

**APPLICATION OF PRESCRIBED MINIMUM
SENTENCING LEGISLATION ON JUVENILE
OFFENDERS IN SOUTH AFRICA**



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A minithesis submitted in partial fulfillment of the requirements for the degree of Masters
Legum in the Faculty of Law, University of the Western Cape.

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16 May 2005

KEYWORDS

Children

Minimum sentence Legislation

Substantial and compelling circumstances

Sentencing

Proportionality

Constitution



ABSTRACT

Application of prescribed minimum sentencing legislation on juvenile offenders in South Africa

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The detention of juvenile offenders is not encouraged by both the Constitution and a number of international instruments. This right is entrenched in the South African Constitution (section 28(1)(g)) which provides that every child has the right not to be detained except as a measure of last resort in which case, in addition to the rights a child enjoys under section 12 and 35, the child may be detained only for the shortest appropriate period of time.

This Constitutional provision, in clear terms, views the incarceration of juvenile offenders in a serious light as it provides that the detention of juvenile offenders should be a measure of last resort.

One of the important international instruments, the United Nations Convention on the Rights of the Child, (Article 37(b) provides that children may be arrested, detained or imprisoned “only as a measure of last resort and for the shortest possible period of time”. This thesis examines the impact of the Constitution and some international instruments on the Criminal Law Amendment Act, 105 of 1997 with regard to juvenile offenders. It also sets out the current legal position in South Africa with regard to sentencing of juvenile offenders.

16 May 2005

DECLARATION

I declare that “*The application of prescribed minimum sentencing legislation on juvenile offenders in South Africa*” is my own work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

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ACKNOWLEDGEMENTS

I am indebted to a great number of people who have played an important part, both directly and indirectly, in the preparation of this thesis. In particular and foremost, I wish to express my sincere gratitude to my supervisor, Professor Julia Sloth-Nielsen, for her supervision and guidance that was indeed valuable. Without her encouragement and support, this thesis would not have been completed.

I would like to thank my secretary, Ms Maureen Johnson and Ms Ncediswa Mayambela, for their assistance in the typing of this thesis during their spare time and during evenings. I would also like to thank all my personal friends for their understanding and support.

Finally, I would like to thank my parents, Mr Gallan Mvuyo Momoti and Mrs Olga Ntombolundi Momoti, for motivation, encouragement and understanding during the process of completing this thesis and the sacrifices they have had to make. Without them, I would not have been the person I am today nor be in the position I find myself in today. I would therefore like to dedicate this thesis to my family and all the people who have supported me during the period of hard work towards this thesis.

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LIST OF ABBREVIATIONS

SA	South African Law Reports
SACJ	South African Criminal Justice
SACR	South African Criminal Law Reports
SAJHR	South African Journal on Human Rights
SALJ	South African Law Journal



CHAPTER 1

1. INTRODUCTION AND BACKGROUND

The dawn of democracy in 1994, culminated an era where shortcomings in the South African sentencing system were identified. Increased fear of crime has led to calls for heavier sentences. In response to such calls, government called upon the Department of Justice to investigate and come up with proposals on how the issue of high crime could be addressed.

On 21 August 1996 Cabinet requested the Department of Justice to investigate the question of compulsory minimum sentences. A draft provision providing for the imposition of compulsory minimum sentences for a range of offences, including murder, rape and robbery with aggravating circumstances was presented to Cabinet for approval in the Criminal Law Amendment Bill, 1997. The opinion held was that the simultaneous promotion of the inclusion of minimum sentences and the consequential amendments to the death penalty could negate the impact which the abolition of the sentence of death could have, especially in view of the prevailing crime situation in the country.¹

In essence the view was that putting the minimum sentence legislation in one package with the abolition of the death penalty would shadow the impact which the abolition of the death penalty would have on the people who were against the abolition of the death

¹ This is contained in the Memorandum to Cabinet which was initially classified as 'secret'. I have later learnt that this Memorandum has now been declassified on 21 February 2000. The Memorandum is entitled 'Compulsory Minimum Sentences for Certain Offences' HN450397. April 1997 at para 31. The Ministers responsible for the implementation of the National Crime Prevention Strategy (NCPS) made recommendations to Cabinet on 21 August 1996 regarding measures which need to be introduced to effectively deal with crime in the country. These recommendations are contained in a document entitled 'Information Note to Cabinet on Crime Situation in Western Cape' dated 21 August 1996.

penalty in that heavy sentences could still be imposed on offenders who have committed serious crimes. It should be borne in mind that the Constitutional Court had earlier declared the death penalty as being unconstitutional on the grounds that it was contrary to human dignity.²

On 5 June 1996 Cabinet approved the introduction into Parliament of the Criminal Law Amendment Bill. However, due to specific circumstances surrounding the Bill, it could not be introduced. On 5 March 1997 Cabinet therefore approved the introduction of the Bill into Parliament during the 1997 Parliamentary session.³

During 1996 the Minister of Justice appointed a new Project Committee for the Commission's investigation, on an ongoing basis, of all aspects of sentencing. This Committee operated from late 1996 to March 1998 under the leadership of Judge Leonora van den Heever. The committee developed an issue paper on mandatory minimum sentences and invited public comment on the subject of 30 September 1997.⁴ The van den Heever Committee completed its term of office without consolidating its work in a discussion paper or legislative proposals.⁵

² See: *S v Makwanyane and another* 1995 (3) SA 391 (CC).

³ at para 4.1.2 of the memorandum.

⁴ South African Law Commission, Issue Paper 11 Sentencing: Mandatory Minimum Sentences June 1997 ISBN 0-621-27253-8.

⁵ South African Law Commission Project 82: Sentencing: A New Sentencing Framework ISBN 0-621-30070-5 at para 1.15. In late 1998 a new committee was appointed by the Minister of Justice and Professor Dirk van Zyl Smit was appointed as project leader. The committee had the same general brief of sentencing reform and was also to consider the position of victims in the criminal justice system. Since this legislation on minimum sentences had already been enacted it did not repeat what was done by the Van den Heever Committee, instead commissioned a study that would seek to determine the impact that the Act had, both on the sentencing outcomes and on the perceptions of this form of sentencing by key role players in the criminal justice system.

The Committee was also tasked to look into the desirability of the legislative determination of minimum and maximum sentences. Because of the general outcry from members of the public, media and judiciary, the Commission considered whether mandatory sentences for certain serious offences had to be introduced in South Africa.

