IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT/20/94

In the matter of :

THE STATE

versus

HENRY WILLIAMS
JONATHAN KOOPMAN
TOMMY MAMPA
GARETH PAPIER
JACOBUS GOLIATH
SAMUEL WITBOOI

HEARD ON 24 MARCH 1995

DELIVERED ON 9 JUNE 1995

JUDGMENT

LANGA, J:

[1] This matter has been referred to this Court by the Full Bench of the Cape of Good Hope Provincial Division of the Supreme Court (Conradie, Scott and Farlam JJ). It is a consolidation of five different cases in which six juveniles were convicted by different magistrates and sentenced to receive a "moderate correction" of a number of strokes with a light cane. The issue is whether the sentence of juvenile whipping, pursuant to the provisions of section 294 of the Criminal Procedure Act,[1] is consistent with the provisions of the Constitution.[2]

[2] Mr. Bozalek appeared with Mr. Hathorn as *amicus curiae* on behalf of the accused; they were assisted by the Legal Resources Centre's Cape Town office. We are indebted to both Counsel and to the Legal Resources Centre. Before the date of the hearing, the President of this Court was advised by the Attorney General of the Cape of Good Hope Provincial

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[1] Act No. 51 of 1977 (as amended). For convenience this will be referred to simply as "the Act.”

[2] Act No. 200 of 1993 (as amended). For convenience, this will henceforth be referred to simply as "the Constitution."

Division that he wished to withdraw the argument which had been filed on his behalf (and on behalf of the State) as he shared the view that the provisions relating to corporal punishment in section 294 of the Act were unconstitutional. Mr. Slabbert, who is a member of the Attorney General's staff, however agreed to present the opposing argument as *amicus curiae* in accordance with the written argument which had been filed on behalf of the State. We place on record our appreciation to him for having undertaken this task.

[3] Purely for the sake of convenience, I shall refer to the accused as the applicants and to the position adopted by Mr. Slabbert in his argument as that of the State.

[4] Although each of the cases has a history of its own, much is in common. The applicants are all males and they are all juveniles. Three of them, namely, Williams, Koopman and Mampa were each sentenced to suspended prison sentences in addition to the juvenile whipping. The remaining three were sentenced to juvenile whipping only. All the trials had commenced before 27 April 1994; each of the sentences was passed after 27 April 1994.

[5] The Provincial Division became seized of the matters in two ways: all five cases were subject to automatic review in terms of section 302(1)(a) of the Act because of the terms of imprisonment, albeit suspended, imposed on the applicants themselves or on their fellow accused who do not feature in the present proceedings. In addition to this, Mr. A.P. Dippenaar who presided over the case involving Williams, requested that the sentence of strokes be subjected to special review in terms of section 304(4) of the Act. He took this step because he doubted whether juvenile whipping was a permissible punishment in the light of the provisions of the Constitution and in view of the decision in *Ex Parte Attorney-General, Namibia: In re Corporal Punishment By Organs of State.*[3]

[6] Whether, as a matter of strict law, the Magistrate was correct in deferring the execution of the whipping[4], is not in issue. He deserves to be commended for treating as a matter of

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[3] 1991(3) SA 76 (NmSC).

[4] In *S v Pretorius* 1987(2) SA 250 (NC) it was held that where a magistrate has, in terms of section 294 of the Act, sentenced a juvenile offender to a whipping, and has conjoined a sentence which is subject to automatic review

priority an issue involving fundamental human rights and in particular, the application of the provisions of Chapter 3 of the Constitution. He indeed went further than merely taking the initiative to submit the matter for special review.

[7] A sentence of juvenile whipping in terms of section 294 of the Act is not normally reviewable; the whipping is therefore administered immediately after sentence is passed. There must have been countless instances in the past where courts sitting on appeal or review have had to set aside sentences imposed by trial courts because of irregularities; where those offenders had been sentenced to a juvenile whipping, the punishment would almost invariably have been carried out already.[5] Once a whipping has been administered, as is the case with five of the applicants in this matter, any decision which this Court comes to, will make no practical difference to them for purposes of the present proceedings. Mindful of this, Mr Dippenaar ordered that the sentence of five strokes imposed by him on the applicant Williams should not be carried out until the issue, whether or not the punishment was consistent with the Constitution, had been finally decided by the appropriate court. The concern he displayed is to be welcomed.

[8] Courts do have a role to play in the promotion and development of a new culture "founded on the recognition of human rights,"[6] in particular, with regard to those rights which are enshrined in the Constitution. It is a role which demands that a court should be particularly sensitive to the impact which the exercise of judicial functions may have on the rights of individuals who appear before them; vigilance is an integral component of this role, for it is incumbent on structures set up to administer justice to ensure that as far as possible, these rights, particularly of the weakest and the most vulnerable, are defended and not ignored. One of the implications of the new order is that old rules and practices can no longer be taken for granted; they must be subjected to constant re-assessment to bring them

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to the whipping, the magistrate does not have the jurisdiction to suspend the infliction of the whipping pending the result of the review. The case might of course be distinguishable on the basis that what is at issue here and what is sought to be reviewed, is the sentence of whipping.

[5] See *S v Ruiters en Andere, S v Beyers en Andere, S v Louw en 'n Ander* 1975(3) SA 526 (C); *S v M* 1982(1) SA 240 (N); *S v V en 'n Ander* 1989(1) SA 532 (A); *S v F* 1989(1) SA 460 (ZHC); *S v Zuzani and Others* 1991(1) SACR 534 (Tk).

[6] See the provision in the Constitution under the heading "National Unity and Reconciliation."

into line with the provisions of the Constitution.

[9] It was no doubt because of these considerations that Conradie J advised magistrates for their guidance that, pending the decision of this Court, it would be undesirable for sentences of whipping, in terms of section 294 of the Act, to be imposed and that where such sentence had in fact been imposed, it might not be appropriate for it to be carried out until a ruling from the Constitutional Court had been obtained.

[10] When the matter was argued before this Court, it was common cause between the applicants and the State that the provisions in our law which authorise corporal punishment for adults are inconsistent with the Constitution. This consensus of course does not remove those provisions from the statute book; they have not been set aside by a competent body or authority and the relevant legislation has not been repealed. The agreement is, however, an acknowledgement of the effect which the provisions of the Constitution have in forcing a re-assessment of the laws that govern us against the values expressed in the Constitution. The effect is to demarcate the parameters of civilised behaviour, at least at the level of the administration of justice.

[11] Apart from provisions which permit juvenile whipping, the law presently allows whipping as a punishment which may be imposed upon adult males between the ages of 21 and 30 years. This is notwithstanding the fact that over the last thirty years at least, South African jurisprudence has been experiencing a growing unanimity in judicial condemnation of corporal punishment for adults. Criticism of the practice has been consistent and emphatic, it being characterised as "punishment of a particularly severe kind ... brutal in its nature ... a severe assault upon not only the person of the recipient but upon his dignity as a human being";[7] "a very severe and humiliating form of punishment";[8] "`n uiterste strafvorm";[9] "`n erg vernederende en fisies baie pynlike vorm van bestraffing";[10] "cruel and inhuman

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[7] Fannin J in *S v Kumalo and Others* 1965(4) SA 565 (N) at 574F; see also *S v Maisa* 1968(1) SA 271 (T) at 271E.

[8] De Wet CJ in *S v Myute and Others and S v Baby* 1985(2) SA 61 (Ck) at 62H; see also *S v Zimo en Andere* 1971(3) SA 337 (T) at 338G; *S v Ruiters et al* supra note 5, at 530B; *S v Seeland* 1982(4) SA 472 (NC) at 476H.

[9] Conradie J in *S v Staggie* 1990(1) SACR 669 (C) at 675C.

