Article 40

THE DYNAMICS OF YOUTH JUSTICE & THE CONVENTION ON THE RIGHTS OF THE CHILD IN SOUTH AFRICA

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Article 37(b)

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

From Old Jeshwang to Kanifing

Improving children's access to justice in The Gambia – Challenges and Prospects

By Edmund Amarkwei Foley

Tucked in the belly of Senegal lies one of Africa's small countries – The Gambia – snaking its way inland eastwards along the River Gambia. In spite of criticisms of the country's human rights record, The Gambia can boast of one of the admirable pieces of children's legislation on the continent. With regard to child justice, section 72(1)(f) of the Children's Act, 2005 provides mandatory legal representation for children in conflict with the law, without which a trial cannot proceed. This provision is buttressed by section 30(1)(b) of the Legal Aid Act, 2008 which requires the National Agency for Legal Aid (NALA) to provide legal aid for children pursuant to the Children's Act.

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EDITORIAL

Welcome to the first edition of Article 40 for 2012!

As our feature article for this edition, we remain with our theme of child justice in other African countries. Edmund Amarkwei Foley (the new coordinator and senior researcher in the Children's Rights Project at the Community Law Centre) writes about improving children's access to justice in the Gambia in this regard. Valuable lessons on implementation of the law can be learned from this article.

The Child Justice Act in South Africa has been in implementation for two years. As a result, we have seen multiple cases going on review to the High Court. Most of these cases under review deal with the sentencing of children by magistrates. Hence the editors of Article 40 deciding to place a focus on two cases that went on review. These cases were decided before the implementation of the Child Justice Act. These, we hope, will be considered valuable to add to the debate on the sentencing of children, as both the magistrate and the probation officer play a pivotal role in this respect.

The first case under review in this edition was written by Morgan Courtenay (an attorney at the Centre for Child Law at the University of Pretoria). He provides us with an interesting discussion of "The State v CKM, FTM & IMM". His analysis of case investigates the retrospective effect of the Child Justice Act, together with sentencing children to child and youth care centres, the latter also being a form of depriving children of their liberty.

Similarly Clare Ballard (a researcher in the Civil Society Prison Reform Initiative of the Community Law Centre) writes on the role of youthfulness and the deprivation of liberty in sentencing children, before the application of the Child Justice Act. This discussion is based on the case of "Fredericks v The State".

Lorenzo Wakefield (co-editor, Article 40)

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The journey from law to practice has however not been smooth-sailing. Until the development of Rules of Procedure for the Children's Court in 2010 (the Children's Court) – the only one in the country then[1] – could not deal with any cases involving children in conflict with the law. The affected children who were in custody – mainly in the Juvenile Wing of the Old Jeshwang Prison Camp – could not access justice in any way, rendering the Kanifing Children's Court illusionary. Following the promulgation of the Rules by the Chief Justice, the Court began to address the backlog of cases but there was still one more hurdle – the lack of mandatory legal representation.

The Institute for Human Rights and Development in Africa (IHRDA), a pan-African non-governmental organisation based in Banjul, undertook a project to provide pro-bono legal counsel for children in conflict with the law and on remand. This article gives an overview the provision of legal assistance to children in conflict with the law, highlighting the challenges and successes and makes recommendations for shortening the trip from the Old Jeshwang to Kanifing.

The legal framework protecting children in conflict with the law

The Constitution of the 2nd Republic of The Gambia, 1997 (the Constitution) provides generally for the rights of the child in article 29 covering the right to a name and nationality, right to parental care, protection from economic exploitation and hazardous work, and the right of a 'juvenile offender' to be separated from adults in places of detention. Children also hold all other rights as applicable to them under Chapter IV of the Constitution. Therefore children in conflict with the law are entitled to all the due process rights provided for in article 24 of the Constitution. The Constitution interestingly does not expressly define who a child is. The Children's Act however resolves the issue by stating in section 2 that a child is a person under 18 years of age.