Sections 51 to 53 of the Criminal Law Amendment Act 105 of 1997 came into operation on 1 May 1998.⁶ This Act was introduced in Parliament in order to provide for minimum sentences ranging from five years imprisonment to life imprisonment to be imposed upon conviction for specified offences.

Although prescribed sentences were provided for, they were combined with a discretion allowing the Court to depart from the prescribed minimum in certain circumstances.⁷ Initially, the effect of this section was limited to two years for commencement of the Act and therefore the Act would have ceased to have an effect on 30 April 2000. The President extended its operation according to the powers vested in him.⁸ This means the Act was intended to be a temporary measure. The Act has been extended on three further

⁶ Proclamation R43 GG6175 of 1 May 1998

⁷ Section 51 (3)(a). In Chapter 2 I have indicated that section 51(3)(a) provides that the sentencing court may impose a lesser sentence if substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the prescribed sentence. According to commentators the term ‘substantial and compelling circumstances’ was not previously found in South African law and it appears to have been borrowed from American sentencing practice in the form of the Minnesota Guidelines. In the Minnesota Guidelines, if substantial and compelling circumstances are found to exist, a departure from the guidelines can either favour a harsher or more lenient sentence – that is, a longer or a shorter prison sentence than that suggested by the guidelines may be imposed or a prison sentence not imposed even though the guidelines propose a prison term. See Van Zyl Smit D “Current Developments: Mandatory minimum sentences and departures from them in substantial and compelling circumstances” (1999) 15 SAJHR, p 270-276; Terblanche S S. “Sentencing Guidelines for South Africa: Lessons from Elsewhere.” 2003 SALJ, p 858.

⁸ Section 53(2). Whenever the President extends this Act, Parliament should concur to the extension. This is normally done through resolutions in both the National Assembly and the National Council of Provinces.

occasions. The section was supposed to be in operation until 30 April 2005.⁹ However, this Act has recently been extended for another period of two years.¹⁰

This Act was passed with a view of fighting serious crimes in South Africa. Passage of this Act was also government's attempt to ensure that criminals who commit serious crimes like murder, armed robbery and rape get severe sentences.¹¹

The aim of this paper is to:

Provide an overview of the sentencing policy in South Africa

Outline the interpretation and application of the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997 in so far as it relates to sentencing in general and more specifically to sentencing of juvenile offenders.

Establish that the provision of section 28 of the Constitution of the Republic of South Africa Act 108 of 1996 make it an obligation that detention of children should be done as a last resort.

Assert that some international instruments, among others, United Nations Convention on the Rights of the Child (1989), make it an obligation on the

⁹ This Act was extended for one year by Proclamation R2 GG 22261 of 30 April 2001 and has been further extended for a period of two years ending 30 April 2005.

¹⁰ The National Assembly and the National Council of Provinces have by resolution, on 12 and 13 April 2005 supported the extension of this Act until 30 April 2007.

¹¹ Van der Merwe A: Minimum Sentences in Child Sexual Abuse Cases: The After-Effects of Rape as a Factor in imposing life imprisonment p.1. Available at <http://www.isrd.org/papers/merwe.pdf>. Accessed on 08 February 2005; Snyman C.R. (2002) Criminal Law 4th Ed, Butterworths p 26; Cilliers A: Minimum Sentences in South Africa p 1. Available at <http://jurist.law.pitt.edu/world/foreignmay02.php>. Accessed on 08 February 2005, Nesor J J: Mandatory Minimum Sentences in the South African Context p.2. Available in Crime Research in South Africa at <http://www.crisa.org.za> Vol 3 Number 3 (June 2001). Accessed on 08 February 2005.

contracting States to ensure that detention of children should be avoided and should be done as a last resort.

Provide an overview of the approach adopted by our courts when invoking the provisions of section 51 of the Criminal Law Amendment Act 105 of 1997.

And finally conclude that it is settled law in South Africa that the prescribed minimum sentences legislation is not applicable to juveniles below the age of 16 years and that our courts have finally brought certainty as to the application of minimum sentence legislation on juveniles between the ages of 16 and 18.



CHAPTER 2

SENTENCING POLICY IN SOUTH AFRICA

1. Introduction

In this chapter I will set out the sentencing policy in South Africa taking into account the general principles of sentencing and also relevant case law. I will highlight that, in accordance with the general principles of sentencing, there are various factors taken into consideration by our courts before deciding upon an appropriate sentence. Further, I will indicate that our courts have a discretion to determine which sentence is appropriate after having taken into consideration all the factors present in a particular case. Furthermore, I will also highlight what the sentence process seeks to achieve.

In broad terms, I will look into the theories of punishment namely, deterrence, prevention, rehabilitation and retribution. In my analysis, I will evaluate the relationship between minimum sentence legislation and the traditional principles of sentencing and developments in general in our law of sentencing.

2. General Principles of Sentencing

Our courts have an important role to play in ensuring that there is an effective and proper administration of justice in this country. Without effective machinery in this arm of government, there could be anarchy in South Africa as criminals will undermine the justice system and governance systems as being ineffective. If there is anarchy, our fledgling democracy and the economy will be compromised as this factor will have an impact on investor confidence in the country. The courts ensure that there is a proper

administration of justice by bringing offenders before the courts and upon conviction, imposing appropriate sentences.

When the offenders are brought before the courts, tried and convicted, another important aspect in the administration of justice, namely, the sentencing process, begins. Before a judicial officer imposes sentence upon an offender, he firstly has to determine which sentences may be imposed through an interpretation of the relevant penalty clause. The court also has to collect all the information that may be relevant to the determination of a suitable sentence. Thereafter, the court has to exercise its sentence discretion to choose the most appropriate sentence from the possible alternatives.¹²

Before arriving at a decision on which appropriate sentence to impose, a court takes into account various general principles. As Terblanche puts it: 'these general principles are purely judge-made principles and are not contained in any statute.'¹³

These basic principles are that the court must consider the crime, the criminal and the interests of society, and find the sentence which, objectively, best balances these elements with retribution, deterrence, prevention and rehabilitation.¹⁴ This weighing of the various factors enables the court to apply its discretion as to which sentence to impose.

¹² Terblanche S S: *The Guide to Sentencing in South Africa*, Butterworths, 1999, p 153.

¹³ Terblanche S S: *The Guide to Sentencing in South Africa*, p 153.

¹⁴ Terblanche S S: *The Guide to Sentencing in South Africa*, p 137.