[10] MT Steyn in *S v V en 'n Ander* supra note 5, at 543D.

punishment."[11] This tone of condemnation is to be found, not only in many decisions in this country,[12] but also in other jurisdictions.[13]

[12] If adult whipping were to be abolished, it would simply be an endorsement by our criminal justice system of a world-wide trend to move away from whipping as a punishment. As far back as 1947, the Lansdown Commission of Enquiry, while recommending the retention of corporal punishment in limited form in South Africa, made the point that most civilized countries in the world had abandoned corporal punishment as a method of dealing with crime. The report of the Viljoen Commission, tabled in Parliament in January 1977, also endorsed the view that whipping for adults was a brutal assault, not only on the person of the recipient, but also on his dignity as a human being.

[13] The provisions being challenged, however, relate to juvenile whipping. The State was at pains to point out that there are differences between adult and juvenile whipping. The contention was that corporal punishment was not in itself objectionable, particularly when restricted to male youths; what rendered adult whipping constitutionally unacceptable was the manner in which it was executed. The nub of the enquiry is, however, not the legality or otherwise of adult whipping or how different it is from juvenile whipping. The issue is whether juvenile whipping, on its own merits or demerits, is consistent with the Constitution.

[14] The Act contains a number of related provisions which deal with the infliction of corporal punishment.[14] In so far as juveniles are concerned, no minimum age is fixed in the Act although practice and judicial decisions would seem to have fixed the lower age limit at

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[11] Greenland J in *S v F* supra note 5, at 460I.

[12] See *S v Ximba and 2 Others* 1972(1) PH H66 (N); *S v Motsoesoana* 1986(3) SA 350 (N) at 355D; *S v Daniels* 1991(2) SACR 403 (C) at 406B.

[13] See e.g., *S v Ncube; S v Tshuma; S v Ndlovu* 1988(2) SA 702 (ZSC); *Ex Parte Attorney-General, Namibia: in re Corporal Punishment* supra note 3.

[14] Some sections contain general provisions which are applicable to both adults and juveniles, e.g. section 276 which lists whipping as one of a range of punishments which may be imposed and section 292 which provides general guidelines for whipping.

9 years.[15] A whipping may not be imposed "if it is proved that the existence of some psychoneurotic or psychopathic condition contributed towards the commission of the offence."[16] Section 294(1)(a) provides for whipping to be carried out "by such person and in such place and with such instrument as the court may determine." We were informed that, in practice, a cane is used, but it is significant that the Act leaves this to the discretion of the magistrate.[17] The maximum number of strokes that may be imposed at any one time is seven.[18] Juvenile whipping is inflicted over the buttocks, which must be covered with normal attire [19] and a parent or guardian may be present.[20] No whipping may be carried out unless a district surgeon or an assistant district surgeon has certified that the juvenile "is in a fit state of health to undergo the whipping."[21] Juveniles over the age of 17 years may be sentenced to a whipping in addition to any other sentence, provided that where a sentence of imprisonment is imposed, the whole period must be suspended.[22]

[15] The applicants sought to impugn section 294 of the Act on a number of grounds. It was contended that this provision violated sections 8, 10, 11, and 30 of the Constitution. These provisions are contained in Chapter 3, which is generally referred to as the Chapter on Fundamental Rights.

[16] Section 8(1) of the Constitution guarantees to each person "the right to equality and to

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[15] See *S v Du Preez* 1975(4) SA 606 (C).

[16] Section 295(2).

[17] Section 292(2) of the Act prescribes a cane as the instrument to be used for adult whiping. See also section 92(1)(c) of the Magistrates' Court Act No. 32 of 1944 (as amended) which prescribes that a cane only may be used for whipping. This provision, however, excludes juvenile whipping in terms of section 294. During oral argument, we were informed that, in practice, canes conforming to the dimensions listed in the regulations of the Department of Correctional Services are used for both adult and juvenile whipping. See Regulation 100(4) promulgated in terms of section 94 of the Correctional Services Act No. 8 of 1959 (as amended) which provides that canes used for the whipping of prisoners should approximate 125cm in length and 12 mm in width for adults and 100cm by 9mm for juveniles.

[18] Section 294(1)(a).

[19] Section 294(2).

[20] Section 294(3).

[21] Section 294(5).

[22] Section 294(1)(b).

equal protection of the law." Section 8(2) prohibits unfair discrimination on grounds which include race, gender, sex, colour, and age; according to section 8(4), "*[p]rima facie* proof of discrimination on any of the grounds specified ... shall be presumed to be sufficient proof of unfair discrimination ... until the contrary is established." Applicants argued that the provisions of section 294 of the Act discriminated unfairly against male juveniles on grounds of age and sex and, in the context of South Africa's unjust and unequal past, their application was susceptible to racial bias.

[17] Section 10, for its part, guarantees to every person " the right to respect for and protection of his or her dignity." The proposition advanced was that the circumstances under which juvenile whipping is administered, including the fact that it involves the intentional infliction of physical pain on the juvenile by a stranger at the instance of the State, are incompatible with respect for and the protection of the dignity of the person being punished. It was contended that this was a violation of the dignity of both the minor as well as that of the person administering the whipping.

[18] The provisions of section 30 of the Constitution are designed to protect children. It was argued that inasmuch as the Constitution recognises the vulnerability of children as a group and sets out to protect them, juvenile whipping infringed their right to security and not to be subjected to abuse.

[19] Much of applicants' argument was, understandably enough, devoted to the alleged violation of section 11(2) of the Constitution. As the heading indicates, this section deals with *"[f]reedom and security of the person"* and the subsection provides that "[n]o person shall be subject to torture of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment." This is the only provision, among those relied upon by the applicants, that expressly refers to *punishment.* I propose to deal with the impact, if any, of sections 10 and 11(2) of the Constitution on the conduct which is prescribed by section 294 of the Act.

[20] It is clear that when the words of section 11(2) of the Constitution are read disjunctively,

as they should be,[23] the provision refers to seven distinct modes of conduct, namely: torture; cruel treatment; inhuman treatment; degrading treatment; cruel punishment; inhuman punishment and degrading punishment.

[21] In common with many of the rights entrenched in the Constitution, the wording of this section conforms to a large extent with most international human rights instruments.[24] Generally, the right is guaranteed in absolute, non-derogable and unqualified terms; justification in those instances is not possible.[25]

[22] The interpretation of the concepts contained in section 11(2) of the Constitution involves the making of a value judgment which "requires objectively to be articulated and identified, regard being had to the contemporary norms, aspirations, expectations and sensitivities of the ... people as expressed in its national institutions and its Constitution, and further having regard to the emerging consensus of values in the civilised international community ... "[26]

[23] While our ultimate definition of these concepts must necessarily reflect our own experience and contemporary circumstances as the South African community, there is no disputing that valuable insights may be gained from the manner in which the concepts are dealt with in public international law as well as in foreign case law.

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[23] See *S v Ncube, S v Tshuma, S v Ndhlovu* supra note 13, at 714I-715D and *Ex Parte Attorney General, Namibia: In re Corporal Punishment* supra note 3, at 86A-C.

[24] Article 5 of the Universal Declaration of Human Rights, adopted by the General Assembly of the United Nations on 10 December 1948, forbids "torture or . . . cruel, inhuman or degrading treatment or punishment." According to Sieghart, *The International Law of Human Rights* (1983) 159-160 and 162, the wording has been followed with minor variations in a number of other international instruments and national constitutions adopted since 1949. See e.g., Article 7 of the International Covenant on Civil and Political Rights (ICCPR), which is identical; Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("torture or . . . inhuman or degrading treatment or punishment"); Article 5 of the Banjul Charter on Human and Peoples' Rights (African Charter) (". . . torture, cruel, inhuman or degrading punishment and treatment").

[25] Article 8 of the Namibian Constitution, for instance, provides: "(1) The dignity of all persons shall be inviolable. (2)(a) . . . (b) No persons shall be subject to torture or to cruel, inhuman or degrading treatment or punishment." No limitation applies to this provision. See also *Ex Parte Attorney General, Namibia* supra note 3, at 86D; Sieghart *op cit* at 161.

[26] Mahomed AJA in *Ex Parte Attorney-General, Namibia* supra, note 3, at 86 I.

