

TITLE PAGE

**THE DEVELOPMENT OF A JUVENILE SENTENCING JURISPRUDENCE
IN THE ABSENCE OF LEGISLATION**

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ABSTRACT

The South African Law Commission Project Committee submitted a report and draft Bill to Parliament on 8 August 2000 addressing the creation of a juvenile justice system.ⁱ Parliament has to date failed to implement legislation regulating juvenile justice in South Africa thereby failing to create a distinct juvenile justice system. The purpose of this paper is to consider the extent to which the judiciary has been developing juvenile justice practises in light of the fact that legislation regulating juvenile justice is practically non-existent. The development of the law by the judiciary is not unique to juvenile justice. However, it is worthwhile discussing the judiciaries' involvement in the development of juvenile justice in light of challenges faced by the judiciary while developing this area of law. The challenging task faced by the judiciary involves developing juvenile justice practices which satisfies Constitutional and international principles while also adhering to the needs of the society. In South Africa, the Criminal Procedure Act, 51 of 1977 governs children and adults who are accused of having committed a crime. Separate legislation governing children justice has to date not been implemented by Parliament. It is also interesting to note how in light of the inequalities of the past and the absence of legislation pertaining specifically to children, the judiciary grapples with giving effect to Constitutional and International principles such as the best interest of the child, the principle of last resort and the principle of proportionality, while still trying to give effect to the needs of the victim and society.

ⁱ J Sloth-Nielsen 'Justice for children as victims and as offenders' in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 392

ABSTRACT	i
TABLE OF CONTENTS	ii
CHAPTER	PAGE
1. INTRODUCTION	1
1.1 RELEVANT INTERNATIONAL INSTRUMENTS	1
1.2 SOUTH AFRICAN LEGISLATION	3
1.3 THE BEGINNING OF A PROGRESIVE APPROACH IN THE NEW CONSTITUTIONAL DISPENSATION	6
2. THE RATIONALE BEHIND ‘GIVING CHILDREN A CHANCE’	10
3. PRE-SENTENCE REPORTS	15
3.1 INTERNATIONAL INSTRUMENTS AND POLICIES	15
3.2 SOUTH AFRICAN LEGISLATION AND LAW REFORM PROPOSALS	16
3.3 SOUTH AFRICAN CASE LAW ON PRE-SENTENCE REPORTS	18

4. THE PRINCIPLE OF IMPRISONMENT AS A LAST RESORT AND FOR THE SHORTEST PERIOD	27
4.1 INTERNATIONAL INSTRUMENTS AND POLICIES	27
4.2 DIFFICULTIES EXPERIENCED BY FOREIGN JURISDICTIONS IN GIVING EFFECT TO THE PRINCIPLE OF INCARCERRATION AS A LAST RESORT AND FOR THE SHORTEST APPROPRIATE PERIOD	31
4.3 SOUTH AFRICAN LEGISLATION	36
4.4 SOUTH AFRICAN CASE LAW ON THE PRINCIPLE OF INCARCERATION AS A LAST RESORT AND FOR THE SHORTEST PERIOD	38
5. ALTERNATIVE SENTENCING	54
5.1 INTERNATIONAL INSTRUMENTS AND POLICIES	54
5.2 SOUTH AFRICAN LEGISLATION	57
5.3 SOUTH AFRICAN CASE LAW ON ALTERNATIVE SENTENCING	62
6. CONCLUSION	70

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THE DEVELOPMENT OF A JUVENILE SENTENCING JURISPRUDENCE IN THE ABSENCE OF LEGISLATION

1. INTRODUCTION

This paper seeks to consider the extent to which the South African Judiciary has developed sentencing jurisprudence in respect of juveniles in the absence of much anticipated domestic legislation.

The role played by the judiciary in developing juvenile sentencing jurisprudence will be examined by way of an analysis of South African case law. It will be argued that domestic legislation is either vague, non-existent or in conflict with international juvenile sentencing norms. This will be achieved by considering both international and domestic legislation. It will also be argued that in the absence of domestic legislation, international law has played an influential role in the development of juvenile sentencing jurisprudence and that it will be seen from the case law that domestic law has been developed by the judiciary to meet constitutional norms and international standards.

Three particular areas of juvenile justice development will be discussed in different chapters in this paper: pre- sentence reports; the principle of incarceration as a last resort and for the shortest possible period; and alternatives to sentencing. Each of these chapters will include a discussion of both international and domestic legislation in order to establish that domestic legislation does not meet international standards. The chapters will also include a discussion on South African case law to show that frequently, the judiciary has attempted to develop domestic legislation to meet

international law standards. Furthermore, the submission by Julia Sloth-Nielson ‘that the international law regime has competed with local influences in shaping the process of juvenile justice reform, and, more specifically the process of new legislation contained in the Report’¹ is supported by the writer hereof and is reflected in the case law.

Each chapter will illustrate the growth of a juvenile justice framework despite the absence of legislation. Each chapter will also show the propensity of the judiciary to assist in the growth of a juvenile sentencing framework, which is in line with Constitutional and international norms. It will also be argued that the Child Justice Bill (hereinafter referred to as the Bill), though not always specifically mentioned in the cases, has also influenced the criminal justice system. In conclusion it will be argued that juvenile sentencing legislation is practically non-existent with regards to pre-sentence reports. It will also be argued that even though the principle of incarceration as a last resort and for the shortest appropriate time is a constitutionally entrenched principle, the principle is confused by the ambiguity of the wording of minimum sentence legislation.²

The remainder of this introduction briefly discusses the relevant international instruments and domestic legislation featuring in this paper and a short synopsis of *S v Z and four other cases*,³ is provided. It is important for the purposes of this paper to

¹ J Sloth-Nielsen *The role of international law in juvenile justice reform in South Africa* (2001) Unpublished LLM dissertation at 15. The Report which Sloth-Nielson refers to is the South African Law Commission Report on Juvenile Justice (2000) Project 106 in which proposals were made for a justice system for juveniles. These proposals are reflected in the Child Justice Bill, B 49 of 2002.

² Minimum sentence legislation is governed by the Criminal Law Amendment Act, Act 105 of 1997

³ 1999 (1) SACR 427 (E)

refer to the *S v Z* judgment as it lays the foundation for many later decisions in respect of developing juvenile sentencing jurisprudence.

1.1 Relevant international instruments

There is a coherent body of international law dealing with juveniles, some binding others not but yet still persuasive. South Africa is bound to the provisions of The United Nations Convention on the Rights of the Child⁴ (hereinafter referred to as CRC), having ratified the CRC in 1995. In ratifying the CRC, South Africa became bound by its provisions and had to refrain from acts, which would defeat the purpose of the treaty.⁵ International law has played an important role in shaping juvenile justice in South Africa because of the weight afforded to it by the Constitution⁶ and thus the judiciary. Important elements of the CRC are reflected in the Constitution.⁷ In particular, the principles of incarceration as a last resort and best interests of the child are specifically mentioned in the Constitution.⁸ The CRC features prominently in all three chapters concerning juvenile sentencing jurisprudence as the provisions contained in Articles 37 and 40 of the CRC are referred to in many of the cases discussed in this paper. Article 37 (a), (b), (c) and Article 40(1), (2) (b) (iv), (3) and (4) are the specific provisions considered in the case law and are attached to a Appendix A, which is attached hereto.

⁴ Adopted by the UN General Assembly on 20 November 1989, Resolution 44/25

⁵ J Sloth-Nielsen *op cit* n 1 at 27

⁶ Final Constitution of the Republic of South Africa, 1996. Section 39 (1) (b) states that a court must interpret international law when interpreting the Bill of Rights.

⁷ J Sloth-Nielsen *op cit* n 1 at 31

⁸ Specifically in s 28 (1)(g), the principle of detention as a last resort and s 28 (2), the best interest principle.

It is clear from the above provisions that the CRC adopts a ‘child centred’⁹ approach with the primary focus being the best interests of the child and which reflects the notion of restorative justice. Also evident from the CRC is the move away from the welfare and justice paradigms in favour of regarding the child as an individual thereby assessing each child separately.¹⁰ The aforementioned ideals are also reflected in the Constitution¹¹ and have been reiterated in the case law.¹²

Other key international instruments mentioned in the case law are The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (‘The Beijing Rules’)¹³ and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (‘UN JDL Rules’).¹⁴ Though the Beijing and UN JDL Rules have not been ratified by South Africa, their provisions should be considered, as many of the provisions contained in these rules have been codified in the Convention on the Rights of the Child¹⁵ and the Constitutional Court has confirmed that both binding and non-binding legislation may be referred to when interpreting the provisions of the Bill of Rights.¹⁶ The strength of these rules and guidelines arguably form part of customary

⁹ A Skelton, ‘Developing a juvenile justice system for South Africa: international instruments and restorative justice’ 1995 Acta Juridica at 181

¹⁰ J Sloth- Nielsen ‘Justice for children as victims and as offenders’ in CJ Davel (ed) *Introduction to child law in South Africa* (2000) 392

¹¹ In terms of section 28 (1)(g) ‘every child has the right not to be detained except as a measure of last resort, in which case in addition to the rights the child enjoys under sections 12 and 35, the child may only be detained for the shortest period of time....’. Section 28 (2) provides that ‘A child’s best are of paramount importance...’ giving constitutional effect to the common law and international ‘best interest of the child principle’.

¹² For example in the cases of *S v Petersen en n Ander 2001(1) SACR 16 SCA*, *Brandt v S* [2005] 2 ALL SA 1 (SCA) and *S v Kwalase 2000(2) SACR 135 (C)*.

¹³ Adopted by the UN General Assembly on 29 November 1985, Resolution 40/33

¹⁴ Adopted by the UN General Assembly on 14 December 1990, Resolution 45/113

¹⁵ G van Bueren *The international law on the rights of the child* (1995) at 170

¹⁶ *S v Makwanyane* and Another 1995 (6) BCLR 656

international law and as such provide a strong yardstick against which national legislation can be measured.

1.2 South African legislation

Unlike the coherent body of international law governing juvenile justice, South Africa's juvenile justice is conducted according to a piecemeal framework. Currently the only tangible domestic protection afforded to children in trouble with the law can be found in ss28 (1) (g) (h) and (i) of the Constitution,¹⁷ which provide:

'Every child has the right

- g. not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be
 - i. kept separately from detained persons over the age of 18 years; and
 - ii. treated in a manner, and kept in conditions, that take account of the child's age;
- h. to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
- i. not to be used directly in armed conflict, and to be protected in times of armed conflict.'

Section 35 of the Constitution provides for the rights of arrested, detained and convicted persons while s12 provides for the Freedom and security of all people.

Children enjoy the protections provided for in ss12, 28 and 35. These rights accrue to children and are in accordance with international standards.

¹⁷ Constitution of South Africa, 1996

The South African Law Commission report was presented to the Minister of Justice in 2001 and draft legislation, the Child Justice Bill was debated in parliament in 2001.¹⁸ The Bill has still not been passed by parliament but the absence of juvenile justice legislation has not impeded development of juvenile justice. Important juvenile justice reforms have been implemented by the judiciary by taking into account international legislation, the Constitution, the Bill and the 'best interest of the child' principle. This trend is evident in *S v Z*.¹⁹ Being one of the first post-constitutional cases it ushered in the beginning of a progressive constitutional approach in sentencing juveniles. In the absence of implied legislation the court in *S v Z* laid down its own guidelines, some of which have been confirmed by the Constitutional Court. Moreover, the guidelines laid down in *S v Z* have been referred to several later judgments²⁰ and therefore merit closer consideration.

1.3 The beginning of a progressive approach in the new Constitutional dispensation

Influenced by the approach adopted by the Constitutional Court in *S v Williams*,²¹ Erasmus J, in *S v Z*, held that the decision of the Constitutional Court in *Williams* reflected a need for the 'development of a law which is in line with the spirit, purport and object of the Constitution'.²² The judge held that the courts must therefore consider current sentencing options in a new light and develop sentencing options in

¹⁸ Sloth-Nielsen J, Muntingh J L 'Juvenile justice review 1999 - 2000' (2001) <http://www.sn.ac.apc.org/users/clc/children/jjreview.doc> accessed 19 September 2006

¹⁹ *supra* n 3

²⁰ For example *S v Kwalase* *supra* n 12, *S v Peterson* *supra* n 12 (pre – sentence reports) ; *M v The senior Prosecutor* (alternative sentencing options)

²¹ 1995 (3) SA E 632 (C)

²² *S v Z* *supra* n 3 pg 430 at para E

line with our new constitutional dispensation. He reasoned that the development of a more progressive juvenile sentencing jurisprudence is particularly important, in light of the fact that children are, to their detriment, easily influenced.²³ Erasmus J also addressed the harsh reality of imprisoning a child, which in his view involved more than the mere deprivation of liberty.²⁴ The child is forced to grow up in a whole new world – one which will shape the rest of that child’s life.²⁵ Ultimately, imprisonment could do more harm than good for both the child and the interests of the community as instead of being rehabilitated and reintegrated back into society, imprisonment could have the effect of creating a seasoned criminal, a risk more prominent in children than adults, given how impressionable children are.

All four accused in *S v Z* had received suspended sentences after they were found guilty of theft and housebreaking with the intent to steal. The court conducted an in depth investigation by exploring the different options available when sentencing juveniles. The enquiry included a report prepared by the Deputy Director of Public Prosecutions, a visit to the prison facility housing the juveniles, interviews with officials of the Department of Correctional Services and consideration of a circular instruction issued to prosecutors by the Director of Public Prosecutions.

²³ at para G - H

²⁴ at para J

²⁵ at 431para A

In light of the court's findings and in an attempt to develop juvenile sentencing jurisprudence in line with constitutional and international legislation, the following guidelines were laid down by the Judge:

1. The court shall, before commencement of the trial, consider in certain cases the progress of the accused in a juvenile program.
2. For the purposes of sentencing the court must meticulously consider age and personal circumstances of the accused. If it appears that an incorrect age is reflected on the charge sheet, then the court must correct the record to ensure that the correct age of the child is reflected on the charge sheet.
3. The court must ensure that the complete personal circumstances of the accused are placed before the court. Where necessary the court must request a report from a probation officer. It is essential to request a report where the accused is convicted of a serious offence or has a previous conviction. It will be inappropriate to sentence an accused to a period of imprisonment, or a suspended sentence, without having considered the probation officer's report.
4. The court must carefully and imaginatively use its wide discretion to determine a sentence that is appropriate and suitable to each individual accused taking into account their personal circumstances and the type of crime which the accused was found guilty of.
5. The court must as far as possible avoid a sentence of imprisonment, especially when considering the following:
 - a. The younger the accused, the more inappropriate a sentence of imprisonment.
 - b. Imprisonment is especially inappropriate with regard to first time offenders.
 - c. A short period of imprisonment is rarely appropriate and therefore the court must always consider the appropriateness of all other sentencing options. If it appears after considering all options, that imprisonment is the only appropriate sentence, then the will have to impose a sentence of imprisonment.
6. The court must not impose a suspended sentence where a sentence in the form of imprisonment would have been inappropriate.

