

**YOUTH IN CONFLICT WITH THE LAW: A CASE STUDY OF CRITICAL ISSUES THAT ARISE IN
SENTENCING YOUTH WHO ARE ON THE VERGE OF ADULTHOOD**



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MBLKEA003

MPHIL DISSERTATION

2022

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Declaration

I, the undersigned, Kearabetswe Tsholofetso Mablane, hereby affirm that this minor dissertation is my own independent work. All citations and references have been properly acknowledged. None of the work in this dissertation has been submitted for any degree or examination at any other university or academic institution.

Signed by candidate

Signature

13 February 2023

Date

Dedication

To my parents, Kebawetse Mablane and Molelekeng Sekoboto

Acknowledgements

I would like to show appreciation to:

God for giving me the strength to apply, the wisdom to push through and will dive in till the end. There were times when I felt like giving up, but God kept me grounded, gave me zeal and clothed me with grace to reach this point.

My supervisors, Dr Omowamiwa Kolawole and Professor Dee Smythe, to this day I do not have the words to thank both of you for the support and time invested in me. You both believed in me and my abilities. I appreciate your time, patience, feedback and support during this challenging journey. I cannot emphasise enough how much I appreciate everything both of you have done for me. I am thankful especially to Dr Kolawole for always availing yourself and your resources all the time. Your kindness and willingness to make sure I succeed is not taken for granted.

The National Research Fund Chairperson's grant for financial support to complete my study.

My sisters, Keamogetse Mablane, Ntswaki Sekoboto and Kebogile Mablane, your support and faith in me motivated me to keep on going. I am grateful for the sacrifices you have made to ensure that I complete this study, for switching off the TV when I had to connect online, and for the warm meals and intense debates and laughter.

My parents, Kebawetse Mablane and Molelekeng Sekoboto, your prayers became a rock I could stand on. I am grateful that you taught me the importance of education. I appreciate the sacrifices you have made. I hope I made both of you proud as I am.

My other sisters, Kgalalelo Leeuw, Sister Pearl Tonono and Jemina Gopane, thank you for always being in my corner, and for being my peer reviewers and soundboards. Your support and confidence in me do not go unnoticed. I appreciate the three of you and all the contributions towards making my academic journey lighter.

My friend, Nthabiseng JahRose Jafta, thank you for hyping me and rooting for me, especially towards the end. Your poetic soul kept me calm and encouraged me to reach the finish line.

My partner, Boitumelo Ramohlola. Thank you for the late nights and early mornings. I appreciate your ear and insight during this journey. Your sacrifices and support are highly appreciated.

Finally, my father Rev Omphemetse Mmutle for the spiritual guidance and prayers. I would like to express my deepest appreciation to you for always availing yourself every time I approached you for spiritual guidance. Thank you for always encouraging my academic endeavours. We bless God.

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Terms and Acronyms

Beijing Rules	The United Nations Standard Minimum Rules for the Administration of Juvenile Justice
CCL	Centre for Child Law
CJA	Child Justice Act 75 of 2008
CJS	Criminal Justice System
CRC	The United Nations Convention on the Rights of a Child
CYCC	Child and Youth Care Centre
CPA	Criminal Procedure Act 51 of 1977
DCS	Department of Correctional Services
JDL	The United Nations Rules for the Protection of Juveniles Deprived of their Liberty
NGO	Non-Governmental Organisation
SAPS	South African Police Services

Summary

Crime among youth in South Africa is a very serious and complex problem because it encompasses a lot of social issues that are deeply rooted. These issues encompass but are not limited to poverty, unemployment, disorganised families and communities, association with deviant peers, easy accessibility to illicit substances and poor education. As can be seen from statistics on youth who violate the law the amount of offences committed by young children is alarming negatively. Young children aged between 12 and 21 years are still forming part of the "high risk" for violating the law. As will be seen in the case in this study children are now becoming involved in heinous crimes. As alluded to above there are various factors that could have contributed to these children violating the law.

These factors are called socio-economic risk factors. A great deal of children are already negatively affected by these risk factors. They come from poverty-stricken communities where unemployment is at its high and there is little to no adherence to the law. This is not only in the communities they come from but also in the homes that they live in. The school drop-out rate is very high and illicit substances are easily accessible to the youth. The peers they associate themselves with also contribute as they are most likely also deviant. That being the case, the number of children involved in crimes increases rapidly.

Resources that are meant to cater for the needs of these children are fast becoming depleted because of overcrowding and other lack of resources. The lack of resources negatively affects these children because they often find it challenging to transition into responsible adults in most cases ending in recidivists and not contributing positively to the economy and society.

This study explores a case of a young man from the Western Cape who has committed a very heinous crime. The case of the young man is then applied to the socio-criminogenic risk factors within the family, community, peer group association and school, in order to better understand the challenges that this young man might have (which are not unique to only him) the age that he is about to transition to being an adult.

The study concludes that further in-depth research pertaining to youth who are about to transition into adulthood needs to be conducted. Research on the socio-criminogenic risk factors for youth who commit heinous crimes in the South African context is critical as the research will better guide the relevant stakeholders on where to focus much attention and emphases regarding rehabilitation and

prevention of crime. Lastly, the sentences that youth are granted should be cognisant of the age when they committed the crime and the severity of their sentences should be less compared to those of adults.

Key Terms

Youth, Child(ren), Criminogenic Risk Factors, Sentencing, Violation of the Law, Adulthood

Chapter 1

Introducing the Problem

Crime is a serious challenging issue in the Republic of South Africa, especially among the youth (Phillips, 2020: 1; Khan & Singh, 2014: 105; Peacock, 2006: 1). While statistics are unreliable and often do not separate children from adults (Muntingh & Ballard, 2012: 46-48), it is apparent that detention centres accommodating young children are fast becoming overcrowded (2019/2020 SAPS Annual Crime Report, 2019/2020 Annual Report of the Judicial Inspectorate for Correctional Service (JCIS)). The result is that they lose the essence of rehabilitating children effectively and preparing them for reintegration into society. Youth crime and incarceration is a complex issue. In this thesis I address the question of how youth who are on the verge of adulthood are treated and sentenced by South African courts and the challenge of ensuring they are treated appropriately considering their age, the circumstances of the environment they live in, and the crimes they have committed.

This is important because courts are often not sensitive when sentencing such children and, as a result, their sentences lack certainty for them and the community at large. This is also important because the manner in which children on the verge of adulthood are sentenced is often not proportionate to the crime they have committed considering the age at which they committed the crime (Van Zyl Smit, 2001: 4 & Skelton, 2013: 2). I start by looking at one such case and consider the reasoning of the court as an entry point to examine how we conceive of issues relating to the sentencing of youths and their implications, in order to be in a better position to understand the law and address emerging concerns.

Youth from disadvantaged communities, economically poor, and socially unstable backgrounds are often faced with challenges that put them on the wrong side of the law. In South Africa, the relationship amongst young people and incarceration is complex. Consider the State of Emergency in 1986 and the student protests that left prisons overcrowded with children between the ages of 14 and 18 years (Puritz, 1987: 1). Security forces targeted these children with the aim of silencing them. As a result, a lot of children were incarcerated, without access to legal representation or the ability to communicate with their families (Puritz, 1987: 1). Once detained, these children suffered brutal treatment both at the hands

of police and older inmates. The brutality that these children suffered in prisons and in their communities from the hands of law enforcers has been recognised globally as a mark of shame against the apartheid regime (Puritz, 1987).

Apartheid resulted in deep structural inequalities between racial groups for the benefit of the white minority (Mhlauli, Salani, & Mokotedi, 2015: 204; Wielenga, Batley, & Murambadoro, 2020: 46). The introduction of democratic constitutionalism in South African after 1994 started a process of rectifying and improving the system of justice that was applied to children. The focus of the Criminal Justice System (CJS) when handling matters relating to children became oriented to diverting those in trouble with the law from punitive to retributive and rehabilitative approaches (Prinsloo, 2005: 3) It is therefore the responsibility of the CJS to treat children with caution and sensitivity, both because of their backgrounds and experiences and also because of the history of brutality against children in South Africa at the hands of law enforcers. That, however, is not the reality for many young South Africans, especially for males from previously disadvantaged communities. Instead, the reality is that the law is often not applied with care or in a manner that is understandable to the accused, their family, the victim(s), or the community (Van Zyl Smit, 2001: 5 & Skelton, 2013: 4). In her analysis of the Mpofu case, for example, Skelton demonstrates how the court lacked sensitivity towards the accused and failed to consider his age at the time he committed the offence (Skelton A. , 2013). In the next section I discuss another case that raises troubling questions.

1.1 Setting the scene: A killing in Beaufort West

On the evening of 23 December 2018, a 16 year old (who will be referred to as YM for purposes of anonymity because he was a minor when he committed the crime) was at Cameron's Yard, a pub (commonly known as a tavern in South Africa) in Beaufort West, with his pals drinking alcohol.¹ According to him, at some point during that night the victim (who

¹ In South Africa it is illegal for children under the age of 18 to be sold alcohol or to be supplied with it on the premises of an individual with a liquor licence. According to the Liquor Act 59 of 2003 s 46(a), *the holder of a licence shall not (a) sell or supply liquor on the on the licensed premises to any person who is under the age of 18 years; (b) allow such a person who is not a person contemplated in Section 45(2), to be in any restricted part (if any) of those premises.* It is critical that the holder of the licence makes reasonable efforts to determine a person's age, subject to a fine or sentence of to up to five years imprisonment. I doubt the owner of the tavern asked the accused and his friends to produce identity documents to verify their age, which suggests that he allowed these children to consume alcohol on his premises. The focus of this study is not on consumption of alcohol or the owner of the tavern. The point I make is that in the communities where these young men are growing up serious laws that have tangible consequences and are intended to protect children are not adhered to.

will be referred to as UD), crashed into him as he walked past and the bottle of beer that YM had in his hand slipped, fell on the ground, and broke. YM demanded that UD buy him another bottle of what he was drinking. UD said no and they started arguing. The two began fighting to a point where other patrons intervened and they stopped fighting. Later the same evening, the two men were walking home when the altercation about the spilled beer started again. YM was still angry at UD because he'd refused to buy YM another beer. YM pushed UD, who fell down. While UD was on the ground YM kicked him on his body and head. Then he picked up a stone and hit UD on the head with it, before picking up a larger stone and dropping it on UD's head.

UD was lying on his stomach on the floor and, according to YM's statement, it appeared to him that UD was unconscious. YM then planned to have sexual intercourse with UD. He pulled down his pants and those of UD, and tried to penetrate UD's anus with his erect penis. He could not achieve this as the deceased was lying at an unfavourable angle. While he was on top of UD, YM's friends approached the scene. YM got up from on top of UD and pulled up his pants.

It is recorded that an ambulance was called to the scene of the crime, that UD was transported to the hospital, and that he died there a few days later. YM acknowledged in the presence of his guardian that the main cause of UD's death was his attack. He said that he was to some extent intoxicated with alcohol on the day and was also furious with UD, but was cognizant of what he was doing, predicted the possibility that he may murder UD, but still continued, knowing that he was violating the law. The statement was confirmed by both him and his guardian. The post-mortem report admitted in court indicated deep cuts on the face and scalp of the deceased's body, consolidation of the lungs and a crack of the left eye with sever blood loss in and around the brain. The State accepted the plea of guilty in consequence the accused was convicted of murder and attempting to commit a sexual offence (*S v VN (19754) [2020] ZAWCHC 33*).