[24] The Oxford English Dictionary defines 'cruel' as "causing or inflicting pain without pity," 'inhuman' as "destitute of natural kindness or pity, brutal, unfeeling, savage, barbarous" and 'degrading' as "lowering in character or quality, moral or intellectual debasement." In South African case law, definitions of 'cruel,' with regard to treatment or punishment are rare. The phrase "cruel treatment" has been used in the context of abuse of animals and has been described variously as "wilfully caus[ing] pain without justification ... intention of causing it unnecessary suffering;"[27] "deliberate act causing substantial pain and not reasonably necessary in all the circumstances."[28]

[25] Whether it is necessary to split the words of the phrase and interpret the concepts individually is a matter which would largely depend on the nature of the conduct sought to be impugned. It may well be that in a given case, conduct that is degrading may not be inhuman or cruel. On the other hand, other conduct may be all three. It was suggested to us that a useful approach might be to grade the concepts on a sliding scale of suffering inflicted, *torture* occupying the extreme position, followed by *cruel, inhuman* and *degrading*, in that order.

[26] International forums offer very little guidance with regard to the meaning to be given to each word, individually. The tendency has been to deal with them as phrases or a combination of words. Thus when the United Nations Human Rights Committee (UNHRC) was called upon to interpret the corresponding section in the International Covenant on Civil and Political Rights (ICCPR), it did not consider "it necessary to draw up a list of prohibited acts or to establish sharp distinctions between the different kinds of punishment or treatment; the distinctions depend on the nature, purpose and severity of the treatment applied." [29] According to the UNHRC, the assessment of what constitutes inhuman or degrading treatment depends on all the circumstances of the case, such as the duration and manner of the treatment, its physical or mental effects as well as the sex, age and state of

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[27] *R v Mountain* 1928 TPD 86 at 88.

[28] *Hellberg v R* 1933 NPD 507 at 510.

[29] General Comment 20.4 of the Human Rights Committee 1992 Report (referred to in and filed with applicants' brief).

health of the victim.[30]

[27] Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention), has been interpreted by distinguishing the concepts primarily by the degree of suffering inflicted.[31] The European Commission of Human Rights (European Commission) described *inhuman treatment* as that which "causes severe suffering, mental or physical, which in the particular situation is unjustifiable" and *torture* as "an aggravated form of inhuman treatment." [32] The European Court of Human Rights (European Court) found the difference between *torture* and *inhuman treatment* in the fact that the former attaches "a special stigma to deliberate inhuman treatment causing very serious and cruel suffering."[33] The Court also categorised *degrading* conduct as that which aroused in its victims feelings of fear, anguish and inferiority leading to humiliation and debasement and possible breaking of their physical or moral resistance.[34] The same Court distinguished between *inhuman* and *degrading* punishment in *Tyrer v United Kingdom*,[35] and held that suffering had to reach a certain level before punishment could be characterised as *inhuman.* In a case where a juvenile had been sentenced to three strokes of the birch, the Court found that although that level had not been reached, the birching of the minor nevertheless amounted to *degrading punishment.*

[28] The Eighth Amendment to the Constitution of the United States of America (Eighth Amendment) as well as Article 12 of the Canadian Charter of Rights and Freedoms (Canadian Charter) prohibit "cruel and unusual punishment." In *Furman v Georgia,*[36] Brennan J postulated criteria in the assessment of what amounts to cruel and unusual

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[30] See *Vuolanne v Finland* 96 ILR 649, 657.

[31] See P van Dijk and GJH van Hoof, *Theory and Practice of the European Convention on Human Rights*, (1990), 2 ed., 226-227.

[32] See *Denmark et al v Greece*: Report of 5 November 1969, Yearbook of the European Convention on Human Rights XII (1969), 186.

[33] *The Republic of Ireland v The United Kingdom* (1979-80) 2 EHRR 25, 80, paragraph 167.

[34] Id.

[35] (1979-80) 2 EHRR 1, 9, paragraph 29.

[36] 408 US 238 (1972). This case held that capital punishment in the then existing statute, providing for capital punishment, in the State of Georgia was unconstitutional.

punishment. He pointed out that punishment does not become "cruel and unusual" merely because of the pain inflicted. The true significance lay in the fact that members of the human race are treated:

> "... as nonhumans, as objects to be toyed with and discarded ... [and that this is] ... thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."[37]

[29] Although some of the views expressed in *Furman v Georgia* were qualified in the subsequent case of *Gregg v Georgia,*[38] Stewart J in the latter case affirmed that the basic concept underlying the Eighth Amendment "is the dignity of man."[39]

[30] The framework of Canadian rights legislation is not much different from ours and section 1 of the Canadian Charter plays a role not very dissimilar to that of section 33(1) of the Constitution. The Canadian Supreme Court has interpreted the concept "cruel and unusual punishment" as a "compendious expression of a norm" to which the relevant test was "whether the punishment prescribed is so excessive as to outrage the standards of decency."[40] Factors to be taken into account in the assessment of the punishment included its effect, which must not be grossly disproportionate, the gravity of the offence, the personal characteristics of the offender and the particular circumstances of the case. According to Dickson CJ and Lamer J:

> " ... some punishments or treatments will always be grossly disproportionate and will always outrage our standards of decency: for example, the infliction of corporal punishment, such as the lash, irrespective of the number of lashes imposed ... "[41]

[31] The decisions of the Supreme Courts of Namibia and of Zimbabwe are of special

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[37] Id. at 273.

[38] 408 US 153 (1976). The ruling in this case differed from that in *Furman v Georgia;* it was held that the new statute providing for capital punishment in the State of Georgia was not prohibited by the Eighth Amendment.

[39] Id. at 173.

[40] *Smith v The Queen* (1988) 31 CRR 193, 213.

[41] Id. at 214.

significance. Not only are these countries geographic neighbours, but South Africa shares with them the same English colonial experience which has had a deep influence on our law; we of course also share the Roman-Dutch legal tradition. Unlike our Constitution, the Namibian Constitution does not have a general limitation clause. Article 22 however specifies how limitations, whether they are built-in or are imposed by other laws, are to be employed. In *Ex Parte Attorney-General, Namibia,* Mahomed AJA had no difficulty in arriving at the conclusion that the infliction of corporal punishment, whether on adults or juveniles, was inconsistent with article 8 of the Namibian Constitution and constituted "inhuman or degrading" punishment.[42]

[32] In *S v Ncube; S v Tshuma and S v Ndhlovu* the Zimbabwe Supreme Court, dealing with the issue of corporal punishment for adults, held that the practice was inhuman and degrading in violation of section 15(1) of the Declaration of Rights of the Zimbabwe Constitution which prohibits "torture or inhuman or degrading punishment."[43] The same conclusion was reached with respect to juvenile whipping by the Zimbabwe High Court in *S v F*.[44] Juvenile whipping was held to constitute inhuman and degrading punishment by the Zimbabwe Supreme Court in *S v Juvenile*.[45] Gubbay JA characterised juvenile whipping as:

> " . . . inherently brutal and cruel; for its infliction is attended by acute physical pain. After all, that is precisely what it is designed to achieve ... In short, whipping, which invades the integrity of the human body, is an antiquated and inhuman punishment which blocks the way to understanding the pathology of crime."[46]

[33] The Court in *Tyrer v United Kingdom* characterised the whipping of a juvenile thus:

> "The very nature of judicial corporal punishment is that it involves one human being inflicting physical violence on another human

[42] Supra note 3.

[43] Supra note 13, at 721H.

[44] Supra note 5. At 462I-J Greenland J agreed with the characterisation of corporal punishment as "barbaric, inherently brutal, cruel, inhuman and degrading."

[45] 1990(4) SA 151 (ZSC).

[46] Id. at 168I-169B.