It is clear from the above guidelines that the age and personal circumstances of the accused are of paramount importance when determining an appropriate sentence. The above guidelines also reflect a strong international law influence and are especially reflective of the Beijing rules.²⁶ These guidelines clearly reflect a move on the part of the judiciary to adopt a more child-centred approach in developing sentencing principles by treating each child as an individual as advocated by the CRC.

²⁶ This statement will be discussed more substantially in chapters 1, 2 and 3.

S v Z has contributed to the development of juvenile sentencing legislation particularly with regard to the development of pre-sentence reports²⁷ and alternative sentencing options.²⁸ The guidelines laid down in this case have also been endorsed by the Supreme Court of Appeal²⁹ and are thus referred to throughout this paper.

The above discussion provided a brief context for the argument that juvenile sentencing practice is shaped by the judiciary to conform with international and constitutional law in the absence of legislation. The remainder of this paper will focus on an in-depth discussion of juvenile sentencing jurisprudence by tracing its development through pivotal case law, as it pertains to the selected three constitutional and international principles discussed in this paper, namely pre-sentence reports, the principle of incarceration as a last resort and alternative sentencing options.

2. THE RATIONALE BEHIND ‘GIVING CHILDREN A CHANCE’³⁰

The plight of children detained in prisons is aptly described in the following poem:

²⁷ see chapter 3

²⁸ see chapter 5

²⁹ See *S v Peterson supra* n 12

³⁰ D Pinnock, A Skelton and R Shapiro ‘New juvenile justice legislation for South Africa: Giving children a chance’ (1994) Occasional Paper series 3 – 94 cited on <http://web.uct.ac.za/depts/sjrp/publicat/newjust.htm> accessed 10 September 2007

**'I have been sent to
Sea Point Police Station,
Where I was beaten by civil servants,
I have been to Polsmoor Prison,
Where I was sodomised
And left bleeding
On the damp floor.
I have been to
Places of Safety and Reformatories
Where I was hardened by
Warders and fellow inmates,
Where I learned to hold on
To what was mine and take
From those who could not fight.
I am now the perpetrator of violence
And not the victim.
On the streets
I am a law unto myself.'**³¹

Subjecting children to punishments which include assault, torture and sexual molestation is cruel and inhumane and should not be tolerated in a civilized society. The Apartheid regimes treatment of children was characterised by unjust treatment of children, by often detaining them, without recourse to courts, for the political beliefs.³²

Child justice reformers have taken on the battle against abuse of juveniles, an abuse which is legitimised by the State, particularly, the criminal justice system. A seminar³³ was held in Cape Town in 1993 to discuss the plight of children in trouble with the law and the way forward. Key political figures who attended the conference included Dullah Omar, Bridgette Mabadla, Kader Asmal and Jacob Zuma.³⁴

It was asserted at the seminar that the brutal treatment of children in trouble with the law is a product of the Apartheid regime. It was further asserted that even though

³¹ Poem by Glen Leedenberg cited in D Pinnock *op cit* n 31

³² J Sloth-Nielsen *op cit* n 10 at 389

³³ Community Law Centre (CLC) 'Report of the international seminar on "children in trouble with the law" (1993)

³⁴ Community Law Centre *supra* n 33 at 8

South Africa had laid Apartheid to rest, many children were still feeling the effects of the discriminatory regime as 'poverty, homelessness, rural-urban migration, inadequate schooling and false arrests persists'.³⁵ The effects of the Apartheid regime on children necessitate a transformation of the criminal justice system into a child justice system. As products of a former repressive regime, children of a democratic South Africa are just as much victims of the former regime as political child prisoners were in the past.³⁶

Evidence of the repressive regime's treatment of children is still clearly visible in criminal justice system which has one system of law dealing with child and adult offenders.³⁷ Skelton comments that the 'juvenile justice system has generally treated juveniles as smaller versions of adult offenders'.³⁸ The cases discussed in this paper highlights the effects of the disparities of the past as many of the child offenders come from impoverished communities, had difficult childhoods, belong to gangs and have spent most of their lives in the prison system. Also evidence of the effect of the former repressive regime is the fact that the majority of the prison population are comprised of black and 'coloured' inmates. According to the Department of Correctional Supervision, statistics for the year 2006/2007 indicate that the sentenced prison population is comprised of 534 Asian prisoners, 2175 White prisoners, 20 645 'Coloured' prisoners and 88 742 Black prisoners.³⁹ The Department statistics unfortunately do not indicate what percentage of the each population group is comprised of child prisoners. However, one is inclined to surmise, in light of the

³⁵ Community Law Centre *supra* n 33 at 14

³⁶ Sloth-Nielsen *supra* n 10

³⁷ The Criminal Procedure Act, 51 of 1977 is the governing legislation in respect of offences committed by children and adults.

³⁸ A Skelton *supra* n 9 at 180

³⁹ Department of Correctional Supervision website <http://www.dcs.gov.za/WebStatistics/>

extreme difference in numbers, that the Black and 'Coloured' child prison population should significantly exceed the White and Asian population groups.

Law reform in the area of child justice was one of the key objectives of the new democratic South Africa. In his opening address to Parliament in 1994, former President Nelson Mandela said

'The Government will as a matter of urgency, attend to the tragic and complex question of children and juveniles in detention and prison. The basic principle from which we will proceed from now onwards is that we must rescue the children of the nation and ensure that the system of criminal justice must be the very last resort in the case of juvenile offender'.⁴⁰

There have been developments in the area of child justice since the former President's opening address confirming the importance allocated to reforming the child justice system. For instance, the CRC was ratified by South Africa in 1995, binding South Africa to international principles in respect of treatment of children. Another development occurred in 1996 when the Final Constitution⁴¹ came into effect. Key international principles, such as the best interests of the child and incarceration as a measure of last resort for shortest period of time were entrenched in the Constitution. In 1997 the South African Law Commission project committee commenced an enquiry in respect of the development of juvenile justice. The committee eventually produced a Child Justice Bill,⁴² with the view that it would be the governing legislation in respect of a procedural system for child offenders. The contents of the

⁴⁰ Cited in Skelton 'Transforming the youth and child justice system' (2005)

<http://www.anc.org.za/ancdocs/pubs/umrabulo14/childjustice.html> (accessed 19 September 2006).

⁴¹ Final Constitution of the Republic of South Africa, 1996

⁴² B 49 of 2002

Bill were made known on 8 August 2000 and have been the subject of much debate since then. Deliberations in respect of the Bill occurred in 2003 and various changes were recommended.⁴³ The Bill has to date not been implemented and further discussions in respect of the Bill have become disturbingly silent.

It is possible that the delay by Parliament in passing the Bill relates to the opposing needs of the child offenders and society. Government may find it difficult to adequately satisfy both needs. The Bill is largely characterised by the principle of restorative justice while societal demands in a growing crime infested environment call for stricter forms of punishment.

The challenge now faced by judiciary is to merge together the various needs of children and society and produce law which satisfies both needs. The law produced by the judiciary must comply with constitutional and international norms and be mindful of South Africa's oppressive past. The rest of the discussion illustrates how the judiciary has taken on this challenging task, in the absence of legislation and developed a child justice system which takes into account all the aforementioned difficulties.

⁴³ L Ehlers 'Child justice in South Africa: children's rights under construction' (2006) Criminal justice initiative occasional paper at 5

3. PRE-SENTENCE REPORTS

3.1 International instruments and policies

Geraldine van Bueren argues that the purpose of sentencing a child in trouble with the law is to ensure that both the needs of the child and society are met. The punishment must therefore be proportional, taking into account the offence committed and the personal circumstances of the offender.⁴⁴ This argument is sound, as children, unlike their adult counterparts are more likely to make bad choices due to their youthfulness and immaturity. The common law has always recognised that children may not always have the necessary capacity to be responsible for their actions and therefore the criminal liability of a child has always been linked to the age of the offender. The younger the child, the less likely the possibility that the child had the necessary

⁴⁴ G Van Bueren *op cit* n 15 at 183

capacity to understand the wrongfulness of their actions or act in accordance with this understanding.⁴⁵ Children should therefore be given the benefit of the doubt by taking into account the personal circumstances of each individual child prior to sentencing.

The Beijing Rules⁴⁶ therefore recommends that:

‘In all cases except those involving minor offences, before the competent authority renders the final disposition prior to sentencing, the background and circumstances in which the juvenile is living or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority’.

The commentary⁴⁷ to Beijing Rule 16 stresses the importance of pre-sentence reports in legal proceedings involving juveniles. It provides that parties must make social resources in the form of probation officers, or other social services personnel, available to child offenders in order to conduct enquiries into the relevant personal circumstances of the child accused. The discussion below will show that this international rule is not reflected in South African legislation as currently legislation regarding pre-sentence reports is practically non-existent.

3.2 South African legislation and law reform proposals

The Criminal Procedure Act⁴⁸ governs procedure in respect of child and adult offenders and provides a very basic outline concerning sentencing of juveniles.

Section 290 of the Criminal Procedure Act describes the manner in which the court should deal with convicted persons who are below the age of 18. In terms of the

⁴⁵ J M Burchell *Principles of criminal law* 3rd ed (2005) at 358

⁴⁶ Beijing Rule 16

⁴⁷ see commentary to R16

⁴⁸ Criminal Procedure Act 51 of 1977

section the juvenile should be 'placed under the supervision of a probation or correctional officer' or, 'in the custody of a suitable person designated by the court' or, 'be sent to a reform school' as opposed to direct imprisonment. It will be seen from the case law concerning pre-sentence reports that ordinarily pre-sentence reports are drafted by probation officers or correctional supervisors. The s290 provision is the only provision relating to pre-sentence reports, yet this provision does not specifically refer to pre-sentence reports. The provision is also vague, as it does not stipulate which factors need to be taken into account when placing the child under the supervision of the probation/correctional officer, what the responsibility of the officer is in respect of the juvenile, how such placement occurs and the what duties of the probation officer or correctional supervisor are.

Law reform regarding pre-sentence reports has been proposed and is reflected in the Bill. The Law Commission Report⁴⁹ reflects support for compulsory pre-sentence reports. As a result of recommendations made in the Law Commission Report, the Bill includes provisions relating to pre-sentence reports. Section 62 of the Bill stipulates that a court imposing a sentence **must** request a pre-sentence report before imposing a sentence. The court must record reasons for deviation from recommendations made in the probation officer's report where the court imposes a sentence other than that recommended in the report.⁵⁰ Concerns highlighted in the Law Commission report regarding undue-delays in obtaining a pre-sentence report were noted and accounted for in the Bill. Provisions were made for dispensing with the pre-sentence report in instances where undue delays would occur or in cases of

⁴⁹ South African Law Commission Report op cit n1at 175

⁵⁰ S62(3)

petty offences.⁵¹ However, a protection mechanism was included for juveniles who faced a suspended sentence or imprisonment in that such a sentence could not be imposed without a report submitted by the probation officer.

Although the pre-sentence report is not as yet a statutory requirement, the production of the pre-sentence report has become an integral aspect of juvenile sentencing requirements. This is clearly reflected in the case law.⁵²

3.3 South African case law on pre-sentence reports

The importance of pre-sentence reports has been emphasised by the courts,⁵³ even before the advent of the Constitution.⁵⁴ Considering the personal circumstances of the accused and the production of a probation officer report are therefore not new concepts in our law. The case of *Jansen*⁵⁵ indicates that even as early as 1975, the courts were aware that juveniles had to be treated differently from adult accused. The court in *Jansen* recognised that the interests of society were best served by taking into account the interests of the juvenile. It would not be in the best interest of society to return a distorted individual to it. *S v Z* was the first post-constitutional case to refer to the importance of pre-sentence reports.

Pre-sentence reports provide a background to the personal circumstances of the accused and allows for each accused to be treated as an individual.⁵⁶ *Kwalase*⁵⁷ is one of the earlier post-constitutional cases stressing the importance of pre-sentence

⁵¹ South African Law Commission *supra* n 1 at 173

⁵² see *S v Z supra* n 3; *S v Kwalase supra* n 12 and *S v Petersen supra* n 12

⁵³ A Skelton *A decade of case law in child justice* (2006) Conference on child justice held in Irene

⁵⁴ see *S v H and Another* 1978 (4) SA

⁵⁵ 1975 (1) SA 425 A

⁵⁶ Skelton *op cit* n 53

⁵⁷ *Kwalase supra* n 12

reports. This case is important because it restates the principles laid down in *SvZ* and emphasises the importance of an individualised approach in sentencing juveniles.⁵⁸

The accused in *Kwalase* was found guilty of robbery and was sentenced to three years imprisonment, eighteen months of which were suspended for three years on condition that the accused not be convicted again of a dishonest crime. At the time of the commission of the offence, the accused was almost 16 years old and had a previous conviction for housebreaking and theft, for which he obtained a postponed sentence. Prior to sentencing in this matter he had already committed another offence of robbery, for which he was also found guilty and sentenced to three months imprisonment. The personal circumstances of the accused in the latter robbery charge were not placed on record and the probation officer report was not requested by the magistrate.

Van Heerden J (as she was then) stressed the importance of probation officer reports by referring to South African case law as well as constitutional and international legislation. She referred to the pre-constitutional case of *S v Jansen*⁵⁹ in which the Appellate Division emphasised the importance of a pre-sentence report.