1.2 Findings of the court

A pre-sentence report was compiled by Mrs Daveline Abrahams, who was the probation officer in this case. According to information Mrs Abrahams gathered, YM was a first time offender. This means he had never violated the law before or that, if he had broken the law,

he had not been arrested and charged. The probation officer also noted that YM was conceived by teenage parents, who had been together since they were 18 years old. The probation officer noted that YM's parents had initially stayed with him at his paternal grandfather's house, but the parents left to co-habitate, leaving YM to be raised by his grandfather. YM started associating with older friends who used illicit substances at the age of 13 years. He then began abusing marijuana. At this stage his behavioural problems began. YM's drug abuse worsened as he gradually started using stronger drugs. From marijuana, YM used mandrax, tik and occasionally alcohol over weekends. YM dropped out of school in grade 10 in 2017. These findings are suggestive of some of the factors that might have contributed to YM's delinquent behaviour and will be discussed in more details in the sections that follow.

1.3 Sentence by the Magistrate court

YM was sentenced under section 76 of the Child Justice Act 75 of 2008, which is set out in Chapter 2 below, and the passing of a sentence was postponed for eight months. YM was detained at a Child and Youth Care Centre (CYCC) during this time, with the order that he be assessed in different programmes, and provided with counselling and drug rehabilitation, if possible, in the centre. The head of that institution was ordered to compile a report about YM's behaviour and response to the programmes at the centre, and ordered to present YM and the report to the Court on 2 April 2020, at which point the sentence was handed down. On review, the judge was of the opinion that the child being held in custody prior to being sentenced as an adult, was not in accordance with justice and stipulated that the sentence should be set aside in part and altered. Points of concern raised in the judgment include whether the court made an error in committing YM to compulsory residence in a Youth Care Centre for a period of 8 months before he was sentenced and whether ss 76 and 77 of the Child Justice Act 75 of 2008 and s 297 of the Criminal Procedure Act 51 of 1977 were properly applied in the case.

1.4 Importance of this research

Numerous children and youth in South Africa are incarcerated where they should actually be diverted to diversion programmes. The number of youth who are deprived of their liberty remains a serious challenge even in the democratic South Africa (Peacock & Theron, 2007: 61; Skelton, 2013: 4). YM's case is a good example of how the letter of the law and the spirit

of the law are not perfectly aligned, raising questions around our understanding of justice, children's rights, criminal capacity and their implications for the decision to rehabilitate child offenders and how we go about that. Drawing on this case, my dissertation engages with how we conceive of these issues and their implications in order to help better address the emerging concerns. The following section provides an overview of the socio-criminogenic risk factors encountered by youths like YM and UD, followed by a brief overview of what the rest of this thesis will cover.

1.5 Socio-criminogenic risk factors

Socio-criminogenic risk factors refer to macro- or broad level risk factors that are explicitly linked to unlawfulness and which increase the probability of criminal or violent misconduct (Maree, 2013: 69; Phillips & Maritz, 2015: 54). According to Maree, these are circumstances that often place young people at risk of becoming offenders or that contribute to their chances of violating the law (Maree, 2013: 82). A risk factor is a variable that predicts a high probability of an individual violating the law, which means the chances of the child violating the law even as they get into their adolescence increase because of the presence of these conditions (Maree, 2013: 82; Walsh, 2014: 150). This may result in the child being classified as a 'high-risk youth' or a 'youth at risk', terms used to describe young children, usually in their teenage or adolescent stages who are faced with challenges that might lead to them violating the law early in their lives (Schonert-Reichl, 2000: 3; Swahn & Bossarte, 2009: 225).

Schonert-Reichl (2000:5) points out that this term can be used to characterise youth who are from poor socio-economic backgrounds, engage in sexually irresponsible behaviour, abuse alcohol and illicit substances, and live in areas where crime is always significantly high. There are a variety of reasons why high-risk youth violate the law, including, but not limited to, lack of supervision at home and associating with deviant peers (Phillips, 2019: 6). With that said, there are different levels and categories of risk that can be identified; for the purpose of this study the focus will be on socio-criminogenic risk factors that can be categorised into the four realms of family, community, peer association and school. Finally, it should be noted that socio-criminogenic risk factors are interdependent. This means there is a high probability that one domain will affect another (Bezuidenhout, 2013: 70). For example, the family domain can affect the school domain. It is possible that a child who witnesses physical or sexual abuse at

home, might view this behaviour as normal or as an acceptable way of solving conflict. Therefore, when the child is faced with challenges in the community, being physically violent might be the only way the child thinks of resolving conflict (Phillips, 2019: 10-11).

1.5.1 Family

The family contributes greatly to how a child behaves, as they are the first association that an individual interacts with (Walsh, 2014: 88). It is therefore important that families teach children how to socialise with others and how to behave in society. Failure to teach a child appropriate rules of social conduct exposes the child to the risk of violating the law. Factors such as low socio-economic status, weak family structure, absent parental supervision, parent or sibling criminality, or antisocial behaviour and witnessing abuse or violence in the family are some of the biggest contributors to young people violating the law at a young age (Phillips, 2019: 37; Ntshangase, 2015: 38 & Bezuidenhout, 2013: 75). There is agreement that children who are from lower socio-economic backgrounds are more likely to violate the law than children who are from higher socio-economic backgrounds, at least partly because chances are that there are certain needs parents of poor socio-economic backgrounds cannot meet (Maree, 2013: 76). The child therefore tries to meet those needs for himself, which may include violating the law. The majority of the young offenders who are arrested are from economically deprived and socially disorganised communities (Maree, 2013: 88). Circumstance of these children allow for them to be classified as youth who have a higher risk of violating the law (McWhirter et al, 2013: 9).

The structure of the family contributes to youth violating the law in various ways. In YM's case, he was birthed by teenage parents and lived with his grandfather while his parents lived elsewhere. Research on teenage pregnancy and law-breaking is very limited, especially on the African continent. However, according to Coyne and D'Onofrio (2012: 113), adolescent motherhood is linked to a variety of weak social, economic and psychological outcomes for these young mothers when they become adults. It is possible that the child's mother will not have the necessary tools to teach the child, who could be learning deviant ways from a very young age, possibly unconsciously so. At times children who are raised by grandparents or older siblings may lack parental love and care, and demonstrate this in how they behave from a young age (Maree, 2013: 90).

Various factors contribute to broken or disorganised family structures, these factors include, but are not limited to, poverty, single parent households, being raised by older people and overcrowded homes (Maree, 2013: 88). The negative impact these factors have on children is that they might be exposed to things they would not normally be exposed to if the family structure was positive. Children may witness adult sexual encounters, and see and experience sexual and physical abuse at a very young age, growing up thinking it is normal and modelling that behaviour even outside of the family.

1.5.2 Community

There is not much that is mentioned in the pre-sentence report about the community YM came from. However, from the information provided in the case he is not from a wealthy community. According to Bezuidenhout (2013:70), Shader (2001:4), and Phillips (2019:10), poor communities where there are high crime rates, illicit substances and alcohol are easily available to youth, and the neighbourhood is disorganised have a very high probability of youth misconduct. Other scholars concur, suggesting that youth who are violent and delinquent reflect the society they come from. This is because the community provides a guide for numerous forms of antisocial behaviour, which are more prevalent in poorer communities (De Wet, 2003: 97; Stewart & Simons, 2010: 591).

1.5.3 Peer Association

The probation officer noted that at the age of 13 YM started associating with older friends who were using drugs. Peer influence and pressure is a major social problem facing societies, as children influence each other to violate the law in order for them to be accepted in the group (Amali, Moshood & Iliyasu, 2017: 152). Maree (2013) adds that teenagers and adolescents often want to be around their peers, especially at a time in their lives when they want to minimise the importance of parental and family relationship and maximize the relationships they have with friends (Maree, 2013: 69). However, this does not always mean that the relationship with these friends is comparatively warm. According to a study conducted by Chaiken, more than 50 percent of children who took part in the study keep to themselves because they feel like they are not like other people their age, even if they are

friends (2000: 6). With that said, the association with older deviant peer increases the likelihood of that young person violating the law (Maree, 2013: 96; Bartol & Bartol, 2017: 56). This also increases the chance of the child experimenting with illicit substances.

1.5.4 School

The probation officer noted that YM started using marijuana while he was at school and that his behaviour worsened when he started abusing other stronger illicit substances. Substance abuse is not the only contributor to crime, however, easy availability and access to these illicit substances contributes greatly. Youth who drink and abuse alcohol and illicit substances are more likely to experience academic challenges. Learners who perform poorly at school tend to avoid the frustration of failure by being involved in anti-social behaviour such as drinking alcohol and abusing illicit substances (De Wet, 2003: 93; Crosnoe, 2006: 56; Phillips, 2019: 37). Young people who are not supervised easily get involved with abusing drugs. In order to get these drugs they commit crime because they need the money to buy the drugs . Therefore, stealing and robbing people or any other small crimes becomes a norm for them. However, as they experiment with more expensive, stronger and addictive illicit substances, such as mandrax and tik, more money is required more frequently resulting in them committing more serious crimes because more money is needed (Maree, 2013: 73). Undoubtedly illicit substance abuse and excessive alcohol use also has a direct contribution to violent crime (Maree, 2013: 73). These are the contexts in which many youth offences in South Africa occur. In the following section I provide the overview of this dissertation, as it further unpacks the implication for sentencing child offenders.

1.6 Overview of the study

Chapter Two describes international and domestic laws that inform sentencing of both children and adults in South Africa. International legal instruments that inform the sentencing of children include the United Nations Convention on the Rights of a Child (Cohen, 1989) the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Rules, 1985), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Crawshaw & Holmström, 2008 and Sloth-Nielsen & Gallinetti, 2004: 16-24). Domestic legal instruments that inform the sentencing of children include the African Charter on the Rights

and Welfare of the Child , The Constitution of the Republic of South Africa, 1996 and the Child Justice Act (Act 75 of 2008). The Constitution also regulates sentencing for adults. The chapter ends with a brief discussion of two further laws relevant to sentencing adults, the Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment Act 105 of 1997.

In Chapter Three I discuss the importance of the Centre for Child Law's assistance to the court in matters involving the sentencing of children, and particularly in YM's case (*The State v S V*, 2020). The chapter will discuss issues raised by the CCL which are at the core of efforts in this area of scholarship and child rights advocacy. I conclude by highlighting how these issues should inform how we understand criminal capacity, justice and fairness in relation to the rights of the child.

Chapter Four charts the implications of balancing justice and rehabilitation. Analysis of s 76 of the Child Justice Act shows how it attempts to bring a balance between justice and rehabilitation or reform. The chapter discusses the role of Child and Youth Care Centres in meeting the therapeutic needs of the child and explores the best interest of the child and its contextual implications. It concludes by discussing the need for a clear regimen of steps necessary for treatment of children, provided by the probation officer in the case.