3. The Sentencing Discretion of the Court

South Africa court uses a discretionary sentencing system. Within the boundaries set by the legislature, the courts have to exercise a judicial discretion in order to determine an appropriate sentence. Such determination of sentence is based on a balancing of all the different factors present in that particular case. This discretion is coupled with a well established system of appeal against any sentences imposed by a trial court, as well as judicial review of sentences imposed in the lower courts.¹⁵

Before a court can exercise any sentence discretion, it has to determine the boundaries within which that discretion is to be exercised. In this discussion on sentencing discretion, Terblanche submits that the court has to balance the seriousness of the crime, the personal factors surrounding the criminal and the interests of society.¹⁶

When courts apply these principles of sentencing, taking into account the considerations mentioned above, they are expected to impose sentences that will serve the purposes of deterrence, prevention, rehabilitation and retribution.

Terblanche submits that the sentence discretion is a vital element of our law of sentencing. He concludes that at the heart of the sentence discretion are the principles

¹⁵ Terblanche S S: Sentencing in South Africa: Lacking in principle but delivering on justice? p 2. Available at <http://isrc1.org/Papers/2004/Terblanche.pdf>. Accessed on 17 February 2005

¹⁶ Terblanche S S: Sentencing in South Africa : Lacking in principle but delivering on justice? p 2.

that each case should be treated on its own facts or merits and that the sentence discretion belongs to the trial court.¹⁷

The sentencing court has to impose an appropriate sentence, based on all the circumstances of the case. The court therefore has to have regard to all the factors relevant to the case to enable it to arrive at a just decision.¹⁸

The sentence should be an expression of the offender's blameworthiness.¹⁹ In *S v Qamata*²⁰ the court found that an appropriate sentence actually means a sentence in accordance with the blameworthiness of every individual offender.

An appropriate sentence should reflect the severity of the crime, while at the same time giving full consideration to all the mitigating and aggravating factors. These two factors, namely, the crime and the offender, are the first two elements of the triad as set out in the celebrated judgement of Rumpff J A in *S v Zinn*²¹ where the learned judge remarked as follows:

“What has to be considered is the triad consisting of the crime, the offender, and the interests of society” (my emphasis)

¹⁷ Terblanche S S: The Guide to Sentencing in South Africa, p 122.

¹⁸ A just decision includes the fact that the sentence should not be too lenient or too severe. If the sentence is too lenient taking into account the severity of the crime, this may cast doubt on the effectiveness of the justice system in our country. If it is too harsh, taking into account the severity of the crime, this may result in the criminal justice system being condemned as exercising cruel and degrading punishment contrary to the Constitution. In the sentencing process, the court has to apply the objective test.

¹⁹ Terblanche S S: The Guide to Sentencing in South Africa, p 165.

²⁰ 1997 (1) SACR 479 (E) at 483a.

²¹ 1969 (2) SA 537 (A) 540 G-H.

An appropriate sentence should have regard to, or serve the interest of society. This factor is the third element as expounded by Rumpff J A in *Zinn*.²²

Terblanche submits that in *Zinn's* case, the general protection of society and deterrence of others were seen as important determinants of the interests of society.²³

4. The Traditional Purposes of Punishment

In his discussion on the purposes of punishment, Terblanche states as follows:

“The question is as to how the purposes of punishment should be incorporated into the *Zinn* triad, usually the purposes are simply seen as considerations additional to the *Zinn* triad and there is no real indication how they should affect the sentence which has otherwise been determined with the aid of the *Zinn* triad only. Theoretically, however, the purposes of punishment should be dealt with as part of the interests of society component of the *Zinn* triad.”²⁴

4.1 Deterrence

Deterrence has two components, namely to deter the offender from re-offending (individual) and to deter would-be offenders (general deterrence).²⁵

²² In his judgement in *Zinn's* case, Rumpff J A deliberated on the third leg of the triad as follows: “The interests of society demand that a man like the appellant must be put away for a long time not only to protect society against [such] a man but also as punishment for crimes committed over an extended period and as warning to [other] businessmen” (542D).

²³ Terblanche S S: *The Guide to Sentencing in South Africa*, p 157.

²⁴ Terblanche S S: *The Guide to Sentencing in South Africa*, p 177.

²⁵ Rabie M Strauss S A: *Punishment: An Introduction to Principles*, p 25.

4.1.1 General Deterrence

The idea behind general deterrence is that a person will refrain from the commission of crimes if he knows that the unpleasant consequences of punishment will follow. Rabie points out that general deterrence is an inhibiting effect of the threat of punishment or of the imposition of punishment on others, which should cause man to think twice before he would commit crime. He refers to this restraint as psychological coercion.²⁶ Terblanche submits that generally our courts assume that their sentence will deter other potential offenders, and that the higher the sentence the greater the deterrence value.²⁷ Terblanche²⁸ further submits that a court may conclude that a particular sentence has a deterrent effect under any of the following circumstances:-

- (i) If the crime is particularly serious, the sentencing court may conclude that it is accepted as a matter of principle that the sentence should contain a deterrent element;
- (ii) If the crime is considered to be prevalent or the crime rate to be rising, the sentencing court may conclude that since sentences other than imprisonment have been tried, and have failed to reduce the crime rate, stricter sentences must now be imposed;
- (iii) It may further point that the failure of alternative sentences brings increasing pressures from the community;

²⁶ Rabie M Strauss S A: Punishment: An Introduction to Principles, p 35.

²⁷ Terblanche S S: The Guide to Sentencing in South Africa, p 180.

²⁸ Terblanche S S: The Guide to Sentencing in South Africa, p 180.

- (iv) Further, because the police find it difficult to curb these crimes, with the result that many complaints are not solved, a general deterrent sentence may be required.

A court cannot consider increasing its sentence in order to deter other would-be offenders by imposing an unreasonable severe sentence to the offender.²⁹

A question that needs to be addressed is whether deterrence is effective. In order to arrive at an informed decision, it is important to have an understanding of the views of the courts and academics. Terblanche points out that there are some doubts on the effectiveness of deterrence from both academic circles and also from the courts. Terblanche³⁰ expresses his doubts on general deterrence as follows:

“Therefore, in the absence of clear indications that a particular sentence will have some deterrent effect on a particular group or class of offenders, no court can be sufficiently satisfied that its sentence will have such deterrent effect to justify, based on deterrence alone, the imposition of a sentence which is more severe than that deserved by the offender; in other words, more severe than a sentence in accordance with the blameworthiness of the offender.”

