Issue 16 Sentencing of young offenders: Ntaka case

Sentencing of young offenders is a delicate matter as it requires finding a fine balance among interests of community, offenders and victims. According to rule 17 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules);

> 17.1(a) the reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society.
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> (b) restriction on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum;
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> (c) deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response;
>
> (d) the well-being of the juvenile shall be the guiding factor in the consideration of her or his case.

In other words, a sentence imposed on juvenile offenders should be proportional, not only to the gravity of the offence, but also taking into consideration the circumstances and the needs of the child offender. A sentence which deprives personal liberty, should be imposed only as a last resort when there is no appropriate alternative. Furthermore, it should be limited to the minimum possible length.

Applying above principles is far from straightforward. Recently, the South African Supreme Court of Appeal has handed down a judgment concerning a juvenile offender convicted of serious crime in *Ntaka v The State*.[1] The judgment builds upon the previous SCA judgments of *S v B*[2] and *DPP, KZN v P*[3].

In the Ntaka case, the appellant, who at the time of offence was 17, raped a close female friend, who was also 17 years old. The appellant was a hardworking and highly regarded student from a stable family background. The complainant had suffered a psychological trauma rising from her parents' divorce. She had a history of attempted suicide and consequently, she sought treatment for depression. She had shared her story with the appellant. On 5 July 2004, the appellant invited the complainant to his house and raped her in his room. The appellant sent her an insensitive SMS in the same evening. The complainant, shaken by the events, attempted to commit suicide. The appellant showed no remorse or regret. One of the social workers who assessed the appellant concluded that correctional supervision would not benefit him. The other social worker reported that imprisonment would be appropriate but did not rule out the option of correctional supervision.

The Magistrate rejected the option of correctional supervision and sentenced the accused to10 years imprisonment of which four years were conditionally suspended.

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1 *Ntaka v The State* (469/2007) [2008] ZASCA 30 (28 March 2008)

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

3 Director of Public Prosecutions, Kwa Zulu Natal v P 2006 (1) SACR 243 (SCA).

An appeal against the conviction and sentence was dismissed by the High Court. A further appeal was allowed to the Supreme Court of Appeal.

Cameron JA, who wrote the majority judgment, came to a different conclusion after considering three factors; 1) gravity and the nature of the crime, 2) practicality and appropriateness of correctional supervision, and 3) youthfulness of the offender. Justice Cameron, while agreeing that considering the gravity and the nature of the crime, direct imprisonment was unavoidable, argued that imposing the six-year imprisonment failed to take into consideration of his youthfulness. The court found that it also failed to individualize the sentence to 'prepare him for his first entry into society.'[4] Referring to section 28(1)(g) of the Constitution, the Court stressed the necessity of distinguishing child offenders from adults as their crimes may be due to 'immature judgment, from as yet unformed character, from youthful vulnerability to error and to impulse'.[5] Based on such arguments, Cameron JA favoured a five-year prison sentence imposed under s 276(1)(i) of the Criminal Law Amendment Act 105 of 1997. The effect of this would be that the offender would spend one sixth of his sentence in custody before being considered for release under correctional supervision. Justice Cameron's approach to sentencing in the case demonstrates that the primary aim of sentencing child offenders is rehabilitation. In a case where direct imprisonment is absolutely necessary, the imprisonment sentence should be individualized with emphasis on rehabilitation and reintegration of the offender.

Maya JA wrote a dissenting judgment in which she upheld the sentence of an effective 6 years imprisonment imposed by the magistrate. She argued that although the fundamental principle that 'a child offender should not be deprived of his or her liberty except as a measure of last resort, for the shortest appropriate period'[6] should be respected and vigorously applied, considering the gravity and the nature of the offence, 'the element of retribution and deterrence must take precedence over the appellant's interests, including his young age.'[7]

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4 Para 42 of the *Ntaka v The State*
5 Para 45 of the *Ntaka v The State*
6 Para 15 of the *Ntaka v the State*
7 Para 31 of the *Ntaka v the State*