37

⁶ African Charter on the Rights and Welfare of a Child OAU Doc CAB/LEG/24.9/49 (1990)

Child,⁷ United Nations Guidelines for the Prevention of Juvenile Delinquency,⁸ United Nations Rules for the Protection of Juveniles Deprived of their Liberty,⁹ and Beijing Rules,¹⁰ provide a general framework. Juvenile justice should operate within such a framework, while encouraging constant assessment and development of such systems to adapt and evolve to fully meet children's rights.¹¹ These instruments all share a common objective, requiring detention for juvenile delinquents to be a 'measure of the last resort and for the shortest possible period.'

The Constitution¹² brought about change regarding the treatment of juvenile delinquents in conflict with the law. Section 28 emphasises that "*the best interests of the child is of paramount importance, apropos of every matter that affects the child, including detention.*"

The CJA¹³ was promulgated to create a separate criminal justice system aligned with the rights and needs of juvenile delinquents, coming into effect in 2010. According to the CJA,¹⁴ "*a child is any person under the age of 18 years and, in certain circumstances, a person who is 18 years or older, but under the age of 21 years.*"¹⁵ The main objective of the CJA¹⁶ is to divert juvenile delinquents away from the criminal justice system by means of restorative justice conditioning to prevent re-offending.¹⁷ However, the CJA¹⁸ acknowledges that diversion may be unsuitable, inadequate, and unsuccessful, hence the creation of child justice courts to sentence juvenile delinquents.¹⁹

⁷ United Nations Convention on the Rights of a Child, 20 November 1989

⁸ United Nations Guidelines for the Prevention of Juvenile Delinquency, 14 December 1990

⁹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990

¹⁰ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985

¹¹ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 15

¹² Constitution of the Republic of South Africa, 1996

¹³ Act 75 of 2008

¹⁴ S 1 of Act 75 of 2008

¹⁵ S 1 of Act 75 of 2008

¹⁶ S1 Act 75 of 2008

¹⁷ SS Terblanche 'The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders' (2012) 67 *Potchefstroom Electronic Law Journal* 2

¹⁸ S 1 Act 75 of 2008

¹⁹ Terblanche (note 17 above)

The CJA²⁰ does not only set out the rights of children, but also it lays down when imprisonment may occur, the various sentences that may be imposed, and the benefits of treating children differently from adults.²¹ The guiding principle behind the CJA²² is that children should not be treated more harshly than adults; and one must have regard to international instruments which state that ‘detention should always be a measure of the last resort and for the shortest possible period.’²³

The CJA²⁴ operates independently and parallel with the CLAA²⁵ in terms of s 51(6²⁶) and s 276.²⁷ The minimum and mandatory sentences clause as contained in s 51(6) does not apply to juvenile delinquents below the age of 16 years.²⁸ However, it allows for the imposition of detention sentences on juveniles between 17 to 18 years of age, should the sentencer be satisfied that facts of the case call for such application; with the proviso that sentencers record their reasons, justifying sentencing.²⁹

Literature review suggests that the principle of ‘juvenile detention should be a measure of last resort and for the shortest possible period’ is not only vague: it creates inconsistency during sentencing owing to its inability to give objective sentencing guidelines, granting excessively wide judicial discretion.³⁰ This results in numerous appeals and reviewing of sentences, while

²⁰ Act 75 of 2008

²¹ Act 75 of 2008

²² Act 75 of 2008

²³ S 68 of Act 75 of 2008; SS Terblanche ‘The Child Justice Act: A detailed consideration of s 68 as a point of departure with respect to the sentencing of young offenders’ (2012) 67 *Potchefstroom Electronic Law Journal*

²⁴ Act 75 of 2008

²⁵ Act 105 of 1997

²⁶ Criminal Law Amendment Act 105 of 1997

²⁷ Act 105 of 1997

²⁸ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 26

²⁹ *Ibid*; S v Blaauw 2001 (2) SACR 255 (CC); S v Nkosi 2002 (1) SACR 135 (W)

³⁰ SS Terblanche ‘Sentencing a child who murders – DPP, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA)’ (2007) 20 *South African Journal of Criminal Justice* 339

children's rights are not upheld in the most stringent manner as required by the Constitution and by international instruments.

This study will investigate the standard of sentence consistency applied by sentencers in accordance with the CJA³¹ and their ability to sentence juvenile delinquents who have been convicted of serious crimes according to international standard of 'juvenile detention as a measure of last resort and for the shortest possible period.' Therefore, a possible overall sentencing guideline system will be investigated which might assist sentencers faced with the difficult task of sentencing a child.

In order to understand the future, one has to understand the past. Hence, the study will examine case law and the application of the CJA,³² seeking inadequacies faced during sentencing. The existence of the current legislation applicable to children may either hinder or facilitate further sentencing guidelines for juvenile delinquencies. This research serves as motivation to investigate the CJA,³³ and the CPA,³⁴ providing necessary rules for strategically dealing with this problematic area.

The complexity of sentencing juvenile delinquents is a constant challenge which varies on an *ad hoc* basis and is an ever-evolving area of study. There are no definite structured sentencing guidelines. Each case requires individualisation owing to unique facts and circumstances. This study seeks to develop a basic sentencing guideline for juveniles in conflict with the law, according to their specific needs, characteristics, and rights.

³¹ Act 75 of 2008

³² Act 75 of 2008

³³ Act 75 of 2008

³⁴ Act 105 of 1997

1.5. Research Methodology and Ethical Issues

The research design utilised is desktop research, which relies on secondary data.³⁵ Secondary data are already in existence and need not be collected by the researcher.³⁶ Secondary data sources include government publications, published or unpublished information available from either within or outside the organisation, data available from previous research, online data, case studies, library research, and the Internet in general.³⁷

The following chapter will seek to provide an overview of the youth-sentencing policy applicable in South Africa and the Netherlands. It will also consider the challenges that sentencers are likely to face in the implementation of this policy.

³⁵ U Sekaran & R Bougie *Research Methods for Business* 6 ed (2013) 115.

³⁶ *Ibid*

³⁷ *Ibid*

2. CHAPTER 2: YOUTH SENTENCING POLICY IN SOUTH AFRICA

2.1. Introduction

Sentencing is considered the most challenging phase of the criminal procedure, especially when sentencing juvenile delinquents: special considerations are involved; and the law extends a measure of sympathy for juvenile immaturity.³⁸ Sentencing is “*an action by a formal court of imposing the most appropriate sentence.*”³⁹ Therefore, a sentence is “*an order of court that finalises the criminal case against the offender.*”⁴⁰ The sentence imposed is consequently the closest the public will come to observing the law in action.⁴¹

The South African Law Reform Commission held that for a sentencing system to be supreme it must promote consistency, allow for victim participation, and enact restorative justice.⁴²

2.2. Purposes of punishment

Punishment generally involves a measure of discomfort.⁴³ Sentencing is generally aimed at punishing the offender for the crime committed.⁴⁴ Therefore, punishment must be structured in such a manner that will have the offender realise the nature and degree of the offence committed; while allowing him to atone and rehabilitate his character. Sentencing is largely based on four purposes of punishment.⁴⁵

³⁸ SS Terblanche ‘Judgements on sentencing: Leaving a lasting legacy’(2013) 76 *THRHR* 95

³⁹ S Hoctor *Setencing* (Unpublished lecture notes, University of KwaZulu-Natal, 2015)

⁴⁰ *Ibid*

⁴¹ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 113

⁴² SS Terblanche ‘Sentencing guidelines for South Africa: Lessons from elsewhere’ (2003) 120 *SALJ* 858

⁴³ Hoctor (note 39 above)

⁴⁴ *Ibid*

⁴⁵ *Ibid*

2.2.1. Deterrence

The primary function of punishment is to prevent reoffending.⁴⁶ Deterrence operates against an individual (aimed at the primary offender) and for the general good (society as a whole)⁴⁷.

2.2.1.1. Individual

Individual deterrence operates as a warning mechanism, operating as it does on the premise of preventing crime by the imposition of a penal sentence on a specific offender due to their fear that the unpleasant experience of his punishment will reoccur.⁴⁸ A prime example of individual deterrence is a suspended sentence. The theory of individual deterrence is flawed to some degree – hardened criminals have become accustomed to the severity of punishment imposed, which does not deter them from reoffending.⁴⁹ The theory also fails to take account of premeditated crimes, in which the offender knowingly commits the offence, reconciling himself to the punishment that will follow.

2.2.1.2. General

General deterrence aims to deter society as a whole from perpetrating crimes since the sentence is utilised as a scare-tactic to other potential offenders.⁵⁰ The success of general deterrence is said not to be based only on the severity of the sentence imposed but rather on the great possibility of arrest, conviction, and the predetermined sentence imposed. It is thus submitted that the major deterrent effect in our legal system “*is not the degree of the punishment, but rather the certainty that punishment will follow.*”⁵¹ South African courts generally assume that their sentences will deter other potential offenders and the higher the sentence, the greater the deterrent value, however, Terblanche asserts that not every sentence needs to deter potential

⁴⁶ SS Terblanche ‘Sentencing guidelines for South Africa: Lessons from elsewhere’ (2003) 120 *SALJ* 858

⁴⁷ *Ibid*

⁴⁸ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 177

⁴⁹ S v B 1996 (2) SACR 543 (C) at para 555b-c; S v Stephen 1994 (2) SACR 163 (W) at para 168h

⁵⁰ Terblanche (note 46 above: 172)

⁵¹ *Ibid* 173

offenders.⁵² The theory of general deterrence is flawed to a degree, based as it is on the principle that all people are rational human beings who weigh the advantages against the disadvantages of their actions.⁵³ Research indicated that the “*deterrence cannot be accepted as a fact.*”⁵⁴ In *S v Makwanyane*⁵⁵ the court mentioned that research based on the deterrent effect of the death penalty have been inconclusive, since only those who were not deterred enter the statistics; while the number who were deterred are unknown. In *S v Skenjana*⁵⁶ the court held that there is no reason to believe that the “*deterrent effect of a prison sentence is always proportionate to its length.*” While in *S v Sibeko*⁵⁷ the court held that magistrates often complain that crime continues regardless of increased sentences. Terblanche asserts that this is “*a realisation that proves the inability of increased punishment to counter crime would prevent thinking that there is reason for a further increase in punishment.*”

2.2.2. Prevention / Incapacitation

The aim of punishment is the preventing of the offender from reoffending, primarily by his or her imprisonment.⁵⁸ Prevention in the broader scope includes deterrence and rehabilitation.⁵⁹ The theory of prevention differs from that of deterrence. Deterrence aims at creating psychological fear amongst society, thereby preventing offending; while prevention aims to disable the offender from reoffending. Thus, the primary sentence option operating under the theory of punishment is imprisonment. The theory of prevention is flawed to a degree: establishing whether an offender will reoffend on release of sentence served or early parole is difficult to near impossible.

⁵² SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 172, North Gauteng v Thabethe 2011 (2) SACR 567 (SCA) at para 22, S v Makwanyane 1995 (2) SACR 1 (CC) at para 123

⁵³ Ibid

⁵⁴ Beylveld A bibliography on general deterrence (1990)

⁵⁵ 1995 (2) SACR 1 (CC) at para 182 and 202

⁵⁶ 1985 (3) SA 51 (A) at 541-5A

⁵⁷ 1995 (1) SACR 186 (W) at para 191d-e

⁵⁸ S Hoctor *Sentencing* (Unpublished lecture notes, University of KwaZulu-Natal, 2015)

⁵⁹ Terblanche (note 52 above: 177); S v Makwanyane 1995 (2) SACR 1 (CC) at para 169.

2.2.3. Rehabilitation

The aim of punishment is the reconditioning of the offender's character to prevent reoffending, allowing reintegration into society as a law-abiding citizen.⁶⁰ Rehabilitation works better for first-time offenders and juvenile delinquents than for habitual offenders. Terblanche asserts that rehabilitation would be most successful where:

- *"The crime was caused by a known condition;"*
- *"Treatment of such conditions is well known; and"*
- *"Likelihood of success of treatment must be considered, and its extent not left to conjecture."*⁶¹

In *S v De Klerk*⁶² it was held that *"a paedophilia cannot be cured, but that such offenders can be rehabilitated."* However many sentencers will be reluctant to accept this, as the idea of rehabilitation without cure is a foreign concept for most.⁶³

Recent precedence have held that, rehabilitation became an insignificant consideration in relation to the seriousness of the offence which justify lengthy imprisonment sentences, as was held in *S v Mhlakaza*⁶⁴ which stated that *"the object of a long prison sentence is not rehabilitation but the removal of that offender from society."*

Imprisonment sentences impose an additional risk of exposing the offender to the negative effects of the penal system, essentially creating a greater offender, while the immediate advantage of protecting the community is short-lived.⁶⁵ Should the offender attend and

⁶⁰ S Hctor *Sentencing* (Unpublished lecture notes, University of KwaZulu-Natal, 2015); *S v Makwanyane* 1995 (2) SACR 1 (CC) at para 169

⁶¹ Momoti, V.L. *Application of Prescribed Minimum and Mandatory Sentencing Legislation on Juvenile Offenders in South Africa* (unpublished LLM thesis, University of the Western Cape, 2005) 20

⁶² 2010 (2) SACR 40 (KZP) at para 8

⁶³ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 179

⁶⁴ 1997 (1) SACR 515 (SCA) at para 519h-i

⁶⁵ Terblanche (note 63 above; 180); *S v De Klerk* 2010 (2) SACR 40 (KZP) at para 8

cooperate with the treatment programs, the likelihood of reoffending will be reduced⁶⁶. However, family support and employment is essential for the successful rehabilitation of the offender.⁶⁷

An important condition of rehabilitation was highlighted in *S v Nkambule*,⁶⁸ where the court held that rehabilitation can only be considered as an important sentencing option if the offender is willing and able to be rehabilitated.

The theory of rehabilitation is flawed to a degree. It is difficult to establish how long rehabilitative treatment may be necessary. The theory does not adhere to the principle of proportionality between the harm caused by the offender and the punishment imposed on such an offender.

2.2.4. Retribution

The aim of punishment is to avenge the wrong committed against society by inflicting a sanction on the offender.⁶⁹ The theory of retribution is flawed in that it ignores the causes or motives of the crime and the potential of rehabilitation and reintegration. The theory has an unbalanced approach and application of the principle of proportionality, punishment being severe in relation to the crime perpetrated.

2.3. Principles of Sentencing

2.3.1. Sentencing discretion

The sentencer is tasked to individualise a sentence according to his best attempt at the evaluation and application of the relevant facts, sentencing principles, and appropriateness of

⁶⁶ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 180; *S v De Klerk* 2010 (2) SACR 40 (KZP) at para 8

⁶⁷ *Ibid*; *S v De Klerk* 2010 (2) SACR 40 (KZP) at para 8

⁶⁸ 1993 (1) SACR 136 (A) at para 147f.

⁶⁹ Momoti, V.L. *Application of Prescribed Minimum and Mandatory Sentencing Legislation on Juvenile Offenders in South Africa* (unpublished LLM thesis, University of the Western Cape, 2005) 20

sentences.⁷⁰ Essentially, sentencing discretion presupposes that no single correct sentence exists.⁷¹

Sentencing is complex in nature owing to each case's having a unique set of facts, sentencing factors, and features that will influence the sentence imposed.⁷² The sentencer is tasked to determine which of the facts, factors, and features are relevant to the sentence, accordingly assigning weight to each of them.⁷³ Thereafter, the sentencer has to decide whether the offender should be removed from society, all the while considering the extent of the sentence by determining whether the sentence should be suspended. If so, it must be made plain for how long and under which conditions.⁷⁴ Thus the exercising of sentencing discretion is extremely precarious.

The Constitutional Court has acknowledged that the principle of sentencing discretion has led to a measure of inconsistency in the sentences imposed by our courts. The case of *S v Thebus*⁷⁵ is a prime example of such inconsistency. One sentencer imposed an eight-year imprisonment sentence, fully suspended, conditional on community service; while the majority judgement imposed a 15-year imprisonment sentence. This indicates an excessively wide range of sentences for one case.

Sentencing discretion must be exercised reasonably and properly. The test for reasonableness is whether the trial sentencer would reasonably have imposed the sentence; while properness is the absence of substantial misdirection on the part of the sentencer.⁷⁶

⁷⁰ Momoti, V.L. *Application of Prescribed Minimum and Mandatory Sentencing Legislation on Juvenile Offenders in South Africa* (unpublished LLM thesis, University of the Western Cape, 2005) 20

⁷¹ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 113

⁷² Ibid 114

⁷³ Ibid

⁷⁴ Ibid

⁷⁵ 2002 (2) SACR 566 (SCA)

⁷⁶ 2002 (2) SACR 566 (SCA)

Terblanche argued that sentencing discretion is valuable, sentencers being equipped with analytical skills to actively determine an appropriate sentence.⁷⁷ The most valued characteristic of sentencing discretion is the ability to individualise a sentence according to unique facts of the case, with regard for the offender, the crime, and the presence or absence of mitigating and aggravating factors.

However, Terblanche noted that wide sentencing discretion could be harmful. This would enable personal perspectives to dominate the sentencing phase, causing sentence inconsistency, prejudice, or excessive mercy, which is a direct infringement of the right to equality.⁷⁸ Sentence inconsistency leads to uncertainty regarding the outcome of criminal cases, which is why it may be described as a direct violation of the principle of legal certainty.

The functional value of sentencing discretion is that it allows similar cases to be treated alike. It also allows for the offenders of serious crimes to be sentenced more severely than those of minor crimes.⁷⁹ This, however, does not presuppose that identical sentences must be imposed. The ideal is to strive for an endorsement of basic sentencing consistency.

In *S v Giannoulis*⁸⁰, the court held that an appeal court will be justified in interfering with a sentence if it found that the sentence imposed was disturbingly inappropriate, owing to great disparity between the sentences imposed by the court a quo and that regarded appropriate by the court of appeal. The court went further, encouraging appeal courts not to standardise the sentences, but rather to individualise the sentences according to what it considers appropriate to the circumstances.

⁷⁷ SS Terblanche 'Judgements on sentencing: Leaving a lasting legacy' (2013) 76 *THRHR* 95

⁷⁸ *Ibid*

⁷⁹ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 113

⁸⁰ 1975 (4) SA 67 (A) 873E-H

Sentencing discretion is not unlimited. Ashworth asserted that there are four methods to limit the scope of sentencing discretion, namely, judicial self-regulation, statutory sentencing principles, numerical guidelines (Dutch *bos-polaris* sentencing guidelines), and minimum and mandatory sentencing legislation (s 51 of CLAA).⁸¹ Ashworth's fourth technique, minimum and mandatory sentencing legislation, has now been firmly entrenched in the South African legal system.

Our criminal courts and its sentencers operate on the practice of judicial self-regulation, which has seen reasonable success.⁸² Appeal and review courts utilise four basic principles to determine whether the sentence imposed by the trial court was proper and reasonable:⁸³

- Proportionality: “*An evaluation of the nature and seriousness of the crimes, the rights of the offender, and the interests of society are balanced in seeking an appropriate sentence;*”⁸⁴
- *S v Malgas*⁸⁵ held that a sentencer should not readily depart from the prescribed minimum sentences in CLAA,⁸⁶ unless substantial and compelling circumstances are present;
- *S v Xaba*⁸⁷ held that a sentencer should actively consult and consider previous sentences imposed for similar offences; and
- *S v Brandt*⁸⁸ held that a sentencer should be vigilant when sentencing juvenile delinquents, taking cognisance of the best interests of the child.

⁸¹ Ashworth ‘Four techniques in reducing sentencing disparity’ in Von Hirsh and Ashworth (eds) *Principled sentencing* 2ed (1998) 227-239

⁸² SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 113

⁸³ *Ibid* 131

⁸⁴ *S v Zinn* 1969 (2) SA 537 (A)

⁸⁵ 2001 (1) SACR 469 (SCA)

⁸⁶ Act 105 of 1997

⁸⁷ 2005 (1) SACR 435 (SCA)

⁸⁸ [2005] 2 All SA 1 (SCA)

2.3.2. The triad of Zinn

South African criminal law attempted to simplify the sentencing process with the trite principle of proportionality and balance that was formulated in *S v Zinn*.⁸⁹ The *Zinn case*⁹⁰ emphasised balance which mainly relates to the influence of the nature of the crime. The principle of proportionality involves an evaluation of the nature and seriousness of the crimes, the rights of the offender and victim, and the interests of society, balanced, in seeking an appropriate sentence.⁹¹

The nature and seriousness of the crime assumes an investigation into the degree of harmfulness.⁹² The more serious the offence, the more punitive the sentence should be.⁹³ In determining the seriousness of the crime, a two-fold approach is undertaken, namely (1) a consideration of the degree of harmfulness and (2) the consideration of the degree of culpability of the offender⁹⁴. The degree of culpability on the part of the offender determines how blameworthy his actions were and how severe punishment should be.⁹⁵ It is a difficult task for a sentencer to find a sentence that adequately reflects the seriousness of the crime. Therefore sentencers developed a point of departure for the sentences imposed for a specific type of offence; and consult society view of the crime. Personal characteristics of the offender are of importance, indicating the motive behind the offence, and permitting individualisation according to absence or presence of aggravating or mitigating factors.⁹⁶

The rights of the offender and victim assume an investigation into many factors such as the motive of the offender, age, presence of dependants, level of education, employment and

⁸⁹ 1969 (2) SA 537 (AD)

⁹⁰ 1969 (2) SA 537 (AD)

⁹¹ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 114

⁹² Ibid 148

⁹³ Ibid

⁹⁴ Ibid 164

⁹⁵ Ibid

⁹⁶ Ibid 151

health.⁹⁷ This leg of the triad allow for individualisation of sentences. Ideally, sentencers should become familiar with the character of the offender, which can be done by way of pre-sentencing reports. However as character analysis are difficult to establish and sentencers general hesitancy regarding the accuracy of presentencing reports,⁹⁸ sentencers simply attempt to determine the culpability of the offender.⁹⁹

The interests of society assume an investigation of the reaction of the community to the crime committed; and the purpose which the sentence should serve to society.¹⁰⁰ However, in *S v Mhlakaza*¹⁰¹ the court held that “*the object of sentencing is not to satisfy public opinion but to serve the public interest.*” In *S v Martin*¹⁰² and *S v Manonela*¹⁰³ the courts held that when right-minded members of society are of the opinion that the offender deserves a severe sentence the court should agree with the view only when it considers the view to be, objectively speaking, correct.