²⁹ Thus in *S v De Kock* 1997 (2) SACR 171 (T), 190C-D the view was that the deterrence must come from the balanced sentence imposed on the offender, not from an unreasonable sentence which is to the detriment of the offender. In *S v Mbingo* 1984 (1) SA 552 (A), it was held that prevalence of crime cannot justify sentence disproportionate to the seriousness of the case.

³⁰ Terblanche S S: *The Guide to Sentencing in South Africa*, p 181.

Our courts have also expressed their views on the effectiveness of deterrence. In *S v Mhlakaza*, Harms J A pointed out that the effectiveness of general deterrence is unclear, but according to judicial precedent, it remains an important consideration.³¹

4.1.2 Individual Deterrence

As regards individual deterrence, the punishment only concerns the offender who has committed the crime. In his discussion on individual deterrence, Rabie states that:

“The underlying idea is that a person who has once been subjected to pain which punishment brings about, will be conditioned thereby in the future to refrain from criminal behaviour. By means of punishment the offender is to be taught a lesson so that he will be deterred from criminal behaviour. It does not mean that the convicted offender must necessarily serve his punishment: a suspended sentence is also a form of individual deterrence.”³²

4.2 Prevention

The basic idea underlying prevention is that offenders should become law-abiding citizens (individual prevention) and citizens should remain law abiding (general prevention).³³ Terblanche contends that prevention can be used in both the wider and narrower sense.³⁴

³¹ 1997 (1) SACR 515 (SCA). See also *S v Skenjana* 1985 (3) SA 51 where Nicholas J A held that in so far as deterrence is concerned, there is no reason to believe that the deterrent effect of a prison sentence is always proportionate to its length.

³² Rabie M Strauss S A: *Punishment: An Introduction to Principles*, p 25.

³³ Rabie M Strauss S A: *Punishment: An Introduction to Principles*, p 23.

³⁴ Terblanche S S: *The Guide to Sentencing in South Africa*, p 186.

When used in the wider sense, it includes deterrence and rehabilitation. In some instances, it is used as a synonym for general deterrence, for example, when courts state the sentence should prevent others from committing similar offences. In this instance, people in general are prevented from committing crimes and thereby remaining law-abiding citizens.

When used in combination with the other three purposes, it is used in the narrow sense, and should mean the physical prevention of the accused from committing crime in society. The current punishment with such an effect is life imprisonment. Terblanche points out those other incarcerative sentences, such as imprisonment and detention in a rehabilitation centre also prevent the offender from committing crime in society. However, this will take place for a limited period only.

In incapacitation of an offender is important if the offender is a danger to society and society can only be protected by the incarceration of that offender. Terblanche stresses that the extent to which the offender can be removed from society should be limited by the requirement that the sentence should be proportional to the severity of the crime committed.³⁵

³⁵ Terblanche S S: The Guide to Sentencing in South Africa, p 181.

4.3 Rehabilitation

Rehabilitation is based on the notion that the personality of the offender can be influenced so that he can become a law-abiding citizen. The theory of rehabilitation is aimed at neutral reform measures.³⁶

A question is whether rehabilitation of an offender is effective. In *Mhlakaza* it was held that it is abundantly clear that the object of a long term of imprisonment is not rehabilitation, but removal of that offender from society.³⁷ In his discussion on rehabilitation, Terblanche points out that although the belief that a prison sentence can rehabilitate an offender has largely been discredited, our courts have found renewed faith in rehabilitation with the advent of correction supervision.³⁸

Terblanche stresses that rehabilitation remains an important factor in the case of juvenile offenders. Rehabilitation has been applied possibly with greater success as far as youthful offenders are concerned. The view of Terblanche is also supported by Rabie who submits that youths are generally more susceptible to influence and therefore more amenable to rehabilitative measures than adults who have developed more or less fixed personalities.”³⁹

According to Terblanche, rehabilitation in respect of other offenders other than juvenile offenders can be possible where:

³⁶ Rabie M Strauss S A: *Punishment: An introduction to Principles*, p 27. See *S v Nkambule* 1993 (1) SACR 136 (A), 147b where the Supreme Court of Appeal pronounced itself as follows: “Rehabilitation is an important consideration, but only if the sentence is able to achieve rehabilitation”.

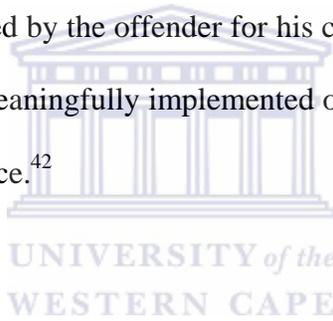
³⁷ 1997 (1) SACR 515 (SCA) at 519.

³⁸ Terblanche S S: *The Guide to Sentencing in South Africa*, p 188.

³⁹ Rabie M Strauss S A: *Punishment: An Introduction to Principles*, p 26.

- (i) the crime was caused or stimulated by a well known condition such as drug or alcohol dependency;
- (ii) the treatment of this condition must be well known;
- (iii) the likelihood of success of the treatment must be considerable and its extent not left to conjecture.⁴⁰

Terblanche submits that any other view, especially if it involves the medium or long-term incarceration of offenders in prison, with the view of rehabilitating them, cannot be based on any certainty and will lead to unfair and inappropriate sentences which are disproportionate to that deserved by the offender for his crime.⁴¹ Rehabilitation normally takes a long time and can be meaningfully implemented only in relation to offenders who serve a long term prison sentence.⁴²



4.4 Retribution

The retributive theory is based on the notion that punishment is justified because of the offender's desert. Retribution therefore restores the legal balance which has been disturbed by the commission of the crime. Punishment is the payment of the account which, because of the commission of the crime, the offender owes to society.⁴³

⁴⁰ Terblanche S S: *The Guide to Sentencing in South Africa*, p 189.

⁴¹ Terblanche S S: *The Guide to Sentencing in South Africa*, p 190.

⁴² Rabie M Strauss S A: *Punishment: An Introduction to Principles*, p 28

⁴³ Snyman C R: *Criminal Law*, p 14.

