CHILD LAW MATTERS

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Minimum sentences declared invalid for 16 and 17 year olds

Background to Minimum Sentences for Children

The Constitutional Court has declared minimum sentences invalid for 16 and 17 year olds. The judgment is the culmination of efforts that started a few years ago, when the Criminal Law Amendment Act 105 of 1977 was introduced into Parliament. The initial version of the Act did not exclude children. Lobbying from civil society advocates saw the exclusion of children below the age of 16 from its operation However, 16 and 17 year olds were included in the ambit of the Act, though the procedure for them was different from the procedure for adults.

The courts debated the interpretation of the provisions relating to sixteen and seventeen year olds.1[1] The question of applicability of minimum sentences was finally resolved by the Supreme Court of Appeal in *S v B*2[2] which held that minimum sentences did not apply to sixteen and seventeen year olds. The case involved a 17 year old boy who had been convicted of murder. The court *a quo* had applied the minimum sentence of life imprisonment. His appeal against this sentence was upheld on the basis that, in the opinion of the Court, minimum sentences do not automatically apply to persons below the age of 18 years. A constitutional argument was invoked, namely that as the Constitution provides that children should not be detained except as a last resort, and that a minimum sentence implies a first resort of imprisonment. The court held that the traditional aims of punishment for child offenders have to be re-appraised in the light of international instruments. Any sentencing court must have a discretion when sentencing a child, in order to give effect to the requirements of international law for individualisation and the need for proportionality to be applied to the young offender, as well as the crime and circumstances surrounding it. The sentencing court should thus start with a "clean slate" when sentencing a child offender. The Court found that minimum sentences do not accord with the principle of "detention as a measure of last resort". The court added, however, that when dealing with sixteen and seventeen year olds the fact that the legislature has ordained minimum sentences for specific offences should be taken as a weighting factor when the court exercises its discretion in the sentencing process. Following this case however, the Criminal Law (Sentencing) Amendment Act, Act 38 of 2007 was passed, which ensured minimum sentences applied unambiguously to 16 and 17 year olds, and could only be departed

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1[1] S v N 2000 (1) SACR 209 (W); S v S 2001 (1) SACR 79 (W); S v Blaauw [2001] 3 All SA 588 (C); S v Malgas [2001] 3 All SA 220 (SCA); S v Nkosi(supra); Direkteur van Openbare Vervolgings, Transvaal v Makwetsja [2003] 2 All SA 249 (T).

2[2] 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA.

on the same basis as in adult cases - if the court could find substantial and compelling reasons. This move was retrogressive, and it seemed to invite constitutional challenge.

High Court challenge

The Centre for Child Law brought such a challenge to the High Court during 2008. The court found the ,3[3] the High Court found that the Amendment Act was aimed at reintroducing minimum sentences for application to 16 and 17 year old offenders. As a result of the Amendment Act minimum sentences would have to be applied as a first option and could only be departed from if the court found substantial and compelling circumstances to impose a different sentence. The Court reaffirmed the correctness of the 'clean-slate' approach which requires a sentencing court to apply the usual sentencing criteria to 16 and 17 year old offenders (which includes a possible long term sentence) and not to start by first considering the minimum sentences. The Court accordingly declared the offending provisions to be unconstitutional.

Constitutional Court confirms the order of invalidity.

In the *Centre for Child Law v Minister of Justice and Other 4**[4]*** the Constitutional Court ruled that the Constitution prohibits minimum sentencing legislation from being applied to children aged 16 and 17 years old. The court confirmed the order of constitutional invalidity handed down by the High Court declaring sections of the Criminal Law Amendment Act (as amended) invalid. The majority of the Constitutional Court found that the minimum sentencing regime limits the discretion of sentencing officers by orienting them away from non-custodial options, by interfering with the individualisation of sentences, and by giving rise to longer prison sentences. This breaches their young offenders' rights in terms of section 28(1)(g), and the Court found that no adequate justification had been provided for the limitation. The judge had the following to say regarding why children should be treated differently from adults:

> "The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults. These considerations take acute effect when society imposes criminal
> responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more

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3[3] Centre for Child Law v Minister of Justice and Others 2008 JOL 22687 (T).

4[4] CCT 98/08 [2009] ZACC 18.

> capable of rehabilitation than adults.These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence.
> We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility."5[5]

The Court went on to acknowledge that children can and do commit very serious crimes, and that the legislator has legitimate concerns about violent crimes committed by under 18's. The Court points out that the Constitution does not prohibit Parliament from dealing effectively with such offenders - the fact that detention must be used only as a last resort in itself implies that imprisonment is sometimes necessary. However, the Bill of rights mitigates the circumstances in which such imprisonment can happen. - it must be a last (not first or intermediate) resort, and it must be for the shortest appropriate period.

> "If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time."6[6]

The order

The order declared section 51(1) and (2) invalid to the extent that they refer to 16 and 17 year olds. To remedy the defect, the Court declared that section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of2007, is to read as though it provides as follows:

> "This section does not apply in respect of an accused person who
> was under the age of 18 years at the time of the commission of an
> offence contemplated in subsection (1) or (2)."

The order does not work retrospectively to invalidate sentences already handed down (except in cases where there are appeals or reviews currently). However, any person person who was below 18 at the time of the offence who was sentenced under the regime set up by the second amendment Act will be able to have his or her case taken on appeal or review so that the sentence can be reconsidered in the light of the Court's finding of Constitutional invalidity. In order to assist with this, the Court ordered the Minister of Justice and Constitutional Development and the Minister of Correctional Services to provide the names, case and sentence details of such sentenced children to the Centre for Child Law.

5[5] Paras 26-28.
6[6] Para 31.