The primary aim of proportionality is to achieve justice. Thus the principle of proportionality strives for an optimal combination of the three aims. Henceforth it is the court’s obligation to impose confidently a fitting sentence.

2.3.3. Measure of mercy

This sentencing consideration was articulated in *S v Rabie*.¹⁰⁴ The Court held that:

⁹⁷ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 150

⁹⁸ S Hooror *Sentencing* (Unpublished lecture notes, University of KwaZulu-Natal, 2015) there are three main problems with presentencing reports: (1) there are a shortage of personal who can draw up these reports; (2) presenting reports are timeous to compile; (3) presentencing reports are not of a standard that assist the sentencer. (due to the lack of skill and qualification on the part of the social worker)

⁹⁹ Terblanche (note 97 above; 165)

¹⁰⁰ Ibid 153

¹⁰¹ 1997 (1) SACR 515 (SCA) at para 518-c

¹⁰² 1996 (2) SACR 378 (W) at para 386c

¹⁰³ 1997 (2) SACR 690 (O) at para 694h-j

¹⁰⁴ 1975 (4) SA 855 (A)

*“The measure of mercy depends on the facts of the case, as it is a balanced and humane state of thought. It tempers one’s approach to the factors to be considered in arriving at the appropriate sentence. It is not common sympathy, as it acknowledges that sometimes fair punishment needs to be robust. Essentially, measure of mercy is the objective sentencing of a fellow human being, as it aims to avoid severity arising from anger or disgust.”*¹⁰⁵

2.3.4. Mitigating and aggravating factors

These factors allow for the individualising of a sentence based on the existence of mitigating factors that could justify a lesser sentence, while aggravating factors could justify the imposition of a more severe sentence.¹⁰⁶ There is no complete list of either aggravating or mitigating factors.¹⁰⁷

Some of the prominent aggravating factors are:¹⁰⁸

- Seriousness of the crime;
- Premeditation;
- Problem-type crimes;
- Previous convictions;
- Motive;
- Lack of remorse;
- Abuse of trust;
- Professionalism of criminals;
- Abuse or exploitation of children; and

¹⁰⁵ 1975 (4) SA 855 (A)

¹⁰⁶ S Hooror *Sentencing* (Unpublished lecture notes, University of KwaZulu-Natal, 2015)

¹⁰⁷ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 186

¹⁰⁸ Ibid 186-192

- Prevalence of crime

Some of the prominent mitigating factors are:¹⁰⁹

- *Dolus eventualis*;
- First-time offender;
- Youth;
- Older offender;
- Ill-health;
- Family or dependants;
- Employment;
- Various mental and emotional factors;
- Alcohol and drugs;
- Positive motive;
- Sub-normal intelligence;
- Financial need and social status;
- Actions by groups;
- Lack of premeditation; and
- Remorse and plea of guilty.

2.3.5. Theories of punishment¹¹⁰

The application of theories of punishment during sentencing is based on the rationale that punishment has a social benefit for society; hence it is justified by the advantage it contributes to social order.¹¹¹

¹⁰⁹ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 193-207

¹¹⁰ As explained above at Chapter 2.2.

¹¹¹ Terblanche (note 109 above)

2.3.6. South African Law Commission Report and Guideline for Sentencing

This is the guideline set by the Commission to which the sentencer must adhere should the offence contain a prescribed penalty (minimum and mandatory sentences),¹¹² which will specify the sentencing option and its quantum.¹¹³

2.4. Sentencing options

Skelton asserts that alternative sentences allow for greater individualisation of sentences as they include rehabilitation and reintegration.¹¹⁴ The Department of Correctional Services echoed Skelton; noting that alternative sentences are more advantageous than imprisonment because the offender is granted the opportunity of remaining in society while deconditioning of criminal behaviour occurs.¹¹⁵ This, in turn, limits the detrimental exposure of juveniles to prison life, while promoting accountability, promoting family preservation, breaking cycles of violence, reducing stigma, demonstrating remorse, making reparation, and ultimately, allowing for ‘real’ justice between the victim and the offender.¹¹⁶

The Department of Correctional Services must, however, promote alternative sentences, as it is wrong to presume that prosecutors and sentencers are cognisant of them.¹¹⁷

2.4.1. Community-based sentences

A community-based sentence is allowed for in s 72 of the CJA,¹¹⁸ “*which allows a juvenile offender to remain within the community.*” “*Such a sentence includes any options referred to in s 53¹¹⁹, as a sentencing option, or any combination thereof; and a sentence involving some*

¹¹² SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 193-207

¹¹³ SS Terblanche ‘Sentencing guidelines for South Africa: Lessons from elsewhere’ (2003) 120 *SALJ* 858

¹¹⁴ A Skelton ‘Alternative sentencing review’ (2004) 6 *CSPRI Research paper series*. 1-51

¹¹⁵ *Ibid*

¹¹⁶ *Ibid*

¹¹⁷ *Ibid*

¹¹⁸ Act 75 of 2008

¹¹⁹ S 56 of Act 75 of 2008. Diversion on condition of adherence to a compulsory school attendance order, family time order, a good behaviour order, a peer association order, a reporting order or a supervision and guidance order.

form of correctional supervision.”¹²⁰ The “child justice court that has imposed a community-based sentence is obliged to request the probation officer concerned to monitor the juvenile delinquent’s compliance with the sentence,” while providing the court with progress reports indicating such compliance. The sentencer “*must warn the juvenile that any compliance failure will result in the juvenile delinquent’s being brought back before the child justice court for an inquiry in terms of s 79.*”¹²¹¹²² Community-based sentences could previously only be imposed if they were accompanied by conditions or a suspended sentence; however, the law now allows for this sentence to be independently imposed.

2.4.2. Restorative justice

Restorative justice is said to be an ideal similar to the concept of justice itself.¹²³ South Africa’s Ubuntu principle allows for the application of restorative justice, it being based on the values of rehabilitation and reintegration.¹²⁴ Under s 73 of the CJA¹²⁵, restorative justice sentences allow the court convicting the juvenile delinquent of an offence to sentence the juvenile to attend “*a family group conference,¹²⁶ victim-offender mediation¹²⁷, or any other form of restorative justice process in accordance with the definition of restorative justice.*”¹²⁸ The

¹²⁰ S 75 of Act 75 of 2008

¹²¹ Act 75 of 2008

¹²² S 79 of Act 75 of 2008. “*If a probation officer reports to a child justice court that a juvenile has failed to comply with the community-based sentence imposed in terms of s 72. The child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply. If it is concluded that the juvenile has failed to comply with the sentence imposed, the child justice court may confirm, amend or substitute the sentence.*”

¹²³ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 77

¹²⁴ Ibid

¹²⁵ Act 75 of 2008

¹²⁶ s 61(1)(a) of Act 75 of 2008 defines a family group conference as “*an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together, supported by their families and other appropriate persons and, attended by persons referred to in subsection (3)(b), at which a plan is developed on how the child will redress the effects of the offence.*”

¹²⁷ s 62(1)(a) of Act 75 of 2008 defines victim-offender mediation as “*an informal procedure which is intended to bring a child who is alleged to have committed an offence and the victim together at which a plan is developed on how the child will redress the effects of the offence.*”

¹²⁸ S 1 of Act 75 of 2008 defines restorative justice as “*an approach to justice that aims to involve the child offender, the victim, the families concerned and community members to collectively identify and address harms, needs and obligations through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident and promoting reconciliation.*”

“child justice court that has imposed a restorative justice sentence is obliged to request the probation officer concerned to monitor the juvenile delinquent’s compliance with the sentence,” while providing the court with progress reports indicating such compliance.¹²⁹ The sentencer must caution the juvenile that any compliance failure “will result in the juvenile delinquent being brought back before the child justice court for an inquiry in terms of s 79.”¹³⁰ The CJA¹³¹ acknowledges that the majority of juvenile delinquents are from the most vulnerable and marginalised groups of society; therefore the CJA¹³² did not exclude serious crimes as contained in Schedule 3 of CPA¹³³ from the ambit of restorative justice.¹³⁴ This does not however mean that juveniles from wealthy and highly privileged spheres of life are excluded from this sentencing option.

2.4.3. Fines and alternatives to fines

This is arguably the sentence most commonly imposed on juvenile delinquents for less serious crimes.¹³⁵ However, s 74(1) of the CJA¹³⁶ obliges a child justice court that has convicted a juvenile delinquent of an offence for which a fine is appropriate, to investigate the juvenile or and their parents’ financial means, thereby actively determining an appropriate fine or repayment method, and whether failure of repayment would result in imprisonment. Section 74(2)¹³⁷ allows for several options as alternatives to the imposition of a fine. These options

¹²⁹ S 73(4)(a)-(b)

¹³⁰ S 73(4)(b); S 79 of Act 75 of 2008. “If a probation officer reports to a child justice court that a juvenile has failed to comply with the restorative justice sentence imposed in terms of s 73. The child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply. If it is concluded that the juvenile has failed to comply with the sentence imposed, the child justice court may confirm, amend or substitute the sentence.”

¹³¹ Act 75 of 2008

¹³² Act 75 of 2008

¹³³ Act 105 f 1997

¹³⁴ Act 105 of 1997

¹³⁵ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 86

¹³⁶ S 74(1)(a) of Act 75 of 2008

¹³⁷ Act 75 of 2008

include: symbolic restitution, payment of compensation, service, or benefit, and “*any other option that the child justice court considers appropriate in the circumstances.*”

2.4.4. Correctional supervision

Section 75 of the CJA¹³⁸ allows “*a child justice court that convicts a juvenile delinquent of an offence to impose a sentence of correctional supervision in terms of s 276(1)(h) of CPA.*”¹³⁹

Section 1 of CPA¹⁴⁰ defines correctional supervision as “*a community based sentence to which a person is subject in accordance with Chapter V and VI of the Correctional Services Act, 1998, and the regulations under that act...*”

In *S v R*¹⁴¹ the court imposed correctional supervision, holding that “*correctional supervision does not necessarily describe a specific sentence, rather, it is used as a collective term for a wide range of measures which may be imposed, all of which must be executed within the community.*”

Since it is essentially an imprisonment sentence, it is aimed at serious crimes.¹⁴² Therefore, it functions as a punishment somewhere between ordinary imprisonment and a sentence which does not involve imprisonment.¹⁴³

Thus, correctional supervision is a sentence which varies; ultimately restricting freedom of movement through house arrest and community service, and the attendance at rehabilitation programmes which must all operate within the community in which the juvenile offender finds himself.¹⁴⁴

¹³⁸ Act 75 of 2008

¹³⁹ Act 105 of 1997.

¹⁴⁰ Act 105 of 1997

¹⁴¹ 1993 (1) SACR 209 (A)

¹⁴² S Hooror *Sentencing* (unpublished lecture notes, University of KwaZulu-Natal, 2015)

¹⁴³ *Ibid*

¹⁴⁴ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 279

In *S v E*¹⁴⁵ the court held that community service is not a lenient alternative to imprisonment, but rather, a more challenging option to that of ordinary imprisonment: the offender is forced to regrow his character within a community, while obeying sentencing orders. The court further held that correctional supervision affords the ‘offender a greater scope for regrowth of character.’

Correctional supervision offers several advantages. It is highly punitive, promoting rehabilitation; it is also extremely flexible in nature¹⁴⁶. Also, the various disadvantages of imprisonment are diminished, namely, no exposure to hardened criminals, no isolation, no stigma, preventing and alleviating overcrowding. Correctional supervision, in addition, costs less than imprisonment.¹⁴⁷

There is no comprehensive list of offences for which correctional supervision may be imposed. However, our courts have emphasised on several instances that sentencers must not hesitate to impose this sentencing option, even when the conviction was for serious offences,¹⁴⁸ as correctional supervision primarily deprives the offender of his liberty¹⁴⁹ and may be combined with conditions and another sentence. Consequently, correctional supervision allows for a truly individualised sentence.

Conditions that may be attached to correctional supervision include, but are not limited to: *“house detention, community service, employment, payment of compensation or damages, treatment-development-and-support programmes, mediation, and family-group conferencing, offender contribution towards costs of sentence, restriction to magistrate courts’ districts,*

¹⁴⁵ 1992 (2) SACR 625 at 633a-b

¹⁴⁶ *S v R* 1993 (1) SACR 209 at 221 d-f the court held that correctional supervision allows for individualisation according to the unique facts of the case and the characteristics of the offender and may be readjusted should there be a change in circumstances.

¹⁴⁷ *Supra* at 366 b-c

¹⁴⁸ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013)

¹⁴⁹ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 284

*living at a fixed address, refraining from using or abusing of drugs or alcohol, refraining from committing crimes, instituting monitoring and educational programmes.”*¹⁵⁰

In deciding whether to impose correctional supervision, the sentencer is guided by the foundational objective of whether an offender should be removed from society or not.¹⁵¹ Another motivation for correctional supervision is the offender’s ability to reform.¹⁵² Sentencers will, however, take account of whether the offender is a first-time offender, whether they are employed and requires to support a family, whether the offender poses a danger to society, the type of crime committed, and the presence of youth.¹⁵³

Correctional supervision nonetheless has limitations. It may not be imposed for a conviction in terms of the minimum and mandatory legislation unless substantial and compelling circumstances have been found, nor may it be imposed for a statutory offence, if the statute does not allow for imprisonment.¹⁵⁴ Furthermore, correctional supervision must be imposed for a limited period of time: it cannot exceed a period of 3 years.¹⁵⁵

Terblanche noted that correctional supervision is an ideal sentencing option for alleviating the overcrowding of prisons.¹⁵⁶ However, the researcher stresses that this sentencing option may be viewed as a lenient alternative to imprisonment, owing to a lack of trust which society and the judiciary have in the Department of Correctional Services’ ability to implement and report on these services efficiently.¹⁵⁷

¹⁵⁰ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 296-303

¹⁵¹ Ibid 289

¹⁵² S v R 1993 (1) SACR 209 at 220 h

¹⁵³ Terblanche (note 150 above:289-291)

¹⁵⁴ Ibid 288

¹⁵⁵ Ibid; S 276A (1)(b) of Act 51 of 1977

¹⁵⁶ Ibid 313

¹⁵⁷ Ibid

2.4.5. Compulsory attendance at a youth centre

Section 76 of the CJA¹⁵⁸ allows “*a child justice court that has convicted a juvenile delinquent of an offence to impose a sentence of compulsory residence at a child and youth care centre providing a programme in terms of s 191(2) (j) of the Children’s Act.*”¹⁵⁹ The CJA¹⁶⁰ expressly limits the period of attendance to 5 years, or until the juvenile attains majority at 21, whichever date is the earliest. This sentencing option may, however, only be imposed for offences¹⁶¹ committed in terms of Schedule 3 of the CPA,¹⁶² or any offence which, were it “*committed by an adult, would have justified a period of imprisonment exceeding ten years.*” Should there be any substantial or compelling reasons, the juvenile delinquent may be sentenced to a period of imprisonment after the completion of attendance at the child or youth centre.¹⁶³ The aim of this sentencing option was to allow a juvenile delinquent “*under the age of 14 years to be sentenced to imprisonment via a youth centre.*”¹⁶⁴ This sentencing option is highly punitive in nature, while its efficacy remains unseen.¹⁶⁵

2.4.6. Imprisonment

Imprisonment is the “*admission into a prison and confinement of an offender in a prison for the duration determined by the court or statute.*” Section 77 of the CJA¹⁶⁶ allows “*a child justice court that has convicted a juvenile delinquent of an offence to sentence the offender to*

¹⁵⁸ Act 75 of 2008

¹⁵⁹ Act 35 of 2005

¹⁶⁰ Act 75 of 2008

¹⁶¹ Schedule 3 include but are not limited to: “*an offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs or intoxicating liquor; murder, rape, assault, robbery, theft and housebreaking*”

¹⁶² Act 105 of 1997

¹⁶³ A ‘child and youth care centre’ appears to be a new name for a reform school which was in practice prior to the CJA; a type of prison for juvenile offenders which does not involve detention, but rather educative and rehabilitative programmes.

¹⁶⁴ CR Van Eeden: *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 90-92

¹⁶⁵ Ibid

¹⁶⁶ Act 75 of 2008

imprisonment.” However, the CJA¹⁶⁷ expressly limits the circumstances in which imprisonment may be imposed, namely:

- “No juvenile under the age of 14 years when they committed the offence may be imprisoned;”¹⁶⁸
- “Should the juvenile be 14 years at the time of the commission of the crime, they may only be imprisoned as a last-resort measure, and for the shortest possible period;”¹⁶⁹
- “Should the juvenile be 14 years at the time of the commission of the crime, they may only be imprisoned if:”
 - “A Schedule 3 offence¹⁷⁰ has been committed;”¹⁷¹
 - “A Schedule 2 offence¹⁷² has been committed, and substantial and compelling circumstances exist;”¹⁷³ and
 - “A Schedule 1 offence¹⁷⁴ has been committed, and a record of previous convictions and substantial and compelling circumstances exist.”¹⁷⁵

“If the juvenile was 14 years at the time of the commission of the crime, he or she may only be imprisoned:”

- “For a period not exceeding 25 years¹⁷⁶;” or

¹⁶⁷ Act 75 of 2008

¹⁶⁸ s77(1) of Act 75 of 2008

¹⁶⁹ s77(2) of Act 75 of 2008

¹⁷⁰ Schedule 3 include but are not limited to: “an offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs or intoxicating liquor; murder, rape, assault, robbery, theft and housebreaking”

¹⁷¹ s77(3)(a) of Act 75 of 2008

¹⁷² Part 1 of Schedule 2 offences refers to “premeditated murder, or where the victim was a law enforcement officer performing his function or a material witness, or death was accompanied by rape or aggravated robbery, or raped more than once or by more than one person, or is under the age of 16 years old or physically or mentally disabled, or is inflicted grievous bodily harm, or if the offender knows he has AIDS or is HIV positive, or has been convicted for two or more rapes for which no sentence has yet been imposed.”

¹⁷³ s77(3)(b) of Act 75 of 2008

¹⁷⁴ Schedule 1 include offences “that can be rather trivial, such as theft of or malicious injury to something inexpensive, or many of the statutory offences for which more than 6 months’ imprisonment can be imposed.”

¹⁷⁵ s77(3)(c) of Act 75 of 2008

¹⁷⁶ s77(4)(a) of Act 75 of 2008

- *“In terms of s 276(1)(i) CPA a person may be placed under correctional supervision.”*¹⁷⁷

Furthermore, the child justice court is obliged to take account of the number of days of imprisonment the juvenile delinquent served prior to the sentence being imposed,¹⁷⁸ and qualification for an early release on parole must be an element of imprisonment.¹⁷⁹

The main purposes of punishment is thus to *“punish the perpetrator, prevent further crime and to rehabilitate the offender.”* However sentencers have expressed an unqualified belief in imprisonment as a means of rehabilitating offenders, but many more, while holding a basic belief that this could happen acknowledge two doubts: one, whether the Department of Correctional Services is able to carry out its functions in such a way to rehabilitate offenders, and two, whether the nature of the institution of a prison can assist with rehabilitation, given the lack of availability of effective psychological services.¹⁸⁰

Imprisonment has two pivotal advantages: *“one, it removes the offender from society, and two, it provides a sufficiently severe sentencing option.”*¹⁸¹

However, imprisonment is riddled with grave disadvantages, namely: with regard to financial costs, expensive both in terms of maintaining prisoners and loss of potential income the offender could have earned.¹⁸² Two, with regard to the effect of imprisonment on inmates, extensive time (23 hours out of 24 hours) are spent doing nothing, overcrowding and unfavourable conditions in prisons, removal of prisoners from ‘normal’ society and placement

¹⁷⁷ s77(4)(b) of Act 75 of 2008

¹⁷⁸ s77(5) of Act 75 of 2008

¹⁷⁹ s 77(6) of Act 75 of 2008

¹⁸⁰ One of the biggest problems is the lack of resources – even if a prison could be used to rehabilitate, this would require far more resources than currently available

¹⁸¹ S Hoctor *Sentencing* (unpublished lecture notes, University of KwaZulu-Natal, 2015)

¹⁸² Ibid

into an ‘abnormal society’, with results into institutionalization of the offender and lack of positive influences.¹⁸³

The following chapter will give an overview of s 51-53 of the CLAA,¹⁸⁴ and the application of minimum and mandatory sentences for juveniles who have been convicted of serious offences. The chapter will also consider the challenges that sentencers are likely to face in the implementation of this sentencing legislation.

¹⁸³ S Hoctor *Sentencing* (unpublished lecture notes, University of KwaZulu-Natal, 2015)

¹⁸⁴ Act 105 of 1997

3. CHAPTER 3: PROVISIONS OF S 51-53 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

3.1. Introduction

Generally, the court has wide judicial discretion; however, s 51-53 CLAA¹⁸⁵ contains a minimum and mandatory sentence provision which attempts to curtail wide judicial discretion and its consequences, namely, lack of consistency, and impossibility of determining a basis for sentences.¹⁸⁶ Section 51-53¹⁸⁷ came into operation on 1 May 1998 as a temporary sentencing measure.¹⁸⁸ However, it has been endorsed by the legislature and has become an integral part of the criminal law. Whilst district courts are not affected by this legislation; both high – and regional courts are.¹⁸⁹

3.2. Outline and application of the provisions of s 51-53

The CLAA¹⁹⁰ accounts for three types of offenders, namely, “*children below the age of 16 years, children between the ages of 16 and 18 years, and adult offenders.*”¹⁹¹

3.2.1. Section 51(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 1 of Schedule 2 or;*
- b) *If the matter has been referred to it under 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 life imprisonment.”*

¹⁸⁵ Act 105 of 1997

¹⁸⁶ S Hoctor *Sentencing* (unpublished lecture notes, University of KwaZulu-Natal, 2015)

¹⁸⁷ Act 105 of 1997

¹⁸⁸ Proc R43 GG 6175 of 1 May 1998

¹⁸⁹ Hoctor (note 186 above)

¹⁹⁰ Act 105 of 1997

¹⁹¹ C Du Toit ‘A measure of last resort? Child offenders and life imprisonment’ (2006) 17 *South Africa Crime Quarterly* 13-18

Section 51(1)¹⁹² applies regardless of any other law. However, if this would lead to an absurd result, the position can be affected by certain principles of the interpretation of statutes.¹⁹³ An example of this occurred in *S v Shaik*¹⁹⁴ where the court confirmed that a corporate offender can only be sentenced with fines, and that the minimum sentences legislation does not apply.

Section 51¹⁹⁵ operates in conjunction with subsections (3) and (6). If the provisions of these subsections are satisfied, the minimum and mandatory sentence imposition does not apply.