Part VI of the Act provides for the Children's Court. Section 68 provides that a Children's Court shall be established in every Division[2] or other form of local government administrative area by the Chief Justice. The Court is composed of a 'Chairperson, who shall be a Magistrate, not below the grade of … First Class to be designated by the Chief Justice and two other persons of proven integrity … one of whom shall be a woman to be appointed by the Chief Justice on the recommendation of the Judicial Service Commission.' The Court is vested with both civil and criminal jurisdiction. Thus the Children's Court is presently conducted by the Kanifing Magistrates Court, which has designated Tuesdays and Thursdays as sitting days for children's cases. This situation is not ideal as the Act intends a full time Children's Court.

1 A new Children's Court was recently opened at the Brikama Magistrates' Court in Brikama, the second largest town in The Gambia, by the Chief Justice, Hon. Justice Emmanuel Agim. See 'Brikama Magistrates Court's new complex inaugurated', *Daily Observer* (online edition) *Thursday, 2nd February 2012*. Available at www.observer.gm (Accessed on 9th February 2012).

2 The Gambia is divided into seven main administrative areas: two Municipalities (City of Banjul and Kanifing) and five Divisions (now known as Regions). The Regions are: Western, Lower River, Central River, Upper River and North Bank.

As previously noted there is only one venue for the detention of child offenders – the Juvenile Wing of the Old Jeshwang Prison Camp - which houses boys, with no facilities for girls. Girls are therefore incarcerated with adult females in the country's prisons. Police stations do not have separate detention facilities, thus children are detained with adults.

Section 209 of the Act sets the minimum age of criminal responsibility at 12 years. The administration of child justice is regulated by Part XVII. Among others, it prohibits the subjection of children to the general criminal justice system meant for persons at and over the age of majority and mandates that children should only be subjected to the child justice system. This part of the Act also requires the Children's Court in any criminal proceeding involving a child to act in the best interest of the child, ensuring that the trial is conducted fairly, expeditiously and without delay with the full participation of the child, guaranteeing his or her freedom of expression in the proceedings.

Section 228 prohibits the Children's Court from using terms such as 'conviction' and 'sentence', rather using 'proof of an offence against the child' and 'order' respectively. The Act also prohibits the imprisonment or the imposition of the death penalty on a child. Detention of a child should always be reserved by the Court as measure of last resort. The Court is required to consider alternative measures such as community service, imposition of fines (to be paid by the parent or guardian of the child, subject to some exceptions), and the pursuance of peaceful resolution of the conflict occasioning the commission of the offence by the child.

The Secretary of State responsible for children – in consultation with the Secretary of State for Internal Affairs – is required to establish a National Rehabilitation Centre for Children or such other centres that serve as a place of detention and also provide rehabilitation and re-training of children who, in terms of section 223(1) of the Act, are directed by the Children's Court to be placed there. These safeguards, in addition to the general rules on fair trial, are meant to protect children who come in conflict with the law. Though laudable on paper, in practice the story is quite different.

Challenges to the administration of child justice

In the combined first, second and third Periodic Report of The Gambia to the United Nations Committee on the Rights of the Child (CRoC), the State conceded that it had not established the National Rehabilitation Centre as required by the Act due to lack of resources (Government of the Gambia (2008) 67). The State further conceded that 'disaggregated data on arrests of children and legal cases involving children, including outcomes, sentences, and recidivism rates, is not available' (Government of the Gambia (2008) 68).

On the detention of children, the State also admitted that 'disaggregated data on the

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number of persons under 18 held in police stations, pre-trial detention, or other facilities is not available, nor are there records on the length of sentences or cases of abuse and maltreatment' (Government of Gambia (2008) 70). Though section 198 of the Act requires that there should be a Children's Court in every Division or other local government administrative unit this is currently not the case. There is one court sitting at the Kanifing and a newly-commissioned one sitting in Brikama, The Gambia's second largest town. It could not be ascertained if the new court in Brikama has commenced sitting.