The court in *Jansen* held that:

'In determining the appropriate sentence to be imposed upon an accused person in any particular case, it is the duty of the court to have regard, not only to the nature of the crime committed and the interests of society, but also the personality, age and circumstances of the offender in the case of a juvenile offender it is above all necessary for a court to determine what appropriate form of punishment in the peculiar circumstances of the case would best

⁵⁸ Skelton *op cit* n 53

⁵⁹ *Jansen supra* n 55

serve the interests of society as well as the interests of the juvenile. The interests of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with distorted personality being eventually returned to society. To enable the court to determine the most appropriate form of punishment in the case of a juvenile offender, it has become the established practice of the courts to call for a probation officer, in at least all serious cases...'⁶⁰

Van Heerden J also referred to the guidelines laid down by the court in *S v Z*. The judge further highlighted the importance of the probation officer report by referring to international instruments which call for a pre-sentence report prior to sentencing juveniles. She noted that the Commentary to the Rule 16 of the Beijing Rules considers 'social enquiry reports' to be 'an 'indispensable aid' in legal proceedings involving juveniles'.⁶¹ The court, though not obligated in terms of the Beijing rules to request a pre-sentence report prior to sentencing, considered the importance of a pre-sentence reports crucial to the enquiry. The judge's decision was influenced by principles of individualised sentencing and proportionality. She reasoned that:

'the judicial approach towards sentencing juvenile offenders must therefore be reappraised 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 interest of the juvenile offender. If at all possible, the sentencing officer must structure the punishment in such a way so as to promote the reintegration of the juvenile concerned into his or her family and community.'⁶²

⁶⁰ *Jansen supra* n 55 at 428

⁶¹ *Kwalase supra* n 12 at 139

⁶² *Ibid*

Reference was also made to the Bill in respect of pre-sentence reports. The court acknowledged that the recommendations made by the project committee concerning mandatory pre-sentence reports in the case of imprisonment of the juvenile had gained strong support.⁶³

In light of these constitutional and international principles and the development of the law as reflected in the Bill, the court found that the magistrate could not have properly considered the proportionality requirement without due consideration to the personal circumstances of the accused. The judge found that the magistrate, in sentencing the accused, had only considered the aggravating factors relating to the accused's previous convictions. The magistrate had not taken the accused's personal circumstance and youthfulness into account when imposing the sentence of direct imprisonment. The court therefore failed to see how the magistrate could have determined an appropriate sentence. Van Heerden J therefore set aside the sentence of the magistrate and replaced it with a more lenient sentence, though the accused was still sentenced to imprisonment.

Kwalase is an important judgment because it clearly sets out the factors taken into account by the courts in determining juvenile sentencing principles. It indicates the significant role international law plays in the decision making process. It is evident that there exists a tendency by the courts to support the international law notion of an individualised approach in sentencing considerations relating to children. Also evident from this judgment is the strong emphasis placed on the Bill. It is furthermore

⁶³ *Kwalase supra* n12 at 140

clear that in determining a just sentence equal weight must be attributed to both the interests of society and the juvenile accused.

Though the judgment is an extremely welcome precedent, it is not immune to criticism. It is disappointing that the Judge failed to practically execute her own finding. Though she emphasised the importance of a pre-sentence report, especially where the juvenile accused is sentenced to imprisonment, and despite finding it unacceptable that the magistrate sentenced the accused to direct imprisonment without taking into consideration the personal circumstances of the accused, she too imposed a sentence of imprisonment without a pre-sentence report. While the sentence itself is not questioned, this judgment would have been far more credible if the Judge had requested a pre-sentence report prior to imposing the converted sentence.

The opportunity for the Supreme Court of Appeal to join the discourse on pre-sentence reports arose in *S v Petersen*.⁶⁴ The accuseds in this matter had been convicted of murder and possession of an unlicensed firearm and ammunition and were sentenced to 18 years imprisonment. The court requested a probation officer's report prior to sentence. The probation officer failed to produce the pre-sentence report. Instead, a letter from the Regional Director of Social Welfare Services was handed in to court explaining reasons for the absence of the probation officer report.

The letter provided reasons for the probation officer's failure to conduct an enquiry into the accused's personal circumstances. Included in the reasons provided to the court were that, the probation officer would have had to conduct the enquiry in an

⁶⁴ *S v Petersen supra* n 12

unsafe area, that the accused continued to deny guilt and that their parents were prescriptive about the sentence to be imposed. The court sentenced the accused to imprisonment despite the absence of a pre-sentence report. The accused appealed to the High Court against the sentence imposed by the trial court. A full bench of the Eastern Cape Division refused to hear the appeal finding that a sentence of imprisonment of 18 years was not heavy enough to warrant interference on the part of the High Court.⁶⁵

The Supreme Court of Appeal disagreed with the Full Bench of the Eastern Cape Division. The Court took into account factors such as the age of the accused, the fact that they were first time offenders and that the sentence imposed exceeded the age of each accused.⁶⁶ It further added that a **sentence of imprisonment** should not be imposed on a juvenile without a pre-sentence report detailing the personal circumstances and background of the accused.⁶⁷ Furthermore, a sentence of imprisonment should not be imposed without seriously considering all other sentencing options.⁶⁸

The Supreme Court of Appeal referred to and endorsed the sentencing guidelines identified by the Court in *S v Z*.⁶⁹ Judge Olivier stressed the importance of the judicial officer playing a dynamic role in the sentencing process. He further found that the trial court had not played a dynamic role in the sentencing process in this matter and that, while the sentence imposed may well be a just sentence, it was not possible to

⁶⁵ *Peterson supra* n 12 at 22D -E

⁶⁶ at 22 E - H

⁶⁷ *Ibid*

⁶⁸ at H-I

⁶⁹ at 23 G

make such a determination if paragraphs three and four of the *S v Z* sentencing guidelines were not fully adhered to.⁷⁰ This matter was therefore sent back to the trial court for reconsideration of the sentence based on the necessary information obtained from a pre-sentence report.

It is clearly evident from this judgment that pre-sentence reports form a vital part of the sentencing process especially where the sentence imposed involves the direct imprisonment of juveniles. Failure by the social worker to submit a report detailing the personal circumstances of the accused will not be accepted and the court should not impose a sentence without a pre-sentence report. The fact that this judgment was also made available to the Director of Social Services further indicates the importance which the court attributes to pre-sentence reports. It clearly brings across the message that pre-sentence reports are compulsory, excuses will not be accepted, probation officers will have to ascertain the personal circumstances of the accuseds by whatever means necessary and the sentencing court cannot impose a sentence of imprisonment without the pre-sentence report. Also welcoming from this judgment is the approval of paragraphs three and four of the sentencing guidelines articulated by Judge Erasmus in *S v Z*.

The requirement of pre-sentence reports has now become a well established principle in South African case law. This point is illustrated by the case of *S v M*.⁷¹ In reviewing the case of *M*, Pickering J identified two problems associated with this case in that the accused's were had been convicted without the assistance of their parents

⁷⁰ at 24 A - C

⁷¹ *S v M and another* 2005 (1) SACR 481 (E) - This case involved two juveniles, aged fifteen and seventeen who had been convicted in the Magistrates Court on a charge of housebreaking with intent to steal and theft.

or guardians and without a pre-sentence report. For the purposes of this paper, the writer will only deal with the issue pertaining to the magistrate's failure to obtain a probation officer's report.

It was found that the Magistrate erred by sentencing the accused without a probation officer's report. The court noted that this matter was postponed on numerous occasions in an attempt to obtain a probation officer's report until the magistrate eventually sentenced the accused without the report. The Judge held that the magistrate should have played a more dynamic role in the proceedings and should have requested that the probation officer furnish reasons for not submitting the report.⁷² Instead the Magistrate sentenced the accused to imprisonment without adequate evidence concerning the accused's personal circumstances. This matter was therefore referred back to the magistrate for the purpose of obtaining a probation officer's report.

Despite the importance of probation officer reports being stressed by the courts, it is clear that the courts should not merely rubber stamp these reports. The case of *S v P*⁷³ shows that the judicial officer is still the final adjudicator when sentencing an accused.

*S v P*⁷⁴ concerned conflicting recommendations made by the probation officer concerning the imposed sentence. The 16 year old accused had been found guilty of theft of a dog collar. In the first report the probation officer recommended that the accused receive a postponed sentence and that the accused 'submit himself to the

⁷² *S v M* supra n 71 at 483 I - J

⁷³ 2001 (1) SACR at 70

⁷⁴ *Ibid*

supervision and control of a probation officer, rendering community service, re-enrolling at school and carrying out the reasonable instructions of the probation officer'.⁷⁵

The probation officer then produced a second report recommending that the accused be sentenced to a reformatory school. There was nothing in the second report to justify the extreme difference in the recommendation.⁷⁶ There was no indication from the second report of a significant change in the personal circumstances of the accused.⁷⁷ The only difference regarding personal circumstances was that the accused had voluntarily returned to school without yet being instructed to do so by a formal court order.⁷⁸ There was only a time difference of one month between the two reports.⁷⁹ The Magistrate had clearly not applied his mind when imposing the sentence and had merely rubber stamped the probation officer's second recommendation that the accused be sentenced to a reformatory school.

On review, Justice Moosa reconsidered the information contained in the two reports. He found that imposing a sentence subjecting the accused to reformatory school was not justified when considering the evidence regarding the accused's personal circumstances. The court therefore set aside the sentence imposed by the magistrate and referred the matter back to the trial court for reconsideration of the sentence.

The judiciary has not only been active in developing juvenile sentencing principles in line with international standards in respect of pre-sentence reports. A similar trend can

⁷⁵ at 71 I and 72 A

⁷⁶ at 72 F - G

⁷⁷ *Ibid*

⁷⁸ *Ibid*

⁷⁹ *Ibid*

be seen in its adherence to the principle of incarceration as a last resort and for the shortest possible period. The following chapter considers international and national legislation in respect of the aforementioned principle and also the courts development of the law in line with the principle. The impact of minimum sentence legislation will also be discussed in this regard.

4. THE PRINCIPLE OF INCARCERATION AS A LAST RESORT AND FOR THE SHORTEST APPROPRIATE PERIOD

4.1 International instruments and policies

Article 37(3) (b) of the CRC stipulates that the incarceration of children should be implemented as a measure of last resort and for the shortest period of time. In terms of Article 37, State Parties are obligated make available alternative forms of punishment for children in trouble with the law and only rely on detention mechanisms when the alternative measures are not sufficient.⁸⁰ Detention as a measure of last resort is also addressed and reinforced in the Beijing Rules.⁸¹

⁸⁰ G Odongo and J Gallinetti ‘ The Treatment of Children in South African Prisons – A Report on the Applicable Domestic and international Minimum Standards’ CSPRI Research Paper (2006) No 11 at 6

⁸¹ Beijing Rule 19 which states that ‘the placement of a Juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period’. Rule 18 provides for alternatives to imprisonment.

18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include:

- (a) Care, guidance and supervision orders;
- (b) Probation;
- (c) Community service orders;
- (d) Financial penalties, compensation and restitution;
- (e) Intermediate treatment and other treatment orders;
- (f) Orders to participate in group counselling and similar activities;
- (g) Orders concerning foster care, living communities or other educational settings;
- (h) Other relevant orders.

The Commentary to the Beijing Rules explains the reasoning behind the principle of imprisonment as a measure of last resort and for the shortest appropriate time. The commentary provides that there is no evidence to show that it is better to imprison a juvenile than not to do so. In fact, imprisonment of the juveniles can cause more harm than good as the juvenile will be exposed to negative influences during his or her developing years. The negative effects resulting from loss of dignity and separation from the social environment has a more detrimental impact on the well being of juveniles, who because of youth, are easily influenced and who are still in the process of developing their character, than it would ordinarily have on adults. The prison world is a rude awakening to the juvenile, who is still at an age where behaviour can be modified in a positive or negative manner. Accordingly, rule 19 aims at restricting institutionalisation in two regards: by limiting sentences of incarceration ('last resort') and by limiting the length of the sentence (shortest appropriate period). The UN JDL further reinforces this principle.⁸²

‘ The overriding message of the JDL’s is that young people under the age of 18 should not be deprived of the liberty except as a measure of last resort, and that where this does occur, each young person must be dealt with as an individual, having his or her needs met as far as possible’⁸³

It is therefore clear from the international instruments discussed above that in keeping with the principle of incarceration as last resort State parties are obliged to develop legislation which provides for alternatives to incarceration. Foreign jurisdictions have attempted to adhere to this principle by incorporating it in their legislation. The discussion below briefly looks at a small sample of foreign legislation in a very basic

⁸² UN JDL n4 Rule 2.

⁸³ A Skelton *op cit* n 9 at 191

attempt aimed at showing how foreign jurisdictions adhere to the principle of incarceration as a last resort and for the shortest appropriate period. However, the scope of this paper is not intended to deal with a comparative analysis of foreign jurisdictions implementation of the principle.

In Canada, the Youth Criminal Justice Act limits the incarceration of juveniles to violent offences and repeat offenders.⁸⁴ The sentencing officer is directed to impose imprisonment as a last resort.⁸⁵ Where imprisonment is imposed the period of imprisonment cannot exceed 7 to 10 years.⁸⁶

The Beijing rules in respect of imprisonment of children have been incorporated in German legislation.⁸⁷ According to German legislation, imprisonment can only be imposed as a measure of last resort and only in cases where the accused is convicted of a serious crime.⁸⁸ However, prison convictions are limited to children between the ages of 14 and 17 and the term of imprisonment cannot exceed 10 years.⁸⁹ The German legislature has therefore limited the power of the court in imposing prison sentences on child offenders by prescribing the length of the sentence and the applicable age category.

⁸⁴ C Du Toit 'A measure of last resort? Child offender and life imprisonment' (2006) 17 *SA Crime Quarterly* 13 at 14

⁸⁵ *Ibid*

⁸⁶ *Ibid*

⁸⁷ Du Toit *op cit* n 84 at 15

⁸⁸ *Ibid*

⁸⁹ *Ibid*

According to the Ugandan Children's Statute of 1996, no child may receive a prison sentence exceeding three years even though an adult would have received the death sentence for the crime.⁹⁰

Not all foreign jurisdictions have given effect to the principle of incarceration as a last resort. For instance, in Australia, it is possible to impose a sentence of life imprisonment on a juvenile. In England, children convicted of serious crimes could be sentenced to a term of imprisonment 'at Her Majesty's pleasure'.⁹¹ Child offenders imprisoned during Her Majesty's pleasure were detained for an indeterminate period at the discretion of the Home Secretary.⁹² In *Hussain v The United Kingdom*,⁹³ the European Court of Human Rights found that sentences 'at Her Majesty's pleasure' 'is more comparable to a discretionary life sentence'.⁹⁴ Subsequent to *Hussain*, s 28 of the Crime (Sentence) Act was brought into force to give effect to the judgment of the court in *Hussain*.⁹⁵ Now the parole board and not the Secretary of State decide on the release of the prisoner once the sentence period has been completed.⁹⁶ However, incarceration of child offenders remains part of the law of England.