Subsection (3)(a)¹⁹⁶ contains an escape clause. It reinstates the court's sentencing discretion to deviate from the prescribed sentence should the court find "*substantial and compelling circumstances.*" There is no onus on the accused to prove such circumstances, however, should they want the sentencer to take cognisance of such circumstances, they must raise them accordingly.¹⁹⁷ In *S v Malgas*¹⁹⁸ the court held that "*prescribed sentences should not be departed from lightly, and that such sentences should ordinarily be imposed. However, if substantial and compelling circumstances exist, the court should not hesitate to deviate from the prescribed sentence.*" A prescribed sentence would be disturbingly inappropriate should the imposition amount to injustice. The court further held that substantial and compelling circumstances are based on a composite and not disjunctive test.

Subsection (6)¹⁹⁹ excludes juveniles if they were "*under the age of 16 years at the time of the commission of the crime from the imposition of the Act.*"²⁰⁰ Hence the general principles regarding the sentencing of such juveniles should be followed.²⁰¹

¹⁹² Act 105 of 1997

¹⁹³ SS Terblanche Guide to Sentencing in South Africa 2ed (2007) 57

¹⁹⁴ 2007 (1) SACR 142(D0 at para 244f-g.

¹⁹⁵ Act 105 of 1997

¹⁹⁶ Act 105 of 1997

¹⁹⁷ Terblanche (note 193 above; 42); *S v Roslee* 2006 (1) SACR 537 (SCA) at para 33 and 45

¹⁹⁸ 2001 (1) SACR 469 (SCA)

¹⁹⁹ Act 105 of 1997

²⁰⁰ *Centre of Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC)

²⁰¹ *Centre of Child Law v Minister of Justice and Constitutional Development* 2009 (2) SACR 477 (CC)

Subsection (3) (b)²⁰² contains a limitation clause because the minimum and mandatory sentence legislation does not operate for “*children below the age of 16 years.*”²⁰³ However, should the offender be “*between 16 to 18 years at the time of the commission of the offence, minimum and mandatory sentences generally do not apply; unless the court decides that, based on the facts of the case, the provision should apply.*”²⁰⁴ This generally occurs when the crime is serious in nature, such as rape and murder. Contrary to the ordinary burden of proof, it is the duty of the court to establish whether there are justifiable reasons calling for the application of minimum and mandatory legislation for juvenile delinquents aged 16 to 18 years.²⁰⁵ It should, however, be noted that the ‘substantial and compelling circumstances’ requirement has no application for juvenile delinquents under the age of 16 years as it would be against the child’s constitutional rights to take account of his best interests.²⁰⁶ Hence it is considered that the legislature intends the sentencer to impose less severe sentences for juvenile delinquents, unless there are aggravating factors sufficiently severe that call for a minimum sentence to be imposed.²⁰⁷

Section 51(7)²⁰⁸ places “*an onus on the state to prove the juvenile’s age when the age of the juvenile is in dispute.*”

Section 51(1)²⁰⁹ applies to both regional and high courts.²¹⁰ It requires sentencers to impose life imprisonment for the listed offences.²¹¹ More specifically it requires a sentencer to impose life imprisonment sentences mostly in the case of murder or rape, and in both cases only with

²⁰² Act 105 of 1997

²⁰³ Centre of Child Law v Minister of Justice and Constitutional Development 2009 (2) SACR 477 (CC)

²⁰⁴ S v Brandt 2005 (2) All SA 1 (SCA) at para 9

²⁰⁵ Supra at para 11; S v Nkosi at para 141b; S v Blaauw 2001 (2) SACR 255 (CC) at para 262e-264j

²⁰⁶ Centre of Child Law v Minister of Justice and Constitutional Development 2009 (2) SACR 477 (CC)

²⁰⁷ S v Brandt 2005 (2) All SA (SCA) at para 24a-e; S v Nkosi 2002 (1) SACR 135 (W)

²⁰⁸ Act 105 of 1997

²⁰⁹ Act 105 of 1997

²¹⁰ SS Terblanche Guide to Sentencing in South Africa 2ed (2007) 58

²¹¹ Ibid

respect to situations described, which include premeditated murder in the course of rape, or robbery and rape involving the infliction of grievous bodily harm.²¹²

Section 51(2)²¹³ prescribes the minimum terms of imprisonment which must be imposed. The CLAA,²¹⁴ however, permits the imposition of a further sanction (in combination with the minimum sentence that must be imposed), such as a fine or committal to a treatment centre, when justified by the facts of the case. Terblanche asserted that s 290 of CLAA²¹⁵ sanctions correctional supervision as an alternative to a minimum imprisonment sentence, since the term of ‘imprisonment’ are not limited to ordinary, determinate imprisonment.²¹⁶ Sentences such as declaring an offender a dangerous criminal, or correctional supervision also constitute imprisonment in our law.²¹⁷

3.3. Interpretation of Section 51-53

Legislature intended the CLAA²¹⁸ to be interpreted according to the ordinary principles pertaining to statutory penalty clauses.²¹⁹ The meaning of the words used must be of primary importance, balanced with the legislature intention, and in accordance with the spirit, purport, and objectives of the Bill of Rights.²²⁰

Legislature has primarily intended the minimum and mandatory legislation to act as a deterrent.²²¹

²¹² Part 1 of Schedule 2 of Act 105 of 1997

²¹³ Act 105 of 1997

²¹⁴ Act 105 of 1997

²¹⁵ Act 105 of 1997

²¹⁶ SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 67

²¹⁷ S 276(1)(i) of Act 51 of 1977; S v Van der Westhuizen 1995 (1) SACR 601 (A) at para 603i-j; S v Slabbert 1998 (1) SACR 646 (SCA) at para 647h-i

²¹⁸ Act 105 of 1997

²¹⁹ Terblanche (note 216 above; 44)

²²⁰ Ibid; S v Dzukuda 2000 (2) SACR 443 (CC) at para 38; Brandt v S [2005] 2 All SA 1 (SCA) at para 9; s v Mofokeng 1999 (1) SACR 502 (W) at 516

²²¹ Ibid

The constitutionality of the CLAA²²² was unsuccessfully challenged in *S v Dodo*²²³. The court held that the CLAA²²⁴ does not breach the doctrine of separation of powers, as both the “legislature and judiciary share an interest in the punishment to be imposed by courts both with regard to its nature and its severity.”²²⁵ It was also held that the accused’s “right not to be punished in a cruel, inhuman, or degrading way must not be infringed”²²⁶ referring to the *Malgas case*²²⁷ in which the court held that “a sentencing court is not obliged to impose a sentence if substantial and compelling circumstances exist which will render the minimum or mandatory sentence disturbingly inappropriate.”²²⁸

Terblanche asserted that youth is an important factor in determining whether substantial and compelling circumstances exist.²²⁹ The mere fact that the offender is young is not by itself considered to be a substantial or compelling circumstance.²³⁰ The seriousness of the offence and the character of the offender are determinative.²³¹ The fact that separate legal positions exist in the operation of minimum and mandatory sentences imposed on offenders below the age of 18, and offenders of 18 years and older, is discriminatory.²³² In *S v Meiring*²³³ the court held that it is discriminatory if an 18-year-old accused is sentenced to 15 years’ imprisonment, whereas, had he been 2 days younger at the time of the offence, the sentence would have been much less severe. In *S v Khoza*²³⁴ the court held that it was not justified to differentiate in

²²² Act 105 of 1997

²²³ (2001) SACR 594 (CC)

²²⁴ Act 105 of 1997

²²⁵ *S v Dodo* (2001) SACR 594 (CC) at para 23

²²⁶ S 12(1)(e) of the Constitution of the Republic of South Africa, 1996

²²⁷ 2001 (1) SACR 469 (SCA)

²²⁸ *Supra* at para 12

²²⁹ *SS Terblanche Guide to Sentencing in South Africa* 2ed (2007) 68; *S v Nkosi* 2002 (1) SACR 135 (W); *S v Brandt* 2005 (2) All SA 1 (SCA) at para 8

²³⁰ *Ibid*

²³¹ *Ibid*

²³² *Ibid*

²³³ 2004 (2) SACR 201 (C)

²³⁴ [2006] 1 All SA 89 (N)

sentencing between the accused A who was 18 years old, and accused B who was 17 years and 10 months old, although theoretically they fell into different sentencing categories.

The following chapter will give an overview of the CJA, and will seek to analyse the sentencer's approach to the implementation of this legislation. It will also consider the challenges that the sentencer is likely to face in the implementation of this legislation.

4. CHAPTER 4: THE CHILD JUSTICE ACT 75 OF 2008

4.1. Introduction

The Child Justice Act 75 of 2008 came into effect in 2010. It revolutionised the CPA²³⁵ with the introduction of new criminal justice procedures and concepts which are conducive to juvenile rights and needs.²³⁶

The CJA²³⁷ was promulgated “*to establish a separate criminal justice system for juveniles who are in conflict with the law, and are accused of committing offences, in accordance with the values fundamental to the Constitution and international instruments. The CJA²³⁸ aims to provide the minimum age of criminal capacity of children²³⁹ to make provision for the assessment of juveniles;²⁴⁰ to provide for the holding of a preliminary inquiry,²⁴¹ and to incorporate the fundamental principle of diversion, which aims to divert juvenile matters away from the formal criminal justice system in appropriate circumstances;²⁴² to make special provision for securing attendance at court;²⁴³ and for the release, detention, or placement of juveniles;²⁴⁴ to make provision for child justice courts to hear all trials of juveniles whose matters are not diverted;²⁴⁵ to extend the sentencing options available for convicted juveniles; and to entrench the notion of restorative justice in the criminal justice system in respect of juveniles who are in conflict with the law.*”²⁴⁶

²³⁵ Act 51 of 1977

²³⁶ CR Van Eeden: *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 56

²³⁷ Act 75 of 2008

²³⁸ Act 75 of 2008

²³⁹ S 7 of Act 75 of 2008

²⁴⁰ S 34-40 of Act 75 of 2008

²⁴¹ S 43-50 of Act 75 of 2008

²⁴² S 41-42 & s 51-62 of Act 75 of 2008

²⁴³ S 17-20 of Act 75 of 2008

²⁴⁴ S 21-33 of Act 75 of 2008

²⁴⁵ S 63-67 of Act 75 of 2008

²⁴⁶ S 68-79 of Act 75 of 2008

The CJA²⁴⁷ expressly cautions the relevant parties that detention should be a “*measure of last resort and for the shortest possible period;*”²⁴⁸ juveniles must “*be treated in a manner and kept in conditions that take account of their age;*” juveniles must be “*kept separate from adults;*” and boys must be separated from girls while in detention; juveniles must be protected from “*maltreatment, neglect, abuse, or degradation; juveniles must not be subjected to practices that could endanger the juveniles’ well-being, education, physical or mental health, or spiritual, moral, or social development; and current statutory law does not effectively approach the plight of juveniles in conflict with the law in a comprehensive and integrated manner that takes into account their vulnerability and special needs.*”²⁴⁹

The CJA²⁵⁰ expressly acknowledges that there are “*capacity, resource, and other constraints on the state which may require a practical and incremental strategy to implement the new criminal justice system for juveniles.*”²⁵¹

The aim of the CJA²⁵² was to replace the traditional forms of punishment with restorative justice principles, encouraging the rehabilitation and reintegration of juvenile delinquents.²⁵³

Youth is always considered a mitigating factor owing to its ability to influence the juvenile delinquent’s moral culpability, and calls for sentencing treatment other than that of adults.²⁵⁴

Children require a different sentencing approach. It is recognised that juvenile delinquent crimes may stem from immature judgement, an unformed character, youthful vulnerability to

²⁴⁷ Act 75 of 2008

²⁴⁸ S 69(1)(e) of Act 75 of 2008

²⁴⁹ Preamble of Act 75 of 2008

²⁵⁰ Preamble of Act 75 of 2008

²⁵¹ Preamble of Act 75 of 2008

²⁵² Preamble Act 75 of 2008

²⁵³ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 56

²⁵⁴ SS Terblanche *Guide to Sentencing in South Africa* 2ed (2007) 80

error, impulses, and influences.²⁵⁵ The court has recognised in *S v M*²⁵⁶ that “demanding full moral accountability for an offence might be too harsh on a juvenile, because such offenders are not yet adults.” Hence, the law affords juvenile delinquents some leeway of hope and possibility.

4.2. Objects of the CJA

The objects of the CJA are:²⁵⁷

- “To protect the rights of juveniles as provided for in the Constitution and international instruments;”²⁵⁸
- “To promote the spirit of Ubuntu in the child justice system through fostering the juvenile’s sense of dignity and worth; reinforcing juveniles’ respect for human rights and fundamental freedoms by holding them accountable for their actions, and safeguarding the victim and the community; supporting reconciliation based on restorative justice practices; involving the affected relevant parties in the procedures to ensure the reintegration of juveniles;”²⁵⁹
- “To provide for the special treatment of juveniles in the child justice system designed to prevent reoffending, with the aim of protecting the community and conditioning the juveniles to become law-abiding citizens;”²⁶⁰
- “To prevent juveniles from being exposed to the adverse effects of the formal criminal justice system by using appropriate means more suitable to their needs;”²⁶¹ and

²⁵⁵ *S v M* (Centre for Child Law as Amicus Curiae) 2007 (2) SACR 539 (CC)

²⁵⁶ Supra

²⁵⁷ S 2 of Act 75 of 2008

²⁵⁸ s 2(a) of Act 75 of 2008

²⁵⁹ s 2(b)(i-iv) of Act 75 of 2008

²⁶⁰ s 2(c) of Act 75 of 2008

²⁶¹ s 2(d) of Act 75 of 2008

- *“To promote cooperation between all role-players to ensure an integrated and holistic approach in the implementation of the CJA.”*²⁶²

4.3. Guiding principles

The guiding principles of the CJA are:

- *“All consequences arising from the commission of the offence by the juvenile should be proportional to the circumstances of the child, the nature of the offence, and the interests of society;”*²⁶³
- *“A juvenile must not be treated more severely than an adult would have been treated in the same circumstances;”*²⁶⁴
- *“Every juvenile should, as far as possible, be given an opportunity of participating in proceedings where decisions affecting him or her might be taken;”*²⁶⁵
- *“All procedures should be conducted and completed without unreasonable delay;”*²⁶⁶
and
- *“The rights and obligations of juveniles are contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.”*²⁶⁷

4.4. Application of the CJA

Prior to the implementation of the CJA²⁶⁸ the court In *S v Kwalase*,²⁶⁹ held that the sentencer must determine the juvenile delinquent’s moral culpability with reference to his age and

²⁶² s 2(e) of Act 75 of 2008

²⁶³ s 3(a) of Act 75 of 2008

²⁶⁴ s 3(b) of Act 75 of 2008

²⁶⁵ s 3(c) of Act 75 of 2008

²⁶⁶ s 3(g) of Act 75 of 2008

²⁶⁷ s (3)(i) of Act 75 of 2008

²⁶⁸ Act 75 of 2008

²⁶⁹ 2002 (2) SACR 135 (C) at 141 i-143c

maturity at the time of the commission of the crime. Likewise, in *S v Blaauw*,²⁷⁰ the court held that the sentencer must be mindful of the fact that a juvenile may not be immature and still developing a day before she/he attains majority; nor does a juvenile become mature and developed the day majority has been attained.

The CJA²⁷¹ applies to any juvenile “*under the age of 18 years and, in certain circumstances, this applies to a person who is 18 years or older, but under the age of 21 years.*”

4.5. Minimum Age of Criminal Capacity

Criminal capacity is the ability to conduct oneself in line with the appreciation of the wrongfulness of one’s conduct.²⁷²

At common law, it is generally recognised that juveniles lack both the intellectual maturity and the self-control necessary to be held criminally or delictually accountable for their wrongdoing.²⁷³ The CJA²⁷⁴ has changed the common law in this regard.

A juvenile “*who is 10 years or younger at the time of the commission of the offence does not have criminal capacity.*”²⁷⁵

A juvenile “*who is 10 years or older but under the age of 14 years at the time of the commission of the offence is presumed to lack criminal capacity, unless the state can prove that he has criminal capacity.*”²⁷⁶

²⁷⁰ 2001 (2) SACR 255 (C)

²⁷¹ Act 75 of 2008

²⁷² CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 58

²⁷³ G Kemp et al *Criminal law in South Africa* (2013) 155

²⁷⁴ Act 75 of 2008

²⁷⁵ s 7(1) of Act 75 of 2008

²⁷⁶ s 7(2) of Act 75 of 2008

A juvenile who is 14 years or older at the time of the commission of the offence is presumed to have criminal capacity.²⁷⁷

4.6. Diversion

The CJA²⁷⁸ defines diversion as “*a means of diverting a matter involving a juvenile away from the formal court procedure in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8.*”²⁷⁹

The CJA²⁸⁰ expressly states the objectives of diversion as:

- “*A manner of dealing with a juvenile outside the formal criminal justice in appropriate cases;*”²⁸¹
- “*Encouraging accountability on the part of the juvenile;*”²⁸²
- “*Meeting the particular needs of the individual juvenile;*”²⁸³
- “*Promoting reintegration into society;*”²⁸⁴
- “*Providing an opportunity for the harmed parties to express their views on the impact of the crime on them;*”²⁸⁵
- “*Encouraging the juvenile to render an appropriate form of restitution to the victim;*”²⁸⁶
- “*Promoting reconciliation between the juvenile and relevant parties;*”²⁸⁷

²⁷⁷ s 7(3) of Act 75 of 2008

²⁷⁸ Act 75 of 2008

²⁷⁹ s 1 of Act 75 of 2008

²⁸⁰ Act 75 of 2008

²⁸¹ s 51(a) of Act 75 of 2008

²⁸² s 51(b) of Act 75 of 2008

²⁸³ s 51(c) of Act 75 of 2008

²⁸⁴ s 51(d) of Act 75 of 2008

²⁸⁵ s 51(e) of Act 75 of 2008

²⁸⁶ s 51(f) of Act 75 of 2008

²⁸⁷ s 51(g) of Act 75 of 2008

- “Preventing stigmatisation and the adverse effects of the formal criminal justice system;”²⁸⁸
- “Reducing the potential for reoffending;”²⁸⁹
- “Preventing the juvenile from obtaining a criminal record;”²⁹⁰ and
- “Promoting the dignity, well-being, and self-worth of the juvenile, and the ability to contribute to society.”²⁹¹

Diversion allows a prosecutor in terms of s 41(1) of the CJA²⁹² to divert a matter involving a juvenile who allegedly committed a Schedule 1 offence.²⁹³ In order to determine whether diversion will be suitable, a prosecutor must “take account of whether the juvenile has a record of previous diversions.”²⁹⁴ Further consideration must be given to whether the juvenile “acknowledges responsibility for the offence; whether the juvenile was not unduly influenced to acknowledge responsibility; the presence of a prima facie case against the juvenile; and the juvenile and his representative’s consent to diversion.”²⁹⁵ Additional consideration will be required if the juvenile allegedly committed a Schedule 2²⁹⁶ or Schedule 3²⁹⁷ offence. The prosecutor will be tasked with considering the views of the victim and his representative as to whether diversion “should be allowed; and if so, the nature and content of the diversion option,

²⁸⁸ s 51(h) of Act 75 of 2008

²⁸⁹ s 51(i) of Act 75 of 2008

²⁹⁰ s 51(j) of Act 75 of 2008

²⁹¹ s 51(k) of Act 75 of 2008

²⁹² Act 75 of 2008

²⁹³ Schedule 1 offences include but are not limited to “any offence committed by contravention of any bye-law or regulation regarding the use of a vehicle such as driving a vehicle at a speed exceeding a prescribed limit or driving a motor vehicle without holding licence to drive.”

²⁹⁴ s 41(5) of Act 75 of 2008

²⁹⁵ s 52(1)(a)-(d) of Act 75 of 2008

²⁹⁶ Part 1 of Schedule 2 offences refers “to premeditated murder, or where the victim was a law enforcement officer performing his function or a material witness, or death was accompanied by rape or aggravated robbery, or raped more than once or by more than one person, or is under the age of 16 years old or physically or mentally disabled, or is inflicted grievous bodily harm, or if the offender knows he has AIDS or is HIV positive, or has been convicted for two or more rapes for which no sentence has yet been imposed”

²⁹⁷ Schedule 3 offences include but are not limited to: “an offence under any law relating to the illicit possession, conveyance or supply of dependence-producing drugs or intoxicating liquor; murder, rape, assault, robbery, theft and housebreaking”

*in consultation with the police official responsible for the investigation of the case.”*²⁹⁸ Should the prosecutor find that diversion is unsuitable in a case, he “*must immediately make provision for the juvenile to appear at a preliminary inquiry.*”²⁹⁹

It should be noted that diversion is seldom used in serious cases. Thus it is essential to ensure that all deserving cases are diverted.³⁰⁰

Section 53 of the CJA³⁰¹ prescribes the diversion options available to the prosecutor:

- A compulsory school-attendance order;
- Family-time order;
- Good-behaviour order;
- Peer-association order;
- Reporting order; or
- Supervision and guidance order.

Section 42(1) of the CJA³⁰² requires a diversion to be made an order of court by the sentencer in his chambers in the presence of all relevant parties.

The failure of a juvenile to comply with a diversion order justifies the issuing of a warrant for his arrest, or a summons for the juvenile to appear before the sentencer in a child justice court.³⁰³

²⁹⁸ s 52(2)(a)-(b) and s 52(3)(a)(i)-(ii) of Act 75 of 2008

²⁹⁹ s 41(6) of Act 75 of 2008

³⁰⁰ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 99-105

³⁰¹ Act 75 of 2008

³⁰² Act 75 of 2008

³⁰³ S 58(1) of Act 75 of 2008

Skelton asserts that, owing to the wide discretion to divert cases given to prosecutors and sentencers, bifurcation occurs.³⁰⁴ Hence, minor offences are being diverted, while serious cases proceed to trial, which place such offenders beyond the reach of restorative justice.³⁰⁵ This can easily result in discriminatory practices.³⁰⁶ However, the CJA³⁰⁷ allows diversion to occur at three stages, namely: after arrest; at the preliminary enquiry; and during the trial. This is an inherent safeguard to prevent discriminatory practices by allowing serious offences also the opportunity of being diverted.³⁰⁸

4.7. Preliminary inquiry

The CJA³⁰⁹ defines a preliminary inquiry as an “*informal pre-trial procedure which is inquisitorial in nature, held in a court or any other suitable place, presided over by a magistrate of the district within which the juvenile has allegedly committed the offence.*”³¹⁰

Section 43(2)(a) - (h) of the CJA³¹¹ expresses the preliminary inquiry objectives as:

- “*A consideration of the assessment report by the probation officer regarding age, criminal capacity, and whether a more detailed assessment of the juvenile is required;*”
- “*Establishing whether the matter is suitable for diversion;*”
- “*Where applicable, the identification of a suitable diversion option;*”
- “*Establishing whether the case should be referred to a children’s court;*”

³⁰⁴ A Skelton ‘Restorative justice as a framework for juvenile justice reform’ (2002) 42(3) *British Journal of Criminology* 496-513.