In 2009, IHRDA was informed in a meeting with the then Chairperson of the Children's Court that there were about 200 children in detention for various offences and who had not been tried due to the absence of Rules of Procedure for the Children's Court.[3] Given the seriousness of the offences, the children involved had been remanded in custody – some over two years – pending the determination of their fate by the Children's Court, which was helpless. IHRDA was also informed by the Court that there were no separate facilities for the remand of girl-child offenders. The example was given of a girl who had been incarcerated with boys and was consequently sexually assaulted and conceived a baby. The inability of parents and guardians to afford legal representation also accounted for the long periods of remand. Some of the children were as young as 13 years of age. IHRDA was further informed that seven of the 200 children were facing murder charges. In 2010, during another meeting with the then Chairperson, the author was shown a list of 16 cases of serious offences pending before the Children's Court which had stalled for lack of legal representation. Though members of the Female Lawyers Association of Gambia (FLAG) had been assisting with the provision of legal representation, the Association's capacity was overwhelmed as not all of its members were in full-time courtroom law practice (IHRDA (2011) 10). FLAG has been the largest provider of legal aid so far in the Children's Court.

The operations of the Children's Court have also been hampered by lack of personnel and equipment. The Magistrate has to share a computer with the Registry. This does not bode well for the security of judgments and orders made by the Children's Court. The computer is not in a secure place and files could be easily accessed by unauthorised court staff and other persons. In the past, during the absence of the substantive Chairperson, the acting magistrate appointed could not be fully devoted to the Children's Court due to the demands from his own court.

As previously noted there is only one venue for the detention of child offenders – the Juvenile Wing of the Old Jeshwang Prison Camp - which houses boys, with no facilities for girls. Girls are therefore incarcerated with adult females in the country's prisons. Police stations do not have separate detention facilities, thus children are detained with adults.

Light at the end of the tunnel: advancing towards better child justice administration

The Children's Court received a boost in 2010 when the Chief Justice promulgated its Rules of Procedure. The Rules greatly aided the consideration of cases and gave the Children's Court momentum to deal with cases. In January 2012 the Chairperson informed the author that, with the Rules and Children's Act, the Children's Court had been able to grant bail to most of the 200 children who were on remand at the Juvenile Wing of the Old Jeshwang Prison Camp.

Having gained information on the plight of children on remand, IHRDA commenced a project in November 2010 to provide pro bono legal representation to children with cases before the Children's Court. The primary objective of the project was to pilot a legal aid scheme for children with cases before Children's Court and gradually hand over the initiative to NALA. Under the terms of the project, IHRDA was to select 10 lawyers to take on 20 cases of children charged with serious offences before the Children's Court. IHRDA consulted members of the Gambia Bar Association (GBA) to select 10 highly qualified and committed lawyers to take up 2 cases each.

The next step was the development of criteria to select the cases. Working with the Chairperson and staff of the Registry of the Children's Court, 2 main elements were taken into account in selecting the cases. First was the seriousness of the offence. Under this, the following factors were taken into account: whether a child's plea had been taken; where a child's plea had been taken, but trial had not had commenced; and key witnesses, evidence or case docket could not be traced after all diligent effort. Second was the length of detention, considering whether a child had been on remand longer than the term of imprisonment for the offence charged under the Criminal Code; and whether a child had been charged with an offence and had been on remand for two years or more.

In the event that cases meeting these criteria were less than 20, IHRDA and the Children's Court decided to add civil cases requiring urgent

3 The author was a Legal Officer at IHRDA and the lead officer on child rights. The author obtained this information in the course of his responsibility as the officer on child rights.

measures to be taken for the care and protection of the child or children involved. Following these elements, 17 criminal and three civil cases were selected. The 10 lawyers selected two cases each and signed memoranda of understanding to complete the cases. IHRDA undertook in turn to provide research support to the lawyers. The lawyers commenced court appearances in last week of March 2011 and it was anticipated that the cases would be completed within two to three months.

By the end of June 2011, five cases had been completed. In *KCC/CR/129/10 IGP v O.S.*, for example O.S. was charged with rape but the Court found him mentally unfit to stand trial and discharged him. In *KCC/CR/083/10 IGP v G.N.*, the Court struck out the case on the ground that G.N. had been wrongly charged with stealing. G.N. was therefore discharged.