Terblanche opines that retribution requires the sentencing court to impose a sentence proportional to the guilt of the offender.⁴⁴ Terblanche concludes the discussion on retribution with the following:

“The real utility of retribution is that it explains why the courts, as an arm of the state, are justified in exposing its subjects to intentional punishment. As such retribution forms the foundation of every sentence. It is inherent in the notion that every sentence should be appropriate objectively speaking with due regard to the *Zinn* triad, in accordance with the intent to which the offender can be blamed for his crime, with the only exception that the interest of society may justify a limited deviation from such a sentence.”⁴⁵

Snyman concurs with Terblanche and points out that the extent of the punishment must be proportionate to the extent of the harm done or of the violation of the law.⁴⁶ The idea of a proportional relationship between harm and punishment, inherent in the retributive theory, called ‘limiting retributivism’, is of great importance in the imposition of punishment.⁴⁷

Snyman further opines that by insisting upon the proportionality between harm and punishment, retribution reveals its basic link with the principle of equality which is inherent in the principle of justice. Such right is the right to equality which is enshrined

⁴⁴ Terblanche S S: *The Guide to Sentencing in South Africa*, p 196.

⁴⁵ Terblanche S S: *The Guide of Sentencing in South Africa*, p 196.

⁴⁶ Snyman C R: *Criminal Law*, p 16.

⁴⁷ Snyman C R: *Criminal Law*, p 16.

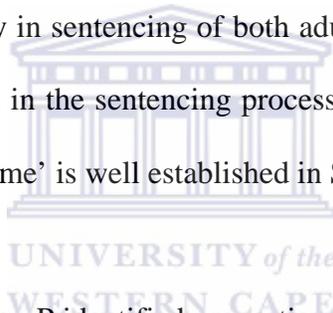
in the South African Bill of Rights and it is a right which needs to be maintained at all times.⁴⁸

Snyman further points out that if the court applies the retribution theory it respects the offenders dignity in that, when applied taking into account the proportionality test, it takes into account the rights of the offender.⁴⁹

4.5 The Constitutionally Derived Principle of Proportionality

General

The principle of proportionality in sentencing of both adult and child offenders is one of the factors taken by the Courts in the sentencing process and also that the principle that the ‘punishment must fit the crime’ is well established in South African sentencing law.



In *S v Makwanyane*⁵⁰ Chaskalson P identified proportionality as a factor to be considered when deciding whether a particular punishment was cruel, inhuman or degrading.

However, the Constitution itself does not refer to proportionality explicitly.⁵¹ In his discussion of the principle of proportionality, Van Zyl Smit opines as follows:

⁴⁸ Snyman C R: Criminal Law, p 16. See section 9 (1) of the Constitution of the Republic of South Africa, 1996 where the right to equality is contained.

⁴⁹ Snyman C R: Criminal Law, p 18. In his discussion on retribution, Snyman opines that the idea of a proportional relationship between harm and punishment, inherent in the retributive theory is of great importance in the imposition of punishment. If the retributive theory were rejected and only the relative theories followed, it would mean that punishment that is out of all proportion to the seriousness of the crime committed could be imposed. He concludes his discussion on the subject by saying that the retributive theory is the only theory which relates punishment directly to the completed crime and the idea of justice.

⁵⁰ 1995(6) BCLR 665 (CC) para 94. See also the construction of section 12 (1)(e) which provides as follows: (1) Everyone has the right to freedom and security of person, which includes the right ...

(e) not to be treated or punished in a cruel, inhuman or degrading way.

⁵¹ Chaskalson et al: Constitutional Law of South Africa, Juta, 2nd Ed: Sentencing and Punishment, 49-9.

“A constitutional principle of proportionality in sentencing can be deduced from the South African Constitution by a similar process of analysis to that adopted in German Law. The principle of the *Rechtsstaat* is also part of South African constitutional law while human dignity is explicitly protected by section 10 of the South African Constitution. However, the South African Constitutional Court has used the prohibition on cruel, inhuman and degrading punishment and treatment in section 12 (1)(e) of the Constitution as the key to a classic statement of the rationale for recognizing the principle of constitutional proportionality in sentencing.”⁵²

Van Zyl Smit made this remark having had regard to the sentiments of Ackermann J in *S v Dodo*,⁵³ which I have dealt with in detail in Chapter 3. The court, in its analysis of whether section 51 of the Criminal Law Amendment Act 105 of 1997 is in conflict with section 12(1)(e) of the Constitution, followed with approval the sentiments raised in *S v Malgas*.⁵⁴

The Court followed and applied the determinative test applied in *Malgas* which is as follows:

“if the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an

⁵² Chaskalson et al: Constitutional Law of South Africa, p 49- 10.

⁵³ *S v Dodo* 2001 (1) SACR 594 (CC). In *Dodo* the Constitutional Court, among others, was tasked to consider whether section 51(1) read with section 51(3)(a) of the Act compels the High Court to pass a sentence which is inconsistent with the accused’s right under section 12(1)(e) of the Constitution.

⁵⁴ 2001 (1) SACR 469 (SCA). I have discussed this case in detail in Chapter 3.

injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.”⁵⁵

In *S v Dodo*, Ackerman J emphasized the centrality of the concept of proportionality in the sentencing process as follows:

:The concept of proportionality goes to the heart of the inquiry as to whether punishment is cruel, inhuman and degrading, particularly where, as here, it is almost exclusively the length of time for which an offender is sentenced that is in issue. This was recognized in *S v Makwanyane*. Section 12(1) guarantees, amongst others, the right ‘not to be deprived of freedom without just cause.’ The ‘cause’ justifying penal incarceration and thus the deprivation of the offender’s freedom is the offence committed. ‘Offence’, as used throughout in the present context, consists of all factors relevant to the nature and seriousness of the criminal act itself, as well as all relevant personal and other circumstances relating to the offender which could have a bearing on the seriousness of the offence and the culpability of the offender. In order to justify the deprivation of an offender’s freedom it must be shown that it is reasonable necessary to curb the offence and punish the offender. Thus the length of punishment must be proportionate to the offence.”⁵⁶

In essence this means that sentencing an offender to a long term imprisonment should be proportionate to the crime the offender has committed but also the personal culpability of the offender. The sentence imposed on the offender should be informed by the crime of

⁵⁵ *S v Malgas*, para 25.

⁵⁶ *S v Dodo*, para 37.

the offender has committed. It therefore stands to reason that if there are substantial and compelling circumstances in a case warranting a lesser sentence, the sentencing court should impose a sentence taking into account the substantial and compelling circumstances to presented.