Chapter Five picks up on the implications of the preceding chapters for understanding issues relating to minors and justice. It briefly discusses deterrence and what justice means for minors and the society. It then turns to the challenge of resource constraints in South Africa's facilities. The chapter concludes by highlighting why this research is important.

Chapter 2

Sentencing in South Africa

The South African Criminal Justice System (CJS) distinguishes between children and adults who violate the law. However, in practice the line between children and adults is not so clear, especially when the child is not really a child anymore but they are not an adult yet. The complexity of sentencing is demonstrated in YM's case where even the magistrate was stuck between a rock and a hard place, given the child's proximity to adulthood and the seriousness of the crime. This chapter describes the legal frameworks that deal with sentencing of both children and adults in South Africa and outlines the international and domestic frameworks that inform sentencing in South Africa. The first section will address legal instruments catering for children, followed by that the sentencing instruments catering for adults.

2.1 International Instruments

There are a number of legal instruments that have guided the development of child justice globally and in South Africa. For this study I focus on the United Nations Convention on the Rights of a Child (CRC), the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules), and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (JDL) as they are most applicable to this study.

2.1.1 The United Nations Convention on the Rights of a Child

The United Nation Convention on the Rights of a Child (CRC) is the primary international legal instrument that guides domestic legislation pertaining to children (Skelton & Tshehla, 2008: 16; Sloth-Nielson & Gallinetti, 2004: 22). The CRC provides a comprehensive framework for child justice. The principles it contains include that the best interests of a child must be central in all deliberations and proceedings relating to children who have violated the law and that children should never be discriminated against because of their age, gender or nationality. The CRC also stresses that it is important that children feel included in decisions that are taken. This makes it easier for the child to accept responsibility and be accountable. The last guiding principle is concerned with the child being in a healthy environment, having access to social services, and being protected from any form of harm (Sloth-Nielson and Gallinetti, 2004: 22). When considering the above mentioned principles against the actual proceedings

of YM's case we realise that certain critical factors, such as the age of the child when he committed the offense, were not considered by the court when the magistrate set the date for the sentencing of the child.

The CRC further highlights that youth who have violated the law should ideally be dealt with away from formal judicial proceedings. Additionally, it requires that the courts and all relevant parties must always protect the rights of children who are accused of violating the law. This means that whatever the nature of the crime committed, the child must be treated fairly with dignity and sensitivity. According to Phillips (2019: 21), treating a child with dignity and sensitivity strengthens the child's respect for human rights and freedom of others and promotes better reintegration.

2.1.2 United Nations Standard Minimum Rules for the Administration of Juvenile Justice

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (1985), also referred to as the Beijing Rules, identifies essential elements for the administration of a good child justice system applicable when a child has already violated the law. One of the general principles is the factor of the minimum age of criminal capacity. The Beijing Rules stress the minimum age of capacity should not be set very low keeping in mind the circumstances that different children find themselves under, especially in developing countries (Skelton and Tshehla, 2008: 21). South Africa has one of the lowest age of criminal capacity ages in the world, with only children below the age of 10 years lacking criminal capacity (Child Justice Act 75 of 2008). More detail with regards to criminal capacity of children will be discussed further below.

The Beijing Rules also stress the importance of proportionality in terms of juvenile justice. It is critical that the justice system ensures that any punishment to the child is in proportion to both the circumstance of the offender and the offense (Skelton and Tshehla, 2008: 21). The proportionality principle is very important when dealing with matters of children who have violated the law. This principle is not only important during the trial, but equally important if not more important when the time for sentencing approaches. With regards to YM's case the age of the child and the crime he committed demand even more caution because it is very easy for the court to violate this principle of proportionality, by putting more emphasis on the latter and ignoring the former. Violating this principle is an infringement on fundamental rights of children. Phillips (2019: 22) adds that when consulting the proportionality rule, socio-

criminogenic risk factors should be taken into account because they are factors that contribute to youth violating the law and so mitigate their culpability.

In addition, the Beijing Rules include diverse ways for the justice system and non-custodial interventions such as the family and community to come together to aid the child. The aim of these Standard Minimum Rules is to suggest measures to reduce recidivism and increase societal reintegration where children are concerned. With that said, the Beijing Rules do not suggest that children should go unpunished for violating the law. The main emphasis is on fair treatment for young children who have violated the law with direct incarceration being a measure of last resort (Skelton and Tshehla, 2008: 21). This means that children who are incarcerated should be treated with dignity and care. It is public knowledge that detention centres and correctional facilities in South Africa are not the most conducive places (De Villiers, 1997). What is prescribed on paper is not always the reality of what is happening in practice as these facilities are overcrowded and unhygienic, to name just a few serious challenges experienced by inmates. According to Gallinetti (2009: 9), depriving the child of their liberty should be avoided as much as possible. This means, where appropriate, diversion away from the formal trial should always be considered. While this is difficult to realise in YM's case because of the nature of the crime committed by the child and the circumstance around the crime, it is only one example of many where children are incarcerated, in some of which diversion is arguably a better option.

2.1.3 The United Nations Rules for the Protection of Juveniles Deprived of their Liberty

The United Nations Rules for the Protection of Juveniles Deprived of their Liberty (1990), also known as the JDL, caters for children who have been deprived of their liberty. This includes children who are held at detention centres during trials and those who are who are sentenced to imprisonment. In South Africa, children who are held in "child and youth care centres" are catered for in terms of these rules (Skelton and Tshehla, 2008: 24). As the CCR and Beijing Rules stress, the JDL also emphasises that children should not be deprived of their liberty unless it is a measure of last resort. The JDL adds that where children must be deprived of their liberty they should be dealt with as individuals and their needs and circumstances must be catered for as far as possible (Skelton and Tshehla, 2008: 24). This means that socio-criminogenic risk factors play a significant role and must be considered by decision-makers.

One of the fundamental principles of the JDL is that the child justice system must uphold the rights and safety of children and, most importantly, promote the physical and mental well-being of the child (Skelton and Tshehla, 2008: 24). This is not the reality for a lot of children who are incarcerated. A report by Muntingh and Ballard shows that the number of children incarcerated in South Africa is very high, and increases yearly; children are often mixed with adults in custody; children are held in solitary confinement; and a number of children die in custody not from natural causes (Muntingh & Ballard, 2012: 42-46).

A major part of the JDL is concerned with the management of facilities where children are held. It advises that for compliance with all the requirements aimed at holding the facilities to an acceptable standard, frequent unannounced visits should be made to these sites to monitor if the facility is being properly administered, the physical environment offered to the children is conducive, and if the disciplinary processes are appropriate (Skelton and Tshehla, 2008: 24-25).

2.2 Domestic Legislation

South Africa has come a long way with the establishment of legislation for children who violate the law. Specifically, the Child Justice Act 75 of 2008 is fundamental to dealing with legal issues relating to children. The fundamental rights for children are set out in the Constitution of the Republic of South Africa which governs how other legislation will work and sets out rights for all people detained, in custody or imprisoned, as well as the rights of the child. These two instruments will be discussed below.

2.2.1 Constitution of the Republic of South Africa Act 108 of 1996

The Constitution of South Africa is the supreme law of the country. In the constitution is the legal foundation for the country. Rights and responsibilities of both children and adults are outlined in this document. In terms of section 35 of the Constitution provides for the rights of all people who are accused of violating the law, arrested, detained, and imprisoned. Section 35 (3) of the Constitution gives every accused person the right to a fair trial. When Section 35 (3) is followed correctly and the accused person is convicted under those circumstances then an appropriate sentence should follow.

Section 28 of the Bill of Rights in the Constitution focuses on children. Amongst the rights that children enjoy, section 28 (g) of the Constitution states that children should only be detained as a measure of last resort and that children should be detained for the shortest period of time. They also have the right to be (i) kept separately from detained persons who are over the age of 18 years; and (ii) treated in a manner, and kept in conditions, that take account of the child's age.

2.2.2 Child Justice Act 75 of 2008

One of the key domestic laws that this thesis focuses on is the Child Justice Act 75 of 2008. According to Gallinetti (2009) and Van Eerden (2013), the Act has a children's rights-based approach where children who violate the law are concerned. The Act takes into account the sensitivity of children, offers the child the opportunity to take accountability and responsibility for their actions, and provides room for the young offender to reconcile with the victims and those affected by the crime they committed (the community), and to take part in rehabilitative programmes that teach the child socially acceptable ways of behaving in society (Gallinetti, 2009: 12; Van Eerden, 2013: 31).

The Act applies to all children who are alleged to have violated the law and who are under the age of 18 years. This includes children who are 12 years at the time of the commission of the offence and children who are between the ages of 12 and 18 years when they are served with summons, given notice to appear in court, or are arrested for violating the law. It is critical to note, however, that young persons between the ages of 18 and 21 years are allowed to be assessed and diverted under the CJA, which is in accordance with directives by the National Director of Public Prosecutions (Gallinetti, 2009: 15). This is because of the vulnerability youth in the above mentioned group (18 and 21 years old) (Child Justice Act 75 of 2008 s 4(2); Phillips, 2019: 25).

Both custodial and non-custodial sentencing options are provided for in the CJA. These options include placement in a child and youth care centre, restitution to the victim, restorative justice sentences, and suspended sentences with or without conditions (Child Justice Act 75 of 2008; Gallinetti, 2009: 53; Phillips, 2019: 25). The objectives of punishment are clearly set out in the Act, which includes reintegration back into the community and equipping the child with support and tools that will prevent recidivism (Child Justice Act 75 of 2008 s 276 (1)).

Custodial sentences are reserved for very serious crimes for which other forms of punishments such as fines or community service cannot be justified, or is considered to not be suitable for the crime committed or to rehabilitate the offender (Criminal Procedure Act 51 of 1977 s 51). According to Sections 76(1) and (2) of the CJA, a child justice court that convicts a child of an offence may sentence that child to compulsory residence in a child and youth care centre, for a period not exceeding five years or until the child turns 21, whichever date is the earliest. However, in terms of section 76(3), if a child is convicted of INSERT SCH 3 OFFENCES HERE, and if they had been committed by an adult, imprisonment for more than 10 years may have been justified, the child may be sentenced to an additional term to be completed after the first. Furthermore:

76(3)

(b) The head of the child and youth care centre to which a child has been sentenced in terms of subsection (1) must, on the child's completion of that sentence, submit a prescribed report to the child justice court which imposed the sentence, containing his or her views on the extent to which the relevant objectives of sentencing referred to in section 69 have been achieved and the possibility of the child's reintegration into society without serving the additional term of imprisonment.

(c) The child justice court, after consideration of the report and any other relevant factors, may, if satisfied that it would be in the interests of justice to do so-

(i) confirm the sentence and period of imprisonment originally imposed, upon which the child must immediately be transferred from the child and youth care centre to the specified prison;

(ii) substitute that sentence with any other sentence that the court considers to be appropriate in the circumstances; or

(iii) order the release of the child, with or without conditions.

According to section 77 of the CJA (Child Justice Act 75 of 2008):

(1) A child justice court-

(a) may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and

(b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.

...

(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment; (c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

...