Foreign case law also indicate difficulties experienced by other jurisdictions in adhering to the principle of incarceration as a last resort and for the shortest

⁹⁰ *Ibid*

⁹¹ As in the case of *T and V v The United Kingdom*.

⁹² *T v the United Kingdom* [1999] ECHR 170 at 35 Judgement of 16 December 1999

<http://www.worldlii.org/eu/cases/ECHR/1999/170.html> . *T* is also known as *V v the United Kingdom*

⁹³ [1996] ECHR

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=hussain%20%7C%20v%20%7C%20the%20%7C%20united%20%7C%20kingdom&sessionid=2313567&skin=hudoc-en>

[udoc-en](#)

⁹⁴ *Hussain supra* n 93 para 54

⁹⁵ *T supra* at 36

⁹⁶ *Ibid*

appropriate time.. In this regard the cases of *Nielsen v Denmark*⁹⁷, and *T v The United Kingdom*⁹⁸ bears reference. *T v the United Kingdom* must also be mentioned since this case was recently referred to in two recent South African judgements.⁹⁹

4.2 Difficulties experienced by foreign jurisdictions in giving effect to the principle of incarceration as a last resort and for the shortest appropriate period

*Nielsen v Denmark*¹⁰⁰ involved the incarceration of a child in the psychiatric ward of a state hospital. The incarceration of the child was approved by the mother, who was the custodial parent at the time.¹⁰¹ The Applicant (child) in this matter challenged the lawfulness of his incarceration in the psychiatric ward. The court had to decide whether article 5(1) of the European Convention of Human Rights which guarantees everyone the right to freedom and security and only allows for the lawful limitation of this right was violated.

The majority of the court found that mother in her capacity as custodial parent, and not the state, had decided to hospitalise the Applicant.¹⁰² The Court therefore found that there had not been a deprivation of liberty of the child in terms of article 5 of the convention.

⁹⁷ [1997] ECHR

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=nielsen%20%7C%20v%20%7C%20denmark&sessionId=2313567&skin=hudoc-en>

⁹⁸ *T supra* n 92 <http://www.worldlii.org/eu/cases/ECHR/1999/170.html>. *T* is also known as *V v the United Kingdom*

⁹⁹ In *DPP v P* 2001 (1) SACR 243 (SCA), the court found that despite the principle of incarceration as a last resort, the heinous nature of the crime could warrant the incarceration of a child. Also see *Brandt supra* n 12

¹⁰⁰ *supra* n 97

¹⁰¹ at para 59

¹⁰² at para 63

The minority decision on the other hand favoured the conclusion reached by the European Commission of Human Rights. The minority court held that ‘the specific conditions in which the Applicant was admitted to the hospital and placed, against his will, in the psychiatric ward, and the length and nature of the committal, are important criteria in determining whether the applicant was deprived of his liberty’.¹⁰³ The minority of the court found that the State was responsible for the deprivation of liberty of the child because ‘it not only tolerated it, but also associated itself with it through the action and assistance of its organs’.¹⁰⁴ The minority found that there had been a violation of article 5 as the applicant had been detained in a psychiatric hospital for five and a half months when he was not even mentally unfit.

Van Bueren asserts that the Nielsen case ‘leaves children who are deprived of their liberty on the wishes of one or both parents, but against their own wishes, wholly unprotected’.¹⁰⁵ A further point of contention is the failure of the European Court of Human Rights to even consider the principle of incarceration as a last resort in determining whether there had been a limitation of the freedom and security of the child in terms of article 5 of the European Convention of Human Rights. It is not clear whether the failure on the part of the court to employ the principal stems from a ‘lack of awareness’¹⁰⁶ in respect of the CRC or whether the failure to acknowledge the principal and instead rely on the technical argument that the custodial parent had decided to have the child incarcerated was an provided an convenient escape for the court. However, it is clear that in its failure to acknowledge the principal of

¹⁰³ *Nielsen* supra n 97 – see joint minority decision

¹⁰⁴ *Ibid*

¹⁰⁵ Van Bueren *op cit* at 213

¹⁰⁶ Van Bueren *op cit* at 212

incarceration as a last resort and for the shortest appropriate period, the court deprived the applicant of the protection afforded to him by the principle.

In *Hussain v The United Kingdom*,¹⁰⁷ the applicant was convicted of killing his two year old brother. He was 16 years old at the time and was sentenced to a term of imprisonment at 'Her Majesty's pleasure' and the applicant was therefore not informed of the length of his prison term. Eight years had nearly passed before the Secretary of State set the Applicant's tariff at 15 years.¹⁰⁸ The parole board considered the Applicant's possible release on four occasions.¹⁰⁹ During the third review of the applicant's possible release, the parole board recommended that the applicant be transferred to open prison conditions.¹¹⁰ This recommendation was vetoed by the Secretary of State.¹¹¹

The Applicant applied to the European Court of Human Rights, complaining that his right to 'take proceedings by which the lawfulness of his detention shall be decided by a court and his release ordered if the detention his release ordered if the detention is not lawful.'¹¹² The United Kingdom argued that incarceration during Her Majesty's pleasure was a sentence imposed n juvenile who had committed serious offences but due to their youth could not be punished as severely as adults.¹¹³ The United Kingdom also informed that a legitimate reason for continued incarceration would be where the

¹⁰⁷ *supra* n 93

¹⁰⁸ *Hussain supra* n93 at para 11

¹⁰⁹ *Hussain supra* n 93 at para 12

¹¹⁰ *Hussain supra* n 93 at para 15

¹¹¹ *Ibid*

¹¹² *Hussain supra* n 93 at 45

¹¹³ *Hussain supra* n93 at 47

applicant remained a danger to society.¹¹⁴ European Court of Human Rights found that there had been a violation of the applicant's rights.

In *T v the United Kingdom*¹¹⁵ the applicant and his co-accused, V, had been convicted in the Preston Crown Court for the heinous murder of a two year old boy. Both the applicant and his co-accused were ten years old at the time of the murder. The trial judge recommended a sentence of eight years. The trial judge realised the gravity of the sentence remarking that 'eight years is very many years for a ten or eleven year old. They are now children. In eight years time they will be grown men'.¹¹⁶ The Secretary of State, however, decided to impose a sentence of fifteen years.

The applicant submitted that the sentence imposed on him was in breach of article 5 of the European Convention of Human Rights and furthermore contended that 'it was arbitrary to impose the same sentence – detention during Her Majesty's – pleasure on all young offenders convicted of murder, irrespective of their individual circumstances and needs'.¹¹⁷ In support of he's argument the applicant referred to Article 37 (b) of the CRC and rules 16 and 17.1 (a) and (b), referring to the principal of detention as a last resort and for the shortest period of time.¹¹⁸

The United Kingdom argued that the detention was not unlawful or arbitrary and that the applicant would have to be detained for as necessary to satisfy 'the need for punishment, rehabilitation and the community'.¹¹⁹ The Court, without even referring

¹¹⁴ *Ibid*

¹¹⁵ *T supra* n 87

¹¹⁶ *T supra* n 87 para 19

¹¹⁷ para 101

¹¹⁸ *Ibid*

¹¹⁹ para 102

to the CRC the Beijing Rules in light of the sentence of fifteen years imposed on two ten year olds, accepted the argument of the Government.

Detention during Her Majesty's pleasure is a cruel form of punishment as the juvenile is not informed of the length of the imprisonment. The Secretary of State, an arm of government, initially decided on the duration of imprisonment. The parole board now decides on release and can refuse release if there is a danger to society. However, it is not clear how the parole board determines whether society is at risk. The cases mentioned in this section indicate that in terms of the law of England, sentences imposed on children found guilty of serious offences are not much different to adults found guilty of serious offences. The only difference is that adults are not tortured by uncertainty in respect of the duration of their prison term.

It is also evident from these cases that the European Court of Human Rights failed to take the CRC into account when considering the applications of the juvenile applicants. It is also evident that very little weight was accorded to the principle of incarceration as a last resort and for the shortest appropriate time. In *Nielsen*, the court did not even refer to the principle. In *T*, the court referred to the principle but found that it was outweighed by other factors such as heinous nature of the crime and the interests of the community, which therefore justified the imposition of imprisonment. While the decisions made by the European Court of Human Rights were not incorrect, it is disappointing that the decisions made by the court do not reflect a decision making process that pays cognisance to international norms and values especially those principles derived from binding treaties such as the CRC. Somalia and the United States of America are the only two countries which have not signed the CRC.

All other countries are therefore bound by the provisions of the CRC. The principle of detention as a last resort is provided for in the CRC and failure by the European Court of Human Rights to refer to the provisions of the CRC in sentencing the accused is not acceptable.

The decisions of the justices of the European Courts of Human Rights are in stark contrast to the South African judiciary. The South African judiciary has had to decide upon several cases, some of which are discussed below, involving the principle of detention as a last resort and for the shortest period of time. It will be seen from the cases discussed that international law has been accorded due weight in the decision making process. It is also evident from the case law that the South African juvenile justice system is moving towards a constitutional jurisprudence incorporating international practices.

4.3 South African legislation

The principle of incarceration as last resort is enshrined in the Constitution¹²⁰ in s28 (1) (g). Sentencing proposals in the Law Commission report¹²¹ supports the principle. The report provides that ‘ proposed legislation should not include any provision for prescribed minimum sentences, recently introduced in South Africa by the Criminal Law Amendment Act 105 of 1997’.¹²² The Bill therefore provides that

69. (1) A sentence of imprisonment may not be imposed unless –

- (a) the child was over the age of 14 years of age at the time of commission of the offence; and

¹²⁰ Final Constitution of South Africa, 1996

¹²¹ South African Law Commission report *op cit* n 1

¹²² Law Commission report *op cit* n 1 at 10.3

- (b) **substantial** and **compelling** reasons exist for imposing a sentence of imprisonment, which may include conviction of a serious offence or a previous failure to respond to alternative sentences, including sentences with a residential element

It has been argued that the Bill provides a more ‘concrete framework’¹²³ for the principle of incarceration as a last resort in that it establishes criteria for imprisonment. Provisions in the Bill relating to imprisonment of juveniles reflect a balanced approach in the struggle between two conflicting rights – the best interests of the child and the interests of the society. While imprisonment of juveniles has not been disposed of, strict criteria apply where the sentence imposed is imprisonment.

Nevertheless, minimum sentence legislation as contained in the Criminal Law Amendment Act¹²⁴ is in direct conflict with the principle of incarceration as a measure of last resort and for the shortest appropriate time. Minimum sentence legislation is contained in section 51 of the Criminal Law Amendment Act,¹²⁵ which is attached hereto as appendix B. The provisions contained in s51 are subject to subsections three and six of the Criminal Law Amendment Act.

According to the Criminal Law Amendment Act children below the age of 16 are excluded from minimum sentence legislation,¹²⁶ but 16 and 17 year olds are subject to minimum sentence legislation if substantial and compelling reasons exist.¹²⁷ It appears as if minimum sentence legislation is therefore not only discriminatory, as it discriminates between children on the basis of age, it is also in direct conflict with the

¹²³ J Sloth Nielsen *op cit* n 10 at 453

¹²⁴ Act 105 of 1997

¹²⁵ *Ibid*

¹²⁶ s 51(6)

¹²⁷ s 51 (3)(b)

principle of incarceration as a last resort and for the shortest appropriate time, as the judicial officer is forced to impose a minimum sentence unless substantial and compelling reasons exist. The court's discretion is therefore limited to substantial and compelling reasons.

Carina Du Toit articulates her criticism of minimum sentence legislation by stating that 'minimum sentences are not a measure of last resort, they are a measure of first resort, and do not allow an individualised approach to sentencing as required by international law'¹²⁸ The interpretation of minimum sentence legislation relating to juveniles has resulted in strong debate amongst the judiciary as is evidenced from the case law.

4.4 South African case law on the imprisonment of juveniles and the principle of incarceration as a last resort and for the shortest appropriate period

The uncertainty surrounding the interpretation of minimum sentence legislation was first considered by the Cape Provincial Division in the case of *S v Blaauw*.¹²⁹ The accused in this matter, an 18 year old man, was convicted of the rape of a young girl below the age of 16. The charge of rape of a girl below the age of 16 falls within the ambit of s 51(1) of the Criminal Law Amendment Act.¹³⁰ The court is therefore bound to impose a life sentence, subject to the provisions contained in s 51 (3) and (6) of the Criminal Law Amendment Act.¹³¹ The accused celebrated his 18th birthday six weeks

¹²⁸ C Du Toit *op cit* n 84 at 16

¹²⁹ 2001 (2) SACR 255 (C)

¹³⁰ *Blaauw supra* n 103 at 257 I - J

¹³¹ *Ibid*

prior to committing the crime and therefore the protection afforded by s 51(3) (b) was not applicable to the accused.

The Judge nevertheless considered the implications of s 51 (3) of the Act. The personal circumstances of the accused were thoroughly considered by the court. The court discussed the accused's difficult childhood and effect of a prior incarceration in reformatory school.¹³² The court opined that the accused's incarceration at a reformatory school could have had a negative impact on him in light of the fact the some reformatory schools are regarded as 'universities of crime'.¹³³

However, of considerable importance was the fact that the accused turned 18 only six weeks before committing the heinous crime of which he was convicted of.¹³⁴ The accused would have fallen within the ambit of section 51(3) if he had committed the crime six weeks earlier.¹³⁵ According to Judge Van Heerden an interpretation of s 51(3) (b) does not compel a court to impose a minimum sentence on an accused below the age of 18 but above the age of 16.¹³⁶ She further stated that such reasoning is in line with Constitutional principles and international law.¹³⁷ The judge also referred to academic opinion, in support of her interpretation of minimum sentence legislation, citing Skelton who says:

'Non-governmental organisations rallied and made both written and oral submissions on the draft bill to the Portfolio Committee on Justice, arguing that the idea of minimum sentencing

¹³² at 262 A – G. The accused was convicted of the crime of breaking and entering when he was 15 years old and a year later he was convicted of two more crime, namely, breaking into a motor vehicle and breaking and entering. The accused was sentenced to incarceration at a reformatory school.