Van Zyl Smit affirms the position that Criminal Law Amendment Act 105 of 1997 prescribed that these sentences have to be imposed on adult offenders unless substantial and compelling circumstances exist which justify the imposition of lesser sentence, and are therefore not fully mandatory.⁵⁷

Van Zyl Smit points out that there can be no constitutional objection to the legislature indicating to the court that it requires severe punishment for serious offences.⁵⁸ It is therefore for the courts to interpret what is meant by substantial and compelling circumstances. The Supreme Court of Appeal in *S v Malgas* removed any doubts whether the provision of ‘substantial and compelling’ circumstances was compatible with the principle of constitutional proportionality. This was achieved by ruling that when a court is convinced that an ‘injustice’ would be done by imposing the mandatory sentence, that injustice constituted ‘substantial and compelling’ circumstances that would allow the

⁵⁷ Chaskalson et al: Constitutional Law of South Africa, p 49-14.

⁵⁸ Chaskalson et al: Constitutional Law of South Africa, p 49-14.

court to depart from the prescribed minimum.⁵⁹

The constitutionality of this approach was confirmed in *S v Dodo*.⁶⁰ The Constitutional Court noted that the judgement in *Malgas* was ‘undoubtedly correct.’⁶¹ The Constitutional Court commented that the interpretation that the Supreme Court of Appeal had given to Section 51(1) of the Criminal Law Amendment Act made it plain that the power of the Court to impose a lesser sentence than that prescribed can be exercised well before the disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross.⁶²

The general approach taken in *Malgas* and confirmed in *Dodo*, namely that the prescribed sentence should be ordinarily be imposed, but all considerations traditionally relevant to sentencing should be taken into account in deciding whether to deviate from the prescription, has not been confirmed in a number of cases in the Supreme Court of Appeal.

⁵⁹ Chaskalson et al: Constitutional Law of South Africa, p49-14. In *S v Malgas*, para 18 the court held that the absence of any pertinent guidance from the legislature by way of definition or otherwise as to what circumstances should rank as substantial and compelling circumstances or what should not, has failed to give guidance as was done in Minnesota on the concept of ‘substantial and compelling circumstances’ making the duty of the court difficult. The court concluded that the legislature has deliberately and advisedly left it to the courts to decide in the final analysis whether the circumstances of any particular case call for departure from the prescribed sentence. See also my comments on the origins of the term ‘substantial and compelling circumstances’ in Chapter 1 and also Van Zyl Smit D “Current Developments: Mandatory minimum sentences and departures from them in substantial and compelling circumstances” (1999 15 SAJHR p 270-276.

⁶⁰ 2001(1) SACR 594.

⁶¹ *S v Dodo*, p 615 para 40.

⁶² *S v Dodo*, p 615 para 40.

Thus in *S v Mahomotsa*⁶³ the Court stressed the importance of the proportionality of the sentence to the relevant crime, criminal and the interests of society. The Court stressed that in the case of rape, where life imprisonment is prescribed, it does not automatically follow merely because rape falls within the ambit of Part I, that life imprisonment has to be imposed. Terblanche points out that it has become increasingly clear that the appellate division will not accept the maximum punishment (life imprisonment) merely because the rape is accompanied by the facts mentioned in Part I of Schedule 2.⁶⁴

The case of *Mahomotsa* came within the ambit of Part I because the complainant was raped more than once, but the case involved other factors that can be considered to be even more aggravating in that the accused had threatened her with a knife. Also in *S v Abrahams*⁶⁵ the offence fell within the ambit of Part I because the complainant was under 16 years of age. In both *Mahomotsa* and *Abrahams* the Court found that the rape did not fall within the worst category of rape and that life imprisonment should not be imposed. As Terblanche puts it, the fact that what the court considered an appropriate sentence was substantially different from the prescribed sentence caused the court to find that the prescribed sentence would be unjust and this constituted substantial and compelling circumstances justifying a lesser sentence.⁶⁶

The Court in *Dodo* concluded that the determinative test makes it clear that the power of the court to impose a lesser sentence than that prescribed can be exercised well before the

⁶³ 2002 (2) SACR p 435 (SCA).

⁶⁴ Terblanche S S: Sentencing: 2003 SACJ No 1 Vol 6, p 102.

⁶⁵ 2002 (1) SACR, p 116 (SCA)

⁶⁶ Terblanche S S: Sentencing: 2003 SACJ No 1 Vol 6, p 102.

disproportionality between the mandated sentence and the nature of the offence becomes so great that it can be typified as gross.

In *Dodo* the court made a distinction between the tests as follows. First, the test in *Malgas* must be employed in order to determine when section 51 (3) (a) can legitimately be invoked by a sentencing court to pass a lesser sentence than that prescribed by section 51 (1) or (2). Second, the test of gross disproportionality must be applied in order to determine whether a sentence mandated by law is inconsistent with the offender's section 12 (1) (e) rights. In *Dodo* the Court therefore concluded that section 51 (1) does not compel the court to act inconsistently with the Constitution.⁶⁷

The decision in *Dodo* confirmed the ruling in *Malgas* that the prescribed sentence can be departed from if it would lead to gross injustice on the offender. It is my submission that section 51 does contain an escape⁶⁸ clause which provides that the prescribed sentence can be departed from if there are substantial and compelling circumstances. It is my submission that the discretion of the courts is not completely fettered by the provisions of section 51 as the courts are given grounds to depart from the prescribed sentence. Furthermore, it is my submission that proportionality is not infringed by the enactment of section 51 of the Criminal Law Amendment Act, 105 of 1997.

⁶⁷ *S v Dodo*, para 40.

⁶⁸ Lund J: Sentencing: 2000 (13) SACJ, p 249 where the term 'escape clause' is used in relation to the discretion which the court has where it can depart from the prescribed sentence and impose a lesser sentence if substantial and compelling circumstances exist.

CHAPTER 3

THE PROVISIONS OF SECTION 51 OF THE CRIMINAL LAW AMENDMENT ACT 105 OF 1997

1. Introduction

The Criminal Law Amendment Act created a range of minimum sentences for some serious offences. These sentences fall either under Part 1 of Schedule 2 or Part II of Schedule 2 or Part III of Schedule 3 to this Act.

The minimum sentences range from 5 years to life imprisonment for specified aggravated forms of murder, rape and some aggravated cases of robbery. The sentences have to be imposed on adult offenders unless 'substantial and compelling circumstances exist which justify the imposition of lesser sentences.'⁶⁹ In essence this means that when courts impose sentences as prescribed in the Act, they may exercise their discretion not to impose sentences as prescribed in the Act, they may exercise their discretion not to impose the prescribed sentences, only if substantial and compelling circumstances exist.