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment-

(a) for a period not exceeding 25 years; or

(b) envisaged in section 276 (1) (i) of the Criminal Procedure Act.

(5) A child justice court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed.

Given these provisions, it is critical that the age of the child when he committed the offence be considered and not the age at which he comes back for sentencing or when sentencing takes place. This is stressed by all legislation. This becomes very challenging when the offender is no longer a child but is not yet an adult and has committed a very serious crime, which is considered to be a crime committed by adults.

2.2.3 Sentencing of Adults in South Africa

As alluded to above, there are certain standards and procedures that need to be followed where depriving the liberty of children is concerned. Similar procedures that are applied to children also apply for depriving adults of their freedom. Although the law is more lenient towards children than adults, the law is also fair and just when dealing with offenses committed by adults. South Africa does not, with few exceptions, have set guidelines or procedures for sentencing offenders. This means that discretion is granted to presiding officers when imposing sentences. This is because it is very difficult for a court to balance an individualised approach to sentencing with general legislation that prescribes the approach that should be followed towards sentencing, when there are various factors that play a role in sentencing an offender. There are however primary legislation that guide sentencing of adults, these include the Criminal Procedure Act 51 of 1977 and the Criminal Law Amendment Act 105 of 1997.

2.2.3.1 Criminal Procedure Act 51 of 1977

The Criminal Procedure Act (CPA), contains schedules that outline different types of crimes and set out sentences that may be imposed on adult offenders. The schedules range from schedule 1 to 7 as follows:

Schedule 1 contains minor offenses such as receiving stolen property knowing it to have been stolen, theft whether under the common law or a statutory provision, public indecency, and forgery or uttering forged documents knowing it to have been forged. These are offences where offenders are less likely to be arrested but rather be given a fine or warning for violating the law in that manner.

Schedule 2 offences are also minor offences however with more serious consequences than schedule 1 offences. Such offences include but are not limited to possession or supply of illicit substances, breaking or enter into premises, whether under the common law or a statutory provision, with intent to commit an offence, or theft of items that exceed R2500.

Schedule 3 offences are also minor offences, which are any violation of a bye-law or regulation made by or for any council, board or committee established in terms of any law that manages affairs of any city, town, village, or similar community. These offences include

exceeding the prescribed speed limit when driving a vehicle, owning or driving a vehicle without a valid license for it, or driving a motor vehicle without a license to drive it.

Schedule 4 deals with repealed or repugned provisions and is not relevant.

Schedule 5 offences are more serious offences and might include schedule 1 to 4 crimes committed more than once. These crimes include murder, attempted murder, rape, crimes that involve illicit substances that are above the value of R50 000, and illegal dealing in or smuggling of firearms, ammunition or drugs.

Schedule 6 offences are also serious crimes with aggravating circumstances that include murder when planned or premeditated, the murder of a law enforcement officer whether on duty or not, rape when the victim was raped more than once by the accused or by accomplice, and murder when the death of the victim was caused by the accused in committing or attempting to rape or rob the victim.

Schedule 7 offences are very serious and complex crimes. These include assault which involves infliction of grievous bodily harm, culpable homicide, any offence in terms of any law relating to the illicit possession of dependence producing drugs, and public violence.

Schedule 8 offences are also very serious crimes which include but are not limited to assault, when a dangerous wound is inflicted, culpable homicide, rape or compelled rape as contemplated in sections 3 and 4 of the Sexual Offences (Criminal Law and Related Matters) Amendment Act 32 of 2007, and murder. These schedules assist judges in determining an appropriate sentence for an offender who is accused of violating the law.

2.2.3.2 The Criminal Law Amendment Act 105 of 1997

Pre-democracy in South Africa certain crimes had very serious consequences which included the death penalty. Crimes such as attempted murder and murder had offenders sentenced to the death penalty. However, in 1995 the death penalty was abolished by the ruling of the Constitutional Court in the case of *S v Makwanyane and Another* (The State v T Makwantane and M Mchunu, 1995). The two accused in that matter were convicted of murder and robbery. They were sentenced to death on the murder convictions. The accused appealed to the Appellate Division of the Supreme Court against the convictions and sentences. However, the Appellate Division dismissed the appeals as it concluded that the circumstances of the

murders were deserving of the punishment and should receive the heaviest sentence permissible according to the law (S v Makwanyane and Another, 1995).

Section 277(1)(a) of the Criminal Procedure Act 51 of 1977 prescribed that the death penalty was an acceptable sentence for murder. However, after the counsel for the accused was invited by the Appellate Division to contemplate whether the provision of the Act were consistent with the Constitution of the Republic of South Africa, 1993, which came into force after the conviction and sentence by the trial court. It was argued that the sentences were a violation of the right to life and therefore rendered invalid and unconstitutional as it violates section 11 of the Constitution, which provides for the right to life. As a result of the ruling of the Constitutional court, the death penalty is no longer an applicable form of punishment or sentence in South Africa.

The Criminal Law Amendment Act 105 of 1997 would then amend this law so that for future use of the law people are aware of the changes. According to the Act sections 51 and 52 make provision for the application of minimum sentences where serious crimes are concerned. There are categories that range depending on the degree of seriousness of the crime. Part I-IV of Schedule 2 of the Act lists these parts (Criminal Law Amendment Act 105 of 1997). As stated by section 51(2), a first offender of a serious crime should be imprisoned for a period of not less than 15 years, a second offender should be imprisoned for not less than 20 years while a third or subsequent offender of any serious crime should be imprisoned for a minimum of 15 years but not less than 25 years (Criminal Law Amendment Act 105 of 1997 s2). These provisions in section 51 of the Criminal Law Amendment Act brought an important adjustment and direction to the court as they specify conditions to certain crimes and give guidance for minimum sentences.

1.7 Conclusion

The rights of children and adults who are accused, arrested and detained for violating the law are noted above. However, it becomes very challenging when considering the case of the YM, who is no longer a child but is also not yet an adult and has committed a very heinous crime. Navigating his sentence becomes a challenge because he sits at the intersection between two sentencing regimes. As we have seen in this matter between the state and the YM, sentencing can easily go wrong when magistrates are confused. It needs to be clearly determined whether applying sentencing guidelines for children or sentencing them as an adult is the

most appropriate. This raises a myriad of issues and challenges because the law draws very straight lines between youth and adult offenders. In conclusion, the poor handling and outcome of YM's case demonstrates the tension between sentencing of young offenders and the demands of justice.

Chapter 3

Appropriate sentences for minors and criminal capacity

Direct imprisonment should always be a measure of last resort where children who violate the law are concerned. This is because the justice system considers children to be very vulnerable and demands, therefore, that they should be treated with sensitivity (Skelton & Tshehla, 2008: 26; Van Eerden, 2013: 46; PAN: Children, 2015). Unlike adults, children are more receptive to change and stand a better chance of being rehabilitated. However, because of the nature of certain crimes children commit detaining the child in a facility is sometimes the best way of ensuring that they are rehabilitated.

3.1 Sentencing young offenders and the case for non-custodial sentences

Both as a matter of principle and as a result of the high numbers of offenders in correctional facilities, non-custodial sentences or alternative sentences should always be encouraged. Not only will it decrease the overcrowding challenge faced by South African correctional facilities, it will also relieve the financial burden from the government that is spent on detaining inmates. There are various factors that contribute to why South African correctional facilities are overcrowded. Lack of creativity where alternative sentencing is concerned is not one of those factors. The administration of accused persons awaiting trial is slow, which is one of the main contributors to overcrowding as inmates have to be accommodated in the facilities while awaiting trial. Another factor is the tendency of South African courts to hand down long prison and prison-based sentences (Muntingh, 2005: 104). Muntingh cautions that even though alternative sentencing is desirable especially where children are concerned, it is not easy to sentence offenders to alternative sentences because there is a lack of qualitative research on this form of sentencing and there does not appear to be a comprehensive approach to sentencing that is in accordance with the national policy and guidelines. Therefore, placing alternative sentences of any form within this framework and evaluating it against their intended outcomes becomes unachievable (Muntingh, 2005: 104).

Another advantage of non-custodial sentences is crime prevention and societal reintegration. This does not disregard the fact that other crimes require direct incarceration. However, in some instances, imprisonment is not the cure for crime or a remedy for successful societal

reintegration. As mentioned above overcrowding is a serious challenge in South Africa's correctional facilities. As a result of the overcrowding inmates often find themselves living in inhumane conditions. This contributes negatively to their physical and mental wellbeing ultimately affecting their chances of being rehabilitated and reintegrated successfully back into society. For young children, especially, being incarcerated for a long time puts a lot of strain on the relations the child has with their family, the community and the victims or those affected by the crime. It also hinders the chances of the child contributing to the economy or becoming economically independent because it is very difficult for ex-offenders to recover from life in prison and secure employment. Sentencing children to non-custodial sentences not only demonstrates to the public that the child is taking responsibility for their actions it also minimises the stigma attached to children from detention (Gagnon & Barber, 2010: 450; Lambie & Randell, 2013).

3.1.1 Alternative sentences

According to the United Nations Standard Minimum Rules for Non-Custodial Measures, alternative sentencing is any form of sentencing that does not deprive the offender of the liberty (Villettaz, Gillieron, & Killias, 2015: 2). With regards to children, before depriving the child of their liberty one has to consider why the child violated the law. Questions that probation officers and magistrates should ask at this stage are whether or not the child was deprived of any resources or whether lack adequate guidance lead to them violating the law. The answers to these questions informs an assessment of the criminal capacity and culpability of the child. The less criminally liable the child is, the more lenient the alternative sentence should be or, if the child has to be detained, then it must proportionately influence the term of the detention period (Sloth-Nielson & Gallinetti, 2004: 82). For instance, if a child committed a crime of theft or shoplifting due to the fact that he lost both his parents to an illness and now he has the responsibility of taking care of his younger siblings, such a child may be less liable because he did not believe he had any other alternative (McVie & McAre, 2016). As a child, he was forced into offending by circumstances that he does not have much control over. In addition, he might have had to drop out of school. This is more challenging for the child, as even if he wanted to get a job he might not have the necessary skills that are in demand for the job space. Because of these circumstances, it can be understood why he

violated the law. Even though it does not make it right, it would not be in the best interest of such a child to detain him and he should rather be diverted.

Another factor that needs to be considered before depriving a child of their liberty, if the circumstances of their case do not justify diversion is the sentencing option that is in the best interest of the child. As mentioned above it costs the government a lot of money to accommodate inmates. Therefore, it is important that offenders that do not need to be in the facilities are kept out. Keeping a child who is not a danger to society in a facility is not in the best interest of the child. But, other more seemingly benign sentencing options could also be victimising the child and it is important that any sentence is always within the bounds of the law. For instance, sentencing a 13 year old child to community service, such as assisting in an elderly care facility 30 hours a week, would not be in the child's best interest because child labour is a serious violation of the child's rights as it deprives the child of his or her childhood (Constitution of the Republic of South Africa, 1996; The Basic Conditions of Employment Act 75 of 1997 s 43-48).

3.1.2 Criminal liability

Not all children can be held criminally liable for their actions. There are a number of important principles that need to be recognised by the law before holding a person liable for the actions they have committed. These are discussed below.