> being. Furthermore, it is institutionalised violence, that is in the present case violence permitted by the law, ordered by the judicial authorities of the State and carried out by the police authorities of the State. Thus, although the applicant did not suffer any severe or long-lasting physical effects, his punishment - whereby he was treated as an object in the power of the authorities - constituted an assault on precisely that which is the main purpose of Article 3 to protect, namely a person's dignity and physical integrity ... The institutionalised character of this violence is further compounded by the whole aura of official procedure attending the punishment and by the fact that those inflicting it were total strangers to the offender."[47]

[34] The circumstances described above are present in any judicial corporal punishment;[48] they are certainly present in juvenile whipping in terms of section 294 of the Act. They are consistent with Mahomed AJA's summary, in *Ex Parte Attorney-General, Namibia,*[49] and that of Gubbay JA in *S v Ncube, S v Tshuma, S v Ndhlovu*[50] on the basis of the objection to corporal punishment.

[35] Whether one speaks of "cruel and unusual punishment" as in the Eighth Amendment of the United States Constitution and in article 12 of the Canadian Charter, or "inhuman or degrading punishment" as in the European Covention and the Constitution of Zimbabwe, or "cruel, inhuman or degrading punishment" as in the Universal Declaration of Human Rights, the ICCPR and the Constitution of Namibia, the common thread running through the assessment of each phrase is the identification and acknowledgement of society's concept of decency and human dignity.

[36] In the United States, the Eighth Amendment to the Constitution is interpreted in the light of "contemporary standards of decency." These standards, it has been held, are not static but are continually evolving.[51] The relationship between "contemporary standards of decency"

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[47] Supra note 35, at 11, paragraph 33.

[48] See *S v Juvenile* supra note 45, at 156F-H.

[49] Supra note 3, at 87D-H.

[50] Supra note 13, at 722A-D.

[51] In *Trop v Dulles* 356 US 86 (1958) at page 101, it was held that the Eighth Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society. In *Weems v United*

and public opinion is uncertain and I am not convinced that they are synonymous. It is clear, as was pointed out by Chaskalson P in *State v Makwanyane and Mchunu* that public opinion, on its own, is not determinative of constitutional issues:

> "If public opinion were to be decisive there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament, which has a mandate from the public . . . but this would be a return to parliamentary sovereignty, and a retreat from the new legal order established by the 1993 Constitution."[52]

[37] It is not clear to me however that it is necessary to adopt the American concept of "contemporary standards of decency" or that it is necessary to give definitive meaning to that phrase. Our Constitution is different to the American constitution. Section 35(1) of the Constitution provides expressly that the rights entrenched in it, including sections 10 and 11(2), shall be interpreted in accordance with the values which underlie an open and democratic society based on freedom and equality. In determining whether punishment is cruel, inhuman or degrading within the meaning of our Constitution, the punishment in question must be assessed in the light of the values which underlie the Constitution.

[38] The simple message is that the State must, in imposing punishment, do so in accordance with certain standards; these will reflect the values which underpin the Constitution; in the present context, it means that punishment must respect human dignity and be consistent with the provisions of the Constitution.

[39] There is unmistakably a growing consensus in the international community that judicial whipping, involving as it does the deliberate infliction of physical pain on the person of the accused, offends society's notions of decency and is a direct invasion of the right which every person has to human dignity. This consensus has found expression through the courts and legislatures of various countries and through international instruments. It is a

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States 217 US 349 (1910) at page 378, the court observed that the Eighth Amendment is progressive and does not merely prohibit cruel punishments known in 1688 and 1787, but may acquire wider meaning "as public opinion becomes enlightened by humane justice." In *Jackson v Bishop* 404 F 2d 571 (1968) at page 579, reference is made to "contemporary concepts of decency and human dignity and precepts of civilisation which we profess to possess"; see also *Nelson v Heyne* 491 F 2d 352 (1974).

[52] Case No. CCT/ 3/94 at paragraph 88.

clear trend which has been established.

[40] Corporal punishment has been abolished in a wide range of countries, including: the United Kingdom,[53] Australia (except in the State of Western Australia),[54] the United States of America, [55] Canada, [56] Europe [57] and Mozambique,[58] among others. In Lesotho, restrictions have been imposed by the courts on the whipping of people over 30 years.[59] Although the Constitution of Botswana contains a provision preserving the application of judicial corporal punishment in its criminal justice system, the practice has been severely criticised by the judiciary. The remarks of Aguda, JA in *S v Petrus and Another* are apposite to the present enquiry:

> "First, it must be recognised that certain types of punishment or treatment are by their very nature cruel, inhuman or degrading. Here once more I must cite with approval what Professor Nwabueze says in his book (*ibid*): 'Any punishment involving torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs, burning alive or at the stake, crucifixion, breaking on the wheel, embowelling alive, beheading, public

[53] This was done by the introduction of the Criminal Justice Act 1948, pursuant to the Report of the Departmental Committee on Corporal Punishment(1938) (the Cadogan Committee). At page 59 , the report points out: "In its own interests society should, in our view, be slow to authorise a form of punishment which may degrade the brutal man still further and may deprive the less hardened man of the last traces of self-respect ... " Cited in *Ncube* supra note 13 at 710C.

[54] Although it is still included in the Criminal Code of Western Australia, it seems to have fallen into disuse. *Ncube* supra note 13 at 711J-712A.

[55] In 1790 Congress excluded whipping from the punishments that might be imposed by the Federal Courts for federal offenses. It, however, continued to be applied in some States as a method of enforcing discipline in prisons and against juveniles in institutions and reformatories. Only the State of Delaware still retains the 'whipping post.' *Ncube* supra note 13 at 713B-C.

[56] Canada abolished corporal punishment through the enactment of the Criminal Law Amendment Act 1972. *Ncube* supra note 13 at 710H.

[57] In the applicants' written argument it was pointed out that the *Tyrer* case effectively proscribed judicial corporal punishment in countries subject to the European Convention; the Netherlands Government has declared that corporal punishment is a violation of international instruments; Sweden, Denmark, Finland, Norway and Austria have formally proscribed corporal punishment in institutions as well as in the home; and Cyprus abolished all corporal punishment in 1994.

[58] Public floggings were abolished in 1989 in accordance with the country's obligations under the African Charter on Human and People's Rights. Johannes Weir Foundation on Health and Human Rights, *Health Professionals and Corporal Punishment* (1990) 7.

[59] *R v Tsehlana* Rev. Case 157/77 (High Court), cited in Stephen Neff: *Human Rights in Africa* 33 *International and Comparative Law Quarterly* (1984) at 339.

> dissection and the like, or involving mutilation or a lingering death, or the infliction of acute pain and suffering, either physical or mental, is inherently inhuman and degrading.' Under the Botswana Constitution such punishment which is inherently inhuman and degrading is prohibited . . . notwithstanding the fact that public sentiments favour it. Secondly, a punishment which is not inherently inhuman or degrading may become so by the very nature or mode of execution, and also notwithstanding the fact that popular demand may favour it."[60]

[41] Great play was made by the State of differences between adult and juvenile whipping. The point of the argument was that while it may be difficult to justify the whipping of adults in constitutional terms, juvenile whipping was no more reprehensible than other forms of punishment, since an element of humiliation and degradation is to be found in most. I did not understand the State to be seriously contending that any punishment which involves an element of humiliation or degradation constituted a breach of section 11(2) of the Constitution. The argument was rather that judicial whipping was not an infringement of any of the rights of the juvenile.

[42] In *Tyrer v United Kingdom* the European Court put its finger on the basis for the distinction between punishment *per se* and punishment which was prohibited in terms of article 3 of the European Convention: the humiliation or debasement involved must attain a particular level and must be other than the usual, and perhaps inevitable, element of humiliation associated with punishment in general.[61] In *Furman v Georgia* Brennan J made it quite clear what he found to be particularly objectionable in this species of punishment:

> "...since the discontinuance of flogging as a constitutionally permissible punishment, *Jackson v Bishop* 404 F2d 571 (CA8) 1968, death remains as the only punishment that may involve the conscious infliction of physical pain."[62]

[43] The fact that there may be other punishments which violate fundamental rights cannot, in

[60] [1985] LRC (Const) 699, 725G-726A.