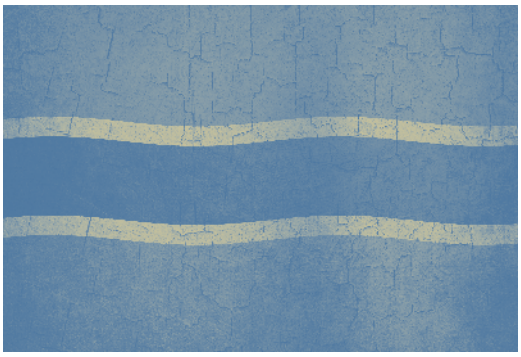
In these cases, as in many others, all that was required was just the intervention of a lawyer to identify procedural lapses and fundamental due process concerns which could easily be resolved by the Children's Court, yet the children involved had been incarcerated for long periods pending their appearance in the Children's Court. In spite of challenges posed by sitting times, absence of counsel, prosecutors and the Chairperson, and caseload of the regular Kanifing Magistrates' Court, 12 cases were fully completed by the 31st December 2011.

NALA was formally established on 30th September 2010. In line with section 30(1)(b) of the Legal Aid, NALA took over all the cases pending before the Children's Court in September 2011 to provide legal representation and assistance. NALA acknowledged the pilot project by IHRDA as part of its motivation for taking over the cases and even included the list of eight pending cases on its list.

Throughout its monitoring, IHRDA had interviewed panel members of the Children's Court, registry staff, prosecutors, children and their parents/guardians.[4] They all asserted that the project had helped the Children's Court to expedite consideration of children's cases. Further, the project had exposed gaps in the capacity of court staff, prosecutors, police and prison staff, and panel members of the Children's Court in dealing with children in conflict with the law under the Children's Act. For the parents and guardians of the children concerned, the intervention of a lawyer was more than welcome relief.

Conclusion

The Children's Court continues to be daily inundated with cases. The capacity constraints and resource challenges still remain, however the collaboration between the Children's Court, IHRDA and NALA has thrown a ray of hope for children in conflict with the law in The Gambia. For those who have to stay in Old Jeshwang, the journey to and from Kanifing has been shortened and for others, a trip home, due to better access to justice through legal aid. ●



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4 IHRDA, Improving Access to Justice for Children in The Gambia: An IHRDA Report on Providing Pro-bono Legal Assistance to Children in Conflict with the Law before the Children's Court of the Republic of The Gambia (forthcoming). The author produced the first draft of the report which is currently being reviewed.

S v CKM & 2 Similar Cases (Centre for Child Law as Amicus Curiae)

By R. Morgan Courtenay

In the latest case dealing with child justice the North Gauteng High Court ('the Court') took the opportunity to elaborate on three important facets of the Child Justice Act, namely the its retrospectivity, the guidelines that need be considered by both magistrates and probation officers alike in sentencing children, and the duties of probation officers when dealing with "troubled and troublesome" children.

The Facts

The North Gauteng High Court reviewed three different matters decided by magistrate courts: The first case involved a child anonymised as CKM. CKM appeared before the Mankweng Magistrate's Court for the first time on 9 September 2009. He was charged together with two others with assault, for allegedly having hit one FT on 5 September 2009. There were no allegations in the trial court that the complainant had suffered any injuries. CKM was fourteen years old at the time he committed the alleged offence. He pleaded guilty and was convicted as charged. The magistrate sentenced CKM to detention in a reform school, on the strength of the recommendation contained in the probation officer's pre-sentence report. The recommendation was based on CKM failure to successfully complete a diversion programme; the fact was that he was without supervision by a parent and had developed into a difficult child. CKM had no previous convictions.

The second case involved a child anonymised as IMM. IMM appeared before the same magistrate as CKM on a charge of assault with the intent to commit grievous bodily harm. IMM was duly convicted and sentenced to a reform school.

The last case involved a child anonymised as FTM. FTM appeared before the same magistrate as CKM and IMM on a charge of housebreaking with the intent to commit an unknown crime. Similar to CKM the magistrate, on the

strength of the probation officers report, sentenced him to a reform school. The recommendations were based on FTMs failure to successfully complete a diversion programme and that he was a "troubled and troublesome child".