2. Outlining the provisions of section 51 of the Criminal Law Amendment Act

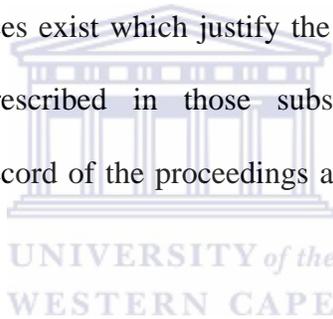
⁶⁹ Section 51 (3)(a) of the Criminal Law Amendment Act 105 of 1997.

Section 51 (1) read together with Section 51 (3) of the Criminal Law Amendment Act 105 of 1997 provides as follows:

Notwithstanding any other law but subject to subsection (3) and (6) a High Court shall, if it has convicted a person of an offence referred to in Part 1⁷⁰ of Schedule 2, sentence the person to imprisonment for life.

Subsection (3) (a) provides that:-

“If any Court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon enforce such lesser sentence.”



Subsection (3) (b) provides that:-

“If any Court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of proceedings.”

⁷⁰ Part 1 of Schedule 2 refers to premeditated murder, or where the victim was a law enforcement officer performing his function or a material witness, or death was accompanied by rape or aggravated robbery, or the crime was committed by a group with a common purpose. It also refers to rape where the victim was raped more than one or by more than one person, or is under the age of 16 years old or physically or mentally disabled, or is inflicted grievous bodily harm, or if the offender knows he has AIDS or is HIV positive, or has been convicted for two or more rapes for which no sentence has yet been imposed.

Subsection (6) provides that:-

“The provisions of this Section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the Act which constituted the offence in question.”

3. Application of prescribed minimum sentences as provided for in section 51 of the Criminal Law Amendment Act 105 of 1997

The Act therefore envisages three classes of offenders, namely:- adults, and children under the age of 16 years and children who are between 16 and 18 years at the time of the commission of the offence. The Act is therefore not applicable to children under the age of 16 years.⁷¹ In terms of the Act, a Court is obliged to enforce a minimum sentence on any offender who was at least 18 years at the time of the commission of the offence unless it finds substantial and compelling circumstances exist which justify the imposition of a lesser sentence.⁷² If such circumstances are found to exist these must be entered on the record and a lesser sentence imposed (section 51 (3) (a)).

Section 51 (3) (b) which is applicable to children between the ages of 16 and 18 contains no reference to ‘substantial and compelling circumstances,’ but requires a Court which decides to impose a minimum sentence to ‘enter’ the reasons for its decision on the record of proceedings.

⁷¹ Section 51 (6).

⁷² Section 51 (3) (a).

Van Zyl Smit contends that ‘an adequate departure mechanism is one way of ensuring that a mandatory minimum sentence requirement does not produce a constitutionally unacceptable degree of disproportionality between crime and punishment.’⁷³

In his discussion on minimum sentences, Van Zyl Smit concludes as follows:

“The 1997 Criminal Law Amendment Act contains various departure mechanisms. The minimum sentences do not apply at all to children under the age of 16 years. For children between 16 and 18 years of age it appears that the courts are not obliged to apply the new minimum sentences but that, if they choose to apply them, they have to enter the reasons for their decisions on the record of the proceedings. This is not a significant limitation of their sentencing discretion. For offenders older than 18 years, however, the grounds for departure are restricted.”⁷⁴

4. Interpretation of section 51 of the Criminal Law Amendment Act 105 of 1997

As I have already mentioned in Chapter 2, the decision in *Malgas* paved the way for the interpretation of the term ‘substantial and compelling circumstances.’ Our courts have on numerous occasions departed from the prescribed sentence and imposed a lesser sentence. I have also mentioned that the Supreme Court of Appeal in *Dodo* followed the

⁷³ Van Zyl Smit D: “Current developments: Mandatory Minimum Sentences and Departures from them in Substantial and Compelling Circumstances:” (1999) 15 SAJHR, p 271.

⁷⁴ Van Zyl Smit D: “Current Development: Mandatory Minimum Sentences and Departures from them in Substantial and Compelling Circumstances”: (1999) 15 SAJHR 271. See also *S v Nkosi* 2002 (1) SACR 135, 141b where the classification of offenders this section applies to is set out.

decision in *Malgas* and concluded that the determinative test used in *Malgas* is the best approach to adopt.

At this stage it is important to look at the various interpretations which the courts in the *pre-Malgas* era interpreted the term substantial and compelling circumstances and the impact *Malgas* has in our law on sentencing law. I will further highlight the legal position *post-Malgas* and the general approach adopted by our courts.

Our courts have on numerous occasions been tasked to apply and interpret the provisions of the minimum sentence legislation. Various cases have been dealt with in our courts so as to clearly set out the intention of the legislature when this legislation was enacted.

In *Malgas* case the trial court (per Liebenberg J) was of the view that in order to avoid the imposition of the compulsory minimum sentence the circumstances would have to be exceptional (*my emphasis*).⁷⁵

The approach adopted by Liebenberg J has been criticized on appeal by the Supreme Court of Appeal as per judgement of Marais J A where he (Liebenberg) indicated that for circumstances to qualify as substantial and compelling, they must be exceptional.⁷⁶

⁷⁵ In *Malgas*' case, the Court a quo regarded appellant's remorse induced voluntary admission of her guilt to her friends as possibly the strongest point in her favour but then tended to minimize its importance by observing that subsequent remorse was not something exceptional. The court a quo having balanced these considerations concluded that they did not amount to substantial and compelling circumstances within the meaning of the legislation and therefore passed the sentence of life imprisonment upon concluding that they did not exist then. (484 c-d).

⁷⁶ In his criticism, Marais J A opined as follows: "Equally erroneous, so it seems to me, are dicta which suggest that for circumstances to qualify as substantial and compelling they must be 'exceptional' in the sense of seldom encountered or rare. The frequency or infrequency of the existence of a set of circumstances is logically irrelevant to the question of whether or not they are substantial and compelling." (478 a-b).