[61] Supra note 35, at 10, paragraph 30.

[62] Supra note 36, at 287-288.

itself, save the specific form of punishment that has been challenged from invalidity.

[44] Differences between adult and juvenile whipping have, in my view, little or no relevance to the enquiry. They are in any event differences of degree rather than kind. To the extent that comment is needed on the argument which has been raised, however, I am of the view that the differences are far outweighed by the similarities. There is a small difference in the dimensions of the instrument used;[63] the adult is stripped naked and trussed, the strokes being delivered on bare flesh while the juvenile's strokes are inflicted on normal attire, without him being tied; there is no limit to the number of times a juvenile may be sentenced to receive strokes while the adult may only be so sentenced twice, and never within a period of three years of the previous sentence of strokes. Both occur in a state institution; the maximum number of strokes that may be imposed is seven in respect of both. Both involve a physical beating with a cane wielded by a State employee, a virtual stranger to the person being punished.

[45] The severity of the pain inflicted is arbitrary, depending as it does almost entirely on the person administering the whipping. Although the juvenile is not trussed, he is as helpless. He has to submit to the beating, his terror and sensitivity to pain notwithstanding. Nor is there any solace to be derived from the fact that there is a prior examination by the district surgeon. The fact that the adult is stripped naked merely accentuates the degradation and humiliation. The whipping of both is, in itself, a severe affront to their dignity as human beings. I agree with the *dicta* in *Campbell and Cosans v United Kingdom* in which Mr Klecker, in a dissenting opinion, stated:

> "Corporal punishment amounts to a total lack of respect for the human being; it therefore cannot depend on the age of the human being ... The sum total of adverse effects, whether actual or potential, produced by corporal punishment on the mental and moral development of a child is enough, as I see it, to describe it as degrading within the meaning of Article 3 of the Convention."[64]

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[63] Supra note 17.

[64] (1980) 3 EHRR 531 at 556.

[46] It was further claimed that age in itself was a redeeming feature; that while an adult whose character and personality has already been formed was likely to be hardened by the infliction of judicial whipping, the position was the opposite in the case of a juvenile. The basis for this was the view that as a juvenile's character was still in the process of formation, he was still susceptible to correction and advice; corporal punishment might therefore still have a reformative effect on the young even though it was accepted that it was likely to have the opposite effect on the old.

[47] I do not agree. One would have thought that it is precisely because a juvenile is of a more impressionable and sensitive nature that he should be protected from experiences which may cause him to be coarsened and hardened. If the State, as role model *par excellence,* treats the weakest and the most vulnerable among us in a manner which diminishes rather than enhances their self-esteem and human dignity, the danger increases that their regard for a culture of decency and respect for the rights of others will be diminished. As Brandeis J observes in a dissenting opinion in *Olmstead v United States*:

> "Our Government is the potent, the omni-present teacher. For good or for ill, it teaches the whole people by its example."[65]

[48] The issue of corporal punishment at schools is by no means free of controversy. The practice has inevitably come in for strong criticism.[66] In *Costello-Roberts v United Kingdom,*[67] the European Court applied the criteria set in *Tyrer v United Kingdom* that, in order for punishment to be "degrading" and in breach of article 3 of the Convention, the humiliation or debasement involved must attain a particular level of severity and must, in any event, be other than the usual element of humiliation inherent in any punishment. It drew a distinction between a judicially imposed whipping, as in *Tyrer v United Kingdom,*

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[65] 277 US 438 (1928) at 485.

[66] See the remarks of Dumbutshena CJ in *S v A Juvenile* supra note 45, at 161E-162E. See also *Campbell and Cosans v United Kingdom* supra note 64, at 556.

[67] Judgment delivered on 25 March 1993. Appellants referred to and included in their brief a Press Release issued on 25 March 1993 by the Registrar of the European Court of Human Rights which contained a synopsis of the judgment delivered that day. See also the discussion in Barry Phillips, *The Case for Corporal Punishment in the United Kingdom. Beaten into Submission in Europe*, 43 *International and Comparative Law Quarterly* (1994) 153.

and punishment meted out on a juvenile boarder through disciplinary rules in force in a private school. This amounted to being slippered three times on his buttocks through his shorts with a rubber-soled gym shoe by the headmaster in private. The court held that in the circumstances of the particular case, the minimum level of severity had not been attained. It is noteworthy that the decision was carried by the narrowest of margins, with five judges voting for it and four against. What is of interest is how the Euorpean Court, in the exercise of a value judgment, went about evaluating the impugned conduct and distinguishing between the concepts 'inhuman' and 'degrading.'[68]

[49] It is not necessary to comment on the suggestion that judicial corporal punishment is in reality no worse than cuts imposed at school; the subject of corporal punishment in schools is not before us. Suffice it to point out that the European Court in *Costello-Roberts v The United Kingdom*[69] seemed to attach some importance to the difference between strokes inflicted by a policeman as a result of a court order, on the one hand, and corporal punishment administered by a headmaster in terms of disciplinary rules in force within the school in which the youth was a boarder. On the other hand, it was White J in a dissenting opinion in *Ingraham v Wright* who stated:

> "Where corporal punishment becomes so severe as to be unacceptable in a civilised society, I can see no reason that it should become any more acceptable just because it is inflicted on children in the public schools."[70]

[50] The Constitution requires us to "have regard" to the consensus referred to above;[71] we are not bound to follow it but neither can we ignore it. The determinative test will be the values we find inherent in or worthy of pursuing in this society which has only recently embarked on the road to democracy. Already South Africa has lagged behind. The Constitution now offers an opportunity for South Africans to join the mainstream of a world community that is progressively moving away from punishments that place undue

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[68] Press Release supra note 67, paragraphs 30-32. See also Barry Phillips supra note 67, at 168.

[69] Press release supra note 67, paragraph 31.

[70] 430 US 651 at 692.

[71] See section 35(1) of the Constitution.

emphasis on retribution and vengeance rather than on correction, prevention and the recognition of human rights.

[51] In interpreting section 11(2) of the Constitution, however, we should not only have regard to the position in other jurisdictions. This Court has held that in interpreting the rights enshrined in Chapter 3 of the Constitution, a purposive approach should be adopted.[72] In seeking the purpose of the particular rights, it is important to place them in the context of South African society. It is regrettable, but undeniable, that since the middle 1980's our society has been subjected to an unprecedented wave of violence. Disputes, whether political, industrial or personal, often end in violent assaults. In addition, during the same period, there has been a marked increase in violent crimes, such as armed robbery and murder.

[52] The process of political negotiations which resulted in the Constitution were a rejection of violence. In this context, it cannot be doubted that the institutionalised use of violence by the State on juvenile offenders as authorised by section 294 of the Act is a cruel, inhuman and degrading punishment. The Government has a particular responsibility to sustain and promote the values of the Constitution. If it is not exacting in its acknowledgement of those values, the Constitution will be weakened. A culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands.

[53] The conclusion that I have reached, that section 294 of the Act infringes the rights contained in sections 10 and 11(2) of the Constitution is consistent with the view that has been expressed by many South African judges before. As already indicated, the courts in this country have acknowledged the international consensus against corporal punishment and, in a sense, associated themselves with it in many judgments which have criticised, sometimes in the strongest terms, the infliction of corporal punishment.[73] Judicial condemnation has resulted in adult whipping being imposed only in exceptional

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[72] *S v Zuma and Others* 1995(4) BCLR 401 (SA) at 410F-412H ; *S v Makwanyane and Mchunu* supra note 52, at paragraphs 9 and 10.