³⁰⁵ Ibid

³⁰⁶ Ibid

³⁰⁷ Act 75 of 2008

³⁰⁸ Skelton (note 304 above)

³⁰⁹ Act 75 of 2008

³¹⁰ s 43(1) of Act 75 of 2008

³¹¹ Act 75 of 2008

- *“Ensuring all relevant and available information regarding the juvenile is considered when making an informed decision regarding diversion;”*
- *“Ensuring the views of all affected persons are considered in the decision-making process;”*
- *“Encouraging participation from the juvenile and his representatives in the decision-making regarding the juvenile;” and*
- *“Determining the release or placement of a juvenile, pending the conclusion of the preliminary inquiry, the appearance of the juvenile in the child justice court, or the referral of the matter to a children’s court, where applicable.”*

Section 43(3)³¹² stipulates the requirements of a preliminary enquiry. Each juvenile should be afforded the opportunity of a preliminary enquiry, unless the matter has been diverted by the prosecutor, the juvenile is 10 years or younger, or the matter has been withdrawn. A preliminary enquiry *“must be held within 48 hours of arrest;”* and attendance at the preliminary enquiry will be regarded as the juveniles’ first appearance before a court of law.

Section 44(1)³¹³ requires that the juvenile, his representative, such as his parents or guardians, and the probation officer, be present at the preliminary enquiry. However, *“a preliminary enquiry may proceed in the absence of the juvenile, his representative, or probation officer, if the sentencer is satisfied that to proceed would be in the best interests of the juvenile.”*³¹⁴ The sentencer must record the reason/s for such a decision.³¹⁵ The sentencer also retains the right to request or subpoena any such person/s who has interests, or whose presence is needed at the preliminary inquiry.³¹⁶

³¹² Act 75 of 2008

³¹³ Act 75 of 2008

³¹⁴ s 44(4)(a) of Act 75 of 2008

³¹⁵ s 44(4)(b) of Act 75 of 2008

³¹⁶ s 44(5)-(6) of Act 75 of 2008

Section 49³¹⁷ authorises the sentencer to order the juvenile to be diverted in terms of s 52(5), or referring the juvenile to a child justice court in terms of s 47(9)(c); and amending any non-custodial conditions in terms of s 24(4), consequently warning the juvenile and his representative of failure to appear.

4.8. Trial

The CJA³¹⁸ defines a child justice court as “*any court provided for in the CPA³¹⁹, dealing with the bail application, plea, trial or sentencing of a child.*”³²⁰

A child justice court is tasked in terms of s 63(4)(a)-(b) of the CJA³²¹ to ensure that “*the best interests of the juvenile are upheld during the proceedings.*” The court must thus elicit any additional information relevant to the case, and must ensure that during all stages of the trial “*the proceedings are fair, and not unduly hostile; and are appropriate to the age and understanding of the juvenile.*”

Parental or guardian assistance for the juvenile is required during the trial proceedings.³²²

Should such people not be present, the probation officer, in exceptional cases, may appoint an independent observer to assist the juvenile.³²³

Section 66(1) of the CJA expressly states that “*a child justice court must conclude all trials of juveniles as speedily as possible; and must ensure that postponements are limited in number and duration.*”³²⁴

³¹⁷ Act 75 of 2008

³¹⁸ Act 75 of 2008

³¹⁹ Act 105 of 1977

³²⁰ s 1 of Act 75 of 2008

³²¹ Act 75 of 2008

³²² s 65(1) of Act 75 of 2008

³²³ s 65(6) of Act 75 of 2008

³²⁴ s 66(1) of Act 75 of 2008

4.9. Sentencing

The child justice court must, after the conviction of a juvenile, impose a sentence in accordance with the CJA.³²⁵

Section 69 of the CJA³²⁶ expresses the objectives of sentencing as:

- *“Encouraging accountability;”*
- *“Promoting individualised sentencing by application of proportionality principles;”*
- *“Promoting reintegration of the child into the family and community;”*
- *“Ensuring that rehabilitation conditions specified in the sentence assist in communal reintegration;” and*
- *“Using imprisonment only as a measure of last resort and for the shortest possible period.”*

The CJA³²⁷ encourages the imposition of combined sentences to give effect to the objectives of the sentencing outline above.³²⁸

When considering the imposition of a detention sentence at a youth care centre, the sentencer must take cognisance of the following:³²⁹

- *“Whether the seriousness of the offence indicates a tendency towards harmful activities;”*
- *“Whether the harm caused justifies a detention sentence;”*
- *“Whether the extent of the harm caused may be equated to the culpability of the juvenile;” and*

³²⁵ s 68 of Act 75 of 2008

³²⁶ Act 75 of 2008

³²⁷ Act 75 of 2008

³²⁸ s 69(2) of Act 75 of 2008

³²⁹ s 69(3)(a)-(d) of Act 75 of 2008

- “Whether the juvenile is in need of a particular service provided at the detention centre.”

When considering the imposition of an imprisonment sentence, the sentencer must take cognisance of the following:³³⁰

- “The seriousness of the offence in respect of the harm caused and the culpability of the juvenile;”
- “The protection of the community;”
- “The severity of the impact of the offence on the victim;”
- “Previous failure of the juvenile to respond to non-custodial sentences;” and
- “Desirability of keeping the juvenile out of prison.”

A child justice court may dispense with a pre-sentence report in which the juvenile was convicted of a Schedule 1 offence.³³¹ However, should the sentencer consider the imposition of a detention sentence, he or she must request a pre-sentence report. The sentencer is “*not obliged to impose the recommended sentence given in the pre-sentence report, but must enter his reasons for the imposition of a different sentence,*”³³² should there be a variation.

Section 72-79 of the CJA³³³ prescribes the sentencing options available to the sentencer. It includes, but is not limited to: “*community-based sentences, restorative justice sentences, fines or alternative to fines, correctional supervision, compulsory residence in a child and youth care centre, and imprisonment.*” These sentencing options have been detailed in Chapter 2 above.

³³⁰ s 69(4)(a)-(e) of Act 75 of 2008

³³¹ s 71(3) of Act 75 of 2008

³³² s 71(4) of Act 75 of 2008

³³³ Act 75 of 2008

Failure to comply with the imposed sentence justifies a “*child justice court to confirm, amend, or substitute the sentence.*”³³⁴

4.10. Restorative Justice

The CJA³³⁵ defines restorative justice as “*an approach to justice that aims to involve the child offender, the victim, the families concerned, and community members to collectively identify and address harms, needs, and obligations, through accepting responsibility, making restitution, taking measures to prevent a recurrence of the incident, and promoting reconciliation.*”³³⁶

Skelton asserts that diversion is not the only restorative justice measure inherent in the CJA.³³⁷

The CJA³³⁸ allows for victim-offender mediation; family-group conferencing, and other restorative-justice measures during the trial and sentencing phases.³³⁹ Sentencing options such as restitution or compensation are restorative in nature.³⁴⁰ Hence it is submitted that the legislature has intended the juvenile to benefit from restorative justice, should he not have been afforded the opportunity of diversion at the pre-trial phase.³⁴¹

A prime practical example of restorative justice at work was in *S v Shilubane*³⁴² where the accused was convicted with the theft of seven fowls. Apart the accused’s genuine remorse, he was sentenced to nine months imprisonment. On review, the sentence was ‘set aside and replaced with a suspended sentence.’ The sentencer reasoned that, in keeping with the new

³³⁴ s 79(2) of Act 75 of 2008

³³⁵ Act 75 of 2008

³³⁶ s 1 Act 75 of 2008

³³⁷ A Skelton ‘Restorative justice as a framework for juvenile justice reform’ (2002) 42(3) *British Journal of Criminology* 496-513.

³³⁸ Act 75 of 2008

³³⁹ Skelton (note 337 above)

³⁴⁰ *Ibid*

³⁴¹ *Ibid*

³⁴² 2008 (1) SACR 295 (T)

values based on restorative justice, the complainant would have been more satisfied to receive restitution for his loss.

However, restorative justice is not without defect.³⁴³ vengeful communities have the ability to exert more punitive measures than the formal criminal justice system if the juvenile is allowed reintegration into society.³⁴⁴ The killing of 14-year-old Kagiso is a prime example of such vigilantism.³⁴⁵ Thus, it is submitted that restorative justice measures which involve community involvement, must be managed within the framework of the minimum standards and rights afforded to juveniles by the Act and international instruments.³⁴⁶

4.11. Constitutional Principles Relating to the Rights of Juvenile Delinquents

International instruments endorsed by South Africa contributed to the promulgation of children's rights under the Constitution.³⁴⁷ These instruments all share a common objective which requires detention for juvenile delinquents to "*be a measure of last resort and for the shortest possible period.*"

Children are afforded the protection of all rights within the Bill of Rights in addition to the rights contained in s 28.

The writer's discussion on the constitutional principles will focus on s 28(1)(g) and s 28(2).

³⁴³ A Skelton 'Restorative justice as a framework for juvenile justice reform' (2002) 42(3) *British Journal of Criminology* 496-513.

³⁴⁴ Ibid

³⁴⁵ Ibid

³⁴⁶ Ibid

³⁴⁷ Ibid; Constitution of the Republic of South Africa, 1996; United Nations Convention on the Rights of the Child; African Charter on the Rights and Welfare of the Child.

4.11.1. S 28(1)(g): Detention as a measure of last resort and for the shortest possible period

Section 28 of the Constitution³⁴⁸ brought about change regarding the treatment of juvenile delinquents in conflict with the law.

Section 28(1)(g)³⁴⁹ provides that “*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 s 12³⁵⁰ and s 35,³⁵¹ the child may be detained only for the shortest appropriate period of time, and has the right to be kept separate from detained persons over the age of 18 years; and be treated in a manner, and kept in conditions taking account of the child’s age.*”³⁵²

The Constitution³⁵³ expressly limits detention of juvenile delinquents by way of time and severity,³⁵⁴ suggesting that alternative sanctions, preferably restorative justice in nature, should be sought and implemented before considering the imposition of a detention sentence.

However, this does not mean that juvenile delinquents may not be detained.³⁵⁵ All rights within the Bill of Rights are subject to the limitations clause in terms of s 36 of the Constitution.

The primary objective of the Constitution³⁵⁶ was to keep juveniles away from the criminal justice system; and, should this be impossible, juveniles should not be imprisoned except as a “*measure of last resort.*”³⁵⁷

³⁴⁸ Constitution of the Republic of South Africa, 1996

³⁴⁹ Constitution of the Republic of South Africa, 1996

³⁵⁰ Constitution of the Republic of South Africa, 1996

³⁵¹ Constitution of the Republic of South Africa, 1996

³⁵² *S v Blaauw* 2001 (2) SACR 255 (C) at para 265f-g the court referred to the awful conditions in overcrowded prisons, which are more likely to result in physical and psychological deterioration of the juvenile. S 28(1)(b) unacceptable conditions in state institutions where juveniles are kept, such as prisons or places of safety, could hardly be seen as providing appropriate alternative care.

³⁵³ Constitution of the Republic of South Africa, 1996

³⁵⁴ VL Momoti Application of Prescribed Minimum and Mandatory Sentencing Legislation on Juvenile Offenders in South Africa (unpublished LLM thesis, University of the Western Cape, 2005) 60

³⁵⁵ *Ibid*

³⁵⁶ Constitution of the Republic of South Africa, 1996

³⁵⁷ S 28(1)(g) of the Constitution of the Republic of South Africa, 1996

The principle that juvenile detention should be “*a measure of last resort and for the shortest possible period*” is considered vague, owing to its inability to give objective sentencing guidelines and because of the principle’s inherent excessively wide judicial discretion.³⁵⁸

In *S v Brandt*³⁵⁹ the SCA had to consider whether a ‘sentence of life imprisonment imposed on the appellant, who at the time of the commission of the offence was 17 years and 7 months, was an appropriate sentence.’³⁶⁰ The appellant was a member of a satanic coven in Port Elizabeth.³⁶¹ On 12 June 2000, he hitch-hiked to his parental home in Hofmeyr, with the purpose of killing his parents.³⁶² The satanic sect promised him, that this act would elevate his status to high priest within the coven.³⁶³ When he arrived at his parental home, however, he was not able to go through with the deed.³⁶⁴ He then sought refuge in alcohol and dagga. Realising that he required money and transport to return to Port Elizabeth, he decided to rob the deceased, a 75 year old female neighbour.³⁶⁵ He killed the deceased with a single fatal blow to the head with a knife, and then proceeded to steal a portable radio, car keys and R300.00.³⁶⁶ The trial court convicted the appellant on charges of murder, robbery with aggravating circumstances and attempted robbery. The trial judge therefore imposed the statutory prescribed minimum sentence of life imprisonment for the murder because he did not find any substantial and compelling circumstances.³⁶⁷ However, the judge did not take into account the appellant’s age at the time of the commission of the offence. The SCA held “*that when a sentencing court is faced with the task of sentencing a juvenile offender, it should also take*

³⁵⁸ SS Terblanche ‘Sentencing a child who murders – DPP, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA)’ (2007) 20 *South African Journal of Criminal Justice* 339

³⁵⁹ 2005 (1) SACR 435 (SCA)

³⁶⁰ Supra at para 1

³⁶¹ 2005 (1) SACR 435 (SCA) at para 3

³⁶² Supra

³⁶³ Supra

³⁶⁴ Supra

³⁶⁵ Supra

³⁶⁶ Supra

³⁶⁷ Supra at para 5

*account the provisions of some international instruments, which do not encourage detention of juveniles. Youthfulness per se would ordinarily constitute a substantial and compelling circumstances.*³⁶⁸ The SCA affirmed that ‘the traditional aims of punishment in respect of juvenile offenders have to be re-appraised and developed to accord with the Constitution and that they should be aimed at reintegration and rehabilitation.’³⁶⁹ The SCA stated that:

“the recognition that juveniles accused of committing offences should be treated differently to adults is now over a century old.”³⁷⁰ ‘Historically, the South African justice system has never had a separate, self-contained and compartmentalised system for dealing with juvenile offenders.’³⁷¹ ‘Our justice system has generally treated juvenile offenders as smaller versions of adult offenders.’³⁷² ‘Hence juvenile offenders charged with an offence must be dealt with in a manner which takes account of their age, circumstances, maturity as well as intellectual and emotional capacity.’³⁷³

The SCA held that should a sentencing court be unable to depart from the statutory prescribed minimum sentence unless the juvenile offender established the existence of substantial and compelling circumstances, meant the juvenile offender would be burdened in the same way as the adult offender. This would infringe the CJA³⁷⁴ principle that detention should be a measure of last resort and for the shortest possible period of time.

The court did not express what would constitute the ‘shortest possible period,’³⁷⁵ but it did express that:

³⁶⁸ 2005 (2) All SA 1 (SCA) at para 8

³⁶⁹ 2005 (2) All SA 1 (SCA) at para 16; Ann Skelton ‘Developing a juvenile justice system for South Africa: International instruments and restorative justice’ 1996 *Acta Juridica* 180.

³⁷⁰ *Supra* at para 16

³⁷¹ 2005 (2) All SA 1 (SCA) at para 14

³⁷² *Supra*

³⁷³ *Supra* at para 15

³⁷⁴ Act 75 of 2008

³⁷⁵ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 319

*“the guiding principles must include the need for proportionality, the best interests of the juvenile, and the least possible restrictive deprivation of the juvenile’s liberty, which should be a measure of last resort and restricted to the shortest possible period of time; this entail a limitation on certain forms of sentencing such as a ban on life imprisonment without parole for juvenile offenders.”*³⁷⁶

Upon consultation of the probation officer report, which noted that the appellant had a neglected childhood, was ill-disciplined and had ineffective parenting, the appellant was raised in an atmosphere of social and emotional deprivation, alcohol and substance abuse was the norm, previous conflict with the law was a commonplace which was followed by admission to a place of safety and an industrial school, two suicide attempts followed and involvement in a satanic group appeared attractive to an impressionable immature mind,³⁷⁷ the SCA ordered 18 years of imprisonment due to the appellant relative youthfulness which would allow for rehabilitation even after a fairly long period of imprisonment.³⁷⁸

In *Director of Public Prosecution, KZN v P*³⁷⁹ the appellant was a 12 year old girl, guilty of the murder of her grandmother.³⁸⁰ The appellant approached two men and asked them to help her kill her grandmother promising them goods from the house and sexual relations.³⁸¹ The state attacked the sentence of community service as *“lenient given the gravity of the offences committed by the accused.”*³⁸² The SCA argued that *“the sentencing of juvenile offenders is never easy and is far more complex than the sentencing of adult offenders.”*³⁸³ The court of appeal arrived at its decision by closely following the approach adopted in the *Brandt case*³⁸⁴

³⁷⁶ 2005 (2) All SA 1 (SCA) at para 20

³⁷⁷ 2005 (2) All SA 1 (SCA) at para 25

³⁷⁸ Supra at para 26

³⁷⁹ 2006 (1) SACR 243 (SCA)

³⁸⁰ Supra at para 1

³⁸¹ Supra at para 2

³⁸² Supra at para 5

³⁸³ S v Ruiters 1975 (3) SA 526 (C) at para 531E-F

³⁸⁴ 2005 (2) All SA 1 (SCA)

and emphasised the reintegration of juvenile offenders into society and the aims of rehabilitation. The court concurred with the *Brandt case*³⁸⁵ that juvenile offenders should not be caged, and that detention should be a ‘measure of last resort,’ as well as the need to individualise a sentence to ensure that the sentence imposed does not result in the accused returning to society with a more distorted personality. The court held that:

*“imprisonment should only be imposed on juvenile offenders who have been convicted of serious violent crimes, but that 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 juvenile offender is not to be detained except as a measure of last resort and if detention is unavoidable, it should be for the shortest possible period of time.”*³⁸⁶

The court replaced the sentence with seven years’ imprisonment, wholly suspended for 5 years on condition that she is not convicted of an offence of which violence is an element and sentenced to 36 months of correctional supervision with stringent conditions.³⁸⁷ The court unfortunately did not express any guidelines for what constitutes the ‘shortest possible period.’³⁸⁸

In *S v Kwalase*³⁸⁹ the court held that serious crimes require severe punishment to be imposed, however, the sentencer should not overemphasise the seriousness of the crime to justify a severe sentence at the expense of the juvenile delinquent. The court, however, failed to provide an objective guideline on what constitutes such overemphasis.³⁹⁰

³⁸⁵ *S v Brandt* 2005 (2) All SA 1 (SCA) at para 16

³⁸⁶ 2006 (1) SACR 243 (SCA) at para 18

³⁸⁷ 2006 (1) SACR 243 (SCA) at para 28

³⁸⁸ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 319

³⁸⁹ 2000 (2) SACR 135 (C)

³⁹⁰ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 319

Terblanche asserts that it is not enough to say that the juvenile must be dealt with in a manner which takes account of his age, circumstances, maturity, intellect, and emotional capacity. It is submitted that, until leading courts are prepared to clearly state the set percentage or formula a juvenile delinquents sentence must be reduced by for the sentences typically imposed for adults who commit certain offences, there will be no objective yardstick; and the sentence will remain within the subjective opinion of the sentencer. Since the CJA³⁹¹ prescribes that the blameworthiness of a juvenile delinquent should be less than that of an adult who committed a similar offence, he maintains that it should be possible to quantify blameworthiness.³⁹²

Academics suggest that, wherever possible, a sentence of imprisonment should be avoided, especially in the case of a first-time offender. Imprisonment should be considered a measure of last resort, when no other sentence may be considered appropriate. Where imprisonment is considered appropriate, it should be the shortest possible period of time, with regard to the nature and gravity of the offence, and the needs of society, as well as the particular needs and the interests of the juvenile. The general sentencing guidelines on the shortest possible period of detention offer that this should be roughly half the adult sentence for the same or similar offence committed.³⁹³ It is submitted that detention sentences for juveniles should be roughly half of that imposed for adults due to juvenile offenders' limited criminal capacity and youthfulness. Hence, this calls for an individualised sentence promoting rehabilitation and reintegration into society.

However, a brief glance at case law indicates that sentencers have frequently resorted to the application of severe sentences, while the presence of youth and absence of aggravating factors

³⁹¹ Act 75 of 2008

³⁹² SS Terblanche *Guide to sentencing in South Africa* 2ed (2007)

³⁹³ S Hoctor *Sentencing* (Unpublished lecture notes, University of KwaZulu-Natal, 2015); United Nations Convention on the Rights of a Child, 20 November 1989; United Nations Guidelines for the Prevention of Juvenile Delinquency, 14 December 1990; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985

have called for less severe sentences. This seems to suggest trial courts' willingness to imprison first-time juvenile offenders and offenders of minor and serious offences, where restorative community-based sentences could have been more appropriate.³⁹⁴ Although thorough appeal and review procedures inherent in the CJA³⁹⁵ have allowed erroneous sentences to be overturned, this indicates the trial court sentencers' inability to evaluate and apply facts, sentencing factors, and appropriate sentences to juvenile delinquents.³⁹⁶ This sentencing inability, inconsistency, and inequality has led to inconsistent juvenile sentences that result in the violation of constitutionally entrenched children's rights.

Although sentencing discretion is essential, and without it, it is impossible to individualise an 'appropriate' sentence for juvenile delinquents, this has led to sentence inconsistency and impossibility in determining a basis for sentences.³⁹⁷ It is therefore submitted that consistency in sentencing is only possible when sentence discretion is curbed.³⁹⁸ Further research will attempt to suggest or develop a juvenile sentencing guideline based on the Dutch *bos-polaris* sentencing guidelines that will intend to curb, but not completely limit judicial discretion, to ensure that juvenile delinquents' rights are upheld while sentence consistency is ensured.

4.11.2. S 28(2): The best interests of the child

Section 28(2)³⁹⁹ emphasises that "*the best interests of the child is of paramount importance apropos of every matter affecting the child, including detention.*"

Hence, the best interests of the juvenile require a proper evaluation of all relevant facts, since it forms the basis for the proportionality test.