3.1.2.1 Legality

The principle of legality is critical. This is where it is determined whether the type of conduct forming the basis of the charge is recognised by law as a crime (Snyman, 2014: 29). This principle is violated where the courts convict and punish people merely because of an opinion that the act/s of that person do not align with the norms of a society and therefore the person “must” be punished. In order for a court to convict the person, the person must have conducted him or herself in a manner that violates the law and must have known that they are violating the law.

3.1.2.2 Act or Conduct and Definitional Elements of Crime

The second principle is conduct. Once there is no doubt that the behaviour of an individual is a violation of the law it is critical to determine if the person actually did commit the crime.

People cannot be held liable for thoughts and decisions. The individual needs to have actually done what they were thinking of (Snyman, 2014: 30).

For an individual to be held criminally liable their conduct must comply with the definitional elements of the crime. According to Snyman (2014: 30), definitional elements are the concise descriptions of the type of conduct prescribed by the law and the circumstances in which it must take place for it to be recognised as a crime. The definitional elements should not only contain the description of the type of conduct, however, but may also contain a description of the way the act must be performed, the individual performing the act, the person or object who the act must be performed on, the location where the action must take place, etcetera.

3.1.2.3 Unlawfulness

It is critical that the actions of the individual are unlawful. The reality could be that a person committed an act that complies with the definitional elements of the crime, but this does not necessarily mean that the act is unlawful (Snyman, 2014: 31). For example, if a police officer shoots and kills someone who was holding innocent citizens hostage, the actions of the police officer are those of a murder according to the definitional elements of the crime. However, this action is not unlawful, because it is justified, and therefore he will not be held accountable.

3.1.2.4 Culpability

The last element that is critical to holding a person liable is culpability. The actions of the person might align with the definitional elements of crime and might be unlawful, however, it still does not necessarily mean that the individual can be held criminally liable. Culpability requires that there are grounds upon which the individual may, in the eyes of the law, be personally blameworthy for his misconduct (Snyman, 2014: 31). There are two requirements for culpability. The first is criminal capacity. This means that at the time of the violation the individual must have had certain mental abilities that allowed them to understand that their conduct was wrong. There must therefore be no doubt that the individual can distinguish between right and wrong. The individual must also have the ability to act in accordance with

his or her comprehension of the wrongfulness of the act (Snyman, 2014: 32; Criminal Procedure Act ss77-78).

South African law recognizes children who are 10 years and younger as lacking criminal capacity, which means that they cannot be prosecuted and must be dealt with in terms of section 9 of the Act (Child Justice Act 75 of 2008 s 7). Children who are not yet ten years cannot be prosecuted for any crime and may not be arrested for committing an offence. Instead, these children must be referred to a probation officer (Child Justice Act 75 of 2008 s 9). Support services can be arranged for the child or the matter can be referred to the Children's Court (Child Justice Act, 75 of 2008; Mahery & Proudlock, 2011: 33). Children who are 10 years old but not yet 14 years old are also presumed to lack criminal capacity, however, it is the responsibility of the prosecutor to prove beyond reasonable doubt, in accordance with section 11 of the CJA, that the child was fully aware of the nature and consequences of their actions when that child was committing the crime (Child Justice Act 75 of 2008 s 7). This is because there is a rebuttable presumption that a child of this age does not fully comprehend the difference between wrong and right. According to sections 27 and 30 of the CJA such children cannot be detained in a prison and can only be held in a CYCC even while they are awaiting trial (Child Justice Act 75 of 2008; Mahery & Proudlock, 2011: 33; Snyman, 2014: 32).

Children who are 14 years or older are considered by law to have criminal capacity and they can be prosecuted for their misconduct (Mahery & Proudlock, 2011: 34; Snyman, 2014: 157). This is because the law assumes that the child has the mental ability to distinguish what is right and wrong and can even understand that certain actions, such as violating the law, have certain consequences. With that being said, it is still critical that these children are treated with sensitivity and caution because they are very vulnerable and sensitive.

The second requirement for culpability is a guilty mind in the form of intention or negligence. The majority of crimes require an individual to have the intention to commit the offence, however some only require that the person is negligent (Snyman, 2014: 32). Intent means that the individual conducted himself in a certain manner fully aware that he or she was violating the law or that he must have known that if he conducts himself in that manner he is

violating the law and the act is criminally punishable. Crimes that require only negligence instead of intent include crimes such as culpable homicide.

There are some children who violate the law unintentionally. *S v TNS* (2014) JOL 2257 is a very good example of how complex determining intent can be when handling cases involving children who violate the law. This was a case of patricide, being the killing of one's own father (Merriam-Webster, n.d.). The accused, a 13-year-old at the time of the commission of the offence, stabbed and killed her father in the chest once with a knife. The accused pleaded guilty, giving a detailed account of events leading to the stabbing of her father. She was convicted of culpable homicide and sentenced to 5 years compulsory residence at a CYCC. A report by a child psychiatrist and clinical psychologist was procured by the trial court, upon which the magistrate based a finding that the child had criminal capacity. The case was taken on review and the review court was concerned mainly on the aspect of criminal capacity of the child and the harshness of the sentence.

On review, the High Court was doubtful of the accused's guilty plea, which was contained in her statement (made in terms of s 112(2) of the Criminal Procedure Act). The question the court had was whether the accused lacked criminal capacity based on her age. As mentioned previously, Section 11 (1) of the CJA provides that it is the responsibility of the state to prove beyond reasonable doubt that any child between the ages of 10 and 14 years at the time of the commission of the offence has the criminal capacity (Child Justice Act 75 of 2008). The court found that criminal capacity was not proven beyond reasonable doubt in the magistrate's court. It also found that the magistrates court's focus was only on determining whether the child had criminal capacity or not and that it did not determine the extent to which she believed herself entitled to use force against her father in the particular circumstances of the case and to act in accordance with that belief. The magistrate court, furthermore, did not explore other reasons why the child could have done what she did even when they had the pre-sentence report that detailed the troubled life the accused lived with her father and the possibility of self-defence was not explored. The conviction was therefore set aside and a not guilty plea was recorded.

Many children who are sent for evaluations, either to psychiatrists or psychologists, to determine criminal capacity tend to be low functioning mentally as compared to other children their age (Sloth-Nielsen, 2020: 474). When these children are taken for evaluations oftentimes a lot of confusion is created, with the biggest contributors being time and resources (Sloth-Nielsen, 2020: 474). Usually, this therefore takes a long time, so that the process becomes skewed towards the capacity of the child at the present moment and not when they committed the offence. Schoeman points out that it can sometimes be very challenging to translate aspects of a child's psychological development and functioning into legal requirements for purposes of determining criminal capacity (Schoeman, 2016: 38). This is because even though children are expected to understand and behave in a certain way at a particular age, they do not develop the same and most importantly their circumstances are not the same. Schoeman further recalls a discussion held at an expert workshop, where psychiatrists raised concerns that there are no standardised tools for assessing psychometric functioning in the context of determining the criminal capacity of children in law (Schoeman, 2016: 475). Inviting *amicus curiae* to make submissions has proven to be very beneficial in many instances where the courts invite such submissions. In the following section I discuss how the *amici* assisted the court in the case of YM in order to highlight key issues regarding criminal capacity and young offenders.

3.1.3 *Amicus Curiae: The case of YM*

Amicus curiae is a Latin term that means "friend of the court" (Spies, 2016: 248). *Amici* are critical in certain cases as they are able to provide the court with information or advice regarding questions of law or fact (Britannica, 2018). The court reviewing YM's sentence invited the Centre for Child Law (CCL) as *amicus*, reported in the case of *S v VN* [2020] ZAWCHC 33. The *amicus* dealt with the challenges of how the magistrate interpreted section 76(3) of the CJA in detail. They highlighted how the magistrate's misdirections and misinterpretations resulted in applying the law incorrectly. The first submission they made was how the magistrate misunderstood section 76(3) of the CJA. The court *a quo* had explained its interpretation of section 76(3) as follows:

The provision provides that when the child has committed an offence, which according to that offence he cannot be released and be outside, for instance, the Court may still postpone the sentencing of the accused person and keep that offender in a

compulsory residence, with the option that that offender has to undergo evaluation and some programmes which might assist him before he is even sentenced. (para 23)

Reflecting on this paragraph, the *amicus* established how the sentencing court misunderstood section 76(3). They argued that the magistrate understood section 76(3) to be a mechanism for the postponement of a sentence while in actual fact it provides for a sentence in and of itself, which requires the duration of time spend at both the CYCC and prison to be set out clearly.

The *amicus* was also concerned by the interpretation of section 76(3) of the CJA where the magistrate had said the following:

On the return of the accused person or juvenile back to court, then the Court may proceed, and at that time the child would be over the age of 18 years, and the Court will be able to sentence him for longer periods. which will still benefit. (para 23)

The *amicus* highlights how statements such as “would be over the age of 18 years” and “will be able to sentence him for longer periods” exposes that courts that do not set the sentence of imprisonment out fully in the order because of their misunderstanding of section 76(3) of the CJA, which they think is a mechanism to postpone sentencing until the child is an adult. This is wrong because for purposes of sentencing the date of the commission of the crime must be taken into account as opposed to the date on which the sentence is passed. Using section 76(3) in the way the magistrate did in YM’s case violates the principles of law relating to certainty and predictability in sentencing. The accused must never be confused with regards to the period of his sentence: he had the right to know and understand the content of the sentence at the date of the sentence. Finally, the *amicus* argued that YM’s sentence actually misled the public about the seriousness of the crime, because it appeared to be very lenient since it was only for eight months in the CYCC and made no mention of a prison sentence (para 28).

The *amicus* argued that it is critical to consider the appropriateness to the nature of the offence, the child and the best interest of society (para 25). The child must be able to access programmes that are specifically designed to assist in rehabilitating the child. Careful consideration of a sentence also gives the child room to be rehabilitated and reformed. If they are focused on the matter returning to court and the report from the head of the CYCC that

will be placed before the court for consideration on a particular date, the child could be acting in a way that satisfies the outcome of the report, but without fully taking in what the programmes are designed to equip them with. Such situations can contribute to recidivism because at the time the child had to internalise the content of the programme, they were focused on pleasing the process so that they can be released. Then, when they are faced with situations where they are expected to know better, they may fail to act appropriately. Stating the exact period of imprisonment sends a clear message about the seriousness of the offence. This means the child is aware of opportunities presented to them for rehabilitation, but most importantly of the serious consequences of their actions (*amicus* para 44 read with 48). In this way, both individual and general deterrence are more effective.

When dealing with sensitive cases such as YM's, it is critical that a court's knowledge of the actual realities of children and what they experience and witness is illustrated. In this case the *amicus* played a pivotal role in providing contextual evidence to the court on the realities of children who violate the law. This aided the court to find legal solutions that address children in conflict with the law. Having *amici curiae* take part in such matters demonstrates that if challenges that children go through are placed before the court, legal issues with regards to children can be addressed, because they are willing to listen and appreciate the contributions of those who are not legal practitioners.