¹³³ at 263 A - C

¹³⁴ 263 E- F

¹³⁵ *Ibid*

¹³⁶ at 223 F - G

¹³⁷ at 223 H - I

for children would go against the UN Convention and the South African Constitution which both state that detention of children should be as a matter of last resort, and that minimum sentence for children would in **fact make imprisonment a first resort, notwithstanding the ‘escape clause’**,¹³⁸

Van Heerden also refers to Sloth-Nielsen’s submissions that minimum sentence legislation does not apply to all children, only 16 and 17 year olds.¹³⁹ However, the state bears the onus of proving that substantial and compelling reasons exist for the imposition of a minimum sentence in respect of the accused.¹⁴⁰ Adult accused bear the burden of proving that minimum sentence legislation does not apply. In further support of her interpretation of the legislation, Van Heerden J refers to the Law Commission report,¹⁴¹ which refers to the different criteria, applied to 16 and 17 year olds. The court therefore found that the arguments by Skelton and Sloth –Nielsen are correct as these arguments reflect international and constitutional norms.

The question of whether minimum sentence legislation applies to children between the ages of 16 and 18 was once again addressed in *S v Nkosi*.¹⁴² The accused pleaded guilty to the charges of murder, theft and housebreaking with intent to steal and the attempted theft of a motor vehicle. The accused was 16 years of age when he committed the crimes that he was charged with. The trial court imposed a minimum sentence of life imprisonment for the murder and seven years in respect of each of the housebreaking convictions. The sentences were to run concurrently. The sentence

¹³⁸ at 264 C – D referring to A Skelton ‘Juvenile justice reform: children’s rights and responsibilities versus crime control’ in Davel (ed) *Children’s rights in a transitional society* (1999) 88 at 101 – 102 D

¹³⁹ at 264 F – G referring to J Sloth-Nielsen ‘The role of international law in juvenile justice reform in South Africa’ unpublished PhD (2001) Chapter 9

¹⁴⁰ *Ibid*

¹⁴¹ Law Commission report *supra* n 50 at 10.3

¹⁴² 2002 (1) SACR 135 W

imposed by the trial Judge was overturned by a full bench of the Witwatersrand Local Division.

The *Nkosi*¹⁴³ judgment presents as well reasoned and constitutionally sound. In delivering the judgment, Cachalia J, in a logical and systematic manner explained why children between the ages of 16 and 18 were not subjected to minimum sentence legislation.

Cachalia J first considered the plain meaning of s 51(3). According to the court hearing the appeal, the trial court erred in concluding that it was obligated to impose a minimum sentence unless “substantial and compelling circumstances” exist which justify deviation from the prescribed sentence. The trial Judge found that while substantial circumstances existed in the form of the accused’s youth, it did not compel the court to impose a lighter sentence.

The court of appeal did not agree with the trial court’s interpretation of the wording of s 51(3) (a) and (b). Pertinent to the appeal court’s interpretation of s 51 (3) were the use of the words ‘substantial and compelling’. The appeal court noted that

‘The Act envisages three classes of offender, namely adults, children under the age of 16 and children who are between 16 and 18 at the time of the commission of the offence. The Act is not applicable to children under the age of 16 (s 51 (6)). This means that a court is unencumbered by any legislative prescriptions in deciding an appropriate form of punishment for such an offender. A court is obliged to impose a minimum sentence on any offender who was at least 18 at the commission of the offence unless it finds substantial and compelling circumstances that justify the imposition of a lesser sentence. If such circumstances are found

¹⁴³ *Ibid*

to exist these must be entered on the record and a lesser sentence imposed (s 51 (3) (a)).

Section 51(3) (b) which is applicable to children between the ages of 16 and 18 contains no reference to ‘substantial and compelling circumstances’, but requires a court which decides to impose a minimum sentence to ‘enter the reasons for its decision on the record of the proceedings.’¹⁴⁴

The Courts in *Blaauw* and *Nkosi* therefore both concluded that s 53(1) (b) and not s 53(1) (a) is the applicable section in determining whether a minimum sentence should be imposed on 16 and 17 year olds. Cachalia J explained the difference between s 53 (1) (a) and (b)

‘The distinction between 51(3) (a) and 51(3)(b) lies in the nature of the discretion which the Court has when considering the two classes of offenders. In the former case the Court should ordinarily impose the prescribed sentence unless there is some weighty justification for the imposition of a lesser sentence. The legislature has therefore limited the discretion of the Court to depart from the minimum sentence. In the latter case there is no reference at all to substantial and compelling circumstances. The express wording of the section only requires a court to justify its decision to impose the prescribed sentence by entering its reasons on the record. **It does not limit the Court’s discretion to impose an appropriate sentence on a child between the ages of 16 and 18**’¹⁴⁵

The implication of the Blaauw and Nkosi conclusion is that ‘a court was not obliged to impose a minimum sentence, unless satisfied that the circumstances indeed justified the imposition of such a sentence’.¹⁴⁶ The wording of s 51(3) (b) imposes an administrative duty on a court imposing a minimum sentence on a 16 or 17 year old in

¹⁴⁴ *Nkosi supra* n 142 at 141 A - E

¹⁴⁵ at 141 F - I

¹⁴⁶ Article 40 ‘Do minimum sentences apply to Juveniles? the Supreme Court of Appeal rules ‘No’’ at 1 vol 7 Number 1 May 2005

that the court must enter on the record of the proceedings its reasons for the imposition of such a sentence.

A different conclusion was reached in *Direkteur van Openbare Vervolgings, Transvaal v Makwetsja*.¹⁴⁷ This case concerned an appeal in the Transvaal Provincial Division against a sentence imposed by the trial court where the accused was convicted on a charge of raping a girl child below the age of 16. The accused was 17 years old at the time of committing the offence. The trial court imposed a sentence of five years, wholly suspended for three years on condition that the accused not be convicted of rape again during the suspended sentence and that the accused undergoes psychiatric therapy.

The legal issue before the Appeal Court related to the correct interpretation of s 51(3)(b) of minimum sentence legislation. The question was whether the section applied to 16 and 17 year olds, or whether the interpretation of the section only requires the sentencing court to enter on the record its reasons for imposing a minimum sentence?¹⁴⁸

In its examination of the s 51(3), the court referred to the English version of the Criminal Law Amendment Act.¹⁴⁹ The court found it strange that the legislature would specifically mention and exclude 16 and 17 year old children in section 51(3)(b) and also exclude all children from minimum sentences in section 51(6).

¹⁴⁷ 2004 (2) SACR 1 (T)

¹⁴⁸ *Makwetsja supra* n 120 at 6 D - F

¹⁴⁹ Act 105 of 1997

The Judge referred to the reasoning of the court in *S v Blaauw*¹⁵⁰ and *S v Nkosi*.¹⁵¹ Bertelsmann J considered the meaning of section 51(3) (b) by holistically considering the meaning of s 51. According to the Judge, an interpretation of s 51(1) warrants the conclusion that a life sentence must be imposed subject to subsections (3) and (6).¹⁵² He also added that, a distinction is not made between sections 51(3) (a) and (b) and that in fact the latter follows on from the former.¹⁵³ According to the Judge's interpretation of the section, s 51(3) (a) provides for imposition of a life sentence on an accused convicted in terms of s 51(1) only allowing for deviation from such an extreme sentence where substantial and compelling reasons exist. Section 51(3) (b) follows on from s 51(3) (a) and provides that the sentencing officer must provide reasons for imposing a life sentence on an accused who at the time of the offence was 16 or 17. He reasoned that the fact that the legislature requested reasons to be placed on record for the imposition of a minimum sentence on a 16 or 17 year old accused is further indicative of the fact that the legislature intended to impose minimum sentences on the children who fell into the ambit of the section. He acknowledged that minimum sentences should only be imposed on 16 and 17 where exceptional circumstances exist but added that it does not mean that minimum sentences could never be imposed on 16 and 17 year olds.

The Supreme Court of Appeal resolved the debate in respect of the conflicting interpretation of the applicability of minimum sentence legislation on 16 and 17 year olds in *Brandt v S*.¹⁵⁴ The facts of the case, briefly stated, involved a 17 year old accused found guilty of murder, robbery and attempted robbery. The trial court

¹⁵⁰ *Blaauw supra* n 129

¹⁵¹ *Nkosi supra* n 142

¹⁵² Makwetsja *supra* n 147 at 13 A - B

¹⁵³ *Ibid*

¹⁵⁴ *Brandt supra* n 12

imposed a life sentence. Ponnan AJA referred to the values enshrined in the constitution and held that minimum sentence legislation should be interpreted in light of constitutional values.

The court referred to s 28(2) of the Constitution, which states that the child's best interests are of paramount importance.¹⁵⁵ The court found that the best interests principle warranted the conclusion that 'child offenders are deserving of special attention'.¹⁵⁶ In its determination of the applicability of minimum sentence legislation, the court also referred to the international law and Constitutionally entrenched principle of incarceration as a measure of last resort. The court approvingly quoted academic opinion being that 'the principle that detention is a matter of last resort (and for the shortest appropriate time) is the *leitmotif* of juvenile justice reform'.¹⁵⁷ Those principles are articulated in international law and enshrined in section 28(1)(g) of the Constitution'.¹⁵⁸ Reference was also made to the Bill whereby the court noted that the Bill forbids life imprisonment of children.¹⁵⁹

The court reasoned that

'if the notional starting point for the category of offender envisaged in subsection 3 (b) is that the minimum prescribed sentence is applicable, as the majority of the court *a quo* and the full bench in *Makwetsja* suggest, then imprisonment (the prescribed sentence)¹⁶⁰ would be a first resort for children aged 16 and 17 years in respect of offences covered by the Act instead of a last resort.'

¹⁵⁵ *Brandt supra* n 12 at 6 para E - F

¹⁵⁶ at 6 para F - G

¹⁵⁷ at 7 para F - G citing J Sloth-Nielsen 'The role of international human rights law in the development of South Africa's legislation on juvenile justice' 2001 (1) 5 *Law, Democracy and Development*

¹⁵⁸ at 7 para F - G

¹⁵⁹ at 8 para D - E

¹⁶⁰ at 8 para E - F

The court found that if the majority judgement in *Makwetsja* was followed, then the sentencing court would have no alternative but to impose a minimum sentence unless the accused could convince the court, that *substantial* and *compelling* reasons exists which allow the court to depart from the prescribed sentence.¹⁶¹ Ponnan AJA further added that on the reasoning of the court in *Makwetsja*, the child accused would be burdened in the same way as an adult accused.¹⁶² The principle of last resort and for the shortest period would therefore be infringed if *Makwetsja* was followed.¹⁶³ Such an interpretation would also be in conflict with the principles of proportionality and individualisation.¹⁶⁴ The judge referred to dicta of the European Court of Human Rights in the case of *V v United Kingdom*¹⁶⁵ in support of his conclusions regarding the principles of incarceration as a last resort for the shortest period, proportionality and individualisation. The court concluded that *Blaauw* and *Nkosi* approach was therefore the preferable approach.

The issue of sentencing child offenders was again dealt with in *Director of Public Prosecutions v P*.¹⁶⁶ This judgement in this case is disappointing and confusing. Though Mthiyane JA in many respects reiterated the reasoning of the court in *Brandt*, he nevertheless increased the sentence imposed by the trial court from a postponed sentence to a suspended sentence. As in *Brandt*, the court in *DPP v P*¹⁶⁷ referred to Constitutional and International principles. The court found rule 5(1) of the Beijing rules applicable in respect of the case before it. These rules refer to the principle of

¹⁶¹ at 8 F - H

¹⁶² at 8 H - I

¹⁶³ *Ibid.*

¹⁶⁴ at 9 A - B

¹⁶⁵ *V supra* n 137

¹⁶⁶ *supra* n 99

¹⁶⁷ *Ibid*

proportionality in respect of the competing rights of the accused, society and the gravity of the crime.

The court also referred to a discussion paper released by the South African Law Commission Project Committee on Juvenile Justice.¹⁶⁸ The court noted that even though the committee overwhelmingly supported the principle of incarceration as a matter of last resort, it also recommended that imprisonment could be imposed upon children who have been convicted of serious and violent offences, in line with Beijing rule 17 (1) (c).¹⁶⁹ In terms of the dicta of the court, constitutional and international law allows for the incarceration of children in certain circumstances.¹⁷⁰ However, such incarceration is subject to the provision that the child be incarcerated for the shortest period of time and be kept separately from adults.¹⁷¹ In support of its argument that despite the principle of incarceration as a last resort and subject to the protection of detention being for the shortest period of time, the court referred to the Bulgar¹⁷² case, where two ten year old boys were sentenced to direct imprisonment for the brutal killing of a 2 year old child. Terblanche¹⁷³ criticises the court for referring to the House of Lords decision, and not the decision of the European Court of Human Rights, which was referred to in *Brandt*.¹⁷⁴

¹⁶⁸ South African Law Commission *supra* n 1

¹⁶⁹ *DPP v P supra* n 99 at 14 para 18

¹⁷⁰ n 99 at 13

¹⁷¹ n 99 at 15

¹⁷² [1997] ALL ER 97

¹⁷³ S S Terblanch 'Sentencing a child who murders – *DPP, KwaZulu Natal v P* (2006) 1 SACR 243 (SCA) (2007) 2 SACJ at 243

¹⁷⁴ *Brandt supra* n 12

In *DPP v P*, a 12 year old girl arranged for the brutal killing of her grandmother. The court, in great detail, described the heinous nature of the crime.¹⁷⁵ The court found that in considering the aggravating factors, the imprisonment of the accused could be the only just punishment.¹⁷⁶ The Judge went on to add that he would have imposed direct imprisonment had he been the trial judge¹⁷⁷ but that it was now too late to impose direct imprisonment.¹⁷⁸

The conclusion that can be drawn from the judgment in *DPP v P* is that the constitutional and international principle of incarceration of children should be employed, as a measure of last resort must be adhered to. However, the mere existence of the principle does not mean that a prison sentence could never be imposed on a child. Both constitutional and international law have made provision for circumstances where a child could be incarcerated and in taking into account the special circumstances regarding the child accused, have included the protection clauses of incarceration for the shortest period of time and separation of child and adult accused.

The judgment in *DPP v P* has been subjected to academic criticism.¹⁷⁹ Skelton asserts that Mthiyane AJA, sent out a confusing message in that the principles laid down in *Brandt* were supported and yet ‘a ringingly clear enunciation of imprisonment as a

¹⁷⁵ The accused approached two men and requested that they kill her grandmother. She promised the men that in return, she would provided them with valuables from the home of the deceased. the deceased was killed in a brutal manner, first she was strangled and then her throat was slit with knives provided by the accused. The accused then telephoned her boyfriend and tried to manufacture an alibi. The men were convicted of the murder and sentenced to 25 years imprisonment. The accused on the other hand received a postponed sentence.