³⁹⁴ Director of Public Prosecutions, *KZN v P* 2006 (1) SACR 243 (SCA)

³⁹⁵ Act 75 of 2008

³⁹⁶ SS Terblanche 'The child justice act: procedural sentencing issues' (2012) 16(1) *Potchefstroom Electronic Law Journal*

³⁹⁷ S Hoctor *Sentencing* (Unpublished lecture notes, University of KwaZulu-Natal, 2015)

³⁹⁸ *Ibid*

³⁹⁹ Constitution of the Republic of South Africa, 1996

In *S v Kwalase*⁴⁰⁰ the court described the application of the principle of proportionality to juvenile offenders 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 officer must structure the punishment in such a way as to promote the reintegration of the juvenile concerned into his or her family and community.”

4.12. Sentences imposed in accordance with the CJA

In order to determine that the interpretation given to the sentencing principle that imprisonment should be ‘a measure of last resort and for the shortest possible period’ was adhered to, the writer has to investigate the sentences imposed prior to the CJA⁴⁰¹ and sentences in accordance with the CJA.⁴⁰²

4.12.1. Cases pre CJA

Terblanche asserted that it has been duly acknowledged that a different approach is required in the sentencing of juvenile offenders.⁴⁰³ In *R v Smith*⁴⁰⁴ the court held that *“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...to educate and uplift him.”* The Court in *S v Jansen*⁴⁰⁵ shared the same sentiments, arguing that *“the interests of society cannot be served by disregarding the*

⁴⁰⁰ 2000 (2) SACR 146 at para H

⁴⁰¹ Act 75 of 2008

⁴⁰² Act 75 of 2008

⁴⁰³ SS Terblanche *Guide to sentencing in South Africa* 2ed (2007) 359

⁴⁰⁴ 1922 TPD 199 201

⁴⁰⁵ 1975 (1) SA 425 (A) at para 427H-428A

interests of young, for a mistaken form of punishment might easily result in a person with a distorted or more distorted personality being eventually returned into society.”

4.12.1.1. S v Nkosi⁴⁰⁶

Until recently *S v Nkosi*⁴⁰⁷ was the most authoritative case regarding the sentencing of juvenile offenders in terms of s 51-53 of the CLAA.⁴⁰⁸ The court had to consider various issues, namely, the analysis of the relevant provisions of the CLAA, the constitutional provisions and also the role of international law in the sentencing of juvenile offenders. Nkosi, the appellant, who was 16 years old at the time of the commission of the offence, was convicted of murder while acting in common purpose.⁴⁰⁹ As the appellant acted in pursuit of common purpose in committing the crime of murder, the offence fell within the ambit of Part 1 of Schedule 2 of the CLAA⁴¹⁰ which prescribed certain minimum sentences. S 51(3)(b) of CLAA⁴¹¹ which was applicable to juveniles between the 16 and 18 years of age contained “no reference to substantial and compelling circumstances, but required a court which decided to impose a minimum sentence to enter the reasons for its decision on the record of proceedings. The court a quo had made no distinction between s 51(3)(a) and s 51(3)(b) and that the court having found no substantial and compelling circumstances that did exist, imposed the minimum prescribed sentence, namely life imprisonment. The court of appeal clearly set out the position with regard to juvenile offenders in clear terms that there should be no reference to substantial and compelling circumstances.⁴¹² Furthermore, the appeal court set down the following guidelines when dealing with the sentencing of juvenile offenders:⁴¹³

⁴⁰⁶ 2002 (1) SACR 135 (W)

⁴⁰⁷ Supra

⁴⁰⁸ Act 105 of 1997

⁴⁰⁹ 2002 (1) SACR 135 (W) at para E

⁴¹⁰ Act 105 of 1997

⁴¹¹ Act 105 of 1997

⁴¹² 2002 (1) SACR 135 (W) at para 141g-i

⁴¹³ Supra at para 141f-i

- “Whenever possible a sentence of imprisonment should be avoided, especially in the case of first offenders;”
- “Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate;”
- “Where imprisonment is considered appropriate it should be 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 interest of the juvenile offender;”
- “It at all possible, the sentence must structure the punishment in such a manner to promote the rehabilitation and reintegration of the juvenile concerned into their family and community.”

The appeal court consequently concluded that “*life imprisonment may only be considered in exceptional circumstances.*”

4.12.1.2. W.N. v S⁴¹⁴

The appellant was convicted of and sentenced to 6 years imprisonment.

The facts of the case are as follows: The appellant, a 17 year old boy, and the complainant, a 17 year old girl, “*attended the same high school and were friends.*”⁴¹⁵ On the evening of 5 July 2004, the complainant received a message from the appellant that he wanted her to come to his house to talk. During the visit, “*the appellant assaulted the complainant into submission and raped her in his room despite her protestations.*”⁴¹⁶ Overwhelmed by the events, the complainant attempted suicide but, fortunately, she suffered no harm.

⁴¹⁴ (469/2007) [2008] ZASCA 30

⁴¹⁵ Supra at para 3

⁴¹⁶ Supra at para 5

Upon conviction, two pre-sentencing reports were obtained in respect of the appellant. “Both social workers reported that the appellant showed no remorse for his actions. In the correctional officer’s opinion, the appellant seemed to have no insight into the extent of harm he has inflicted on the victim and she concluded that the appellant would not benefit from correctional supervision. The probation officer reported that the appellant refused to cooperate with her; she recommended that an imprisonment sentence would be appropriate because of the seriousness of the crime but that the appellant could be referred to correctional supervision for assessment if the court was so minded. The court a quo, sentenced the appellant to ten years imprisonment of which four years were conditionally suspended.”⁴¹⁷

On appeal, it was held that the court a quo “clearly gave due consideration to the findings set out in the pre-sentence reports relating to the appellant’s personal circumstances, he misconceived the import of the probation officer’s recommendation. While the probation officer obviously had misgivings about the appellant attitude towards the offence, she nevertheless did not reject correctional supervision as a sentencing option.”⁴¹⁸ The court a quo “unquestioning reliance on a negative recommendation in the reports based on the appellant’s persistent denial of guilt was another misdirection on his part.”

The court of appeal noted the following:

“The fundamental principle in these instruments is that a child offender should not be deprived of his or her liberty except as a measure of last resort, for the shortest appropriate period and where detention is unavoidable, it must be individualised with the focus on the child’s rehabilitation. In addition to these guiding standards, the sentencing court must take into account the child’s best interests in accordance with s

⁴¹⁷ (469/2007) [2008] ZASCA 30 at para 7

⁴¹⁸ Supra at para 12

28(2) of the Constitution. Notably, regardless of the requirement of limited use of deprivation of liberty, the trite principle of proportionality, which is now required by the Constitution itself, namely that the sentence imposed must fit the nature and seriousness of the offence of which the accused was found guilty and must be fair to both the offender and society, is also applicable to child offenders.”⁴¹⁹

The court of appeal referred to *DPP, KwaZulu-Natal v P*⁴²⁰ which held that in “determining an appropriate sentence the court must take cognisance of the fact that the Constitution⁴²¹ and international instruments do envisage imprisonment of juveniles who have been convicted of serious violent crime to be detained only for the shortest possible period and be kept separate from adult offenders, and does not outright forbid the imprisonment of juvenile offenders.”

The court of appeal noted that correctional supervision is a community based form of punishment.

“Its value lies mainly in that it is lighter than direct imprisonment and offers an offender an opportunity of remaining within the community without the negative influences of prison whilst serving substantial punishment.’ ‘Rendering this form of punishment extremely useful in the case of juvenile offenders as it emphasizes the rehabilitation of the offender and allows for an individualised punishment. However, despite the apparent advantages, it has been cautioned by the courts that the imposition of correctional supervision should be exercised with care, to maintain its credibility and certainly not where the crime is too serious”⁴²²

⁴¹⁹ (469/2007) [2008] ZASCA 30 at para 15

⁴²⁰ 2006 (1) SACR 243 (SCA) at para 19.

⁴²¹ Constitution of the Republic of South Africa, 1996

⁴²² (469/2007) [2008] ZASCA 30 at para 18

In determining an appropriate sentence, the court of appeal held that *“it must bear in mind that too harsh a punishment serves neither the interests of justice nor those of society. Neither does one that is too lenient. Courts should therefore strive for a proper balance that has due regard to all the objects of sentencing.”*⁴²³ Maya JA concluded that correctional supervision is woefully inadequate in this case. It lacks the appropriate punitive impact demanded by the gravity of the offence and does not carry the requisite strong deterrent message to other would be rapists in the community. Maya JA held that the appeal must fail and that six years imprisonment was appropriate.

In a separate judgement Cameron JA, concurred with Maya JA on *“her set out of the facts and reasoning but differed from her conclusion that the appeal against sentence must fail.”*⁴²⁴ Cameron JA argued that the Constitution⁴²⁵ requires sentencers to *“take cognisance of the fact that the appellant was only 17 years old. Prison must therefore be a ‘last resort.’ This bears not only on whether an imprisonment is a sentencing option, but on the sort of imprisonment sentence must be imposed. So if there is a legitimate option other than prison, sentencers must choose it; but if imprisonment is unavoidable its form and duration should also be tempered. Everyday a juvenile spends in prison should be because there is no alternative.”*⁴²⁶

Cameron JA concluded that *“imprisonment cannot be avoided and correctional supervision is not a suitable alternative sentence because every rape sentence sends a public message.”*⁴²⁷ *“This option would be a soft message as well as enable the courts’ seriousness in seeking to punish and deter rapes to be called into question.”*⁴²⁸ However Maya JA *“six year sentence disregards the youthfulness of the appellant, and it may set him up for ruin, while foreclosing*

⁴²³ (469/2007) [2008] ZASCA 30 at para 30

⁴²⁴ Supra at para 34

⁴²⁵ The Constitution of the Republic of South Africa, 1996

⁴²⁶ (469/2007) [2008] ZASCA 30 at para 39

⁴²⁷ Supra at para 40

⁴²⁸ Supra

*the possibility, embodied in his youth, that he will still benefit from rehabilitation and reintegration.*⁴²⁹ Arguing if sentencers “*are to risk erring at all, the Constitution*⁴³⁰ *requires them to err by recognising the possibility of promise that may still flower from his youth, rather than fixing on the destruction that was immanent in his crime.*”⁴³¹ In his view the “*appeal must succeed, the sentence set aside and be substituted with 5 years’ imprisonment.*”⁴³²

4.12.1.3. S v MGK⁴³³

The accused, “*a 16 year old was charged with two counts of robbery and convicted of only one count and was sentenced to 18 months imprisonment wholly suspended on certain conditions.*”⁴³⁴

The facts of the case are as follow: “*The accused, together with four other people who could not be arrested, robbed the complainant. The complainant did not retrieve his articles and was struck with a stone by the accused.*”

On review, Mocumie J argued that the sentenced imposed by the court a quo was too harsh on the accused. The court was of the impression that the court a quo had been “*overwhelmed with this type of offence committed by youngsters in Botshabelo and is almost at the end of his wits on how to deal with them except through the option he believes will solve the problem; direct imprisonment imposed consistently.*”⁴³⁵

The court referred to the juvenile sentencing guidelines for serious and less serious offences laid down in *S v Nkosi*⁴³⁶ and to *S v Phulwane & Others*⁴³⁷ which held that:

⁴²⁹ (469/2007) [2008] ZASCA 30 at para 42

⁴³⁰ The Constitution of the Republic of South Africa, 1996

⁴³¹ (469/2007) [2008] ZASCA 30 at para 44

⁴³² Supra at para 46

⁴³³ Unreported case 13/08, Orange Free State High court on 26 June 2008

⁴³⁴ Supra at para 1

⁴³⁵ Supra at para 6

⁴³⁶ 2000 (1) SACR 135 (W)

⁴³⁷ 2003 (1) SACR 631 (T) at para 634h-635a

“When a youth or juvenile strays from the path of rectitude to criminal conduct, it is the responsibility of judicial officer invested with the task of sentencing such a youth to ensure that she or he receives all relevant information pertaining to such a juvenile to enable him or her to structure a sentence that will best suit the needs and interests of the particular youth. It is, after all, a salutary principle of sentencing that sentence must be individualised. I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever sentence he or she decides to impose will promote rehabilitation of that particular youth and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course the community.”

The court concluded that the court a quo starting point in the determining of a sentence was that the only appropriate sentence would be direct imprisonment, due to the considerable weight he placed on the *“interests of society and total disregard of the socio-economic factors suggested to by the probation officer in the presentence report, the youthfulness of the accused and the fact that the accused was a first time offender.”*⁴³⁸ *“Correctional supervision is one of the options for an alternative sentence provided for in the CPA.”*⁴³⁹ *It is a severe sentence that has rehabilitation and retribution compacted into one. It gives results required if the aim of the sentencer is amongst others to ensure that this young offender is brought in line with the correct way of living where he can serve punishment amidst the society he has wronged. It can even be imposed in the most serious of offences including murder.”*⁴⁴⁰

In light of the above, the *“conviction was confirmed and a sentence of 18 months imprisonment wholly suspended for 3 years on certain conditions imposed by the magistrate is set aside and*

⁴³⁸ Unreported case 13/08, Orange Free State High court on 26 June 2008 at para 11

⁴³⁹ Act 51 of 1977

⁴⁴⁰ Unreported case 13/08, Orange Free State High court on 26 June 2008 at para 13

*substituted with a R 1200.00 fine or 8 months imprisonment which is wholly suspended for 3 years on condition that the accused is not convicted of robbery, theft, assault or attempt thereto committed during the period of suspension.”*⁴⁴¹

4.12.1.4. S v Brandt⁴⁴²

See Chapter 4.11.1 for case analysis.

4.12.1.5. Director of Public Prosecutions, KZN v P⁴⁴³

See Chapter 4.11.1 for case analysis.

4.12.2. Cases post CJA

4.12.2.1. EJB v S⁴⁴⁴

The appellant and his co-accused were convicted of murder and sentenced to 15 years’ imprisonment.

The facts of the case are as follows: “The appellant, Accused 1 (17 years old), Accused 2 (15 years old) and Accused 3 (19 years old), came across the deceased who was under the influence of alcohol. Accused 2 suggested in racist terms that that the deceased should be assaulted. They all assaulted the deceased by kicking and punching him. The deceased was left lying on the pavement where he later succumbed to his injuries. The trial court found on the facts that the appellant and two accused had acted in common purpose, finding them guilty of murder on the basis of *dolus eventualis* and sentenced each of them to 15 years imprisonment.”⁴⁴⁵

“In sentencing the accused, the court of appeal was mindful to the Constitutional provisions applicable to children. The court also took into account the fact that the accused consumed

⁴⁴¹ Unreported case 13/08, Orange Free State High court on 26 June 2008 at para 17

⁴⁴² 2005 (2) All SA 1 (SCA)

⁴⁴³ 2006 (1) SACR 243 (SCA)

⁴⁴⁴ Unreported case A 195/10, North Gauteng High Court on 3 December 2012

⁴⁴⁵ *Supra* at para 6

alcohol, drugs and dagga prior to the commission of the offence. In addition the court requested a probation officer's report and a correctional supervision report. Both these reports suggested a sentence in terms of s 276 of the CPA.⁴⁴⁶

On appeal, the sentence was upheld, reasoning that the offence was not only very serious in nature, but was racially motivated in the killing of an innocent person. Judges Mavundla, Van der Byl and Manumela stating:

“The gravity of the offence committed by the appellant and his co-accused in crime does not lie only in the killing of an innocent person, and the severity and brutality of the commission thereof but more in the motive which propelled them to commit it – racism! Racially motivated offences committed by whoever offends against the ethos and aspirations of the peoples of this nascent democracy. [...] In conclusion, I find that the sentence imposed is not shockingly inappropriate and serves the desert of the appellant [...]”⁴⁴⁷

Hence, this is a grave violation of the fundamental values underlying our democracy. Thus the court of appeal found the accused' sentence not to have been shockingly inappropriate; and deserving of an imprisonment sentence.

It is submitted that the court of appeal took cognisance of the appellants' intoxication as mitigating factor, however balanced against the racial motivation and brutality of the crime, the court opted for detention.

⁴⁴⁶ Act 51 of 1977

⁴⁴⁷ Unreported case A 195/10, North Gauteng High Court on 3 December 2012 at para 22 and 30

4.12.2.2. JL v S⁴⁴⁸

The appellant (16 years) was convicted of murder and sentenced to 10 years' imprisonment of which four years were conditionally suspended for five years.⁴⁴⁹

The facts of the case are as follows: *“The appellant fatally stabbed the deceased, a fifteen-year-old, by inflicting a single stab wound to his chest. In sentencing the appellant to an effective 6 years imprisonment, the Magistrate took the following factors into account: the seriousness of the offence; the trend of ever younger offenders being convicted of offences of this nature; the fact that a 15 year old victim was deprived of a life that lay ahead of him; the fact that the incident had a severe impact on his family – the victim’s girlfriend was pregnant at that time and the court took cognisance of the fact that a child will have to be raised without a father; the fact that the community was tired of violence; that the offence itself was callous and that the appellant showed no remorse.”*⁴⁵⁰

The *“appellant’s legal representative requested a further postponement of proceedings in order to obtain a correctional supervision report, which was denied by the Magistrate. The appellant submitted that the Magistrate should have established what rehabilitation programs were available under correctional supervision as an alternative to direct imprisonment.”*⁴⁵¹

The appeal court held that the trial court had misdirected itself by taking the probation officer’s report at face value. The trial court had failed to take cognisance of the probation officer’s recommendations stating concern about the placement of the appellant in a child and youth centre; the appellant had previously successfully completed a term of rehabilitation after having been arrested for possession of tik, and the appellant’s father was a positive role-model.

⁴⁴⁸ Unreported case A724/2010 Western Cape High Court on 2 March 2012

⁴⁴⁹ Supra at para 18

⁴⁵⁰ Unreported case A724/2010 Western Cape High Court on 2 March 2012 at para 18

⁴⁵¹ Supra at para 20 and 24

The appeal court readmitted the matter to the trial court, calling for a correctional supervision report, and for considering the sentencing afresh.⁴⁵²

4.12.2.3. Lukas & Plaatjies v S⁴⁵³

The appellants were convicted of housebreaking with the intent to steal and with theft and were sentenced to 3 years' imprisonment.

The facts of the case are as follows: The first appellant (15 years of age) and the second appellant (16 years of age) broke into the complainant's house and stole items worth R 5600. Both the appellants pleaded guilty.

The appeal court took cognisance of the probation officer's reports. The first appellant resides with his mother and her partner. He is the second eldest of five children and the family survives on the income of the mother, who earns approximately R250.00 per month. The probation officer reported that the first appellant had 6 previous convictions, of which three are relevant, being housebreaking with the intent to steal and theft; however, he did not pose a threat to society. The second appellant is the eldest of two children and resides with his mother. It appears that his negative behaviour stems from the poor conditions at home and the absence of a father figure. The probation officer reported that the second appellant does not have a good relationship with his mother, the appellant has a scholastic achievement of Grade 7, the appellant is dependent on his mother for his basic needs and the only source of income is R240.00 per month, the appellant had committed the crime while he was under the influence of unlawful substances; and he had two previous convictions. The probation officer maintained that he was capable of rehabilitation within the community, provided that a suspended sentence was considered.

⁴⁵² Unreported case A724/2010 Western Cape High Court on 2 March 2012 at para 31

⁴⁵³ Unreported case A471/2010, Western Cape High Court

The appeal court held despite the social ills that may prevail in the community where the appellants resides, society demands that the courts impose appropriate sentences where crimes of this nature are committed, taking into account the well-established principles of sentencing, noting that it is trite law that direct imprisonment for juvenile offenders should be the last resort. Furthermore, the appeal court held that the trial court overemphasised the seriousness of the offence and the interests of society at the expense of the appellant's age and personal circumstances; and suggested that a sentence of correctional supervision would have been a more appropriate sentence in the circumstances of this case.

The appeal court referred to *S v Kwalase*⁴⁵⁴ which held that the court must properly consider the personal circumstances of the offender in the determination of sentence and that the ideal is that no child should ever have to go to prison; however there will always be cases so serious that imprisonment is the only appropriate punishment, even for juvenile offenders. The approach to the treatment of juvenile offenders is to *“emphasise the wellbeing of the juvenile and to ensure that any reaction to juvenile offenders will be in proportion to the circumstances of both the offenders and the offence.”*⁴⁵⁵

The appeal court took cognisance of the following aggravating factors: the value of the items stolen amounted to R5600.00, the complainants privacy was invaded, the prevalence of such offences occurs on a regular basis, the appellants' previous convictions. The seriousness of the offence merit severe punishment and that the community expects offenders to be punished, but the community also expects at the same time that mitigating circumstances will be taken into account and that an offender's particular position will be given thorough consideration. In light of the above aggravating and mitigating factors, the appeal court took cognisance that the first appellant has served almost 10 months imprisonment to date, taking into account all the

⁴⁵⁴ 2000 (2) SACR 135 at para 135 and 137i-138a

⁴⁵⁵ Supra at para 139c-d

relevant factors pertaining to sentence, the court of appeal set aside and replaced the sentence with 18 months imprisonment, of which 8 months would be conditionally suspended for a period of three years.

4.12.2.4. S v IO⁴⁵⁶

The appellant (his specific age was never mentioned in the judgement) had been convicted on two counts of murder, three counts of attempted murder, and the unlawful possession of firearms and ammunition; and was consequently sentenced to 25 years imprisonment.

The facts of the case are as follows: The appellant, a juvenile who was under the age of 18 years at the time of the commission of the offence, appealed against the trial court sentence, arguing that the trial court had failed to take cognisance of his s 28 rights⁴⁵⁷ and the sentencing objectives of international instruments. The appellant's co-accused, an adult, successfully appealed against his 35-year sentence, which was reduced to 25 years imprisonment.

On appeal, the court held that juvenile rights guaranteed in s 28 of the Constitution⁴⁵⁸ are not absolute; all rights in the Bill of Rights being subject to the limitations clause in s 36. The *“seriousness of the offence, the protection of the community, and the severity of the impact of the offence on the victim may thus justify a limitation.”* The court acknowledged that the CJA⁴⁵⁹ and international instruments require the appellant to be treated more leniently, due to his youthfulness, his susceptibility to yield to peer pressure, and more suitable for rehabilitation than his adult co-accused, who received a 25-year imprisonment sentence. Hence the court upheld the appeal and replaced the sentence with 18 years' imprisonment.