The review court in *S v VN* alluded to child justice as "eating a prickly pear" (para 13):

I have always likened child law to eating a prickly pear. Kicking the ground before approaching its tree may seem useless. But unless you do, and know that you should inductively watch the fine dust and the direction to which the wind is blowing in order to determine the direction from which you should approach the tree, you risk serious health challenges. Once you have established your ground through the kick, watch and determination, you have to navigate the thorns to get to the fruit. The juicy are almost always perched on high, awkward and difficult to reach places. The ripe fruit is very fragile and needs care in handling. Ordinarily you also need some hook to reach out, patiently. Positioning yourself to hook, remove and grab require timing and adjustment. After enduring the pricks and stabs here and there, you should know the art of peeling the fruit. If you don't know, you will suffer from an itchy skin, allergic reaction or even serious damage to your eyes. Only after this labour and patience, can

one actually be a disciple that preaches the joy of eating a prickly pear. The consumption should be measured as enjoying too much of the fruits lead to a clog. *Sentencing a child is both a skill and an art mastered by study, patience, measurement, creativity and courage (my emphasis).*

Such statements further emphasise this study's message that matters relating to children who violate the law are complex and sensitive and therefore require additional effort and sensitivity, especially when the case involves the violation of serious laws such as in YM's case. I consider some of these factors below.

3.1.4 Proportionality and punishment: key factors

When sentencing offenders, it is critical to convey the seriousness of the crime not only for individual deterrence but also for general deterrence. It is, however, often challenging to identify the extent of factors considered in sentencing and consideration given to the seriousness of the crime. This process is complex and has a lot of inconsistencies. The notion of rights and the extent of culpability for offenders who are under the age of 18 often collide with the penal approaches taken by magistrates and judges (Magobotit, 2009: 2). This is compounded by the fact that children under the age of 18 years appear to have more rights as provided for in the constitution and sentencing legislation when compared to adults, and yet they commit serious crimes in some cases, in some cases worse than adults. (Phillips & Maritz, 2015: 60). Age is currently one of the main factors that narrows the discretion of courts to impose sentences on children, especially those who commit serious crimes. It is therefore critical to understand how age is understood in South African sentencing of young offenders who committed serious crimes.

3.1.4.1 Age and remorse

It is critical that after conviction and before sentencing a person their age is taken into account, because the person's age will determine which facility they should go to. As noted above, age also informs the court of the mental capabilities of the child. This then influences the sentence the child should receive as it informs the culpability of a child, especially with regard to serious crimes. Research conducted by Magobotiti in 2009 indicated inconsistencies in sentences judicial officers imposed on children who are under the age of 18 years and adults who committed serious crimes. The study consisted of a questionnaire that explored the discretion of judicial officers when sentencing individuals for serious crimes (Magobotiti,

2009: 134). The majority of judicial officers regarded age as a mitigating factor, that reduces the severity of the offence for children as compared to adults who committed serious crimes (Magobotiti, 2009: 135; Heilbronner, 2011: 119). They emphasised that a lot of children in conflict with the law do not fully understand the consequences of their actions as compared to adults. In contrast, those who did not see it as an important factor highlighted the circumstances of the case and the degree of involvement of the child who was in conflict with the law as key factors. It is challenging to determine how much the age factor should have an impact on the sentencing of the child because both these approaches are valid. For instance, in YM's case, a child committed a very heinous crime and showed no remorse for his actions. According to Tudor, remorse is regret and the feeling of guilt when an individual realises that he or she has done something unacceptable or wrong, especially towards someone else (Tudor, 2008: 243). When people feel remorseful they would usually want to rectify their behaviour by trying to make things right even if some circumstances cannot change. They would want to apologise, or mend the harm and even promise to not repeat the action by changing the manner in which they conduct themselves. In YM's case, we are presented with a child who shows no remorse or empathy for the victim or the victim's family. Even after he pleaded guilty he gave the probation officer all the reasons why he should get a custodial sentence. Even though the law tries as much as possible to not detain children, especially those who are exposed to socio-criminogenic risk factors, these mitigating factors are not a wall to a sentence of direct imprisonment.

3.1.4.2 The seriousness of the crime

Children or youths who have been exposed to violence over a long period of time or have been victims of violence especially within their families, are at higher risk of showing violent behaviour towards others at a later stage of their lives (Burton, Leoschut & Bonora, 2009: 100). It is challenging to provide a single reason why children violate the law, as they are exposed to a variety of risk factors, from dysfunctional family structures, disorganised communities, association with deviant peers and poor performance at school. And, it is particularly challenging when a child who has experienced serious trauma has to be punished for committing the same crime or a worse crime. At the same time, in order to prevent and reduce crime especially among young people the punishment for serious crimes needs to send a strong message to both the offender and the public.

In the study by Magobotiti, regional magistrates and judges were requested to rank the relative seriousness of the crime. They were given 14 cases that included offenders of various ages, recidivists and first-time offenders who committed and were convicted of very serious crimes (Magobotiti, 2009: 138- 140). The responses highlighted that there are vast differences in sentences imposed for similar crimes, with inconsistencies between ranked sentences and ranked seriousness. One of the respondents in the study ranked sexual abuse of a 14-year-old girl child as a very serious crime for which he would impose 15 years or 10 years of direct imprisonment on the offender, while another judicial officer also ranked this as a very serious offence but would sentence the offender to life imprisonment. Others who had the same view could not choose a sentence because of the factors and circumstances that could have affected the case (Magobotiti, 2009: 141).

3.1.4.3 Prior records

There are different views on sentencing offenders who commit serious crimes, whether it is a first time offender or recidivist. Some magistrates and judges are of the opinion that first-time offenders should receive lesser sentences than a recidivist. Having a prior record has a direct impact on many things that affect life outcomes and future opportunities, such as employability, acceptance back community and mental health, even if an individual has completed his or her sentence. It makes it very challenging to find employment, often makes it challenging to travel especially to other countries and can affect sentencing if the individual commits a crime again. Having a criminal record can be an aggravating factor, being any relevant circumstances or facts that increase the severity or culpability of a criminal act (Heilbronner, 2011: 3). During a trial, a criminal record can be a relevant consideration when the accused is being sentenced, used during a trial to explain the character of the offender and how receptive he or she is to rehabilitative measures. This means a prosecutor can use the record to demonstrate that the offender does not learn from his or her mistakes and is less likely to be rehabilitated because they failed previously to be rehabilitated. This is especially for cases where the offender committed a similar offence to the first one within a period. This implies that the sentence the offender received the first time was not effective and the court must impose a different sentence, probably harsher, to deter the individual from committing the crime again (Murhula, Singh, & Nunlall, 2019).

Criminal records can be very damaging to children because when the child becomes an adult the record does not automatically go away (Child Justice Act 75 of 2008 s 87). There is a period after the conviction of a young person (depending of the schedule of the offence) where the criminal record will be expunged. This means if the child violates the law after this period has passed he or she will be regarded as a first time offender. However, if the child violates the law before the period passes, both the records will be part of the criminal record of the individual (Child Justice Act 75 of 2008 s 87). The study by Magobotiti asked magistrates and judges how seriously they regard previous convictions when they have to consider an appropriate sentence for accused persons under the age of 18 and adults. The majority of the respondents said the relevance of a prior record depends on the duration between the first offence and the current and they also said it depends on the relationship the previous conviction has with the current crime (Magobotiti, 2009: 146). They do not generally consider the prior record if the individual was convicted 10 years ago. However, one judicial officer said if the offender was convicted of a serious crime such as rape and his prior records show a pattern of violent behaviour such as assault or murder, then those prior convictions are taken into account. On the other hand, if prior records are not related to a serious crime such as rape and he was previously convicted for crimes such as shoplifting, then that record can be ignored (Magobotiti, 2009: 146).

Children often do not fully understand the seriousness of the crimes they commit and the implications these crimes can have on their future (Ghetti & Redlich, 2001). The court cannot however necessarily be lenient on the child because they believe the child will get better in the future. After all, it is not all children who are receptive to rehabilitation. Even though some children who have been detained may be rehabilitated or may seem rehabilitated they are still going back to the communities where it is not easy to avoid certain risk factors. With that said, the court is challenged because it cannot keep the child in a facility. After all, it is trying to protect the child from committing a crime. Children who are detained for long periods of time get used to the prison lifestyle and end up committing further crimes. Also detaining a child for a long period unnecessarily is against the CJA as it states that children who are detained should be detained for the shortest period possible (Child Justice Act 75 of 2008).

3.1.5 Conclusion

There are inconsistencies that require serious explanations as to how the judiciary approach sentencing of children under the age of 18 years who have committed serious crimes. These inconsistencies are not only evident among individual sentencers of similar courts but also between areas of the same jurisdiction (Magobotiti, 2009). It is critical to determine whether these inconsistencies are present because of different approaches when magistrates and judges sentence individuals in different courts or because of the circumstances and other factors such as the age of the offender, whether the offender is a first time offender or recidivist, the crime they committed, the reaction of the offender, and/ or other socio-criminogenic risk factors the offender might have been exposed to. However, one of the biggest challenges is the number of very violent children who commit heinous crimes because the communities they are reared in have a large influence on their behaviour (Phillips, 2019: 38). The resulting challenge is finding the best way of handling children who commit very serious crimes and who do not show remorse, especially when they violate vulnerable members of society. Contributions from *amici* such as the CCL are very important because they raise important contextual factors that assist the court with understanding concepts of child justice but also not shying away from the fact that a child has committed a very serious crime and needs to be punished for it. The next chapter discusses the importance of having a balance between justice and reform where children are concerned.

Chapter 4

A Balance between Justice and Rehabilitation

There are very high numbers of children in the criminal justice system more than ever, even under apartheid (Mlamla, 2021), when a lot of children were incarcerated wrongfully by the apartheid government, and further punished by being denied access to legal representatives and not being allowed to see their families. Reform was very necessary for the South African criminal justice system and remains important. In order to achieve effective rehabilitation, the criminal justice system needed to make changes where harsh punishment of offenders is concerned, especially towards children. These changes started when the government adopted the National Crime Prevention Strategy in 1996. The aim of this redirection was to move from crime control to crime prevention. This means attempting to understand crime as a social issue instead of merely a security issue (Pelser & Rauch, 2001: 2). This chapter discusses reform as a measure of improving practices for the benefit of children.

4.1 The case for rehabilitation

Rehabilitation is important because often imprisonment does not only affect the offender. The family and those who depend on the offender are also directly affected. When a person who is a breadwinner is incarcerated the rest of the family needs to adjust to this loss of income. The consequences of the breadwinner's actions are often felt harder by those who depend on the breadwinner, and it becomes even worse when the dependents are children, because often the children would have to relocate to foster homes where life is sometimes not as it was at home (see, for example, *M v The State* (CCT 53/06) 2007 as a good example of children suffering because of the parents' actions). Therefore, in the case of children who violate the law, it is critical to view their cases with future term lenses. Young people need to contribute to the economy of the country by securing jobs and/ or creating them. If the child is incarcerated at a young age and has a criminal record, it is difficult for them to find a job once they have completed their sentence. This contributes directly to the already high levels of poverty and unemployment as young people who are expected to contribute to the financial growth of the country end up depending on the government. The biggest challenge and contributor to recidivism is that countries like South Africa cannot afford to take care of

youth financially (Kandala, 2018: 339). This can result in them violating the law because they need to survive, meaning that recidivism rates increase, and prisons remain overcrowded (Andrew, 2017: 37). Overcrowded prisons cannot fully cater to the needs of the offenders as the resources allocated will not be enough for the inmates. Chapter 5 will discuss the requirements needed to ensure that rehabilitation is possible in society.