¹⁷⁶ *DPP v P supra* n 99 at 124 para 21

¹⁷⁷ n 99 at 18 para 23

¹⁷⁸ n 99 at 20 para 26

¹⁷⁹ A Skelton *op cit* n 53

measure of last resort which was reflected in the judgement of the court *a quo*¹⁸⁰ was not reflected in the Appeal. Skelton also voiced her disappointment at the court's detraction from the principles laid down in *S v Z*, which states that a suspended sentence should not be imposed where the court considers a prison sentence would not have been imposed.¹⁸¹

Another disappointing aspect of this case stems from the enormous impact of unexplained statements made by the judge, particularly with regard to the statement that he would have 'seriously considered imposing a sentence of imprisonment'¹⁸² had he been the judge in the court *a quo* and that 'it is too late to impose a sentence of direct imprisonment'. It appears from the judge's statement that he considers it appropriate to impose direct imprisonment on a child who committed a crime at the age of 12. It is irresponsible of the judge to send out such a confusing message given the vast media attention that this case attracted,¹⁸³ without laying a basis for such a statement. The court should have clarified whether it is permissible to incarcerate 12 year olds and if so, under what circumstances, factors to be taken into account when imposing a prison sentence on a 12 year old and a maximum period of imprisonment.

The court paid great attention to the heinous nature of the crime before alluding to the fact that imprisonment could have been imposed in this case. A better approach would have been to explore whether imprisonment was a measure of last resort in *DPP v P*. The difficulty in ascertaining when incarceration is a matter of last resort is articulated by Terblanche, who states that

¹⁸⁰ *Ibid*

¹⁸¹ *Ibid*

¹⁸² *DPP v P supra* n 99 at 18 para 23

¹⁸³ Terblanche *op cit* n 173 at 250

‘at present in South Africa, determining whether imprisonment has become unavoidable is squarely within the discretion of the sentencer. Currently this discretion is largely unguided. As can be seen from *DPP v P*, the observer of the court’s judgement simply does not know which factors would or could have swayed this case over the ‘last resort’ threshold’.¹⁸⁴

Similarly, Terblanche adds that the standard relating to the ‘shortest period of time principle, is also a subjective one.

In *DPP v P*, the court missed a golden opportunity to extend the sentencing guidelines laid down in *S v Z*, by providing guidelines of factors to be taken into account in determining when imprisonment is a measure of last resort. The suspended sentence¹⁸⁵ imposed by the court would have been more credible if it could have been justified in terms of sentence falling within the ambit of the sentence being a measure of last resort, as determined by the guidelines.

Minimum sentence legislation negates the principle of detention as a measure of last resort and is another example succumbing to public pressure. The numerous debates surrounding the Child Justice Bill proves that there is a clear divide between adhering to constitutional and international law that of succumbing to public opinion. When the Bill was originally introduced to parliament it was void of any minimum sentence legislation. In fact the South African Law Reform Commission vehemently opposed the application of Act 105 of 1997 to juveniles. Despite such opposition, it is clear from debates in parliament that there is an intention to include minimum sentence

¹⁸⁴ Terblanche *op cit* n 173 at 252

¹⁸⁵ A suspended sentence has serious implications for the accused as she will be imprisoned if she deviates from the terms of her suspended sentence.

legislation in the Child Justice Bill and furthermore ‘exclude diversion on a charge of rape for 16 and 17 year olds’.¹⁸⁶ Even more disturbing is the reluctance of the portfolio committee to completely outlaw the pre-trial detention of children below the age of fourteen.¹⁸⁷ It is ironic that the Child Justice Bill should include (in contravention of original intentions) such harsh provisions which are completely out of line with international law and the Constitution and which clearly reflects a move away from regarding the child as an individual.

It is apparent from the cases mentioned in this chapter, that in determining an appropriate sentence for the child offender, the court must take into account the principles of proportionality, individualisation, the best interests of the child, and impose a punishment which is in accordance with the principle of imprisonment as a measure of last resort and for the shortest time possible.¹⁸⁸

Despite the confusing judgment in the case of *DPP v P*, the later judgment of *Gagu v S*,¹⁸⁹ reaffirms the principles laid down in *Brandt*. The court approvingly quoted the *Brandt* dicta, which states that the ‘substantial and compelling’ criteria is not applicable to 16 and 17 year olds, therefore giving the court the discretion to apply the usual sentencing criteria in determining an appropriate sentence for 16 and 17 year olds.¹⁹⁰

Despite national and international legislation strongly supporting the principle of detention as measure of last resort and the a strong judicial move in respect of

¹⁸⁶ L Ehlers *op cit* n 43 at 8

¹⁸⁷ L Ehlers *op cit* n 43 at 7

¹⁸⁸ *Brandt supra* n 12 at 8

¹⁸⁹ Case number 416/04. 9 March 2006 (Reportable) received from Community Law Center

¹⁹⁰ *Ibid*

adhering to the principle of incarceration as a measure of last resort, statistical data shows that, in reality, this principle is not adhered to. Between 1996 and 1999, the amount of awaiting trial prisoners increased by 358%.¹⁹¹ Furthermore, despite legislation prohibiting the pre-trial detention of children below the age 14, a list of names provided by the Judicial Inspectorate of prisons indicate that on 7 March 2006, 3 children below the age of 14 were awaiting trial in prison.¹⁹² Also negating the principle of detention as measure of last resort is the fact that on 7 March 2006 ‘21 unsentenced children were held for over one year and one child had been held awaiting trial in prison for 1922 days – over five years.’¹⁹³

Possible explanations for the flagrant disregard of the principle of detention as a last resort could be a poor or non existent infrastructure to accommodate national and international legislation. It is not enough to include provisions in legislation which state that juveniles below the age of 14 awaiting trial should not be held in prison without making available suitable, sufficient and secure care facilities for juveniles who cannot be released into the care of a parent or guardian. The practical reality in South Africa is that many children are orphans and homeless and therefore if charged with committing offence such children will not be released as the prosecution may legitimately fear that the child will abscond. Furthermore, ‘inconsistent use by magistrates of the above amendments (s29 of the Correctional Services Act) has resulted in inappropriate placements of children’.¹⁹⁴

¹⁹¹ C Nevill and A Dissel ‘Children Awaiting Trial in Prison: Reversing the Trends’ (2006) Vol 8 No 1 *Article 40* pg 2

¹⁹² C Nevill *op cit* n 191 at 5

¹⁹³ *Ibid*

¹⁹⁴ C Nevill *op cit* n 191 at 1

Juvenile Justice is still a young and developing system of justice. Mechanisms must be put in place to ensure its successful development within South African law. One of the ways to accomplish such a goal would be by training and educating magistrates and prosecutors in applying national and international legislation pertaining to children. The principle of incarceration as a last resort should not only be adhered to at the sentencing phase of the judicial process or by chance on review of a decision made by a lower court as this principle should be adhered to at the very start of the criminal process.

The influence of the judiciary in shaping juvenile sentencing practises by imposing alternative punishments to imprisonment is considered in the following chapter. The discussion of alternative forms of punishment clearly portrays the importance of pre-sentence reports, as without it the judicial officer would experience difficulty in deciding upon a just sentence, which is both in the interest of the community and the child. Furthermore, the fact that there is a clear move by the judiciary to impose sentences other than prison sentences thereby indicating the propensity of the judiciary to give effect to the principle of incarceration as a measure of last resort and for the shortest appropriate period.

5. ALTERNATIVE SENTENCING

5. International instruments and policies

Article 40(3) (b) of the CRC, requires that state parties impose sentences other than imprisonment when punishing a juvenile offender. Alternative sentencing options are also provided for in s18 of the Beijing Rules, which state that:

18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalisation to the greatest extent possible. Such measures, some of which may be combined, include:

- (a) Care, guidance and supervision orders;
- (b) Probation;
- (c) Community service orders;
- (d) Financial penalties, compensation and restitution;
- (e) Intermediate treatment and other treatment orders;
- (f) Orders to participate in group counselling and similar activities;
- (g) Orders concerning foster care, living communities or other educational settings;
- (h) Other relevant orders.

18.2 No juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary.

The commentary to the Beijing Rules informs that the alternative sentencing options as provided for in s 18 (1) of the rules, have been successfully employed in foreign jurisdictions. However, the drafters of the rule acknowledged that the resources may not be the same in all countries and therefore the rules are stated in general terms, allowing state parties to decide on the monetary resources it makes available to alternative sentencing dispositions. Lack of resources should not be used as a convenient excuse to avoid implementing alternative sentencing options and should not on its own be a justification for failure to implement policies which give effect to

sentencing options which do not include a residential component. While constraints and competing priorities of third world countries are acknowledged, creative approaches should be adopted to counter these problems.

An innovative approach adopted in South Africa is a good example of dealing with budget constraints. A cost analysis of the draft proposals listed in the 1998 Discussion paper was requested by the South African Law Commission.¹⁹⁵ A report known as the AFReC report¹⁹⁶ was produced by economists and provided a cost analysis of the proposals contained in the discussion paper.¹⁹⁷ The report provided that South Africa would make huge monetary savings if the proposals of the discussion paper were implemented.¹⁹⁸ One of the proposals in the discussion involved introducing a preliminary enquiry in respect of child offenders. The purpose of the preliminary enquiry is to determine whether the criminal court process can be avoided and if not 'determine the release or placement of the accused'.¹⁹⁹ The novel idea of the preliminary enquiry would have a domino effect in cost savings as the preliminary enquiry would result in

'the increased use of diversion, lower court case loads, less recourse to detention facilities (both prisons and welfare places of safety), and less police expenditure on transporting children between places of safety, prisons and courts pending finalisation of their trials'²⁰⁰

¹⁹⁵ J Sloth-Nielsen 'The business of child justice' (2003) *Acta Juridica* 175 at 184

¹⁹⁶ J Sloth-Nielsen *op cit* n 195 referring to C Barberton and J Stuart 'Costing the implementation of the Child Justice Bill: A scenario analysis' AFReC Research Monograph No 14, November 1999. C Barberton 'Costing Child Justice' (2002) 2(1) *Article 40 4*; C Barberton 'Re-allocating expenditure to implement the draft Child Justice Bill' (2002) 2(2) *Article 40 4*.

¹⁹⁷ J Sloth-Nielsen *op cit* n 195 at 184

¹⁹⁸ *Ibid*

¹⁹⁹ s 25 (2)(h) of the Child Justice Bill. The purpose of the preliminary enquiry is provided for in s 25 (3).

²⁰⁰ J Sloth-Nielsen *op cit* n 195 at 184

The point made, is that every aspect of the criminal justice system has cost implications, which include costs flowing from imprisonment. It is therefore imperative to compare the cost of imprisonment to that of alternative sentencing and develop sentencing options which reflect a balanced approach in respect of the different needs of a particular country.

Similarly the commentary to the Beijing rules also discusses s 18 (2). Section 18(2) highlights the importance of involving the family in the task of punishing the child offender. The drafters of the s18 have taken an interesting approach to punishing child offenders by according joint responsibility for the successful implementation and completion of punishment for the child accused to the state, family and community. Parents have the responsibility to supervise the punishment of their children. The involvement of the state, family and community in punishment is praiseworthy and gives effect to the saying 'my child is your child', making the development of the child into a healthy member of society a societal responsibility. One accepts, however, the successful implementation of s 18 (2) in a South African context is questionable in light of domestic problems such as poverty, alcohol abuse and family violence.

It will be seen from the discussion below that the existence of alternative forms of sentencing is not a new phenomenon in South African Law. However, it will also be seen that alternative sentencing options have not always been employed, contributing to overcrowding in prisons.²⁰¹ According to the 2005/2006 annual report by the inspectorate of prisons, 'while 74 prisons had less than 100% occupation, 161 exceeded 100% occupation with 72 having more than 150% including 38 with more

²⁰¹ Judicial Inspectorate of Prisons Annual report 2005/2006.

than 175%'.²⁰² The statistics provided by the Judicial Inspectorate apply to the prison population as a whole but is worth mentioning as overcrowding in prisons impact on all detainees including children. A tendency by the judiciary to impose alternative sentences to incarceration is evident from recent judgements, which will be elaborated on further below.

5.2 South African legislation

A wide range of alternative sentencing options are provided for in various sections of the Criminal Procedure Act, 51 of 1977. The relevant sections of the Act dealing with alternative sentencing options are s276 (1)(h), s276 (1)(i), s276A (3)(a), s287 (4)(a) s287 (4) (b), s290, s296 and s297. These provisions are attached hereto as Appendix 'C'.

Section 276(1)(h) governs the situation where the accused receives a sentence of correctional supervision, serving the entire sentence at home without any period of imprisonment. Section 276(1)(i) also pertains to correctional supervision but can be differentiated from s 276(1)(h) in that the accused serves part of the sentence in a prison facility while the remainder of the sentence is served at home under correctional supervision. Sections 276 A (3)(a), 287 (4)(a) and 287(4)(b) deal with the conversion of a sentence of either imprisonment or a fine or both to a period of correctional supervision. Section 290 provides that offenders below the age of 18 can be placed under the supervision of a probation officer, correctional officer, other court appointed official or be sent to reform school. Section 296 governs the situation where the offender is sentenced to detention at a drug treatment centre. Section 297 provides

²⁰² Judicial Inspectorate of Prisons *op cit* n 201 at 17

for further alternatives to incarceration, which include a postponed sentence, suspended sentence, community service or discharging the person with a caution or reprimand. Section 290 is only applicable to offenders below the age of 18 since an age limit is provided for in the section. The rest of the alternative sentencing options mentioned herein are applicable to child and adult offenders.