All three children were sent to the Ethokomala Reform School in Mpumalanga, from which they allegedly escaped repeatedly and to which they were allegedly re-admitted after being apprehended from time to time. On the last occasion they were apprehended after having escaped. They were then taken to the Polokwane Secure Care Centre, an awaiting trial facility. They were assigned to this centre administratively, without a court order and without having being charged with any offence in respect of which they were awaiting trial. Their transfer to the centre was arranged by the social worker responsible for the pre-sentencing reports presented to the trial court prior to the children being assigned to the reform school.

On special review the High Court judge overturned the sentences of both CKM and FTM as he found the sentences to be wholly inappropriate; opting to caution and discharge the two children. The Court was however constrained regarding IMM because his conviction and sentence had already been upheld on review by the High Court. However the Court, acting in the interests of justice, released IMM because he had already served out part of his sentence and had been unlawfully detained at the secure care facility. What follows are the important points raised in the judgment and its impact in particular on magistrates and probation officers.

The Judgment

Retrospectivity of the Child Justice Act 75 of 2008

In both the cases of CKM and FTM the criminal proceedings were instituted before the commencement of the Child Justice Act 75 of 2008 ('Child Justice Act'). The Court therefore sought to deal first with the issue of whether or not the Child Justice Act could be applied. The primary reason for the Court wanting to determine whether or not the Child Justice Act applied retrospectively was that its application could influence the sentences imposed on CKM and FTM. The Child Justice Act introduced a "new" and comprehensive system for dealing with child offenders. It represented a break with the traditional criminal justice system, particularly in the field of sentencing child offenders as it explicitly emphasised that children, where possible, should be diverted from the court-based justice system. The Court emphasised the *"need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care and correcting errant actions as far as possible by diversion, community based programs, the application of restorative justice processes and reintegration of the child into the community"*.

In order for the Court to address the application or otherwise of the Act it had to revert to the Child Justice Act itself, particularly section 98(1) which provides that *"[a]ll criminal proceedings in which children are accused of having committed an offence, which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act, must be continued and concluded in all respects as if this Act had not been passed"*. The Court ruled that whilst it might be possible to interpret section 98(1) in a manner that would render it retrospective, such interpretation would not be necessary. The Court found rather that the constitutional principles enshrined within the Bill of Rights - particularly the paramountcy of a child's best interest must be observed and given effect to in all circumstances (section 28(2) of the Constitution) and a child's right not to be detained except as a measure of last resort and for the shortest period of time (section 28(1)(g) of the Constitution) - always found application irrespective of whether the Child Justice Act was operational or not. Therefore the principles of sentencing found in the Child Justice Act were merely restating the position of that which would have had to be considered in any event.

Reform Schools (Child and Youth Care centres) as a sentencing option

Finding that the Child Justice Act did not apply retrospectively, the Court turned to the question of whether the sentences imposed on the children - detention in a reform school - were appropriate. It held that *"referral to a reform school, which amounts to an involuntary, compulsory admission to a facility where the convicted child is obliged to participate in various programs, represents a serious invasion of the child's rights to freedom of movement and decision making. Such a sentence should therefore not be imposed lightly or without compelling reasons"*. The Court made it clear through this statement that when considering sentencing a child to a reform school a court must be guided by the principles of sentencing. In particular, that a child has the right not to be detained except as a measure of last resort, in which case the child may only be detained for the shortest appropriate period of time. In the cases of CKM and FTM, the Court, after considering the fact that the children were first time offenders, they were young and that the crimes were not serious, found the sentence wholly inappropriate and set them aside.