4.2 Justice matters

Justice is also critically important and for an effective CJS, justice and reform need to balance each other. Often, we hear people say "justice must be served" or "justice must prevail". It is important to understand what this "justice" everyone is talking about means. As alluded to above justice means different things to different people. In the African perspective, justice emphasises social harmony and the interdependence of communities. Whereas in the Roman-Dutch legal system justice is concerned with individual accountability and the relationship between the state and the individual (Murambadoro, Wielenga, & Batley, 2020: 45). For me, justice is holding those who have violated the rights of others to account for the victimisation they caused, with a focus on the needs of the victim. Measures to reach this "justice" often fail the expectations of the people, especially the victim. This might be because the decision or sentence by the court fails to meet the expectations of the victim, which could be for various reasons, including that the victim having suffered a non-compensatory crime such as rape or murder (Wemmers & Canuto, 2002: 35; Kunst, Popelier, & Varekamp, 2015: 342) In other instances, the victim might feel that the punishment the offender received is not enough, because of the trauma they have to live with. For other victims seeing the offender humiliated for the crime they have committed is justice for them, or they want the offender to be rehabilitated because they do not want others in society to suffer the victimization they have suffered at the hands of the offender. Therefore, by the offender being rehabilitated, they feel justice is prevailing.

It is important that when attempts are made to accomplish justice victims are not secondarily victimised by forcing them to make peace with the offence that took place or with the offender. Nigel Biggar writes about how the focus of criminal justice is shifted when dealing with issues of victimisation in general. In his article, he writes that the strong emphasis on peace-making can force victims to "forgive" perpetrators even though they might not want to (Biggar, 2002). Therefore, it is critical to note that justice is about giving each party (the

victim and the offender) what each of them deserves as a result of the crime that occurred. The following sections will discuss different forms of justice, including distributive justice, compensatory justice and retributive or corrective justice.

4.2.1 Distributive Justice and Compensatory Justice

Distributive justice is concerned with how society's institutions equally distribute economic goods among members of society in ways that are fair and just (Lamont, 2017: 4; Darley & Pittman, 2003: 324). This speaks to the contextual issues addressed in this dissertation. In relation to the criminal justice system, compensatory justice refers to the extent to which a person who is entitled to compensation is compensated fairly for the victimisation and/ or injustices suffered because of the actions of offenders. This compensation is a way of minimizing or reversing the impact of the harm caused by the offender (Mullen & Okimoto, 2015: 477). In YM's case, this might mean the child would pay the family of the victim a certain amount of money for the loss they have suffered. This is a challenge, however, because it is difficult to put a monetary value on the life of a person. In addition, it is also not easy to put a value on the degrading and dehumanising action of the accused, especially because the person who was violated is no longer a member of society. Lastly, because of the age of the child, it would be very difficult to get the child a job or way of compensating the family of the victim. Even though the child must be punished, that punishment must not interfere with his development.

4.2.2 Retributive Justice

Retributive justice refers to punishing the offender for the crime they have committed (Carlsmith & Darley, 2008: 193). In countries where the death penalty is still applicable, if the court found evidence that the offender committed a serious offence, especially murder or rape, they could sentence him or her to death. There have been many critics of the death penalty (Desai & Garrett, 2018; Cameron, 2020). If the person convicted of a crime is wrongly convicted it would be too late to reverse the conviction if the person has already been executed. In addition, as mentioned above, children often do not realise the consequences of their actions which they are young but because of their acceptability to change they stand a better chance of being rehabilitated. Additionally, the offender must not be over punished for the crime committed.

4.2.3 Restorative Justice

Towards the end of apartheid, the increase in crime and adherence to a more rights-based political system brought about renewed interest in criminal justice. South Africa shifted from a retributive crime control justice system to a more restorative due process justice system (Neser, 2001: 46 ; Thesnaar, 2008; Skelton & Batley, 2008). Still, the commission of a crime under South Africa's adversarial system meant that the state takes all the responsibility for criminal justice and the victim(s) does not really have much of a role or say in the proceedings. The biggest role the victim assumes is that of a witness. Restorative justice approaches present a practical way for both victim(s) and offender(s) to be part of the process of responding to the crime and healing its consequences and effects (Schoeman, 2016: 34). It is therefore critical to try and find a way of combining these two approaches. The biggest challenge with the current system is that as crime increases more offenders are incarcerated with convictions of very harsh sentences (Maepa, 2005). This has become a burden on the government because prisons are overcrowded and fail to cater to the needs of those who are detained. The financial burden on the government is also victimising taxpayers because they have to cater for things that show them no results. This is why a more restorative approach needs to be introduced with more force because, hopefully, it will cater to the shortcomings of the retributive approach.

The CJA has introduced a non-punitive model based on African perceptions of justice, which support restorative approaches to justice in the criminal justice system. This is reflected in the Constitution of the Republic of South Africa, which became the centre of the legal system in 1996 and reflects the principals of the United Nations Convention on the Rights of the Child, which South Africa ratified in 1995. The following section discusses the balance that is needed between punishing a child and rectifying their behaviour within the CJS.

4.3 The Balance

Where children are concerned it is critical to find a balance between punishment and rectifying the behaviour of the child. In South Africa especially the balance between rehabilitation and justice is necessary, because of the history the country has concerning imprisonment and children. According to research conducted by the Centre for Child Law, at the time 32 inmates were serving life sentences for crimes they committed before they were

18 years old (Du Toit, 2006: 13). Since crime rates have increased in South Africa over the years, it may well be that the number of convicted children who are sentenced to life imprisonment have increased. A life sentence is imposed on someone whom the court believes will not be rehabilitated. When a court gives a child such a sentence it means that the court discredits the risk factors that the child might be exposed to and therefore believes that the child is such a threat to society that he will never learn from his mistakes, nor will he be rehabilitated. This is punishing the child too harshly and no opportunity for reform or rehabilitation is present.

Change is not easy and there is no quick fix to the current serious problems and challenges of very young children committing serious crimes, while not fully understanding or acknowledging the consequences of their actions. The main goal with balancing justice and rehabilitation should be more empowerment to a child who has been incarcerated. The child should be in a mindset of understanding the consequences of his actions by taking accountability for violating the law. The child must be involved actively in repairing the harm caused by his or her actions. This means that services need to be made available for victims of crime to be an active part of the justice system. In addition, the community must be involved especially when decisions are taken so that societal reintegration can be more successful and the community can recognise how and if they contributed to the behaviour of the child (Chin & Dandurand, 2012: 63).

It is often very challenging to encourage prison reform or rehabilitation programmes in developing countries because of the lack of resources, including mostly financial and human resources (Trends, 2021: 3). With that said, it is still critical that at least measures are taken to improve the current state of affairs. As reflected in Chapter 1, children face countless socio-criminogenic risk factors, especially if they are living in poor, underdeveloped neighbourhoods. These risk factors which, include the family, the community, peers the child associates with and the school, can contribute greatly to the chances of the child violating the law. When the child has broken the law and is in the criminal justice system, reintegration becomes challenging because of the realities the child has to face back in their communities. These challenges include, but are not limited to, bad labelling of children and rejection from taking part in activities in the community (Chikadzi, 2017: 288).

Many youths violate the law because they are under the influence of illicit substances or they have abused alcohol (Ntshangase, 2015: 5). If illicit substances and alcohol are not easily reachable for youth then crime rates and recidivism will significantly decrease. Children go back into communities that are not rehabilitated, where illicit substances are easily available, and therefore the chances of recidivism are high as they struggle to cope. In cases of children who are sentenced to imprisonment, once the child has been released they are most probably confronted by issues such as stigmatization, which makes trying to lead a normal childhood very challenging. Going back to school, for instance, can be challenging because the child already has a label assigned to him by the community and or school (Peacock R. , 2008: 63). Securing employment is another challenge because of the stigma a criminal record has and the lack of skills in the case of children (De Villiers, 1997: 44). It is therefore important that children who are convicted and sentenced to imprisonment for serious crimes are prioritised in terms of their rehabilitation and reintegration. This can be achieved by providing offenders with social integration programmes which have not materialised in South African Correctional centres (Parliamentary Monitoring Group, 2014).

Reintegration programmes should start while the offender is incarcerated, continue to when the offender is about to be released and with non-custodial sentences (Griffiths, Dandurand, & Murdoch, 2007: 5). There might be an overlap with these programmes. For instance, some offenders might need post-release programmes while they are incarcerated so that the offender can also see if they are able to cope with certain situations (Griffiths, Dandurand, & Murdoch, 2007: 5). Incarcerating people is often necessary for certain crimes because the actions of the offender require him or her to be under strict control. This is one of the ways to start addressing root causes of certain behaviours that the offender himself might have not been aware of (United Nations Standard Minimum Rules for the Treatment of Prisoners, 2015). However, as stated in the CJA, children should be incarcerated for the shortest period possible so that they can pursue a normal life in the society (Child Justice Act 75 of 2008). This does not suggest that children should not be incarcerated; however, it means that in order to address behavioural challenges of children who commit serious crimes, the state cannot only invest in incarcerating these children. This is because investing in incarceration alone to rehabilitate individuals, especially children, is not always the solution and is a contributor to

recidivism, because the offender was not prepared for what might happen once they are back into society.

When preparing children to go back into society it is important that the children are gradually monitored over a period of time so that they are assisted if they are diverting from the path of non-criminality (Griffiths, Dandurand, & Murdoch, 2007: 8; Muntingh & Ballard, 2012: 67). Children can lose track and quickly fall back into old habits of criminality because there might be no other things for them to do and, therefore, the deviant ways are an easy way out of situations. Many government agencies, like Social Development and Correctional Services, are guilty of only concerning themselves with their programmes but not paying enough attention to assessing the outcomes and results of those programmes (White Paper on Corrections in South Africa, 2005: 18). For example, there is no record of the location or activities of children who were incarcerated in the past 5 years in South Africa, which is one of the reasons it is difficult to track which children are repeat offenders and why they are recidivists (Muntingh & Ballard, 2012: 22).

Inmates are challenged by a lot of issues, which include social, economic, financial and personal challenges that make social reintegration a challenge. As alluded to previously some offenders are faced with socio-criminogenic risk factors that contribute to the attitude the community has towards the offender once back into the community. In addition, the conditions in some prisons often contribute to the mental wellbeing of the offender in a negative way, which directly affects reintegration (Muntingh & Ballard, 2012: 3).