Skelton is of the view that the alternative sentencing options provided for in the Criminal Procedure Act are 'revolutionary'.²⁰³ She points out that ss 276A (3)(a) and 287 (4)(b), 'allow the judicial officer to change his or her own sentence, which is contrary to the general rule of sentencing.'²⁰⁴ She furthermore notes that s287(4)(a) allows the Commissioner, without recourse to the court, to convert a sentence of imprisonment to that of correctional supervision.²⁰⁵

Alternative sentencing options are not tied to specific offences, thereby giving the sentencing officer the discretion of deciding an appropriate sentence. However, the discretion of the sentencing officer has been limited by the introduction of minimum sentence legislation.²⁰⁶

The Bill provides a host of alternative sentencing options. The alternative sentencing options available in the Bill include and extend options available in the Criminal Procedure Act.²⁰⁷

²⁰³ A Skelton 'Alternative sentencing review' *CSPRI Research Paper Series*, No 6 May 2004 at 10

²⁰⁴ *Ibid*

²⁰⁵ *Ibid*

²⁰⁶ Skelton *op cit* n 203 at 11

²⁰⁷ Skelton *op cit* n 203 at 12

Sentencing provisions are dealt with in ss 61 to 72 of the Bill. The purpose of the sentencing provisions is to ensure the

‘child understands the implications of and be accountable for the harm caused’,²⁰⁸ ‘promote an individualised response which is appropriate to the child’s circumstances and proportionate to the circumstances surrounding the offence’²⁰⁹, ‘promote the reintegration of the child into the family and community’²¹⁰ and to ‘ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration’.²¹¹

The Bill makes provision for four sentencing options, available to the sentencing officer. Section 64 provides for community-based sentences, which simultaneously allows the child to remain in the community and carry out the terms of the punishment. Included in the options available to the sentencing officer are options which would normally be available to an accused had the matter been diverted,²¹² such as counselling, attendance at an educational centre or providing a service to the community without remuneration. Restorative justice options are dealt with in s 65 of the Bill. The restorative justice options available include sending the child for family group conferencing or victim-offender mediation.

²⁰⁸ S63 (a) of the Child Justice Bill

²⁰⁹ s 63(b)

²¹⁰ s63(c)

²¹¹ s63(d)

²¹²The section referred to is found at s47 of the Bill which discusses diversion options. Diversion is not really applicable to the sentencing arena except in so far as it is mentioned in respect of community-based options. The objective of diversion is its employment prior to the trial allowing the child accused to be diverted out of the system long before the sentencing phase. Mbambo argues that ‘ Diversion can be understood as the channelling of children into a appropriate reintegrative programmes and services, where the intervention of the formal court system is not necessary. If the child acknowledges responsibility for the wrongdoing, he or she can be diverted to an appropriate programme, thereby avoiding the stigmatising and even brutalising effects of the criminal justice system. diversion gives children a chance to avoid a criminal record...’ B Mbambo ‘Diversion: A Central feature of the New Child Justice Bill’ Ch 7 pg 76 in *Beyond retribution: prospects for restorative justice in South Africa* found at

http://www.iss.co.za/index.php?link_id=3&slink_id=352&link_type=12&slink_type=12&tmpl_id=3
[Accessed 12 September 2006]

The third alternative, as provided for in s66, available to the sentencing officer involves sentencing the child to correctional supervision.²¹³ The fourth alternative to imprisonment is dealt with in s66 of the Bill, which provides for a sentence, which involving a residential option such as a reformatory school.²¹⁴ Section 69 of the Bill deals with imprisonment, which is imposed as a measure of last resort.

Despite the provision of alternative sentences, Sloth-Nielsen reports shocking statistics in respect of children admitted to prisons.²¹⁵ The statistics provide that for the 1998/1999 period, 4630 children were sentenced to imprisonment.²¹⁶ The number of children serving prison sentences increased by 158.67% between 1995 and 2000.²¹⁷ Furthermore, in 1999 there were 239 children serving sentences of 5 years or more and 58 children serving sentences of 10 years or more.²¹⁸ More than 50% of the children sentenced to imprisonment were convicted of property crimes, 30.8% for violent offences, 14.5% for sexual offences, 0.7% for drug related offences and 3.4% for other offences²¹⁹. As at 31 December 2005, there are '2354 children under the age of 18 in prison, 12 are under the age of 14. 1217 of them are awaiting trial, 1137 are

²¹³ However, the effectiveness and the resources available for correctional supervision sentencing is questioned. In the case of the *DPP v P*, referred to in n 88 above, the court criticised the correctional supervision services as..... one therefore foresees problems in future as in the past with the implementation of correctional supervision as without proper resources the community will become increasingly disgruntled with sentencing involving correctional supervision.

²¹⁴ Once again the practical ability of the State to accommodate the residential option alternative to imprisonment must be questioned. In the two recent cases, which was heard in the Natal Provincial Division, involved two children found guilty of property crimes. The Magistrate sentenced the children to reform school. An urgent special review was brought before the Natal High Court, by the time of the, the children had spent 22 months in prison awaiting transfer to a reformatory school facility. The learned Judge provided a practical interim solution to the danger of the child languishing awaiting a place at a reform school by suggesting that administrative structures be put in place to monitor whether the child has been sent to a reform school. While the suggestion provided by the learned Judge is welcomed, one doubts whether the human and financial resources are available to meet the requirements of the suggestion.

²¹⁵ J Sloth-Nielsen *Juvenile justice Review 1999 – 2000* pg 10

²¹⁶ Sloth-Nielsen *op cit* n 215 at

²¹⁷ *Ibid*

²¹⁸ *Ibid*

²¹⁹ *Ibid*

serving sentences'.²²⁰ The latest statistics obtained from the department of Correctional Supervision indicate that for the 2006/2007 year, 2020 children are currently in a prison facility.²²¹ The statistics further indicate that 853 have been sentenced to imprisonment, while 1167 children are being detained while awaiting trial.

The above statistics detailing the number of children in prisons show that there has been a decline in the incarceration of the child prison population. The possibility exists that the courts are increasingly employing alternative sentencing options. Despite the decline in the amount of child prisoners, 2020 incarcerated children remains an unacceptably high number. The statistics indicate that alternative sentencing options are not employed nearly as much as it should be, specifically at the pre-trial stage, in view of the fact that 1167 children are currently being detained while awaiting trial.

Though the statistics are still not in accordance with constitutional and international principles, it has recently been seen in the case law that there is a trend amongst the judiciary to refrain from imposing prison sentences. It will also be seen from the case law that the change in mindset by the judiciary, was influenced by both international

²²⁰ Judicial Inspectorate of prisons *op cit* n 201

²²¹ Department of Correctional Supervision <http://www.dcs.go.za/WebStatistics/>

instruments the Bill. The Courts have attempted to pay deference to the intentions of the Bill as far as possible by not imposing prison sentences and by rather choosing one of the alternatives to imprisonment.

5.3 South African case law on alternative sentencing options

It is evident from the case law that there has been a change in the judiciary's attitude towards imprisonment of children. While youthfulness has always been regarded as a mitigating factor in sentencing child offenders, the effect of youthfulness did not necessarily save the child from incarceration. Instead, youthfulness has in the past been employed as a justification against long term imprisonment.²²²

In *S v Machasa*,²²³ the accuseds were convicted of the gruesome murder of a policeman. The attack and subsequent killing was politically motivated. Three of the accused were above the age of 18, while two accused were 16 and 17 years old at the time the offence was committed. The trial court imposed a death sentence on the three accuseds who were above the age of 18 and imposed a sentence of 20 years on the juveniles. The trial court could not impose the death sentence on the juveniles because section 277(5)(a) of the Criminal Procedure Act prohibited such a sentence in respect of juveniles.²²⁴

The court of Appeal found that when imposing sentence the trial court was particularly swayed by the gruesomeness of the offence and by the 'inherently

²²² *S v Machasa en Andere* 1991 (2) SACR 308 (A)

²²³ *Machasa supra* n 222

²²⁴ 318 D - E

wicked' attitude of the juveniles.²²⁵ However, the Appeal court was not convinced that children below the age of 18 had the ability to be 'inherently wicked' and instead reasoned the juvenile accused may have been negatively influenced, due to their youth and immaturity. The Appeal court cautioned against imposing a long term prison sentence on the juveniles advancing the reason that the negative effect of a long term prison sentence on the development of the child into an adult should be avoided.²²⁶ The Appeal court therefore reduced the juvenile's sentence from 20 years to 10 years for the 17 year old and 8 years for the 16 year old.

This case clearly indicates that the age of the accused influenced the courts decision in respect of the change in sentence. However, the court still imposed a prison sentence on the juvenile despite their age. It is also clear from this case that youth was only considered as a mitigating factor in so far as the length of the prison sentence was concerned and not in respect of imposing an alternative sentence to imprisonment.

The change in attitude of the judiciary in respect of imposing imprisonment can be seen in the case of *S v T*.²²⁷ In this case the accused was convicted of assault with the intention to do grievous bodily harm, having stabbed the complainant twice with a knife. The magistrate sentenced the accused to 12 months imprisonment despite a presentence report recommending a suspended sentence. The magistrate refused to impose a suspended sentence largely because the accused was considered to be 'living the life of an adult'.²²⁸ The Appeal court was of the view that the magistrate was mistaken in finding that a prison sentence was appropriate sentence because the

²²⁵ 318 E - F

²²⁶ 318 H - J

²²⁷ 1993 (1) SACR 468 (C)

²²⁸ *S v T supra* n 227 at 469 F - G

juvenile lived like an adult. The Appeal court decided to reconsider the sentence imposed and requested another pre-sentence report. However, the court found that the second report was not favourable to the accused.²²⁹ It is disappointing that the court failed to provide reasons as to why the second report is not in the accused's favour. However, despite the unfavourable report the, court set aside the sentence of imprisonment and instead imposed a sentence of correctional supervision in terms of s 276(1)(i) of the Criminal Procedure Act, 51 of 1977, which allows for part of the sentence to be served in prison and the remainder at home under correctional supervision.²³⁰

S v T reflects a change in sentencing tendencies which is further bolstered in the case of *S v D*.²³¹ In the case of *S v D*, the accused, a 16 year old, was convicted of raping a 22 year old woman. The trial court imposed a sentence of six years imprisonment, reasoning that the punishment was suitable considering the crime committed.²³² In determining the suitability of the crime, the trial court considered the personal circumstances of the accused as presented by the accused's legal representative.²³³ The legal representative informed the court of the accused's age, that he was unmarried, had no previous convictions and was attending school.²³⁴ A pre-sentence report was not provided.

The court of Appeal was not satisfied with the manner in which the trial court determined the appropriateness of the sentence. The Appeal court found that evidence

²²⁹ At 469 I - J

²³⁰ At 470 E

²³¹ 1999 (1) SACR 122 (NC)

²³² *S v T supra* n 22704 at 124 F - G

²³³ *Ibid*

²³⁴ *Ibid*

in respect of the personal circumstance was not sufficient for the trial court to determine an appropriate sentence. The Appeal court held that when sentencing a juvenile, the starting point cannot be that the crime was so serious that it warrants an incarceration of the juvenile.²³⁵ The court also added that such reasoning can definitely not be supported if a pre-sentence report was not provided to the court.²³⁶

Buyes J quoted dicta of former courts in which it was held that

‘... a view which is widely held and which I share, is that it is an advantage to the delinquent and to the community that a young man who is a first offender should not have to go to gaol if it can legitimately be avoided, because he is likely to come of the gaol a worse character than when he went in’²³⁷

The court recognised that in appropriate cases juveniles could be sentenced to imprisonment.²³⁸ However, the court questioned the determination of when a prison sentence is appropriate.²³⁹ The court held that a good starting point in determining the appropriateness of a sentence would be by obtaining a pre-sentence report.²⁴⁰ The court therefore held that the trial court did not have sufficient information before it to determine an appropriate sentence and therefore referred the matter back to the trial court for reconsideration of the sentence.

It is clear from the case of *S v D* that prison sentences for juvenile should be avoided except where the court, on evidence in the form of a pre-sentence report, considers imprisonment of the juvenile to be an appropriate sentence.

²³⁵ At para 124 I - J

²³⁶ *Ibid*

²³⁷ Buyes J quoting *S v Muller* 1962 (4) SA 77 (N) at 78 G – H and *Persadh v R* 1944 NPA 357 at 358

²³⁸ *S v D* supra at 358 E - G

²³⁹ *Ibid*

²⁴⁰ *Ibid*

Alternative sentences were endorsed by the Constitutional Court in *S v Williams*.²⁴¹ *Williams* can be distinguished from cases already mentioned in this section as this case dealt with whipping as a punishment. However, the noteworthy dicta of the Constitutional Court in respect of alternative forms of punishment must be mentioned as it sets the tone for many later decisions. The State argued that whipping was the best alternative punishment to imprisonment.²⁴² The State further argued that South Africa did not have the physical and human resources to impose any of the other alternatives to imprisonment as mentioned in the Criminal Procedure Act.²⁴³

Langa J had the following to say in response to the State's argument that whipping was the best alternative to imprisonment:

'In keeping with International trends, there has been a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind. The introduction of correctional supervision with its prime focus on rehabilitation, through s276 of the Act, was a milestone in the process of 'humanising' the criminal system. It brought along the possibility of several imaginative sentences, including but not limited to, house arrest, monitoring, community service and placement in employment. This assisted in the shift of emphasis from retribution to rehabilitation.'²⁴⁴

Langa J went on to add that 'to hand is a growing interest in moves to develop a new juvenile system. This impacts directly on the availability of sentencing options for juveniles.'²⁴⁵ The Constitutional court voiced its support for alternative sentencing

²⁴¹ *supra* n 21

²⁴² *Williams supra* n 21 at 63

²⁴³ *Ibid*

²⁴⁴ *Williams supra* n 21 at 68

²⁴⁵ *Ibid*

options in the *Williams* case when it found that the punishment imposed by whipping was not in line with Constitutional principles.

The limitations on physical and human resources were also mentioned but the Constitutional Courts response to limited resources was that

‘to the extent that facilities and physical resources may not always be adequate, it seems that the new dynamic should be regarded as a timely challenge to the State to ensure the provision and execution of an effective juvenile system. The wider range of penalties now provided for in the Act permits a more flexible but effective approach in dealing with juvenile offenders’.²⁴⁶

This endorses the Constitutional Court’s support for ‘legal and systemic reform with regard to children in the criminal justice system’.²⁴⁷ The dicta of the court further indicates that excuses such as limited resources would not be easily allowed by the court as it would hinder the reform process. Interestingly, the sentiment of the constitutional court in respect of reform in the criminal justice system has been reinforced by the AFReC report, which found that huge monetary savings would be made if the Bill were implemented.

The *Director of Public Prosecutions v P*²⁴⁸ is a recent, albeit weak example of the court choosing to impose an alternative sentence to imprisonment. In the case of *DPP v P*, the court imposed a suspended prison term of seven years suspended for five

²⁴⁶ *Williams supra* n 21 at para 74

²⁴⁷ *Skelton op cit* n 53

²⁴⁸ *DPP v P supra* n 99

years, despite the heinous nature of crime. The dicta of the court in this case is very confusing as the court gives the impression that imprisonment would have been an appropriate sentence. Nevertheless, imprisonment was avoided by the imposition of a suspended sentence, which arguably amounts to a prison sentence.