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Pre-sentence reports by probation officers*

It must be borne in mind that probation officers play a pivotal role in the sentencing of child offenders. They are the ones at the coalface, who have an intimate knowledge of the social factors relevant to the matter at hand. Courts, recognising this, place considerable weight on their pre-sentence reports in order to make determinations of just and equitable sentences. It therefore stands to reason that when compiling their reports, probation officers must consider the guidelines enumerated by the Court regarding sentencing children to child and youth care centres. Thus, all alternatives to detention must be considered and such alternatives placed before the court. Custodial sentences – whether in correctional service centres or child and youth care centres – should only be recommended as a last resort and, where appropriate, for the shortest period of time. The recommendation of a custodial sentence should further be reserved for child offenders who commit the most serious of crimes and even then only when facts justify such recommendations. The Court's message was that detention should never be used as a mechanism of simply restoring structure, discipline or education to a "troubled or troublesome" child who has had the misfortune of being the product of a poor social upbringing or who lacks adequate parental control. Rather such children should be dealt with as either children in need of care and protection or be diverted away from the court-based justice system should they have acknowledged that they have indeed committed the offence.

Placement of "troubled and troublesome" children in secure care facilities

The last issue the Court engaged with was the probation officers conduct in placing the children – without a court order – in the Polokwane Secure Care Facility. The Court emphasised that - in addition to children enjoying the right not to be incarcerated or otherwise held in detention without a valid court order - it must be borne in mind that a child's right to liberty, care and family life enjoys the fullest protection possible and that any limitation or infringement thereof must be subject to strict judicial control. In this case there was no judicial control over their subsequent placement. Children are further entitled to appropriate alternative care when removed from the family environment (section 28(1)(b) of the Constitution), the placement of a child in a facility that was created solely to accommodate awaiting trial detainees infringes this right as such placement may never be said to be appropriate in this context. The correct procedure that should have been followed in the present instance was for the children to be dealt with in accordance with sections 170 and including 173 of the Children's Act 38 of 2005 (procedures for children who abscond), by either bringing the child before the trial magistrate in terms of section 170 or requesting the provincial head of social development to make an appropriate determination, which might have included a transfer to another youth care centre.

The Court found that the three children were placed and held unlawfully at the facility. Consequently justice dictated that IMM - together with the other two who had their sentences overturned owing to the inappropriateness thereof - also be cautioned and discharged.

The judgment correctly rebukes the conduct of the probation officer in her recommendations made in the pre-sentence report and placement of the children in the secure care facility. It further serves as a stern warning to other probation officers who may be inclined to administratively place "troubled and troublesome" children in such facilities.

Conclusion

The judgment emphasises a number of important points often overlooked by those at the frontline of the child justice system. Importantly, sentencing of children to child and youth care centres must be looked at by both magistrates and probation officers with a degree of circumspection before ordering or recommending such sentences. Where a child may be labelled "troubled or troublesome" probation officers are enjoined to make a proper determination of whether the child should or should not be dealt with by the criminal justice system. In this regard, should the child appear to be in need of care and protection then the matter should be dealt with in accordance with the Children's Act rather than attempting to remedy his/her behaviour through the criminal justice system. It must be emphasised that such approach accords with the underlying aims and objects of the Constitution and the Child Justice Act.

The judgment further fires a shot across the bow for all probation officers who act outside the ambit of the law when placing children at their own discretion. The Court - in the strongest terms - held that "such action cannot be countenanced and should not be allowed to occur again, particularly not in respect of children whose interests were gravely compromised by their unlawful detention". The emphasis on unlawful detention by the Court also sends a stern warning that a claim for civil damages may follow should this occur in future.

* Section 71 of the Child Justice Act regulates "pre-sentence reports" by probation officers. This report contains recommendations by the probation officer on the sentence the child should receive.

Youthfulness and sentencing prior to the operation of the Child Justice Act

A CASE REVIEW OF FREDERICKS v THE STATE

By Clare Ballard

In "Fredericks v The State" (29 September 2011), the appellant had appealed to the Supreme Court of Appeal (SCA) against the sentence handed down by the Parow Regional Court and confirmed by the High Court of the Western Cape. He and his co-accused had been convicted of robbery with aggravating circumstances (involving the use of a knife and a firearm) and rape. The appellant was sentenced to an effective sentence of 25 years imprisonment – 15 years for the robbery conviction, and 10 years for the rape conviction. The only issue before the SCA was whether, given the circumstances of the case, the trial court had misdirected itself in imposing a lengthy sentence of imprisonment on a child who was 14 years old at the time of the commission of the offence.

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This case note will discuss the approach of the SCA in overturning the lengthy sentence imposed on the appellant, a child at the time of the offence, by the regional court. The judgment is a good example of the courts' progressive attitude towards children in conflict with the law at a time when the prescripts of the Child Justice Act 75 of 2008 had yet to come into force.

Applicable legislation and case law

The Constitution acknowledges that children are physically and psychologically more vulnerable than adults. It affords them a specific set of rights designed to nurture and protect their particular interests and development. In particular, the Constitution recognises the fact that lengthy periods of imprisonment are generally harmful to children. In many ways, it is essentially an articulation of international law (which came into being long before the Constitution) dealing with children in conflict with the law.

Section 28(1)(g)(i) and (ii) of the Constitution states that:

"Every child has the right – not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be ... kept separately from [from adults] and treated in a manner, and kept in conditions, that take into account the child's age."

Although the commission of the offences in *Fredericks* by the appellant occurred at a time when the Child Justice Act had yet to be promulgated, there were nevertheless, in addition to the Constitution, guidelines on the sentencing of children which had been authoritatively laid down in case law.

S v Z en Vier Ander Sake 1999(1) SACR 427 (E) was the first reported judgment in the new constitutional era which considered explicitly the principles relevant to the sentencing of children. Five matters came before the High Court on review in which child offenders had been sentenced to suspended terms of imprisonment. The court considered the options and principles applicable to child offenders and laid down the following guidelines:

a. diversion should be considered prior to trial in appropriate cases;
b. age must be properly determined prior to sentencing;
c. a court must act dynamically to obtain full particulars about the accused's personality and personal circumstances;
d. a court must exercise its wide sentencing discretion sympathetically and imaginatively;
e. a court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is rarely appropriate; and
f. a court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.

Subsequent judgments generally affirmed these guidelines and courts thus became receptive to the idea that a sentence should be responsive to the individualised needs of the child, and where possible, sentences of imprisonment should be avoided. In *Ntaka v The State* (unreported, [2008] ZACSA 30, 28 March 2008), for example, the appellant, who was 17 years old at the time of the commission of the offence, argued before the SCA that the High Court, in sentencing him to ten years imprisonment (of which four were conditionally suspended), had failed to investigate adequately the possibility of correctional supervision. Judge Cameron, writing for the majority found that in light of the gravity of the offence (rape), 'a prison sentence [was] unavoidable.' He disagreed with judge Maya however, that a six-year sentence was fitting. That sentence he said:

"disregards the youthfulness of the appellant when he committed the crime. It treats him too much like the adult he was not when he raped his victim. It may set him up for ruin, while foreclosing the possibility, embodied in his youth, that he will still benefit from resocialisation and re-education. It fails to individualize the sentence with the emphasis on preparing him, as a child offender, for his return to society."

Judge Cameron said that a five-year prison sentence came closer to doing justice. He imposed the sentence under section 276(1)(i) of the Criminal Procedure Act 51 of 1997, which permits the placement under correctional supervision "in the discretion of the Commissioner or a parole board."

Another notable judgment is *Brandt v S* [2005] 2 All SA 1 (SCA). In this matter, the SCA replaced a sentence of life imprisonment imposed by the High Court on an offender who was 17 years old at the time of the offence, with a sentence of 18 years imprisonment. The SCA stated (at paragraph 20):

"In sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles: including the principle of proportionality; the best interests of the child; and, the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time. Adherence to recognised international law principles must entail a limitation on certain forms of sentencing such as a ban on life imprisonment without parole for child offenders."

The Fredericks Judgment

In determining the appropriateness of the sentence of the trial court, the SCA noted the difficulty that sentencing courts face when having to weigh up the child accused's interests against the pressure to punish what are often extremely violent and brutal crimes:

"Whilst the gravity of the offences call loudly for severe sentences with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component."