[73] See the cases cited supra notes 7 to 12.

circumstances and juvenile whipping, in general, only as a device to keep the juvenile out of prison.[74]

[54] The structure and content of Chapter 3 suggests a two-stage enquiry. The first stage is concerned with establishing whether there is a violation of a right sought to be protected by the Constitution; this has been answered in the affirmative. The second leg of the enquiry deals with the question whether the violation constitutes a permissible limitation of the right in question. Section 33(1) of the Constitution provides:

> "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation ---
> (a) shall be permissible only to the extent that it is --
> (i) reasonable; and
> (ii) justifiable in an open and democratic society based on freedom and equality; and
> (b) shall not negate the essential content of the right in question, and provided further that any limitation to ---
> (aa) a right entrenched in section 10, 11 . . .
> shall, in addition to being reasonable as required in paragraph (a)(i), also be necessary."

[55] Applicants contended firstly, that the rights at issue were not capable of limitation and that section 33(1) of the Constitution was therefore not applicable. The implication of this proposition was that no further enquiry was called for once a violation of the right had been proved.

[56] This argument raises an issue which this Court may have to confront in the future and that is the tension between threshold requirements and requirements of limitation. The issue has been raised in argument in other cases which have come before us. It is, however, not an issue which needs to be resolved in this case. In *S v Makwanyane (supra)* this court dealt with section 11(2) of the Constitution on the basis that section 33(1) is applicable to

[74] See *S v Maisa* supra note 7, at 271E; *S v Machwili* 1986 1) SA 156 (N) at 157F-G; *S v Motsoesoana* supra note 12, at page 358G; *S v Zimo en Andere* supra note 8, at page 337H-338A; *S v Maseti* 1992(2) SACR 459 (C) at page 464I-J; *S v V en 'n Ander* supra note 5, at page 543E; *S v P* 1985 (4) SA 105 (N) at page 107F; and *S v M* supra note 5, at page 245B.

breaches of that section. I follow the same approach in the present case.

[57] Applicants claimed further that even if the right was subject to limitation, juvenile whipping provisions failed to satisfy the requirements of section 33(1) of the Constitution. The attitude of the State was that juvenile whipping was neither cruel nor inhuman and it was no more degrading than other acceptable punishments; it was contended that to the extent that the punishment could be said to be in some way humiliating or degrading, it was within permissible constitutional limits because of the provisions of section 33(1) of the Constitution.

[58] The enquiry involves testing the measures adopted against the objective sought to be achieved. The gist of it, put in the context and the language of section 33(1), really amounts initially to three questions, namely: (a) whether the means used are reasonable ; (b) whether they are justifiable in the context of the civilized society we hope we are or which we, through this Constitution, are aspiring to be; and (c) whether they are necessary to attain the objective. The test relies on proportionality, a process of weighing up the individual's right which the State wishes to limit against the objective which the State seeks to achieve by such limitation.

[59] This evaluation must necessarily take place against the backdrop of the values of South African society as articulated in the Constitution and in other legislation, in the decisions of our courts and generally against our own experiences as a people.

[60] In *State v Makwanyane and Mchunu* Chaskalson P deals with the "proportionality" test which is also implicit in the limitation of rights in Canada and the European Court.[75] As a general conclusion he notes that the limitation of constitutional rights for a purpose that is necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality. He points out how the German Constitutional Court applies the proportionality test in dealing with limitations authorised

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[75] Supra note 52, at paragraphs 104-109.

by the German Constitution:

> "It has regard to the purpose of the limiting legislation, whether the legislation in fact achieves that purpose, whether it is necessary therefor, and whether a proper balance has been achieved between the value enhanced by the limitation, and the fundamental right that has been limited."[76]

[61] The grounds on which the State sought to justify juvenile whipping were, firstly, that it made good practical sense to have juvenile whipping as a sentencing option. The practice had advantages for both the offender and the State, particularly in view of a shortage of resources and the infrastructure required for the implementation of other sentencing options for juveniles. Secondly, it was suggested that juvenile whipping was a deterrent.

[62] The purpose of section 294 of the Act is to provide a sentencing option for the punishment of juvenile offenders. What must be addressed is whether it is reasonable, justifiable and necessary to resort to juvenile whipping, notwithstanding the fact that it "constitutes a severe assault upon not only the person of the recipient, but upon his dignity as a human being."[77] The primary argument advanced in favour of juvenile whipping was that it constitutes a better alternative to imprisonment, particularly in the so-called "grey area" crimes. This was a reference to instances where a court has to deal with an offence which is not so serious as to merit a custodial sentence but is serious enough to render inappropriate the use of "softer" sentences.

[63] It was argued that sentencing alternatives for juveniles were limited and that this country did not have a sufficiently well-established physical and human resource base which was capable of supporting the imposition of alternative punishments. This is of course an argument based on pragmatism rather than principle. It is a problem which must be taken seriously nevertheless. It seems to me, however, to be another way of saying that our society has not yet established mechanisms to deal with juveniles who find themselves in conflict with the law; that the price to be paid for this state of unreadiness is to subject juveniles to punishment that is cruel, inhuman or degrading. The proposition is untenable.

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[76] Supra note 52, at paragraph 108.

[77] Fannin J in *S v Kumalo* supra note 7, at 547F.

It is diametrically opposed to the values that fuel our progress towards being a more humane and caring society. It would be a negation of those values precisely where we should be laying a strong foundation for them, in the young; the future custodians of this fledgeling democracy.

[64] We nevertheless need to examine available resources to determine whether there are indeed appropriate sentencing options. It has to be borne in mind that the presence of various options in a number of legislative provisions may not always reflect practical realities. It is important that resources should be made available and that they should be utilised properly, so that the values expressed in the Constitution may be upheld and maintained. It bears mentioning that although changes in the criminal justice system have been occurring, albeit at a painfully slow pace, there has been a perceptible shift in approach and attitude towards punishment. I mention three aspects of this process:

[65] (a) There has been a shift of emphasis with regard to the overall aims of punishment. There is a general acceptance, as observed by Schreiner JA in *R v Karg,*[78] that the retributive aspect has tended to give way to the aspects of prevention and correction. New and innovative systems and procedures have been introduced and some of them have been incorporated into legislation. The traditional objectives of punishment, namely, prevention, retribution, deterrence and rehabilitation, are no doubt still applicable. Still applicable, albeit in modified form, are the remarks of Holmes JA that:

> "Punishment should fit the criminal as well as the crime, be fair to the accused and to society, and be blended with a measure of mercy ... the element of mercy, a hallmark of civilised and enlightened administration, should not be overlooked, lest the Court be in danger of reducing itself to the plane of the criminal ... "[79]

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[78] 1961(1) SA 231(A) at 236A.

[79] *S v V* 1972(3) SA 611(A) at 614D.

[66] While those principles have remained eternal truths with regard to the purposes of punishment, the justice and penal systems have been evolving towards a more enlightened and humane implementation of those principles. In keeping with international trends, there has been a gradual shift of emphasis away from the idea of sentencing being predominantly the arena where society wreaks its vengeance on wrongdoers. Sentences have been passed with rehabilitation in mind.

[67] The introduction of correctional supervision with its prime focus on rehabilitation, through section 276 of the Act, was a milestone in the process of "humanising" the criminal justice system. It brought along with it the possibility of several imaginative sentencing measures including, but not limited to, house arrest, monitoring, community service and placement in employment. This assisted in the shift of emphasis from retribution to rehabilitation. This development was recognised and hailed by Kriegler AJA in *S v R*[80] as being the introduction of a new phase in our criminal justice system allowing for the imposition of finely-tuned sentences without resorting to imprisonment with all its known disadvantages for both the prisoner and the broader community.

[68] The development of this process must not be seen as a weakness, as the justice system having "gone soft." What it entails is the application of appropriate and effective sentences. An enlightened society will punish offenders, but will do so without sacrificing decency and human dignity.

[69] (b) There is growing interest in moves to develop a new juvenile justice system. This impacts directly on the availability of sentencing options for juveniles. It has been a matter of comment that juveniles were being sentenced to whipping on the basis that it was the only alternative to a prison sentence. Judges have, in the past, indicated their distaste for juvenile whipping; they have, however, tolerated and confirmed the sentences purely as a device to avoid imprisoning juvenile offenders.

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[80] 1993(1) SA 476 (A) at 488I.

[70] In *S v Maseti* Conradie J observed that the view that whipping should be imposed as a device to keep juveniles out of prison was fallacious:

> " ... [r]egsbeamptes laat jong mans slaan omdat daar met ons beperkte middele, infrastrukture en vonnisopsies, net geen ander raad met hulle is nie . . . Maar dat die veroorsaking van pyn en leed 'n onbevredigende vonnisopsie is, weet ons algar lankal."[81]

Noting that new sentencing options had been introduced into the criminal justice system, he voiced the hope that they would be creatively and effectively used.[82]

[71] Juvenile whipping, however, has not invariably met with judicial disapproval. In *S v Vakalisa,*[83] Mitchell J referred to remarks in *S v V en 'n Ander*[84] in which MT Steyn JA dealt at length with the undesirability of corporal punishment and described it as "extremely humiliating and physically painful." Mitchell J went on to observe:

> "Whatever may be the South African view of this kind of punishment [juvenile whipping], the Transkeian lawgiver has taken a different view of the desirability of corporal punishment in respect of juveniles even, as I have mentioned, specifically providing for the whipping of female juveniles, a sentence which is frequently applied in various magisterial districts of Transkei. I would have thought that it is far more important to keep juveniles out of gaol where the appropriate circumstances exist, to save them the association with adult convicted criminals, than to shy away from the imposition of a 'juvenile whipping'. This is particularly true in Transkei when, if a juvenile

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[81] Supra note 74, at 464 I-J.

[82] Supra note 74, at 464J-465A.

[83] 1990(2) SACR 88 (Tk) at 94G-J.

[84] Supra note 5.

> is sent to prison, he cannot be sent to one for first offenders only, or to one where juveniles are effectively kept apart from adult criminals, for no such facilities yet exist in this country."[85]

[72] Apart from drawing attention to the distressing fact that some legislation still permitted the whipping of females, Mitchell J's remarks in fact summarised what turned out to be the central argument proffered by the State in favour of the retention of juvenile whipping. If the option of corporal punishment is taken away, so we were warned, many juveniles who would not otherwise have been sent to gaol would now have to be imprisoned.

[73] Pickering J's approach in *S v Sikunyana* [86] appears to be more helpful in that it gives implicit recognition to alternative correctional supervision sentencing options and the need for courts not to be "unduly hamstrung" by administrative and other difficulties in implementing community service orders.[87] It would therefore seem that notwithstanding the daunting problems highlighted by Mitchell J in 1990, the prospects for more enlightened sentencing options have improved.

[74] To the extent that facilities and physical resources may not always be adequate, it seems to me that the new dynamic should be regarded as a timely challenge to the State to ensure the provision and execution of an effective juvenile justice system. The wider range of penalties now provided for in the Act[88] permits a more flexible but effective approach in dealing with juvenile offenders.

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[85] Supra note 83, at 94I-J.

[86] 1994(1) SACR 206 (Tk).

[87] Id. at 210G.

[88] In addition to the provisions of section 290(supra), a juvenile may also be dealt with in terms of other sections of the Act, such as, section 287 [fine]; section 297(1)(a- c) [postponing sentence conditionally or unconditionally, suspended sentence subject to conditions; caution and discharge]; sections 276(1)(h) and 276A [correctional supervision]; and converting the trial to an enquiry in terms of the Child Care Act No. 74 of 1983. The latter course has 4 options, namely: (i) placing the child in the custody of a suitable foster parent; (ii) sending the child to a designated children's home; (iii) sending the child to a designated school of industries; (iv) returning the child to the parent or guardian, under ... supervision of a social worker.

[75] There is indeed much room for new creative methods to deal with the problem of juvenile justice. During argument, we were informed that interesting sentencing options were being increasingly applied in the Western Cape and that Conradie J's suggestion to magistrates was a further encouragement to the process. There are, for instance, community service orders which are linked to suspended or postponed sentences. These are structured in such a way that they meet the punitive element of sentencing while allowing for the education and rehabilitation of the offender. There is also the victim-offender mediation process in terms of which the victim is enabled to participate in the justice process, receive restitution while the offender is assisted to rehabilitate. There are sentences which are suspended on condition that the offender attends a juvenile offender school for a specific purpose. These orders are structured in such a way that they yield benefits to the victim of the crime, the offender and to the community. Doubtless these processes, still in their infancy, can be developed through involvement by State and non-governmental agencies and institutions which are involved in juvenile justice projects.

[76] (c) The enactment of the Constitution has created a framework within which significant changes can be brought about in the criminal justice system. The rights entrenched in Chapter 3 are available to "every person"; that includes children and adults, women and men, prisoners and detainees. The Constitution clearly places a very high premium on human dignity and the protection against punishments that are cruel, inhuman or degrading; very stringent requirements would have to be met by the State before these rights can be limited.

[77] In addressing itself specifically to punishment, the Constitution ensures that the sentencing of offenders must conform to standards of decency recognised throughout the civilised word. Thus it sets a norm; measures that assail the dignity and self esteem of an individual will need to be justified; there is no place for brutal and dehumanising treatment and punishment. The Constitution has allocated to the State and its organs a role as the protectors and guarantors of those

> rights to ensure that they are available to all. In the process, it sets the State up as a model for society as it endeavours to move away from a violent past. It is therefore reasonable to expect that the State must be foremost in upholding those values which are the guiding light of civilised societies. Respect for human dignity is one such value; acknowledging it includes an acceptance by society that " . . .even the vilest criminal remains a human being possessed of common human dignity."[89]

[78] The State sought to strengthen its argument by pointing out the comparative convenience of juvenile whipping as a punishment: it satisfied criteria for punishment, while at the same time affording the courts a reasonable sentencing option; it was not too harsh for young offenders, but it enabled them to "get it over and done with" quickly. In this context, we were informed that parents often asked for this punishment to be imposed.

[79] While there are obvious advantages to "quick" justice, society's greater concern must be the form such punishment takes. The solutions we adopt in dealing with young offenders have to be part of a greater context and must be consistent with the promotion of the values which are reflected in the Constitution. It cannot be reasonable and in keeping with these values to imply, through the punishments we impose, that the infliction of violence is an acceptable option in the solution of problems. In any event, this consideration falls far short of the justification required to entitle the State to override the prohibition against the infliction of cruel, inhuman or degrading punishment. Its implications for the dignity of the individual are also far too serious.

[80] The State stressed the deterrent nature of juvenile whipping. Deterrence is, obviously, a legitimate objective which the State may pursue. We live in a crime-ridden society; the courts and other relevant organs of the State have a duty to make crime unattractive to those who are inclined to embark on that course. The concerns which the provision seeks to address are indeed pressing and they are substantial. But, as already stated, the means employed must be reasonable and demonstrably justifiable. No clear evidence has been

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[89] Brennan J in *Furman v Georgia* supra note 36, at 273.

advanced that juvenile whipping is a more effective deterrent than other available forms of punishment.

[81] In 1960 the Advisory Council on the Treatment of Offenders reviewed the decision abolishing corporal punishment in the United Kingdom, which had been taken pursuant to the Cadogan Report of 1938.[90] The Council pointed out that "[t]here is no evidence that corporal punishment is an especially effective deterrent either to those who have received it or to others."[91] It therefore arrived at the unanimous conclusion that judicial corporal punishment should not be re-introduced. In *S v Motsoesoana* Page J, in an exhaustive analysis of the law in relation to corporal punishment, arrived at the conclusion that corporal punishment serves no useful deterrent function, on the contrary, "its effect is likely to be coarsening and degrading rather than rehabilitative."[92] In his judgment he also referred to an article by Professor Kahn on *Crime and Punishment* 1910-1960:

> "Even making the utmost allowances for extraneous factors such as changes in population and in the efficiency of the police force and prosecuting authorities, it seems reasonable to conclude that the deterrent effect of compulsory whipping is nowhere to be seen. If this is so, its retention can only be atributed to some spirit of retribution or revenge." [93]

[82] It may be relevant to observe that three of the applicants in this matter had previous convictions for which they had received strokes; one of them, Witbooi, had in fact received five strokes a mere five months before the present sentence. Some of the co-accused had a variety of previous convictions for which they had received sentences which included strokes. One of them, namely Thomas, had already received a total of sixteen strokes. The previous punishment has obviously failed to act as a sufficient deterrent in these cases.