In the recent case known as 'M',²⁴⁹ the Pietermaritzburg High Court overturned an eight year sentence for murder and sent the case back to the Regional Court for the purposes of a pre-sentence report and a new sentence. M was 13 years old when he stabbed and killed a 14 year old child.²⁵⁰ He was charged with murder and pleaded guilty in the Pietermaritzburg Regional Court and was sentenced to eight years imprisonment.²⁵¹ The Child Law Center appealed against the sentence, and the Appeal court found 'eight years imprisonment for a 13-year-old boy was shockingly inappropriate.'²⁵² On reconsidering the sentence, the regional court imposed a sentence of three years imprisonment suspended for five years.

Skelton asserts that the later sentence imposed by the court is a creative one.²⁵³ In terms of the sentence imposed by the court, a Children's Court enquiry would be opened to determine if 'M' was a child in need of care and possible alternative placements, he would also be placed under the supervision of a probation officer and when requested to do so by the probation officer, he would have to participate in restorative justice process with the family of the deceased and members of the

²⁴⁹ Unreported case, case number RC 979/2004, Natal Provincial Division cited in Skelton *op cit* n 53

²⁵⁰ A Skelton Examining the Age of Criminal capacity Article 40 Vol 8 No 1 July 2006 at 1

²⁵¹ Ibid

²⁵² Skelton *op cit* n 250 at 3

²⁵³ Skelton Update on the case of 'M' A creative sentence Article 40 Volume 8 Number 3 December 2006 at 13

community.²⁵⁴ It is disappointing to note that at the time that the sentence was imposed 'M' had already served two years in prison. Pre-trial detentions is factor that must seriously be attended to and reduced if any value is to be attached to the intentions behind keeping children out of prison by instead imposing alternative sentencing options.

²⁵⁴ Skelton *op cit* n 253 at 13

6. CONCLUSION

This paper has considered the development of juvenile justice sentencing jurisprudence by focussing on case law in light of international and constitutional principles. Three pivotal areas of reform were considered in this paper, namely pre-sentence reports, incarceration as a last resort and for the shortest appropriate period and alternative sentencing. The chapters on pre-sentence reports and incarceration as a last resort for the shortest appropriate period were drawn together in the chapter discussing alternative sentences, since pre-sentence reports and incarceration as a last resort impact on alternative sentences.

It was evident from the case law considered that one system of law, the Criminal Procedure Act, governs child and adult offenders alike. It was also evident from the case law that this system of law is not effective in dealing with children in trouble with the law thereby forcing the judiciary to create child centred jurisprudence which takes into account the needs of the child in the sentencing process. It was also evident that constitutional and international law and the Bill have been increasingly influential in developing the mindset of the judiciary. Various cases have specifically referred to the Bill in the course of their judgements.²⁵⁵ The judiciary has therefore been forced to perform while Parliament has been dragging its feet in passing the Child Justice Bill. Despite delay by Parliament in passing the Bill, itss transcended Parliament and has made its mark in the case law.

²⁵⁵ see Kwalase *supra* n 12 and Nkosi *supra* n 142

The delay in implementing the Bill is disappointing especially since the legislature is aware that the Bill creates a much needed separate criminal justice system for children. In his opening address to Parliament the first democratic President of South Africa stressed the importance of reforming the criminal justice system in respect of juvenile offenders. Various important political leaders attended seminars on assisting children who had found their way into the criminal justice system.

It obviously recognised that far too many South African children were entering the criminal system hence the initial priority attached to reforming the criminal justice system and in so far as possible keeping children out of prison. However, the initial enthusiasm in the reforming child justice appears to have been pushed aside and one can only surmise, since there is no other plausible excuse for the delay in passing the legislation, replaced with a new agenda of satisfying the voting population.

One therefore wonders how the government intends upholding its promises of transformation in a democratic South Africa, when it fails to transform child justice, a product of the oppressive Apartheid regime. The former oppressive regime will remain part of this democratic South Africa for as long as the government fails to implement transformation in child justice. The vicious cycle will continue as children from violent, poverty stricken, gang infested and alcohol abusing neighbourhoods enter the criminal system as first offenders and exit, inevitably to return again, as hardened criminals. It is unacceptable that there are currently 2020 children in prison. These children should be attending school in preparation for their bright future. Sadly, they attend 'universities of crime' in preparation for a life of crime.

The government should be the forerunner in keeping these vulnerable children out of the criminal system. Instead, the judiciary has been shouldering the burden creating a child justice jurisprudence which recognises constitutional and international principles the impact of the oppressive past on the vulnerable youth.

BIBLIOGRAPHY

Primary sources

South African Cases

Brandt v S 2005 (2) SA 1 (SCA).

DPP, KwaZulu-Natal v P 2006 (1) SACR 243 (SCA).

Direkteur van Openbare Vervolgings, Transvaal v Makwetsja 2004 (2) SACR 1 (T).

Gagu v S 2006 (5) SCA.

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

S v Z en Vier Ander Sake 1999(1) SACR 427 (E).

S v M and Another 2005 (1) SACR 481 (E).

S v Peterson en n Ander 2001 (1) SACR 16 (SCA).

S v P 2001 (1) SACR 70 (C).

S v Blaauw 2001 (2) SACR 255.

S v Nkosi 2002 (1) SACR 135 (W).

S v B 2006 (1) SACR 311 (SCA).

S v Williams 1995 BCLR 861 (CC).

S v H and Another 1978 (4) SA

S v Jansen 1975

S v Machasa en Andere 1991 (2) SACR 308 (A)

S v T 1993 (1) SACR 468 (C)

S v D 1999 (1) SACR 122 (NC)

Foreign Cases

Nielsen v Denmark [2000] ECHR

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=nielsen%20%7C%20v%20%7C%20denmark&sessionid=2313567&skin=hudoc-en> accessed 7 September 2006

Hussain v the United Kingdom [1996] ECHR

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=hussain%20%7C%20v%20%7C%20the%20%7C%20united%20%7C%20kingdom&sessionid=2313567&skin=hudoc-en> accessed 10 September 2007

T v the United Kingdom [1999] ECHR 170

South African Legislation

Constitution of South Africa, 1996.

Criminal Procedure Act 51 of 1977.

Criminal Law Amendment Act 105 of 1997

Child Justice Bill B 49 of 2002

Reports and statistics

South African Law Commission report on juvenile justice (2000) project 106

Judicial Inspectorate of Prisons (2006) Annual report 2005 / 2006 Prisoners and Prisons

Department of Correctional Supervision <http://www.dcs.gov.za/WebStatistics/>

accessed 12 September 2007

International instruments and policies

United Nations Convention on the Rights of the Child Resolution 1989 United Nations General Assembly Resolution 44/25.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice 1985 United Nations General Assembly Resolution 40/33.

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty 1990 United Nations General Assembly Resolution 45/113.

Secondary Sources

Books and Articles

Burchell J *Principles of Criminal Law* (2005) Juta and Co Lansdowne

Community Law Centre Report of the international seminar on “children in trouble with the law” held at the Arthur Seat Hotel, Cape Town, South Africa from 15 to 17 October 1993.

Case Note ‘A warning on sentencing in the absence of a probation officers report (again) *S v M and Another* 2005 (1) SACR 481’ (2005) 7 (2) *Article 40* pg 5

Davel, CJ *Introduction to child law in South Africa* (2000) Juta and Co Ltd, Lansdowne

Du Toit C 'Measure of last report' (2006) *SA Crime Quarterly*
http://www.iss.co.za/dynamic/administration/file_manager/file_links/DUTOITCQ17.PDF?link_id=20&slink_id=3744&link_type=12&slink_type=23&tmpl_id=3 accessed 10 September 2007

Ehlers L 'Child Justice: Comparing the South African child justice reform process and experiences of juvenile justice reform in the United States of America' (2006)
Open Society Foundation

Gallinetti J 'What happened to the child justice bill? The process of law reform relating to child offenders' (2006) *SA Crime Quarterly*
http://www.issafrica.org/static/templates/tmpl_html.php?node_id=1782&link_id=3 accessed 10 September 2007

Leading Article 'Do minimum sentences apply to juveniles? The Supreme Court of Appeal rules "No" (2005) 7 (1) *Article 40*

Leading Article 'Lack of reform schools – A most unsatisfactory and undesirable state of affairs' (2006) 8 (2) *Article 40*

Odongo G and Gallinetti J 'The treatment of children in South African Prisons – A Report on the applicable domestic and international minimum standards' CSPRI
Research Paper No.11 November 2005 Cape Town

Pinnock D, Skelton A and Shapiro R 'New juvenile justice legislation for South Africa: Giving children a chance' (1994) *Occasional Paper series 3 – 94*
<http://web.uct.ac.za/depts/sjrp/publicat/newjust.htm> accessed 10 September 2007

Sloth-Nielsen J *The Role of International Law in Juvenile Justice Reform in South Africa* (unpublished Ph D thesis 2001).

Sloth-Nielsen J 'The Role of International Human Rights Law in the Development of South Africa's Legislation on Juvenile Justice' 2001 (1) *Law Democracy and Development* Vol 5. Pg 59 – 83.

Sloth-Nielsen J 'Case reviews on minimum sentences for children' (2001) 3(2) *Article* 40, 1 – 3.

Sloth-Nielsen 'The business of child justice' (2003) *Acta Juridica* 175

Sloth-Nielsen J, Muntingh J L 'Juvenile justice review 1999 - 2000' (2001)
<http://www.sn.ac.apc.org/users/clc/children/jjreview.doc> accessed 19 September 2006

Skelton A *The influence of the theory and practice of restorative justice in South Africa with special reference to child justice* (unpublished Ph D thesis 2005).

Skelton A 'Alternative sentencing review' *CSPRI Research Paper Series*, No 6 May 2004.

Skelton A 'Transforming the youth and justice system' (2005)
<http://www.anc.org.za/ancdocs/pubs/umrabulo/umrabulo14/childjustice.html>
accessed 19 September 2006

Skelton A 'Examining the age of criminal capacity' (2006) 8 (1) *Article 40* pg 1 – 3

Skelton A 'Update on the case of "M" A creative sentence' (2006) 8(3) *Article 40* (3)
pg 13

Terblanche SS ' Sentencing a child who murders – DPP, KwaZulu-Natal v P 2006 (1)
SACR 243 (SCA)' (2007) 2 *SACJ* at 243

Van Bueren G *The international law on the rights of the child* (1995) Netherlands
Kluwer Academic Publishers

APPENDIX A – CRC Provisions

Article 37 provisions:

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time

Article 40 provisions:

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

APPENDIX B – s 51 of the Criminal Law Amendment Act 105 of 1997

51. Minimum sentences for certain serious offences

(1) Notwithstanding any other law but subject to subsections (3) and (6), a High Court shall-

- (a) if it has convicted a person of an offence referred to in Part I of Schedule 2; or
- (b) if the matter has been referred to it under section 52 (1) for sentence after the person concerned has been convicted of an offence referred to in Part I of Schedule 2, sentence the person to imprisonment for life.

(2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court, including a High Court to which a matter has been referred under section 52(1) for sentence, shall in respect of a person who has been convicted of an offence referred to in-

- (a) Part II of Schedule 2, sentence the person, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 15 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;
- (b) Part III of Schedule 2, sentence the person, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 10 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and
- (c) Part IV of Schedule 2, sentence the person, in the case of-
 - (i) a first offender, to imprisonment for a period not less than 5 years;
 - (ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and
 - (iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years;

Provided that the maximum sentence that a regional court may impose in terms of this subsection shall not be more than five years longer than the minimum sentence that it may impose in terms of this subsection

- (3) (a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.
- (b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings.
- (6) The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question.

APPENDIX C – Criminal Procedure Act provisions

S 276(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely –

(h) correctional supervision

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the Commissioner.

S276A (3)(a) Where a person has been sentenced by a court to imprisonment for a period –

(i) not exceeding five years; or

(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act, (Act 8 of 1959) and the regulations made thereunder is not more than five years in the future,

the Commissioner may if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or the registrar of the court, as the case may be, to have the person appear before the court *a quo* in order to reconsider the said sentence.

S 287 (4) Unless the court which has imposed a period of imprisonment as an alternative to a fine has directed otherwise, the Commissioner may in his discretion at the commencement of the alternative punishment or at any point thereafter, if it does not exceed five years –

(a) act as if the person were sentenced to imprisonment as referred to in section 276(1)(i); or

(b) apply in accordance with the provisions of section 276A(3) for the sentence to be reconsidered by the court *a quo*, and thereupon the provisions of section 276A(3) shall apply *mutatis mutandis* to such a case.

S 290

(1) Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence –

(a) order that he be placed under the supervision of a probation officer or a correctional officer; or

(b) order that he be placed in the custody of any suitable person designated in the order; or

(c) deal with him in terms of a and b

(d) order that he be sent to reform school

(2) Any court which sentences a person under the age of eighteen years to a fine, may in addition to imposing such a punishment, deal with him in terms of paragraph (a),(b),(c) or (d)

S 296

(1) A court convicting any person of any offence may, in addition to or in lieu of any sentence in respect of such an offence, order that the person be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act, 1992, if the court is satisfied from the evidence or from any other information placed before it , which shall in either of the said cases include a report of a probation officer, that such a person is a person as is described in s21(1) of the said Act, and such order shall for the purposes of the said Act be

deemed to be made under s22 thereof: Provided that such order shall not be made in addition to any sentence of imprisonment (whether direct or as an alternative to a fine) unless the operation of the whole of such sentence is suspended.

S297

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-

(a) postpone the sentence for a period not exceeding five years and release the person concerned –

(i) on one or more condition, whether as to –

(aa) compensation

(bb) the rendering to the person aggrieved of some specific benefit or service in lieu of compensation for damage or pecuniary loss

(cc) the performance without remuneration and outside the prison of some service for the benefit of the community under the supervision and control of an organisation or institution which, or person who, in the opinion of the court, promotes the interests of the community (in this section referred to as community service)

(ccA) submission to correctional supervision

(dd) submission to instruction or treatment

(ee) submission to the supervision or control (including control over the earnings or other income of the person concerned) of a probation officer as defined in the Probation Services Act, 1991

(Act 116 of 1991)

(ff) the compulsory attendance or residence at some specified centre for a specialised purpose;

(gg) good conduct;

(hh) any other matter,

and order such person to appear before the court at the expiration of the relevant period; or

(ii) unconditionally, and order such person to appear before the court, if called upon before the expiration of the relevant period, or

(b) pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any condition referred to in paragraph (a)(i) which the court may specify in the order; or

(c) discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction.