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The application of minimum sentences to 16 and 17 year old convicted offenders

Minimum sentences came into being with the passing of the Criminal Law Amendment Act 105 of 1997. The Act excluded children below 16 years of age from its ambit. However minimum sentences could be applied to 16 and 17 year old convicted children, but different procedures for doing so were included in the Act.

Application of the 1997 Act in S v B

In 2005 the SCA had the opportunity to interpret the provisions of the 1997 Act in the *Brandt* case (S v B 2006 (1) SACR 311 (SCA). Basing its decision on constitutional values and international law relating to child offenders the court gave a significant interpretation of section 51(3)(b) of the 1997 Act. This section required a court who wished to apply minimum sentences to offenders who were 16 years or older but under 18 years of age at the time the offence was committed to record its reasons for doing so. The court held that this section gave a sentencing court the discretion not to impose minimum sentences on 16 and 17 year old convicted offenders. Furthermore, the court held that the requirement that a court could only depart from the minimum sentence 'if substantial and compelling circumstances existed', did not apply to persons who were 16 or 17 at the time of the offence.

Despite the SCA's decision the Criminal law (Sentencing) Amendment Act 38 of 2007 (the Amendment Act) has made some significant changes to the law on minimum sentences particularly with regards to its application to children. The outcomes of the amended provisions are highlighted below.

The Sentencing Amendment Act of 2007 and its impact on 16 and 17 year old convicted children:

The first significant change the Sentencing Amendment Act made to the 1997 Act was the repeal of section 51(3) (b) (set out above). Section 51(6) as amended by the 2007 Amendment Act stipulates that the minimum sentence provisions set out in section 51(1) and (2) do not apply to accused persons who were under the age of 16 at the time the offence was committed. In the absence of the repealed section 51(3)(b) (as interpreted in *Brandt)* the provision implies that minimum sentences again apply to children who were 16 and 17 years of age at the time of the offence and that no judicial discretion exists in this regard. The only exception to judicial discretion in this regard is that found in section 51(5) which gives a court the discretion to suspend not more then half of a minimum sentence as prescribed in 51(2) where the accused was 16 or 17 years of age at the time of the offence in question. However this section again indicates the intention of the legislature to make minimum sentences applicable to 16 and 17 year olds.

The overall outcome of section 51 as amended is that minimum sentences (including life imprisonment) apply to convicted children who were 16 or 17 years old at the time of the offence.

If you are representing a child offender who was 16 or 17 at the time the offence was committed and who has been convicted of an offence for which a minimum sentence is applicable, the changes to the 1997 Act are very important. The Amendment Act came into operation on 31 December 2007.

It is important to bring the decision in *S v B* to the attention of the court, and to use the judgment to present substantial and compelling reasons to the court why, in the case of the young offender, the minimum sentence should not be applied.

King Regards