[83] I am, however, prepared to accept that there is some deterrent value in juvenile whippings. As Milne JP observed in *S v Kumalo and Others* it could be expected that:

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[90] See *S v Motsoesoana* supra note 12, at 353F-G.

[91] Id. at 353I.

[92] Id. at 354D-F.

[93] Id. at 352I-J: article published in 1960 *Acta Juridica* 191 at 211-2.

> " . . . the thought of a severe whipping, whether as a result of experience or only of an act of imagination, could well have deterred very many, although it is all too evident that very many have not thereby been deterred."[94]

[84] What has not been shown is that such deterrent value as might exist is sufficiently significant to enable the State to override a right entrenched in the Constitution. All indications are to the contrary. While juvenile whipping has a brutalising effect, it has not been shown that it has the capacity to deter more than other punishments would do. Moreover, I agree with the remarks of Fannin J in *S v Kumalo and Others:*

> "Within comparatively recent times corporal punishment of quite horrifying severity were inflicted for a great number of offences, and I, for one do not believe that the general deterrent effect of such punishments justified the suffering and indignity which were inflicted upon those who were so punished. I am of the opinion that a whipping is a punishment of a particularly severe kind. It is brutal in its nature and constitutes a severe assault upon not only the person of the recipient but upon his dignity as a human being. The severity of the punishment depends, to a very large extent, upon the personality of the officer charged with the duty of inflicting it, and over that the court ordering the punishment can have little, if any, control."[95]

[85] Howie AJA, quite correctly in my view, warned against the idea that the accused should be sacrificed on the altar of deterrence.[96] To this I would add that this is even more so when the court is dealing with a youthful offender.

[86] If, as I have found, the deterrence value is so marginal that it does not justify the imposition of this special punishment, involving as it does the deliberate infliction of physical pain, one has to conclude that the sole reason for retaining it is to satisfy society's need for retribution. While retribution is, in itself, a legitimate element of punishment, it is not the only one; it should not be the overriding one. It cannot, on its own, justify the existence of

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[94] Supra note 7, at 571H.

[95] Id. at 574 E-H.

[96] See *S v Sobandla* 1992(2) SACR 613(A) at 617G.

the punishment.

[87] It needs to be stressed that it is in the interests of justice that crime should be punished. As pointed out by Schreiner JA in *R v Karg:*

> "It is not wrong that the natural indignation of interested persons and of the community at large should receive some recognition in the sentences that courts impose, and it is not irrelevant to bear in mind that if sentences for serious crimes are too lenient, the administration of justice may fall into disrepute and injured persons may incline to take the law into their own hands."[97]

[88] However, punishment that is excessive serves neither the interests of justice nor those of society. According to Brennan J,[98] punishment is excessive if it is unnecessary, and it is unnecessary "if there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted." In *Gregg v Georgia*,[99] Stewart J, described the unnecessary and wanton infliction of pain as an aspect of excessiveness.

[89] Finally, the perceived advantages or benefits of juvenile whipping must be weighed against the rights which the provision seeks to limit. Corporal punishment involves the intentional infliction of physical pain on a human being by another human being at the instigation of the State. This is the key feature distinguishing it from other punishments. The degree of pain inflicted is quite arbitrary, depending as it does on the person who is delegated to do the whipping. The court merely directs the number of strokes to be imposed. The objective must be to penetrate the levels of tolerance to pain; the result must be a cringing fear, a terror of expectation before the whipping and acute distress which often draws involuntary screams during the infliction. There is no dignity in the act itself; the recipient might struggle against himself to maintain a semblance of dignified suffering or even unconcern; there is no dignity even in the person delivering the

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[97] Supra note 78, at 236A-B.

[98] *Furman* supra note 36, at 279.

[99] Supra note 38, at 173.

punishment. It is a practice which debases everyone involved in it.

[90] I have already referred to the dictionary meaning of the words "cruel, inhuman or degrading." Conduct which fits any one of the adjectives is therefore hit by the prohibition. I however do not see any compelling reason to confine the conduct impugned to one adjective only. The deliberate infliction of pain with a cane on a tender part of the body as well as the institutionalised nature of the procedure involves an element of cruelty in the system that sanctions it. The activity is planned beforehand, it is deliberate. Whether the person administering the strokes has a cruel streak or not is beside the point. It could hardly be claimed, in a physical sense at least, that the act pains him more than his victim. The act is impersonal, executed by a stranger, in alien surroundings. The juvenile is, indeed, treated as an object and not as a human being. As pointed out in *Jackson v Bishop:*

> ". . . irrespective of any precautionary conditions which may be imposed, [it] offends contemporary concepts of decency and human dignity and precepts of civilisation which we profess to possess..."[100]

[91] No compelling interest has been proved which can justify the practice. It has not been shown that there are no other punishments which are adequate to achieve the purposes for which it is imposed. Nor has it been shown to be a significantly effective deterrent. On the other hand, as observed by Page J in *S v Motsoesoana,*[101] its effect is likely to be coarsening and degrading rather than rehabilitative. It is moreover also unnecessary. Many countries in the civilised world abolished it long ago; there are enough sentencing options in our justice system to conclude that whipping does not have to be resorted to. Thus, whether one looks at the adjectives disjunctively or regards the phrase as a "compendious expression of a norm", it is my view that at this time, so close to the dawn of the 21st century, juvenile whipping is cruel, it is inhuman and it is degrading. It cannot, moreover, be justified in terms of section 33(1) of the Constitution.

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[100] Supra note 51 at 579.

[101] Supra note 12 at 354F.

[92] I accordingly find that the provisions of section 294 of the Act violate the provisions of sections 10 and 11(2) of the Constitution and that they cannot be saved by the operation of section 33(1) of the Constitution. Although the provision concerned is a law of general application, the limitation it imposes on the rights in question is, in the light of all the circumstances, not reasonable, not justifiable and it is furthermore not necessary. The provisions are therefore unconstitutional.

[93] It becomes unnecessary to embark on an investigation to determine whether or not the provision in fact negates the essential content of any of the rights involved.

[94] In the light of this finding, I do not find it necessary to debate the issue whether section 294 of the Act also infringes the other provisions of the Constitution, namely sections 8 and 30.

[95] There may well be cases where juveniles have been sentenced in terms of section 294 of the Act but where the sentences have, for some reason or other, not yet been carried out. It follows from the finding of this Court that such sentences will have to be set aside by the courts having jurisdiction to do so and new sentences substituted.

[96] The following order is accordingly made:

1. The following provisions of the Criminal Procedure Act No. 51 of 1977 (as amended) are inconsistent with the Repbulic of South Africa Constitution Act No. 200 of 1993 (as amended) and are, with effect from the date of this order, declared to be invalid and of no force and effect:

    (a) section 294 in its entirety; and
    (b) the words “or a whipping” in section 290(2).

2. In terms of section 98(7) of the Constitution, it is ordered that with effect from the date of this order, no sentences imposed in terms of section 294 of the Criminal Procedure Act No. 51 of 1977, shall be carried out.

3. The matter of *State v Williams* (Review No. 53/94) is referred back to the Cape of Good Hope Provincial Division for an appropriate order.

P N Langa
Judge of the Constitutional Court

Chaskalson P, Ackermann J, Didcott J, Kentridge AJ, Kriegler J, Madala J, Mahomed J, Mokgoro J, O'Regan J and Sachs J all concur in the judgment of Langa J.

CASE NUMBER:	CCT/20/94
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DATE OF HEARING:	24 March 1995
DATE OF JUDGMENT:	9 June 1995