⁴⁵⁶ 2010 (1) SACR 342 (C)

⁴⁵⁷ Constitution of the Republic of South Africa, 1996

⁴⁵⁸ Constitution of the Republic of South Africa, 1996

⁴⁵⁹ Act 75 of 2008

4.12.2.5. BF v S⁴⁶⁰

The appellant and his co-accused were convicted on charges of robbery with aggravating circumstances, and two counts of rape; and were consequently sentenced to 25 and 35 years, respectively.

The facts of the case are as follows: *“The appellant and his co-accused broke into the victim’s house, intending to steal money. However, upon realising that the complainant had no money in his possession, the two accused demanded the victim’s bank card and access pin, proceeding to an ATM to make a withdrawal. Upon returning to the victim’s house, the appellant and his co-accused raped two of the complainant’s daughters, and removed goods with an estimated value of R6220 from the complainant’s home. The entire episode lasted six to seven hours.”*⁴⁶¹

The court a quo sentenced the appellant to ‘15 years’ imprisonment on the robbery charges and 10 years’ imprisonment on the rape charges, effectively having to serve a period of 25 years imprisonment.⁴⁶²

On appeal, the issue before the SCA was whether the trial court had misdirected itself in imposing a lengthy detention sentence on the appellant, who was 14 years and 10 months old at the time of the commission of the offence; a direct violation of s 51(6) of the CLAA.⁴⁶³

The SCA noted the difficulty courts face when sentencing juveniles, stating:

“It becomes more onerous where a child is the offender and the offence a very serious one. In the present case the robbery involves the use of a firearm and the knife whilst the rape of a child under the age of 16 years. A decision regarding an appropriate sentence becomes even more difficult – when a juvenile has to be sentenced for having

⁴⁶⁰ (208)[2011] ZASCA 177

⁴⁶¹ Supra at para 3-4

⁴⁶² Supra at para 1

⁴⁶³ Act 105 of 1997

*committed a very serious crime like this. Whilst the gravity of the offence calls loudly for a severe sentence with strong deterrent and retributive elements, the youthfulness of the appellant requires a balanced approach reflecting an equally strong rehabilitative component. After all, the appellant was an immature youth merely 14 years old. Although youthfulness remains a strong mitigating factor, one cannot ignore the sad reality that, nowadays it is the youth that is engaged in violent and serious crimes.”*⁴⁶⁴

The SCA concluded that the “*trial court had overemphasised the seriousness of the offence at the expense of the appellant’s youth. The appeal was upheld and the trial court sentences set aside and replaced with a 10-year sentence on robbery charges and a 12-year sentence on the rape charges. The SCA ordered the sentences to run concurrently; they were to be antedated to 13 December 2000. The appellant will consequently serve 12 years’ imprisonment.*”⁴⁶⁵

4.12.2.6. Rampeta & Three Others v S⁴⁶⁶

The four accused were convicted of a rape and sentenced to life imprisonment.

The facts of the case are as follows: Appellant 1 (20 years of age), appellant 2 (18 years of age), appellant 3 (16 years of age), and appellant 4 (18 years of age) abducted and raped a 15-year-old girl. The first appellant dragged the victim to the third appellant house, while the second, third and fourth appellant followed. The first appellant ordered the victim to hand over her cell phone and proceeded to threaten her with gun to get undressed and have intercourse with her in the presence of the other appellants. While the first appellant raped the victim, the other three appellants made sexual remarks and laughed. Each of the other three appellants

⁴⁶⁴ (208)[2011] ZASCA 177 at para 8

⁴⁶⁵ Supra at para 13

⁴⁶⁶ Unreported case A311/11 Free State High Court on 8 November 2012

proceeded to rape the victim in turn. The appellants took the victim to a tavern nearby and threaten to kill her with knives and a firearm if she reported the rape to the authorities.⁴⁶⁷

The trial court, in considering a sentence, took cognisance of the following: a gang rape of a victim below the age of 16 years; that three of the appellants were first-time offenders; none of the appellants grew up in a normal, formal family home (appellant 1, appellant 3 and appellant 4 were raised by their grandmothers and appellant 2 was raised by his sister); the victim did not sustain any serious physical injuries. Furthermore, the appeal court held that the sentence must be proportionate to the role of each of the appellants who participated in the commission of the crime as it was clear from the evidence that the first appellant played a leading role in the commission of the crime.

The appeal court held that:

“While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored. All factors traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.”

The appeal court however noted that one must keep in mind that *“life imprisonment is the heaviest sentence a person can be legally obliged to serve.”*

⁴⁶⁷ Unreported case A311/11 Free State High Court on 8 November 2012 at para 9-11

The appeal court argued that the rape was of serious nature, especially since it was a gang rape where each member took their turn to rape the victim. The victim physical injuries were few and of a superficial nature; however she sustained serious emotional and psychological trauma which will take years to be recover from. All four of the appellants are juveniles, and except for the first appellant who has a previous conviction, this was a first conviction for the other three appellants.

In light of the above, the appeal court set aside and reduced the sentences as follows: “*Appellant 1 was sentenced to 23 years’ imprisonment; appellants 2 and 4 were sentenced to 18 years’ imprisonment; and appellant 3 was sentenced to 15 years’ imprisonment.*”⁴⁶⁸

4.12.2.7. TJT S⁴⁶⁹

The appellant and his co-accused were convicted of two counts of rape and one count of theft.

The facts of the case are as follows: The appellant and his co-accused broke into the complainants’ house, at approximately midnight, armed with a knife. Both accused raped each of the complainants in the presence of a 13-year-old boy. The appellant proceeded to remove items from the complainants’ house.⁴⁷⁰

The “*appellant, who was 15 years at the time of the commission of the offence, and his co-accused, were sentenced to ‘9 years’ imprisonment on each count of rape, and 2 years’ imprisonment for theft.*” “*The court ordered that the sentences should run consecutively, effectively sentencing the appellant to 20 years’ imprisonment.*”⁴⁷¹

⁴⁶⁸ Unreported case A311/11 Free State High Court on 8 November 2012 at para 19

⁴⁶⁹ Unreported case A138/2011, Free State High Court on 5 April 2012

⁴⁷⁰ Supra at para 5-8

⁴⁷¹ Supra at para 4

On appeal, it was found that the trial court was correct in convicting the appellant for serious offences. However, it failed to take account of the appellant's personal circumstances; and that the law requires juveniles to be treated differently during sentencing.⁴⁷² *“The personal circumstances were highlighted in the probation officer's report which was handed in as an exhibit. These included the fact that the appellant was raised by a single parent, his father left his mother whilst he was still a toddler and subsequently he does not know him; he did not have any previous convictions; there was a high risk of juvenile delinquency in the area he lived and all his family members were unemployed.”*⁴⁷³

The appeal court *“set aside the sentence imposed by the trial court, ordered that the two years' imprisonment imposed in respect of count 4 and three years of the nine year imprisonment sentence in respect of count 3, should run concurrently with the nine year sentence in respect of count 2, effectively imposing a 15 year imprisonment sentence on the appellant.”*⁴⁷⁴

4.12.2.8. BOM & AL v S⁴⁷⁵

The appellants had raped and stabbed a 13-year-old girl to death. Appellant 1 was convicted of murder, but acquitted on the rape charge. Appellant 2 was convicted on both counts. Since both appellants were 18 years of age, the sentencing was conducted in accordance with s 51(1) of CLAA.⁴⁷⁶ The trial court did not find any “substantial or compelling circumstances,” which justified the imposition of a life imprisonment sentence.⁴⁷⁷

On appeal, it was found that the trial court had *“failed to take proper cognisance of the cumulative effect of the appellants' youth, the appellants' intoxication, and the pre-sentencing*

⁴⁷² Unreported case A138/2011, Free State High Court on 5 April 2012 at para 11

⁴⁷³ Supra

⁴⁷⁴ Supra at para 13

⁴⁷⁵ Unreported case A827/12, North Gauteng High Court on 14 June 2013

⁴⁷⁶ Act 105 of 1997

⁴⁷⁷ Unreported case A827/12, North Gauteng High Court on 14 June 2013 at para 1

reports submitted by the probation officer, particularly the socio-economic circumstances of the appellants.”⁴⁷⁸ In respect of appellant 1, these included: “that his parents died, where after he was cared for by siblings. After the death of his parents he started to display inappropriate behaviour, such as absconding from school. He dropped out of school about a year thereafter and started using dagga by the age of 16. He had two previous convictions of assault GBH and malicious injury to property on which he was sentenced to 4 years imprisonment which was wholly suspended.”⁴⁷⁹ With regard to appellant 2, the pre-sentence report indicated “that he was raised by his grandmother. He left school during Grade 10 on his own violation. He then started smoking dagga and drank alcohol. He presented a lot of anger when confronted with had he had done. He also had two previous convictions – crimes which he had committed with appellant 1.”⁴⁸⁰

The appeal court held the trial court did not take the cumulative effect of the appellants’ youth, their socio-economic backgrounds, the role played by liquor in the offence, into account. The court held that “life imprisonment is the heaviest sentence a person can legally be obliged to serve. It should therefore not be imposed lightly, without full and proper consideration of all relevant facts.”⁴⁸¹

The appeal was upheld and the trial court sentences set aside and replaced with 20 years’ imprisonment. Appellant 2’s sentences were ordered to run concurrently.⁴⁸²

⁴⁷⁸ Unreported case A827/12, North Gauteng High Court on 14 June 2013 at para 26

⁴⁷⁹ Supra

⁴⁸⁰ Supra

⁴⁸¹ Supra at para 33

⁴⁸² Supra at para 38

4.12.2.9. S v FM (Centre for Child Law as Amicus Curiae)⁴⁸³

The accused (16 years of age) was convicted for the contravention of s 3 of the CLAA,⁴⁸⁴ corresponding to the common law crime of rape; and sentenced to 15 years' imprisonment, of which 5 years were suspended for 5 years.⁴⁸⁵

The facts of the case are as follows: The accused was charged for the rape of an eleven-year-old mentally disabled girl. The accused pleaded guilty.

On appeal, the high court held that s 85(1) of the CJA⁴⁸⁶ allows for automatic review in respect of all juveniles convicted in terms of the CJA⁴⁸⁷ who are sentenced to any form of imprisonment not wholly suspended, or any sentence of compulsory residence in a child and youth centre.

In considering the sentence, the appeal court stated that:

*'No 16 year old boy, particularly one who participated in the adult world to the degree to which the accused did, could honestly believe that he had a relationship with this mentally disabled 11 year old girl. What the accused meant when he made this claim was that when the mood took him, he used the victim as a receptacle for gratification of his sexual urges and when he did so, the victim did not object. In light of the history I have described above, the accused was at the time he was sentenced a menace to society. A custodial sentence was essential to protect society against a person who did not recognise the boundaries that the Bill of Rights impose in respect of every person's dealings with every other member of society.'*⁴⁸⁸

⁴⁸³ Unreported case A263/12; North Gauteng High Court on 20 August 2012

⁴⁸⁴ Act 105 of 1997

⁴⁸⁵ Unreported case A263/12; North Gauteng High Court on 20 August 2012 at para 1-13

⁴⁸⁶ Act 75 of 2008

⁴⁸⁷ Act 75 of 2008

⁴⁸⁸ Unreported case A263/12; North Gauteng High Court on 20 August 2012 at para 40-41

However, the appeal court held that the “*accused should not be punished for his choices as an adult would since the accused choices were juvenile choices and the primary purpose of the sentence imposed on the accused must be not to punish him for those choices but to facilitate every effort to bring him to understand that the choices and the world in which he lives does not offer other choices and a way of life other than that in which he grew up.*”⁴⁸⁹

The appeal court set aside, antedated and reduced the sentence to 10 years’ imprisonment, of which 5 years were wholly suspended for a period of 5 years.⁴⁹⁰

4.12.2.10. KM v S⁴⁹¹

The appellant (his age was never mentioned in the judgement) was convicted of three counts of rape and one count of sexual assault; and consequently sentenced to life imprisonment on each of the rape charges, and five years’ imprisonment on the sexual assault charge.

The facts of the case are as follows: The appellant raped and sexually assaulted the victims who were residents of a place of safety (Mary Moodley) for juvenile boys who had been previously sexually abused by their family members.

The appeal court held that the three life sentences imposed on the appellant were shockingly excessive for a juvenile. The appeal court set aside and reduced the sentence to 18 years’ imprisonment on all four counts, of which six years were suspended for five years.

4.12.2.11. S v MK⁴⁹²

The “*accused pleaded guilty to two counts of rape of minors and was sentenced to 5 years’ imprisonment, antedated to the date of arrest.*”⁴⁹³

⁴⁸⁹ Unreported case A263/12; North Gauteng High Court on 20 August 2012 at para 45

⁴⁹⁰ Supra at para 49

⁴⁹¹ Unreported case A286/2012 Gauteng North and South Provincial Division on 8 November 2012

⁴⁹² Unreported case 65/2012; South Gauteng High Court on 31 May 2012

⁴⁹³ Supra at para 1

During the trial, “a pre-sentencing report was submitted, recommending that the accused be diverted in terms of s 53(4)(c) and (d) of the CJA.”⁴⁹⁴ “The social worker indicated that the accused comes from an unsophisticated, poor, albeit stable, family background. Juvenile delinquency stepped in at a very young age and the accused would disappear from home for long periods of time where he would live on the streets. He soon engaged in substance abuse. This impacted negatively on his scholastic performance and he prematurely abandoned school. The accused himself was a victim of sexual assault, having been raped on several occasions, and for this reason professed ignorance that rape was a crime. A psychiatric report emanating from Sterkfontein Hospital where the accused was assessed pursuant to an order of the court in terms of section 79 of the CPA,⁴⁹⁵ indicated diagnosis of moderate mental retardation, reactive attachment disorder and substance abuse.”⁴⁹⁶ The sentencer, however, held that diversion is only available prior to conviction and that the seriousness of the offences justified imprisonment as opposed to the recommended sentence of correctional supervision.

On appeal, having considered the pre-sentencing report, the court found that the accused was in dire need of rehabilitation and reintegration, which would best be achieved outside the prison environment.

The appeal court held that the recommendation of the social worker was in the best interests of the accused and should be implemented, namely that:⁴⁹⁷

- “The accused be detained at the Sterkfontein Hospital for intensive therapy and treatment;”

⁴⁹⁴ Unreported case 65/2012; South Gauteng High Court on 31 May 2012 at para 3; Act 75 of 2008

⁴⁹⁵ Act 105 of 1977

⁴⁹⁶ Unreported case 65/2012; South Gauteng High Court on 31 May 2012 at para 3

⁴⁹⁷ Supra at para 8

- *“He thereafter be referred to and be ordered to attend sexual offenders’ programmes; and, finally”*
- *“He be placed under correctional supervision.”*

The matter was remitted to the trial court to impose sentencing afresh.

4.12.2.12. Mporu v Minister of Justice and Constitutional Development & Two Others (Centre for Child Law as Amicus Curiae)⁴⁹⁸

The applicant lodged an application to the Constitutional Court for leave to appeal against a life imprisonment sentence imposed when he was still a juvenile.⁴⁹⁹

The facts of the case are as follows: The applicant and his co-accused were convicted of murder and other serious offences committed in 1998, and consequently sentenced in 2001 to life imprisonment and 28 years, to run concurrently. By the time his application for appeal was heard, he had already served 13 years’ imprisonment.⁵⁰⁰

“Applications by the applicant for leave to appeal against his sentence to the High Court and the SCA were dismissed on 16 November 2004 and 17 August 2006 respectively. In 2008, he approached the CC for the first time with an application for leave to appeal; the basis that the presiding judge was not impartial and violated his constitutional right to a fair trial. He further argued that the fact that the record of his trial could not be traced, infringed his right of access to information. The application for condonation and the application for leave to appeal were dismissed – CCT66/08. In 2009, the applicant approached the court again on the basis that his right to access to information, his right of appeal and his right to a fair trial were infringed.

⁴⁹⁸ CC 124/11 [2013] ZACC 15

⁴⁹⁹ Supra at para 2

⁵⁰⁰ Supra at para 4

*This application was also dismissed – CCT101/09. In both cases, the CC stated in short reasons that it was ‘not in the interests of justice’ to hear the matter.’*⁵⁰¹

The majority judgement refused appeal, and held that, while it was a constitutional issue, the interests of justice did not favour the granting of leave to appeal. It was held that the applicant had failed to establish his right under s 28 of the Constitution; and he failed to show that he was under the age of 18 at the time of the commission of the offence. The fact that the application for leave of appeal was only made ten years after the High Court sentenced him, and that he failed to explain the extent of this delay, further weakened the interests of justice in granting both applications for condonation and for leave. In additions, the appellant did not adequately explain why he brought two previous applications to the CC against his sentence in which this issue was never raised.

In a separate judgement by Van der Westhuizen J, it was held that the leave to appeal should be granted; and that, based on the wording of the trial court judgement, the applicant was a child at the time of the commission of the offences.

The minority judgement held that the trial court had misdirected itself in failing to consider the applicant’s rights as a child when it imposed its sentence. Hence, the sentence should be set aside, and be replaced with 20 years’ imprisonment.

4.12.2.13. S v Mankayi⁵⁰²

The accused was convicted of murder and sentenced to 10 years’ imprisonment.

⁵⁰¹ CC 124/11 [2013] ZACC 15 at para 4

⁵⁰² Unreported cases 243/2013, Eastern Cape High Court

The facts of the case are as follows: The accused (17 years old) was drinking with a group of persons at a tavern. There was an altercation between members of this group. Later, the accused fatally stabbed the deceased (a 19 year old man) outside the tavern.

The review court held that the trial court had misdirected itself regarding the admittance of previous convictions disclosed in the probation officer's report. The review court held that the admittance of such evidence would be adverse to the interests of the accused, as previous convictions were found to be hearsay evidence.

In determining the appropriate sentence, the review court held that cognisance must be taken of the provisions of the CJA;⁵⁰³ and the accused must be treated as a juvenile offender. This requires that imprisonment should be considered only as a last resort. The offence for which the accused was convicted is undoubtedly a very serious offence and one that is, too prevalent. The combination of alcohol and knives regularly spells death in communities across the country and the courts are tasked to deal with the tragic consequences. The case warranted lengthy imprisonment owing to the serious nature of the offence; and the interests of society demanded that the accused be appropriately punished.

The review court held that:

“In my view when proper consideration is taken of the fact that the accused is a first offender and when regard is had to his status as a juvenile it would be appropriate to order that a portion of the sentence imposed is conditionally suspended. That would not only meet the requirement that such period of imprisonment as is imposed upon the juvenile offender is kept to the minimum that the circumstances of the case demand, it

⁵⁰³ Act 75 of 2008

*would also serve as a longer term inducement acting upon the accused to refrain from any criminal conduct in the future.”*⁵⁰⁴

The review court set aside and replaced the sentence with 10 years’ imprisonment, two years conditionally suspended for a period of four years.

4.12.2.14. S v CT⁵⁰⁵

The accused (15 years of age) was convicted of murder and sentenced to 5 years’ compulsory residence at a childcare centre.⁵⁰⁶

The facts of the case are as follows: *“In the presence of other children, the accused and his friends were swimming at a gravel dam. The accused pulled S into the water, pushing his head under water. Two child bystanders rescued S. The accused then pulled the deceased, who could not swim, into the water and submerged his head under the water 5 times. After the fifth time, the deceased did not resurface, evidently drowning. The accused proceeded to warn the bystanders not to divulge to anyone any information regarding the deceased’s drowning.”*⁵⁰⁷

The trial court found the accused guilty of murder on the basis of *dolus eventualis*; reasoning that, since S had to be rescued, the accused must have had an appreciation of the risk of death. He nevertheless reconciled himself to the consequences, and repeated the same fatal conduct on the deceased.

On appeal, the sentence was confirmed. The appeal court held that: *“the trial court failure to enter reasons for the deviation from the recommended sentence by the probation officer did not vitiate the sentence; since s 71(4) of the CJA*⁵⁰⁸ *states that a presiding officer who imposes*

⁵⁰⁴ Unreported cases 243/2013, Eastern Cape High Court at para 14

⁵⁰⁵ Unreported case A506/2013, North Gauteng High Court on 9 July 2012

⁵⁰⁶ Supra at para 1

⁵⁰⁷ Unreported case A506/2013, North Gauteng High Court on 9 July 2012 at para 3

⁵⁰⁸ Act 75 of 2008

a sentence other than the one recommended by the probation officer, must enter the reasons for the imposition of a different sentence on record. In this instance, the probation officer recommended an imprisonment sentence. The appeal court found that, because the magistrate imposed a more lenient sentence than the one recommended by the probation officer, the accused was not prejudiced. The case was readmitted to the trial court to determine whether the accused's behavioural problems would place the other juveniles at the childcare centre at risk or in danger."⁵⁰⁹

4.12.2.15. S v TLT⁵¹⁰

The accused, 15 years and 10 months at the time of the commission of the offence, was convicted of murder and sentenced to compulsory residence at a childcare centre until 19 years of age.

The facts of the case are as follows: "*A fight erupted after a cap was taken from a friend of the accused. The accused intervened, and when he was assaulted, he retaliated by stabbing the deceased 5 times, killing him. The accused pleaded guilty to the count of murder.*"⁵¹¹

During sentencing, two conflicting reports were submitted.⁵¹² The social worker reported positively regarding the accused's behaviour, and recommended compulsory attendance at a childcare centre as sentence; while the probation officer recommended direct imprisonment. The probation officer based his decision on the following facts: "*the accused displayed constant misconduct and lack of discipline from a young age; this led him to be expelled from school in 2011; the accused abused substances such as dagga and glue; and the impact of the*

⁵⁰⁹ Unreported case A506/2013, North Gauteng High Court on 9 July 2012 at para 6; 13

⁵¹⁰ Unreported case 61/2013, South Gauteng High Court on 21 June 2013

⁵¹¹ Supra at para 2-3

⁵¹² Supra at para 4

*crime on the deceased's family.*⁵¹³ The accused was consequently sentenced to compulsory residence at a childcare centre until 19 years of age.⁵¹⁴

On review, the trial sentencer acknowledged that he had failed to take cognisance of the accused's behavioural problems; the deceased had been stabbed several times; the accused was armed with a knife; the incident caused a severe impact on the deceased's family; and there was an increased prevalence of this type of crime.⁵¹⁵

The review court held that the appeal against sentence must succeed, replacing the sentence with compulsory residence at a childcare centre, after which time the accused must be imprisoned for a period of time.⁵¹⁶

4.12.2.16. Mahlangu v S⁵¹⁷

The accused was convicted of rape and sentenced to 20 years' imprisonment and declared unfit to possess a firearm in terms of s 103 of Act 60 of 2000.