Disproportionate punishments suggest that the court believes the child will violate the law again, thereby effectively punishing the child for future law violations. It is a violation of an individual's rights to punish them for one crime multiple times. The "once and for all" rule means that a plaintiff is not allowed to claim damages for the same crime more than once (Christie, 2003: 445) nor may an offender be punished repeatedly for the same offence. In YM's case, the once for all rule was not utilised. The child was supposed to come back for further sentencing when he reached a certain age where the magistrate wanted to sentence the child (again) as an adult. When balancing justice and rehabilitation it is critical to bear in mind that sentencing minors more than once is a violation of their rights and should be avoided at all times.

Finally, when sentencing children to a CYCC, the resources the child needs must be properly outlined before the court, so that a child is not sent to a facility that will bear no fruits on his or her journey. Furthermore, the issue of capacity needs to be dealt with so that the child can be properly monitored and evaluated. In YM's case, the reviewing judge raised a very serious concern of record-keeping and tracking of children in the justice system. The judge did not have a charge sheet as part of the record before him and it was not even clear when the child was detained (S v V N , 2020). All these inconsistencies affect the child greatly because it will be a challenge to document the progress of a child for whom there are no records. It is therefore critical that a clear guideline is developed for record keeping of the child's progress.

4.4 Conclusion

In this chapter I have addressed the balance that needs to be struck between justice and rehabilitation. Justice needs to be a holistic victim-centred so that it does not seem one sided. With that said it does not mean that the offender needs to be neglected. In instances where the offender is incarcerated, the conditions of the facility need not dehumanise the individual. In addition, rehabilitating the child should not stop when the child exits the facility. Constant monitoring should also follow the child into the community so that they don't fall back into criminal ways again. This can be achieved by allocating resources for social reintegration so that recidivism rates are decreased and these young people can be steered in a direction where they can contribute positively to the society.

Chapter 5

Minors, punishment and justice: theory and implications

When analysing crime, especially with specific reference to children or youths who violate the law, it is imperative to engage with theories that can help to explain the purpose of punishment. In South Africa the child justice system aims to rehabilitate children and reintegrate them back into society so that they can be productive adults who will contribute positively to society. The systems we have in place for adult offenders is not as optimistic as the system for children, or for those who sit between childhood and adulthood. Theories of punishment help us to better understand why legal systems are more forgiving to children than they are to adults and provide insight into the roots of crime, which assists in developing and implementing reduction mechanisms (Tibbetts, 2018: 2).

In this chapter I look at the role of deterrence to assist with thinking about rehabilitation. I then move on to engage with the requirements needed to ensure rehabilitation is possible by discussing challenges faced by the government and broader society where rehabilitation of children is concerned.

5.1 Deterrence

Deterrence is a method of reducing crime which is not always easy to understand or apply. Crime prevention or reduction continues to be a very complicated phenomenon in society. In addition, the manner in which offenders should be punished or deterred from violating the law continues to be a widely contested issue (Williams and McShane 2014: 17). Two forms of deterrence have emerged, namely individual and general deterrence. Individual deterrence refers to punishing the offender in a way that would prevent him or her from committing crime again in future (Williams & McShane, 2014: 17). While general deterrence refers to punishing the offender in such a way that it would prevent others from committing the same crime, or crime in general (Williams & McShane, 2014: 17). The rationale behind this theory is that through being punished or watching someone else being punished for violating the law, others would see that there are more consequences than rewards for crime. In order to effectively relay this message, Beccaria identified three critical components of punishment to

influence whether an individual will violate the law or not: celerity, certainty and severity (Tibbetts, 2018: 39). These are discussed below.

5.1.1 Celerity

The first component to the effectiveness of deterrence is the celerity or swiftness of punishment. According to Beccaria (Williams & McShane, 2014: 17), the swiftness of the punishment is critical for two reasons. Firstly, the more quickly the punishment comes after the commission of the offence, the more just and useful it will be, as the outcomes will deter the individual and general public from committing crime. Secondly, it is equally important that sentencing is not prolonged. A swift trial and punishment are critical for deterrence, because trials take so long to be concluded that the offenders (and public) sometimes forget what they are being punished for by the time they are sentenced. This makes it easier for them to repeat the crime, because they did not comprehend what they were being punished for. However, if an offender is punished swiftly after they have committed a crime they are more likely to be deterred because they will still remember why they are being punished. This will most likely result in them not repeating the behaviour, because they would connect the consequences to the act of violating the law. This applies equally to spectators (Tibbetts, 2018: 39-40; Tomlinson, 2016:34).

5.1.2 Certainty

The second component, which Beccaria considered as the most important quality of deterrence, is the certainty of punishment (Williams & McShane, 2014:18). It is important that people not only know that there are consequences for violating the law, but they should also be certain that they will be punished for violating the law, even if it moderate punishment (Tibbetts, 2018: 42). In South Africa people are not easily deterred from committing crime because in some cases the likelihood of apprehension and sentencing are slim. The above statement is supported by the increasing number of crimes in the statistics reported by the *Police Recorded Crime Statistics 2021/2022* report (Police Recorded Crime Statistics, 2022). It is important that offenders and those who would want to violate the law know and understand that for every crime, there will be punishment. If this is generally understood in society then a rational person will see that there no joy in violating the law (Williams & McShane, 2014: 18).

5.1.3 Severity

The final component of deterrence that Beccaria pointed to as important is the severity of the punishment. Although this component is important, it is less significant because severe punishment can lead to further criminality and might take away from the objective of punishment, because some punishments might be inhumane or be a violation of the rights of the individual (Williams & McShane, 2014: 18). Therefore, Beccaria emphasized that for the punishment to be effective, the penalty must exceed the potential benefit (Williams & McShane, 2014: 18). This will most likely deter the individual and general public because they will see no value in violating the law.

Deterrence theory shows that punishment should not be an act of violence or a violation of the rights of others. Instead, punishment should be public, swift, necessary, and should not exceed the gravity of the violation. This is so that individuals and the general public can see that there is no benefit or profit in violating the law (Tibbetts, 2018: 44). In the South African context, effective deterrence would assist in significantly decreasing the number of people who violate the law, especially the youth, which will positively impact the number of young people incarcerated. This would decrease the burden on correctional facilities, as the majority of them lack the critical resources to effectively address the challenges faced by the South African youth who violate the law (Shabangu, 2005: 27).

5.1.4 Lack of critical resources in South Africa's correctional facilities

South African prisons and CYCC's lack critical resources for proper rehabilitation of offenders, especially child offenders (De Villiers, 1997). One of the critical issues lacking in the CYCC's is security. Inmates are often a danger to themselves, to other inmates and to the staff at the facilities. The level of risk an inmate poses varies with the period of the sentence they are serving (Austin, 2001). Sometimes when inmates first enter the facilities, they are traumatised and become out of control. They are not able to accept their new reality, or they are only then realising the impact of their actions. Therefore, they might want to hurt themselves or others. In other cases, inmates who are supposed to be released often do not want to go back into society (Travis, Solomon & Waul, 2001; Shinkfield & Graffam, 2009: 29). There are a variety of reasons for this, which include the fear of rejection by society, the fear of starting over for those who have lost important things such as jobs and families, the fear of being treated the same as everyone in the community for those who had rankings in gangs, and so on (Shinkfield

& Graffam, 2009: 30). Such inmates may sabotage their chance of release by threatening their own security or the security of others.

According to the Bill of Rights, all prisoners have the right to not be tortured, not to be punished in cruel, inhuman or degrading ways, to safe adequate accommodation and to adequate medical treatment when required (Constitution of the Republic of South Africa, 1996, section 27). Inmates are depending on the Department of Correctional Services to not violate these rights, but, given the overcrowding challenge in the facilities, it would not be wrong to assume some rights or needs of inmates are not met. There have been various reports and cases of inmates being tortured by correctional officers (Ramagaga, 2011; Postman, 2019). The challenge of gangs in prisons also threatens the safety and security of inmates. Prison gangs have been a challenge in a lot of prisons globally and have been part of the South African correctional system for more than a century (Steinberg, 2004; Steinberg, 2010; Roth, 2020). The majority of new prison gang members join for protection or they risk the chance of being victims themselves. Even though prisons try to address issues by separating the inmates based on their gang affiliations, fights often occur. This might be because there is not enough space for everyone and therefore more often than not inmates find themselves in situations where they are fighting in the name of the gangs. This might also be because of the hierarchy of gang membership and what one is required to do to climb up the hierarchy structure that results in the violation of other inmates' rights (Kristine, 2011: 108).

Section 35 (2) of the Constitution addresses the health obligations a facility has towards inmates: "Everyone who is detained, including every sentenced prisoner, has the right to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment. This means that the health of inmates must be a priority. However, it is critical to have an understanding of the socio-economic challenges South Africa is faced with especially in terms of providing and delivering on health obligations. There is a shortage of health care workers and a lack of resources to accommodate the current demands. Offenders require both physical and mental health care workers so that they can be evaluated and it can be determined whether the programmes they are assigned to are effective. The reality is that the psychologist to inmate ratio is unevenly distributed (Murhula, Singh, & Nunlall, 2019).

Therefore, this means that even if an inmates see a psychologist, follow up sessions are not guaranteed and, if the inmate does have a follow-up session, so much has happened that it is difficult to reflect and make progress.

Children who are detained require different services because of their age and because of the nature of the crimes they have committed. This requires that these children are separated not only from adults but also from each other as far as possible. With the challenge of resources and overcrowding that South Africa faces it is near impossible to separate these children in a manner that will be effective to their rehabilitation. Even if children were to be diverted, there are not enough resources to accommodate the child's needs (Berg, 2012: 31). The few non-government organisations (NGO's) that are operating in South Africa cannot always cater to the needs of all the children and are not conveniently situated. Often the location of facilities is the biggest challenge because it removes the children from their community, which is what rehabilitating the child and reintegrating the child is trying to avoid. A community must see that the child is taking responsibility, and understand that the child is a product of that community, and therefore maybe they need to make some changes to assist children within their own community who are in conflict with the law.

5.2 Conclusion

The justice system in South African still has a long road to go with regards to matters pertaining to youth misconduct and understanding and applying laws regarding child justice. More work is needed in advocacy and scholarship to better understand the factors and contributors of criminality, especially where children are concerned. Children who commit serious crimes pose a challenge to the justice system, because even though they are young they cannot go unpunished for their conduct. This dissertation shows some of the complexities that arise in balancing justice for the wrongful conduct and rehabilitation, especially where heinous crimes are committed on the cusp of adulthood. As discussed, sentencing children has become more challenging because there are so many factors to consider, and when a child commits a serious crime sentencing becomes even more challenging. It is therefore critical that socio-criminogenic risk factors are not only brought into court by *amici curiae* like the Centre for Child Law, but also confronted in communities, because children are the product of their society.

Even though cases are not the same and the principle of individuality is crucial when sentencing offenders, inconsistency in sentencing youths in conflict with the law is a problem that must be addressed. YM's case, with which I introduced this dissertation, is an indication that judicial officers do not necessarily understand the law and that this can have very serious consequences for the offender. It also hurts the confidence and reputation of the justice system, and the deterrent effect of punishment, both for individuals and the community, which becomes confused and misled. Children who commit serious crimes should be punished. But the courts must also grasp the "prickly pear" of ensuring that punishment balances justice and rehabilitation, safeguarding the child's rights in the present and opening the possibility for a productive life in the future.

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