It acknowledged, however, that although the general purpose of sentencing is to deter, punish and prevent the re-occurrence of crimes, when it comes to juveniles, "rehabilitation seems to be emphasized more."

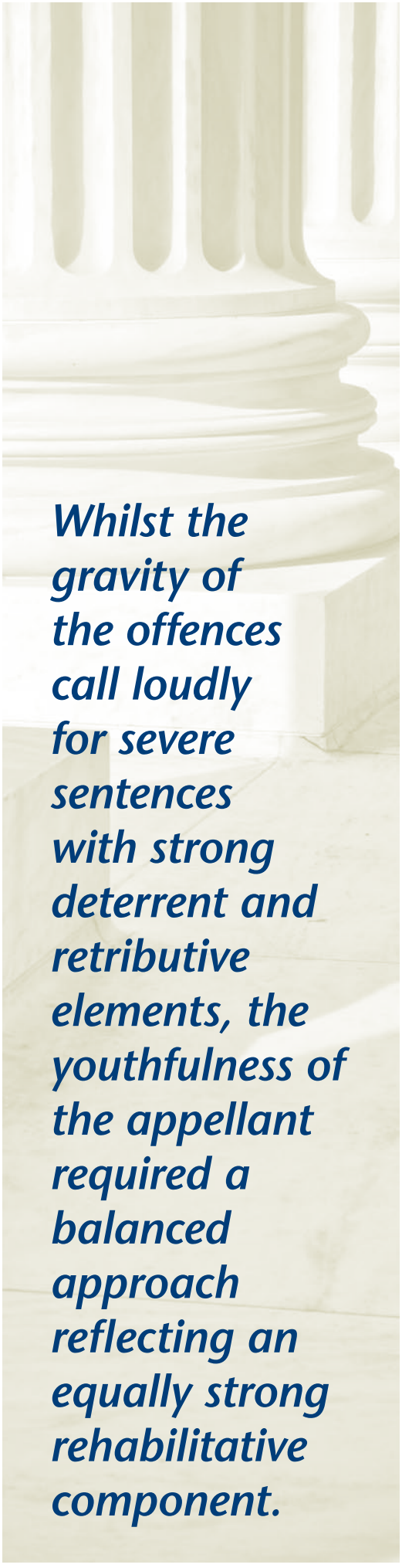
Having considered the relevant constitutional and international law principles, the SCA found that a sentence of imprisonment for 25 years was "shockingly and disturbingly inappropriate." The trial court had failed, the SCA said, to take into account the fact that the appellant was a first-time offender, described by the principal of his school as a "model student" whose "behaviour and academic achievements [were] positive." Instead, it had over-emphasised the seriousness of the offences at the expense of the appellant's youthfulness. The SCA concluded that this amounted to a misdirection and it was therefore empowered to consider the sentence afresh.

Another material misdirection that the SCA noted, was the fact that the trial court had overlooked provisions of the Criminal Law Amendment Act. This Act exempted offenders under the age of 16 years from the minimum sentencing legislation and, on the erroneous assumption that the appellant was 16 years old at the time of the offence, the trial court applied the mandatory minimum sentence.

In order to give effect to section 28(1)(g) of the Constitution an appropriate sentence, the SCA held, was 10 years for robbery conviction, and 12 years for the rape conviction, which were to run concurrently.

Conclusion

Based on the trend in case law that was decided before the *Fredericks* judgment, one can certainly come to a conclusion that the deprivation of a child's liberty and using imprisonment as a last resort was firmly grounded both in the Constitution and in case law. Therefore the trial court and the High Court in the Fredericks matter had to be guided by this precedent and law. An ignorance of the Constitution and the case law (in the absence of the Child Justice Act) amounted to a miscarriage of justice for children, based on their youthfulness. ●



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The 5th biennial conference of the International Juvenile Justice Observatory will be held in London, United Kingdom from 5 – 7 November 2012. The theme for this conference will be **"Criminality or Social Exclusion? Justice for Children in a Divided World"**.

The deadline for the submission of abstracts for workshop papers is on 30 April 2012.

For more information visit: http://www.oijj.org/london2012_en.html

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