The facts of the case are as follows: The accused (17 years of age) raped a five-year-old girl.

A pre-sentencing report was obtained which demonstrated that the complainant had suffered severe emotional and social trauma as a result of the rape incident such as: phobia of being alone; low self-esteem; decline in school performance; oversensitivity; withdrawal and fear of men. The complainant struggles to sleep at night and to venture outside the house when it is dark. She has become very shy and quiet. She has also indicated that she is ashamed of what happened to her and is also ashamed that the other children in the neighbourhood are aware of the incident.

⁵¹³ Unreported case 61/2013, South Gauteng High Court on 21 June 2013 at para 6

⁵¹⁴ Supra at para 7

⁵¹⁵ Unreported case 61/2013, South Gauteng High Court on 21 June 2013 at para 15

⁵¹⁶ Supra at para 19-20; s 76(3)(a) of Act 75 of 2008

⁵¹⁷ Unreported case A382/2014, Gauteng High Court

A report was obtained from a probation officer, who emphasised that the appellant did not acknowledge the charges against him. What weighed with the probation officer was that the complainant trusted the appellant as that he was her uncle. However, the probation officer noted that due regard must be given to the age of the appellant and ruled out a fine or suspended sentence even though he was a first time offender based on the seriousness of the crime. Direct imprisonment was recommended as, according to the probation officer, this option would prevent the appellant “*from committing further crime.*”⁵¹⁸

The appeal court held that the magistrate failed to take into consideration the Constitutional prescript set out in section 28(2) of the Constitution⁵¹⁹ that “*(a) child’s best interests are of paramount importance in every matter concerning the child.*”

The appeal court noted that the appellant was sentenced to 20 years’ imprisonment in terms of s 51(2) of the CLAA,⁵²⁰ which prescribes a minimum sentence of 15 years’ imprisonment. The court held that it may be assumed that the minimum sentencing legislation does not apply to 16 and 17 year old juveniles, given the provisions of s 28 (1) (g) of the Constitution,⁵²¹ which provides that a child may only be detained as a measure of last resort and for the shortest possible period.

The appeal court held that, given the seriousness of the offence and the very young age of the complainant (5 years old), direct imprisonment was warranted, referring to *S v Nkosi*⁵²²

“The following principles are applicable in guiding a court’s discretion in deciding on the suitability of an appropriate form of punishment for a child offender: (i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first

⁵¹⁸ Unreported case A382/2014, Gauteng High Court at para 22

⁵¹⁹ Constitution of the Republic of South Africa, 1996

⁵²⁰ Act 105 of 1997

⁵²¹ Constitution of the Republic of South Africa, 1996

⁵²² 2002 (1) SA 494 (WLD)

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 her or his 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.”

The appeal court also referred to *S v Phulwane and Another*⁵²³ which held:

“I venture to suggest that every judicial officer who has to sentence a youthful offender must ensure that whatsoever he or she decides to impose will promote the rehabilitation of that particular young and have, as its priority, the reintegration of the youthful offender back into his or her family and, of course, the community.”

In light of the above reasoning, the court set aside and replaced the sentence with 10 years’ imprisonment, antedated to 2 May 2013.

4.12.3. Findings

4.12.3.1. Cases pre CJA

Upon investigation of the sentences imposed, the writer concludes the following:

⁵²³ 2003 (1) SACR 631 (TPD) at p 634J

From an analysis of the reported cases, it is submitted that three out of the five cases probation officers conducted a pre-sentencing report. While four in the five cases the sentencers attempted to establish sentencing guidelines for juvenile offenders. It is submitted that this indicated a consciousness on behalf of the South African justice system that juvenile offenders require different treatment than adult offenders.

In all five of the reported cases did the sentencers impose an imprisonment sentence. One of the cases involved a suspended imprisonment sentence as an alternative to the payment of a fine, while another case involved a suspended imprisonment sentence together with correctional supervision with stringent conditions.

4.12.3.2. Cases post CJA

Upon investigation of the sentences imposed, the writer concludes the following:

S 71(1)(a) of the CJA⁵²⁴ expressly requires “*a child justice court imposing a sentence to request a pre-sentence report prepared by a probation officer to the imposition of sentence.*”

From the analysis on the reported cases it is submitted that eleven out of the sixteen cases pre-sentencing reports were obtained from a probation officer or social worker. In accordance to s 71(1)(b) of the CJA,⁵²⁵ a child justice court may only “*dispense with a pre-sentence report if the juvenile offender was convicted of an offence in Schedule 1 or where requiring the report would cause undue delay in the conclusion of the case.*” It is submitted that the remaining five of the sixteen reported cases were a direct violation of s 71(1)(b) as no reasons were put forward that the request for a presentence report would cause undue delay in the conclusion of the cases.⁵²⁶ However, in two of the eleven cases where pre-sentencing reports were obtained, the

⁵²⁴ Act 75 of 2008

⁵²⁵ Act 75 of 2008

⁵²⁶ The pre-sentence reports could not be dispensed with due to the argument that the juvenile was convicted of an offence in Schedule 1 of the CLAA, since the cases investigated dealt with serious crimes only, offences in Schedule 2 or 3 of the CLAA.

trial court failed to take proper cognisance of the reports or attach due weight to the findings contained therein. S 71(4) of the CJA⁵²⁷ expressly states that “*a child justice court may impose a sentence other than recommended in the pre-sentence report and must, enter the reasons for the imposition of a different sentence on the record of the proceedings.*” It is submitted that the trial court inability to take proper cognisance of the reports or attach due weight to the findings contained therein lead to the imposition of excessively harsh sentences which is a violation of s 69(1)(a)-(c) and s 69(1)(e) of the CJA.⁵²⁸

Mitigating and aggravating factors allow for the individualising of a sentence, based on the existence of mitigating factors that could justify a lesser sentence; while aggravating factors could justify the imposition of a more severe sentence.⁵²⁹ There are no complete lists of either aggravating or mitigating factors.⁵³⁰

The main aggravating factors identified in the cases above were:

- The gravity/seriousness of the offence;
- The trend that more juveniles are committing serious violent crimes;
- The victims were juveniles under the age of 16 years;
- Escalation in the number of rape and murder crimes and public outcry in cases where too lenient a sentence has been imposed; and

⁵²⁷ Act 75 of 2008

⁵²⁸ S 69(1) “states that in addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this act are to – (a) encourage the child to understand the implications of and be accountable for the harm caused; (b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society; (c) promote the reintegration of the child into the family and community; (e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time; The rights of the offender and victim assume an investigation into many factors such as the motive of the offender, age, presence of dependants, level of education, employment and health.⁵²⁸ This leg of the triad allow for individualisation of sentences. Ideally, sentencers should get to know the character of the offender. However since these are difficult to establish accurately, the criminal justice system merely attempt to determine the blameworthiness of the offender therefore the courts must ensure that a pre-sentencing report is obtained in each case where a juvenile offender is in conflict with the law.”⁵²⁸

⁵²⁹ S Hooro Sentencing (Unpublished lecture notes, University of KwaZulu-Natal, 2015)

⁵³⁰ SS Terblanche Guide to Sentencing in South Africa 2ed (2007) 186

- The accused had previously displayed unacceptable behaviour.

The main mitigating factors identified in the cases above were:

- Youthfulness;
- The possibility of rehabilitation;
- First-time offender;
- Unfavourable social circumstances of the accused;
- Intoxication; and
- The accused acting under the influence of his adult co-accused.

From the analysis on the reported cases it is submitted that the seriousness of the offence was the most important aggravating factor taken into account by the sentencer in determining an appropriate sentence. The youthfulness and the possibility of successful rehabilitation were the most important mitigating factors taken into account by the sentencer. S 69(1)(b) of the CJA⁵³¹ expressly states that during sentencing, the sentencer “*must promote an individualised response which strikes a balance between the circumstances of the juvenile offender, the nature of the offence and the interests of society.*” However, in twelve out of the sixteen cases considered above,⁵³² the seriousness of the offence was found to be overemphasised at the expense of the youthfulness of the accused. S 69(2) of the CJA⁵³³ empowers sentencers to impose sentences of a restorative justice nature and in combination.

Van der Merwe⁵³⁴ noted that, when a sentencer fails to identify the existence of a particular factor, or wrongly recognises it, or attaches the incorrect weight to it, the sentencing process becomes unbalanced, and the sentencing decision may be overturned on appeal. From the

⁵³¹ Act 75 of 2008

⁵³² 75% of the cases

⁵³³ Act 75 of 2008

⁵³⁴ Van der Merwe, A (2005) *Aspects of the sentencing process in child sexual abuse cases*. (Unpublished PhD Thesis, Rhodes University) 302

analysis on the reported cases it is submitted that ten out of the sixteen cases were appeal or review cases. S 84⁵³⁵ and s 85⁵³⁶ of CJA applies to appeals and automatic review of certain convictions and sentences. It is submitted that this indicates sentencers eager willingness to impose detention sentences on juvenile offenders which in turn requires the juvenile justice system to re-evaluate the sentences imposed to ensure that the sentencing objective⁵³⁷ of the CJA⁵³⁸ were adhere to and that the rights⁵³⁹ of the juvenile offender were adequately protected and balanced in regard to the offence committed.

The sentencers relied heavily on the increasingly high-incidence rate of violent sexual crimes committed against women and children, which influenced the length of sentences imposed. The sentencers imposed imprisonment sentences in fourteen out of sixteen reported cases,⁵⁴⁰ ranging from nine to twenty years on accused who were between the ages of 16 and 18 years at the time of the commission of the crime. Two of these cases imposed life imprisonment sentences. This indicates the sentencers over-reliance on the imposition of imprisonment sentences. This is a direct violation of S 69(1)(e) of the CJA⁵⁴¹ which states that “*the use of imprisonment may only be used as a measure of last resort and for the shortest possible period.*” Interestingly, the minimum sentence imposed for an adult first offender is ten years’ imprisonment. This indicates that there is little deviation in the length of sentences imposed

⁵³⁵ S 84(1)(a) and S84(1)(b) respectively expressly states “*that an appeal by a juvenile against conviction, sentence or order as provided for in the CJA must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the CPA; provided that if the juvenile was, at the time of the commission of the alleged offence under the age of 16 years or 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended.*”

⁵³⁶ S 85(1) expressly states that “*a juvenile has the right of automatic review if they were sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme for in s 191(2)(j) of the Children’s Act, irrespective of – (a) the duration of the sentence; 9b) the period the sentence who sentenced the juvenile in question has held the substantive rank of magistrate or regional magistrate; (c) whether the juvenile in question was represented by a legal representative; or (d) whether the juvenile in question appeared before a district court or a regional court sitting as a child justice court.*”

⁵³⁷ S 69 of Act 75 of 2008

⁵³⁸ Act 75 of 2008

⁵³⁹ S 28 of the Constitution of the Republic of South Africa, 1996

⁵⁴⁰ 87.5% of the cases

⁵⁴¹ Act 75 of 2008

under the CJA⁵⁴² and that of the CLAA.⁵⁴³ Similarly, there seems to be little deviation between the sentences imposed on juveniles and those that are imposed on adults. S 69(4) of the CJA⁵⁴⁴ requires a sentencer to take account of the following factors:

- *“The amount of harm done or risked through the offence;”*⁵⁴⁵
- *“The culpability of the child in causing or risking the harm;”*⁵⁴⁶
- *“The protection of the community;”*⁵⁴⁷
- *“The severity of the impact of the offence on the victim;”*⁵⁴⁸
- *“The previous failure of the child to respond to non-residential alternatives, if applicable;”*⁵⁴⁹ and
- *“The desirability of keeping the child out of prison.”*⁵⁵⁰

The research indicates that sentencers tend to place significant weight on S 69(4)(a)(i) and S 69(4)(c) of the CJA⁵⁵¹ while ignoring or attaching insignificant weight on S 69(4)(a)(ii), S 69(4)(e) of the CJA,⁵⁵² causing an imbalance in the determination of a sentence. The life imprisonment sentences imposed on the two juveniles is also a direct violation of the precedence established in *S v Brandt*⁵⁵³ and *S v Nkosi*,⁵⁵⁴ which held that life imprisonment may never be imposed on a juvenile offender.

⁵⁴² Act 75 of 2008

⁵⁴³ Act 105 of 1997

⁵⁴⁴ Act 75 of 2008

⁵⁴⁵ S 69(4)(a)(i) of Act 75 of 2008

⁵⁴⁶ S 69(4)(a)(ii) of Act 75 of 2008

⁵⁴⁷ S 69(4)(b) of Act 75 of 2008

⁵⁴⁸ S 69(4)(c) of Act 75 of 2008

⁵⁴⁹ S 69(4)(d) of Act 75 of 2008

⁵⁵⁰ S 69(4)(e) of Act 75 of 2008

⁵⁵¹ Act 75 of 2008

⁵⁵² Act 75 of 2008

⁵⁵³ 2005 (2) All SA 1 (SCA)

⁵⁵⁴ 2002 (1) SACR 135 (W)

S 69(2) of the CJA⁵⁵⁵ expressly “states in order to promote the objectives of sentencing as set out in s 69(1) of the Act, and to encourage a restorative justice approach, sentences may be used in combination.” From the analysis on the reported cases it is submitted that only five of the sixteen reported cases imposed suspended imprisonment sentences. This indicates that the sentencers failed to find an optimal combination in the imposition of sentences, and failed to ensure that imprisonment is only for the ‘shortest possible period’ by the minimal use of suspended imprisonment sentences. It is submitted that suspended sentences are an ideal alternative and optimal combination in the imposition of sentences. It ensures that juvenile offenders are only imprisoned as a measure of last resort and for the shortest possible period, while being rehabilitative and integrative in nature as it allows the juvenile offender to repent and amend for his offence/s within the community while ensuring that should he re-offend he will serve an imprisonment sentence and rightly so.

From the analysis on the reported cases it is found that in only two out of the sixteen cases imposed a sentence of compulsorily attendance at a child and youth care centre in terms of s 76 of the CJA.⁵⁵⁶ It is submitted that sentencers are more willing to impose a direct imprisonment sentence than compulsory attendance at a child and youth care centre. This is problematic since these centres, although they are relatively small and scarce, they allow the juvenile to be removed from society for a period of time while being supervised, guided and treated.⁵⁵⁷ Compulsory attendance at a child and youth centre is not only preventative but also rehabilitative and integrative in nature.

The courts have acknowledged that they are tasked with imposing sentences that deter society from committing crimes, and, should the courts fail to do so, society will lose faith in the

⁵⁵⁵ Act 75 of 2008

⁵⁵⁶ Act 75 of 2008

⁵⁵⁷ This sentence adheres to the sentencing objective in terms of s 69(1)(d) of Act 75 of 2008.

criminal justice system. However, the findings above indicates that, although the CJA⁵⁵⁸ was promulgated to protect juveniles in conflict with the law, proper implementation of the CJA⁵⁵⁹ is required. For proper implementation to occur, it is submitted that the relevant parties and institutions must be schooled on the rights, objectives and procedures inherent in the CJA.⁵⁶⁰

4.12.3.3. Pre-CJA vs Post-CJA

Upon investigation of the sentences imposed, the writer concludes the following:

Sentencers willingly imposed imprisonment sentences on juvenile offenders prior to the promulgation of the CJA, however they did acknowledge that juvenile offenders require different treatment to adult offenders hence the tendency of sentencers to establish juvenile sentencing guidelines by way of precedence. It is submitted that this forward thinking must have contributed significantly to the promulgation and eventual implementation of the CJA.⁵⁶¹

Although the CJA⁵⁶² brought about significant change regarding the sentencing of juvenile offenders, sentencers tend to over rely on imprisonment sentences, justifying the seriousness of the offence at the expense of the youthfulness of the juvenile offender. This contributed a grave violations of the sentencing objectives set out in s 69 of the CJA⁵⁶³ and the rights of juvenile as contained in s 28 of the Constitution.⁵⁶⁴

The following chapter will give an overview of the research study conducted, and will seek to provide the reader with recommendations as possible solutions to the problems identified.

⁵⁵⁸ Act 75 of 2008

⁵⁵⁹ Act 75 of 2008

⁵⁶⁰ Act 75 of 2008

⁵⁶¹ Act 75 of 2008

⁵⁶² Act 75 of 2008

⁵⁶³ Act 75 of 2008

⁵⁶⁴ Constitution of the Republic of South Africa, 1996

5. CHAPTER 5: CONCLUSION

5.1. Introduction

This chapter seeks to provide solutions to the key areas identified from preceding chapters, and to conclude this study. An overview of sentencing principles applicable to juvenile offenders has been provided, with an analysis of the CJA⁵⁶⁵ operation and implementation for juvenile offenders who have committed serious crimes. The research has indicated that the majority of sentencers have imposed lengthy detention sentences for juveniles who have committed serious crimes in violation of the constitutional principle that juvenile detention must be “*measure of last resort and for the shortest possible period.*” It was argued that the principle: “*juvenile detention should be a measure of last resort and for the shortest possible period*” is not only vague, but creates inconsistency during sentencing, owing to its inability to give objective sentencing guidelines; and the operation of excessively wide judicial discretion.⁵⁶⁶ This amounts to numerous appeals and reviews of sentences, while children’s rights are not upheld in the most stringent manner as required by the Constitution and international instruments.

5.2. Conclusions drawn from the sentences imposed since the implementation of the Child Justice Act

The aim of this dissertation was to investigate the legislative sentencing principles for juveniles aged 14 years and older who have committed serious crimes. This dissertation questioned whether the constitutional entrenchment of juvenile rights and the promulgation of the CJA⁵⁶⁷

⁵⁶⁵ Act 75 of 2008

⁵⁶⁶ SS Terblanche ‘Sentencing a child who murders – DPP, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA)’ (2007) 20 *South African Journal of Criminal Justice* 339-363

⁵⁶⁷ Act 75 of 2008

had made any substantial difference in the types of sentences and sentence duration imposed on juveniles who commit serious crimes.

Detention of juveniles has been an area of great concern worldwide. International instruments endorsed by South Africa contributed to the promulgation of children's rights under the Constitution.⁵⁶⁸ These international instruments, namely, the African Charter on the Rights and Welfare of a Child,⁵⁶⁹ United Nations Convention on the Rights of a Child,⁵⁷⁰ United Nations Guidelines for the Prevention of Juvenile Delinquency,⁵⁷¹ United Nations Rules for the Protection of Juveniles Deprived of their Liberty,⁵⁷² and Beijing Rules,⁵⁷³ provide a general framework within which juvenile justice should operate, while encouraging constant assessment and development of such systems to adapt and evolve to fully meet children's rights.⁵⁷⁴ These instruments all share a common objective, which requires detention for juvenile delinquents to be a "*measure of last resort and for the shortest possible period.*"

The Constitution⁵⁷⁵ brought about change regarding the treatment of juvenile delinquents in conflict with the law under s 28. Section 28 emphasises that the "*best interests of the child is of paramount importance apropos of every matter affecting the child, including detention.*" More importantly, s 28 (1) (g) expressly provides that "*juveniles may only be detained as a measure of last resort and for the shortest possible period.*"

Notwithstanding this provision, past sentencing practice has shown an over-reliance on the use of detention sentences in South Africa. Suspended sentences is a sentence which has been

⁵⁶⁸ CR Van Eeden *An analysis of the legal response to children who commit serious crimes in South Africa* (Unpublished LLM Thesis, University of Pretoria, 2013) 138-146

⁵⁶⁹ African Charter on the Rights and Welfare of a Child OAU Doc CAB/LEG/24.9/49 (1990)

⁵⁷⁰ United Nations Convention on the Rights of a Child, 20 November 1989

⁵⁷¹ United Nations Guidelines for the Prevention of Juvenile Delinquency, 14 December 1990

⁵⁷² United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990

⁵⁷³ United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985

⁵⁷⁴ Van Eeden (note 568 above; 37-47)

⁵⁷⁵ Constitution of the Republic of South Africa, 1996

imposed, in all the detail requires for the proper imposition of such sentence, but the operation of which is suspended for a specific term, subject to the offender's fulfilling the conditions on which the suspension has been based. It is submitted that suspended sentences coupled with correctional supervision⁵⁷⁶ are an ideal alternative to the imposition of imprisonment sentences. It ensures that juvenile offenders are only imprisoned as a measure of last resort and for the shortest possible period, while being rehabilitative and integrative in nature as it allows the juvenile offender to repent and amend for his offence/s within the community while ensuring that should he re-offend he will serve an imprisonment sentence and rightly so. Furthermore it is submitted that compulsory attendance at child and youth centres are a better alternative to an imprisonment sentence. Because, although these child and youth care centres are relatively small and scarce, they allow the juvenile to be removed from society for a period of time while being supervised, guided and treated. Compulsory attendance at a child and youth centre is not only preventative but also rehabilitative and integrative in nature and free of all the negative effects of adult prisons.

The CJA⁵⁷⁷ was promulgated to create a separate criminal justice system that is in line with the rights and needs of juvenile delinquents, coming into effect in 2010. According to the CJA,⁵⁷⁸ *"a child is any person under the age of 18 years and, in certain circumstances, this means a person who is 18 years or older but under the age of 21 years."*⁵⁷⁹ The main objective is to divert juvenile delinquents away from the criminal justice system by means of restorative justice conditioning to prevent re-offending.⁵⁸⁰ However, the CJA⁵⁸¹ acknowledges that

⁵⁷⁶W.N v S 2006 (1) SACR 243 (SCA)

⁵⁷⁷ Act 75 of 2008

⁵⁷⁸ Act 75 of 2008

⁵⁷⁹ Act 75 of 2008

⁵⁸⁰ SS Terblanche 'The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders' (2012) *Potchefstroom Electronic Law Journal* 67

⁵⁸¹ Act 75 of 2008

diversion may be unsuitable, inadequate and unsuccessful, hence the creation of child justice courts for sentencing juvenile delinquents.⁵⁸²

The CJA⁵⁸³ was correct in opting to note the age when the juvenile offender committed the offence, since South Africa is notorious for its lengthy court rolls and trial delays. The CJA⁵⁸⁴ should also be commended on its inherent appeal and review procedures which have restored juvenile justice where the trial courts erred in their judgement to impose lengthy detention sentences in violation of constitutionally entrenched juvenile rights.

Chapter 4, however, indicated that courts still impose detention sentences in the majority of cases, irrespective of the age of the offender. It is submitted that entrenchment of juvenile rights and the promulgation of the CJA⁵⁸⁵ has not made any significant difference with regard to the imposition of detention sentences on juveniles convicted of serious crimes. There seems to be no difference in the length of sentences imposed or no significant difference between the sentences imposed for the juvenile accused and his adult co-accused. It is submitted that the seriousness of the offence is still considered the most important aggravating factor justifying the use of detention sentences at the expense of the youth of the juvenile.

This dissertation argued that alternatives to detention can and should be imposed in appropriate circumstances. The courts have endorsed this submission on numerous occasions. In *N v S*⁵⁸⁶ the court noted that detention should only be allowed if there is no alternative sentence.

The case law discussed throughout this dissertation demonstrates a genuine commitment by sentencers towards the interpretation and implementation of juvenile rights, as contained in the

⁵⁸² SS Terblanche 'The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders' (2012) *Potchefstroom Electronic Law Journal* 65

⁵⁸³ Act 75 of 2008

⁵⁸⁴ Act 75 of 2008

⁵⁸⁵ Act 75 of 2008

⁵⁸⁶ (469/2007) [2008] ZASCA 30 (28 March 2008) at para 39

Constitution and CJA.⁵⁸⁷ The sentencers have begun to advance the law's understanding of a juvenile's autonomy, however, the ideal that no juvenile should ever see the inside of a prison, is an area that can and should be developed further.

5.3. The Netherlands justice system and the *Bos-polaris* sentencing guidelines

The Dutch criminal law and juvenile justice system operates similarly to the South African criminal law and juvenile justice system, except for mandatory sentences.⁵⁸⁸

The Dutch criminal law and procedure are based on three concepts, namely:

- The principle of legitimacy;
- Two, proportionality: questioning the relationship between the transgression and the proposed penalty; and
- Three, subsidiary: questioning whether there are less punitive methods or penalties available. The principle of subsidiary is highly restorative in nature; however, the Dutch criminal law is primarily reserved for serious offences and for violation of fundamental interests.⁵⁸⁹

Dutch sentencing is essentially a distributive system, allowing authorities to make sentencing decisions at every level of the system.⁵⁹⁰ For example, the police under prosecutorial supervision are authorised to offer a fine in the case of non-serious traffic violations.⁵⁹¹ By paying the fine, the offender pleads guilty and the case will be dismissed.⁵⁹² In juvenile justice, the police are authorised to divert juvenile delinquents to a diversion programme in cases of

⁵⁸⁷ Act 75 of 2008

⁵⁸⁸ AM Anderson *Alternative disposal of criminal cases by prosecutor: comparing Netherlands to South Africa* (unpublished LLM Thesis, University of Amsterdam, 2014) 55

⁵⁸⁹ *Ibid*

⁵⁹⁰ J Junger 'Recent trends in sentencing policies in the Netherlands' (1998) 6 *European Journal on criminal Policy and Research* 480

⁵⁹¹ *Ibid*

⁵⁹² *Ibid*

petty offences, such as vandalism, shoplifting and non-serious violence.⁵⁹³ Participation by the youngster and his guardians must be voluntary.⁵⁹⁴ The diversion programme includes four to eight hours community service as well as compensation to the victim.⁵⁹⁵ These diversion programs have been developed to react speedily to juvenile delinquency through mild but immediate sentences.⁵⁹⁶ The legal provision is an informal conditional dismissal; if the juvenile delinquent satisfies the requirement, the police will drop the case, if not they will refer the case to the prosecutor.⁵⁹⁷ This mirrors the South African juvenile justice system operation for petty juvenile offences. The public prosecutor is a central figure in the Dutch justice system and has extensive powers.⁵⁹⁸ The prosecutor is seen as mixture as mixture of a civil servant and magistrate.⁵⁹⁹ The prosecutor has large discretion to prosecute since the Dutch system is based on the principle of opportunity, which gives him the power to prosecute or not.⁶⁰⁰

The Dutch Penal Code sets out a wide range of sentences that can be imposed, ranging from fines, task penalties to detention.⁶⁰¹ The statutory minimum sentence of imprisonment is one day and this applies to all crimes irrespective of the level of seriousness.⁶⁰² The statutory maximum imprisonment is 15 years, which can be extended to 20 years for the crime of murder.⁶⁰³ Life sentences can be imposed for murder cases but they are rare and be substituted with a fixed sentence of 20 years.⁶⁰⁴ In practice where life sentences are imposed they are

⁵⁹³ J Junger 'Recent trends in sentencing policies in the Netherlands' (1998) 6 *European Journal on criminal Policy and Research* 480

⁵⁹⁴ J Junger-Tas 'Sentencing in the Netherlands: Context and policy' (1995) 7(6) *Federal Sentencing Reporter*. 294

⁵⁹⁵ Ibid

⁵⁹⁶ Ibid

⁵⁹⁷ Ibid

⁵⁹⁸ Ibid

⁵⁹⁹ Ibid

⁶⁰⁰ Ibid

⁶⁰¹ A.A Aronowitz 'The Netherlands – world fact book of criminal justice' (1993) available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnet.txt>, accessed on 8 March 2017

⁶⁰² Ibid

⁶⁰³ Ibid

⁶⁰⁴ Ibid

always converted to a specific period of time by way of a pardon.⁶⁰⁵ The Code of Criminal Procedure provides that fines should be given preference over detention sentences and requires a sentencer to give an explanation when a detention sentence is imposed.⁶⁰⁶ Fines can be imposed for any offence, including murder but tend to be imposed for less serious, non-violent offences.⁶⁰⁷

Dutch sentencing statistics shows an overall clear and continuous reduction in detention sentences from 1837 to 1975.⁶⁰⁸ Since 1975 the rates have been steadily increasing with only a minor interruption in 1987.⁶⁰⁹ Analysts attribute the prime consequence in the changing of sentencing patterns is the reduction of court-sanctioned fines and the reduction of suspended detention sentences.⁶¹⁰ The largest difference concerns the imposition of community sanctions. In 1994 community sanctions account for approximately 60% of all sanctions imposed on juveniles, while they accounted for approximately 16% in adult crimes.⁶¹¹ One third of all adult sentences consists of partial detention, while detention sentences for juveniles are only 10%.⁶¹² The difference in fines imposed has to do with the fact that fines are generally paid by guardians, hence juvenile judges do not consider them as effective sentences.⁶¹³

Sentencing guidelines have a harmonising effect, by binding prosecutors and sentencers to its guidelines, greater consistency is achieved.⁶¹⁴ If the guidelines are effectively applied, it will lead to the development of a more just sentencing policy.⁶¹⁵ The basic point of departure of

⁶⁰⁵ A.A Aronowitz 'The Netherlands – world fact book of criminal justice' (1993) available at <http://www.ojp.usdoj.gov/bjs/pub/ascii/wfbcjnet.txt>, accessed on 8 March 2017

⁶⁰⁶ Ibid

⁶⁰⁷ Ibid

⁶⁰⁸ J Junger 'Recent trends in sentencing policies in the Netherlands' (1998) 6 *European Journal on criminal Policy and Research* 485

⁶⁰⁹ Ibid

⁶¹⁰ Ibid

⁶¹¹ Ibid 486

⁶¹² Ibid

⁶¹³ AM Anderson *Alternative disposal of criminal cases by prosecutor: comparing Netherlands to South Africa* (unpublished LLM Thesis, University of Amsterdam, 2014) 55

⁶¹⁴ Ibid 43

⁶¹⁵ Ibid

guidelines is that it serves to structure the freedom of discretion of the sentencers and that guidelines are to be followed in the standard case.⁶¹⁶ The guidelines itself thus grants the possibility for diversion in ‘non-standard’ cases.⁶¹⁷ The principle of equality requires that ‘non-standard’ cases should in fact be treated differently in order to guarantee equality.⁶¹⁸ Since the deviation from certain guidelines is subjected to judicial control, the offender is protected from the arbitrary exercise of discretion by the prosecutor.⁶¹⁹ Hence the promulgation of the *bos-polaris* sentencing guidelines, which was intended to be an easily accessible system allowing various offences to form part of a framework which would ultimately follow a similar structure in the determination of the imposition of sentences.⁶²⁰

The *bos-polaris* is a set of sentencing guidelines utilised by the Dutch to enable prosecutors actively and objectively to determine an appropriate sentence for the offender, based on all the relevant facts of the case, which they will suggest to the sentencer.⁶²¹ The sentencer is not obliged to impose the suggested sentences; however, few sentencers deviate from such sentencing suggestions.⁶²²

The *bos-polaris* sentencing guideline is based on a mathematical equation. Specific crimes have been designated a base-line number of points which will be further calculated according to the existence of mitigating and aggravating factors each designated a number value, to calculate the actual number of points the offender has accumulated for the commission of his

⁶¹⁶ AM Anderson *Alternative disposal of criminal cases by prosecutor: comparing Netherlands to South Africa* (unpublished LLM Thesis, University of Amsterdam, 2014) 43

⁶¹⁷ Ibid

⁶¹⁸ Ibid

⁶¹⁹ Ibid

⁶²⁰ Ibid

⁶²¹ Ibid 55

⁶²² Ibid

crime.⁶²³ The number value the equation delivers will then specify the number of days' imprisonment, the value of the fine, or the hours of rehabilitation the offender must complete.⁶²⁴

The general aggravating factors are reoffending, presence of concurrent offences, and the committal of an offence while occupying a public office.⁶²⁵ The presence of these factors justifies a 1/3 increase in sentence if a prescribed statutory maximum sentence exists for a particular offence.⁶²⁶ In addition, reoffending allows for a 10% increase in points; while multiple reoffending allows for a 20% increase in points, designated in the *bos-polaris* sentencing guidelines.⁶²⁷

The general mitigating factor is youth.⁶²⁸ However, there is no complete list of either aggravating or mitigating factors.

The *bos-polaris* sentencing guideline serves to structure the freedom of discretion; and must be followed in a standard case. The *bos-polaris* system allows for individualisation of sentences. It accounts for all of the facts of the case, factors of sentencing, and the available sentences. It contains an inherent safeguard, allowing the sentencer to deviate from seemingly inappropriate sentence suggestions by the prosecution,⁶²⁹ provided that the deviation is reasonable and advisable, and that the sentencer records reasons for such a sentence seeming inappropriate.⁶³⁰ These deviations must be temporary, and must be consistently applied.⁶³¹ Should a motivated deviation regularly occur, it will indicate the need for legislative reform to

⁶²³ AM Anderson *Alternative disposal of criminal cases by prosecutor: comparing Netherlands to South Africa* (unpublished LLM Thesis, University of Amsterdam, 2014) 55

⁶²⁴ Ibid

⁶²⁵ Authors unknown *The dutch criminal justice system* 4ed (2008)

⁶²⁶ Authors unknown *The dutch criminal justice system* 4ed (2008)

⁶²⁷ Ibid

⁶²⁸ Ibid

⁶²⁹ Ibid

⁶³⁰ Ibid

⁶³¹ Ibid

enable the sentencing guidelines to adhere to the present intolerance stand taken against the specific crime/s.⁶³²

Statistics indicate that prosecutors and sentencers agreed in 97% of the cases on the verdict of guilty with or without punishment, acquittal or discharge⁶³³. As to the nature of the sentence, agreement reached is 80%.⁶³⁴ In some cases the sentencer imposed additional sentences, such as community service or a fine; in others, the sentencer imposed community service instead of detention.⁶³⁵ The data also indicated that in the majority of cases, deviation from the prosecutor's sentence demand results in a less severe sentence: fines are lower, the length of the sentence is reduced, and in some instances detention was replaced with community service orders.⁶³⁶

The Dutch juvenile justice system allows for diversion at various levels; however, should an offence be of a serious nature, the juvenile will be referred to a children's court at which the imposition of a sentence will follow.⁶³⁷ The jurisdiction of a children's court allows for the imposition of a task, penalty, fine, or detention, as sentences.⁶³⁸

The Dutch juvenile justice system follows a basic sentencing guideline, (very similar to the *bos-polaris* sentencing guideline discussed above) which prescribes the following guidelines for sentences:

- A task penalty may vary from 200 hours or less community service, a 200-hour or less training order, or a combination of community service and a training order not

⁶³² Authors unknown *The dutch criminal justice system* 4ed (2008)

⁶³³ J Junger-Tas 'Sentencing in the Netherlands: Context and policy' (1995) 7(6) *Federal Sentencing Reporter*. 295

⁶³⁴ Ibid

⁶³⁵ Ibid

⁶³⁶ Ibid

⁶³⁷ Authors unknown *The dutch criminal justice system* 4ed (2008)

⁶³⁸ Ibid

exceeding 240 hours. Should the juvenile default, the children's court would be justified in imposing a detention sentence not exceeding 4 months;⁶³⁹

- A fine may range from €3 but not exceed €3350, which has to be paid by the juvenile and not his/her parents, over a period of 2 years. Should the juvenile default, the children's court would be justified in imposing a detention sentence not exceeding 3 months;⁶⁴⁰
- A re-education order may be imposed for a period not less than 6 months but not exceeding 12 months. The training order will be served under a foster family qualified to assist in the reconditioning of antisocial behaviour, criminal behaviour, or serious emotional disorders. These orders may only be extended by 1 year after an evaluation of the juvenile current behaviour and psychology has been observed⁶⁴¹; and
- A minimum of one day imprisonment is allowed. Juveniles under the age of 16 years may only be imprisoned for 12 months or less, while juveniles under the age of 18 years may only be imprisoned for 24 months or less. However, committal or detention will only be justified after 2 reports by a probation officer or behavioural scientists have been furnished. An extension of a detention sentence will only be allowed for violent or sexual offences or owing to juveniles suffering from mental disease or defect, but is limited to 2 years upon the request of the prosecutor, and such a request being heard by a panel of 3 judges.

The Dutch juvenile justice trends are fairly similar to what has been seen in the adult system.⁶⁴²

The standard practice for the police and the prosecutor to simply drop charges in the case of

⁶³⁹ Authors unknown *The dutch criminal justice system* 4ed (2008)

⁶⁴⁰ Ibid

⁶⁴¹ Ibid

⁶⁴² J Junger 'Recent trends in sentencing policies in the Netherlands' (1998) 6 *European Journal on criminal Policy and Research* 488

petty offences has drastically reduced.⁶⁴³ The police will increasingly drop the charges only on condition that compensation en restitution to the victim.⁶⁴⁴ Similarly the prosecutor will increasingly impose a sentence in the form of a fine, compensation or community service as a condition for dropping the charges.⁶⁴⁵ Statistics indicated that between 1985 and 1995 the number of juveniles sentenced to detention did not change much.⁶⁴⁶ Annually only one fifth of the 6000 juvenile who appeared before a juvenile judge were sentenced to imprisonment.⁶⁴⁷ The Dutch penal law allows 16 to 18 year old juveniles to be tried in an adult court, this accounted for 5-6% of these juvenile delinquents to be sentenced to imprisonment, while in 1985 17.7%, and in 1995 19% of juveniles were imprisoned.⁶⁴⁸ However, the proportion of suspended sentences increased from 17.3% in 1985 to 31.3% in 1995 indicating the juvenile justice system willingness to rehabilitate and reintegrate juvenile delinquents.⁶⁴⁹ Upon consideration of the nature of the offences, judges were dealing with relatively more violent offences in 1995 (24%) than in 1985 (14%).⁶⁵⁰ Another indication that the Dutch juvenile justice system is restorative justice in nature, allowing even serious offences to avoid detention.⁶⁵¹

In 1983 community service was introduced for juvenile delinquents together with a treatment order.⁶⁵² A treatment order consisted of a three-month very structured and strict training program, based on behavioural techniques, social skills training and vocational training.⁶⁵³ This was used in relatively serious offences as an alternative.⁶⁵⁴ Of all juvenile sentences in

⁶⁴³ J Junger 'Recent trends in sentencing policies in the Netherlands' (1998) 6 *European Journal on criminal Policy and Research* 488

⁶⁴⁴ Ibid

⁶⁴⁵ Ibid

⁶⁴⁶ Ibid 489

⁶⁴⁷ Ibid

⁶⁴⁸ Ibid

⁶⁴⁹ Ibid

⁶⁵⁰ Ibid

⁶⁵¹ Authors unknown *The dutch criminal justice system* 4ed (2008)

⁶⁵² Junger (note 643 above; 490)

⁶⁵³ Ibid

⁶⁵⁴ Ibid

1996, 60% were alternative sanctions, by 1998 the proportion had increased to approximately 70%.⁶⁵⁵ Due to the positive evaluations, namely their ability to recondition gaps in the offender's social functioning, combining training and intensive supervision orders were extended to young adults.⁶⁵⁶

The Dutch judiciary makes use of the Consistent Sentencing Database (hereafter CST).⁶⁵⁷ This is an electronic database that contains information on sentences passed in previous cases.⁶⁵⁸ The system uses type of offences, criminal history and ages as the basic criteria for identifying similar cases and the sentences imposed therein.⁶⁵⁹ It is submitted that the CST will allow for further sentence consistency and equality as it enables sentencers to treat similar cases alike, due to the CST ease of access, instant and structured results.

5.4. Recommendations

The legislature should provide an objective juvenile sentencing guideline to limit the operation of excessively wide judicial discretion; which would combat the vagueness sentencers experience of the principle that juvenile detention should be a measure of last resort and for the shortest possible period.

The Dutch are renowned worldwide for their liberal sentencing regime promoting restorative justice practices and their low detention rates.⁶⁶⁰ It is recommended that the legislature should opt to create an objective juvenile sentencing guideline which is based on the Dutch *bos-polaris* sentencing guidelines. The *bos-polaris* sentencing guidelines is favoured as it is based on a mathematical equation. Specific crimes have been designated a base-line number of points

⁶⁵⁵ J Junger 'Recent trends in sentencing policies in the Netherlands' (1998) 6 *European Journal on criminal Policy and Research* 488

⁶⁵⁶ *Ibid* 490, 501

⁶⁵⁷ A.R. Lodder, A. Oskamp and R. Van den Hoogen 'IT support of the judiciary' Chapter 6, p 99-110. TMC Asser Press, available at <http://pubs.cli.vu/pub161.php>, accessed on 8 March 2017

⁶⁵⁸ *Ibid*

⁶⁵⁹ *Ibid*

⁶⁶⁰ Junger (note 655 above; 485)

which will be further calculated according to the existence of mitigating and aggravating factors that are designated a number value to conclude the actual number of points the offender has accumulated for the commission of his crime.⁶⁶¹ The number value the equation delivers will then specify the number of days' imprisonment, the value of the fine, or the hours of rehabilitation the offender must serve.⁶⁶² It is thus recommended that the legislature adjust the *bos-polaris* sentencing guidelines, by dividing the number value the equation delivers by two, as international instruments⁶⁶³ encourage a sentence imposed on juvenile offenders to be roughly half of the sentence imposed on an adult committing the same offence. Furthermore, it is recommended that the sentencer should objectively interpret the principle that 'juvenile detention should be a measure of last resort and for the shortest possible period' by giving punitive preference to the value of a fine and/or hours of rehabilitation the offender must complete, the number the equation delivers. It is recommended that, should the case call for imprisonment, the sentencer must impose imprisonment in combination with rehabilitation, as this will allow for positive re-conditioning of the offender's behaviour, whilst deterring such conduct in the future. This recommendation will be in line with S 69(1)(a) of the CJA⁶⁶⁴ which states that the sentencer must "*encourage the juvenile delinquent to understand the implications of and be accountable for the harm caused during sentencing and in line with S 69(1)(d) of the CJA⁶⁶⁵ to ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the juvenile delinquent in the process of reintegration.*" An optimal sentence for a highly serious offence will impose a fine, rehabilitation, and limited detention, as it will allow the offender to make restitution, promote positive behavioural

⁶⁶¹ J Junger 'Recent trends in sentencing policies in the Netherlands' (1998) 6 *European Journal on criminal Policy and Research* 485

⁶⁶² (469/2007) [2008] ZASCA 30 (28 March 2008) at para 39

⁶⁶³ United Nations Convention on the Rights of a Child, 20 November 1989; United Nations Guidelines for the Prevention of Juvenile Delinquency, 14 December 1990; United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 14 December 1990; United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 29 November 1985

⁶⁶⁴ Act 75 of 2008

⁶⁶⁵ Act 75 of 2008

conditioning, and prevent and deter similar criminal conduct. Also, it is recommended that the juvenile sentencing guideline contain an inherent limitation, that sentencers may only impose concurrent detention sentences, as opposed to consecutive sentences, to combat the excessive accumulation of sentences on juvenile delinquents. Concurrent sentences ensure that the juveniles exposure to the negative prison environment will be limited, providing society a greater opportunity to regain a functional and law abiding member of society.

The CJA⁶⁶⁶ expressly cautions the relevant parties that “*detention should be a measure of last resort and for the shortest possible period; and that current statutory law does not effectively approach the plight of juveniles in conflict with the law in a comprehensive and integrated manner, taking into account their vulnerability and special needs.*” The CJA⁶⁶⁷ also expressly acknowledges that “*there are capacity, resource, and other constraints on the state which may require a practical and incremental strategy to implement the new criminal justice system for juveniles.*” Hence, it is submitted that the CJA⁶⁶⁸ will encourage and endorse the juvenile sentencing guideline recommended above.

It is recommended that restorative justice sentences⁶⁶⁹ should be emphasised and endorsed amongst sentencers. As outlined above, the CJA⁶⁷⁰ is primarily based on the premise that restorative justice will allow for the rehabilitation and reintegration of juvenile offenders. Terblanche and Rabie have frequently asserted that juveniles are more prone to rehabilitation than adults; and that research has found juvenile rehabilitation to be highly successful in appropriate cases.

⁶⁶⁶ Act 75 of 2008

⁶⁶⁷ Act 75 of 2008

⁶⁶⁸ Act 75 of 2008

⁶⁶⁹ Such as a suspended sentence, correctional supervision or compulsory attendance at a child and youth centre.

⁶⁷⁰ Act 75 of 2008

It is recommended that sentencers be educated on the benefits inherent in restorative justice sentences. A sentencing information system, similar to the Dutch CST database, can provide sentencers with information regarding the range of penalties imposed by child justice courts nationwide for similar offences, while periodic information regarding alternative restorative sentences may be circulated to continually recommend and emphasise the use of these sentences. It is submitted that the CST will allow for further sentence consistency and equality as it enables sentencers to treat similar cases alike, due to the CST ease of access, instant and structured results.

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