The Supreme Court of Appeal in *Malgas*, therefore quashed the interpretation of the court a quo that the circumstances which allow the court to depart from the prescribed sentence only where exceptional circumstances existed.⁷⁷

Marais in his judgement, summarized the judgement of Liebenberg J when the learned judge sentenced appellant to life imprisonment as follows:

“He (*the trial judge*) reached that conclusion with regret and said that if it had not been for the fact that a sentence of life imprisonment was prescribed by the relevant statute, he would not have considered sentencing appellant to imprisonment for life. He referred to the lack of unanimity in the Provincial Divisions of the High Court as to the correct interpretation of the legislation and regarded himself as bound by the approach indicated by Stegmann J in *S v Mofokeng*⁷⁸ which approach have been approved by Jones J in an unreported decision in the Eastern Cape Division.”⁷⁹

The courts in exercising their discretion should have regard to the intention of the legislature when it enacted section 51 of Act 105 of 1997. Thus the Supreme Court of Appeal in *Malgas* approached the issue of sentence in a careful manner by taking into

⁷⁷ *S v Malgas*, p 484, para c-d.

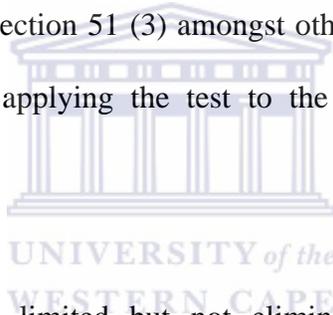
⁷⁸ At page. 523 (C) Stegman J held that for ‘substantial and compelling circumstances’ to be found, the facts of the particular case must present some circumstance that is so exceptional in nature, and that so obviously exposes the injustice of the statutorily prescribed sentence in the particular case, that could be described as ‘compelling’ the conclusion that the imposition of a lesser sentence than that prescribed by Parliament is justified.

⁷⁹ *S v Malgas* p 483 para i-j.

consideration the purport of the legislature when it enacted the minimum sentence legislation.⁸⁰

It is therefore evident that the learned judge, when he made the remarks above, was referring to previous cases where our courts were faced with the task of interpreting the term ‘substantial and compelling circumstances.’⁸¹

In his judgement, Marais J A having considered the purpose of the legislature when it enacted the minimum sentence legislation, interpreted the words ‘substantial and compelling circumstances’ in section 51 (3) amongst other things, detailing step-by-step procedure to be followed in applying the test to the actual sentencing situation as follows.⁸²



- A. Section 51 has limited but not eliminated the court’s discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule

⁸⁰ In his judgement on the role of the court in its exercise of its discretion, Marais J A remarked as follows: “What stands out quite clearly in that the Courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that is they who are to judge whether or not the circumstances if any particular case are such as to justify a departure. However, in doing so, they are to respect and not merely pay lip service to, the Legislature’s view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specific kind are committed.”

⁸¹ See the remarks of Stegmann J in *S v Mofokeng* 1999(1) SACR 502, where the court concluded that the word substantial and compelling circumstances leave the trial court with almost no discretion and in fact compelled to impose the minimum sentence. Also the views of Levinson J in *S v Majalefa and Another* (judgement delivered on 22 October 1998) where the court held that the words substantial and compelling circumstances are principles of sentencing and that the consideration of aggravating and mitigating circumstances should still remain the point of departure. In *S v Blaaw* 1999 (2) SACR 295 (W) Borchers J was of the view the words substantial and compelling circumstances limit the traditional discretion of the courts and therefore the courts cannot deviate from the prescribed sentence on the grounds of ‘circumstances’ alone. See also the view of Davis J in *S v Schwartz* 1999 (2) SACR 380 (C) where he uses the principle of just deserts as a point of departure from applying the principle of ‘substantial and compelling’ circumstances.

⁸² The step-by-step procedure was the approach adopted by the Supreme Court of Appeal in *S v Malgas*, p 481-482. This approach was cited with approval in *S v Dodo* 2001 (1) SACR, p 602-603 and also in *S v Blaaw* 2001 (2) SACR 258-259.

2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

- B. Courts are required to approach the imposition of sentence conscious that the legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should ordinarily and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.
- C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe standardised and consistent response from the courts.
- D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation, and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.
- E. The legislature has however deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.
- F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus

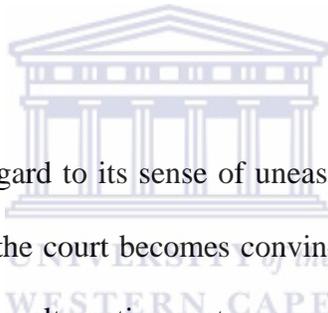
continue to play a role; none is excluded at the outset from consideration in the sentencing process.

- G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick (“substantial and compelling”) and must be such as to cumulatively justify a departure from the standardized response that the legislature has ordained.
- H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentences as the sole criterion.
- I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
- J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and the sentence to be imposed in lieu of the prescribed sentences should be assessed paying due regard to the benchmark which the legislature has provided.

In conclusion, the gist of the judgement in *Malgas* is that the specified sentences should not be departed from lightly and that the prescribed sentences should ordinarily be imposed. However, if the circumstances of the case call for a departure, the court should not hesitate to do so. In the process of determining whether a departure is called for, the

court should weigh all the considerations that would traditionally be relevant to sentencing (*my emphasis*).

Although the case of *Malgas* has been subject to some criticism, notably, that it does not set out and define what is meant by the term substantial and compelling circumstances, it has brought certainty to the interpretation and application of section 51 of Act 105 of 1997. It is therefore settled law in South Africa that section 51 does not take away the sentencing discretion which the courts traditionally possess. The courts can therefore impose a lesser sentence than the prescribed sentence, if substantial and compelling circumstances exist.



The Court should then have regard to its sense of unease with the prescribed sentences. When this unease is such that the court becomes convinced that the prescribed sentence would amount to an injustice, an alternative sentence would be imposed.⁸³ However, an “injustice” is not lightly inferred and the courts need truly convincing reasons or weighty justification to depart from the prescribed sentences.⁸⁴

Further, even before the judgement of the Supreme Court of Appeal in *Malgas*, our courts have been at liberty to exercise their sentencing discretion.⁸⁵ It is therefore evident that the approach adopted in other cases was to look into the traditional principles of sentencing. It is therefore my submission that although the courts are at liberty to exercise their sentence discretion, they should only depart from the prescribed minimum sentence

⁸³ *S v Malgas*, p 481 para b-c. See also Terblanche S S: Mandatory and Minimum Sentences: Considering section 51 of the Criminal Law Amendment Act 1997 (2003) *Acta Juridica* p 213.

⁸⁴ Terblanche S S: Sentencing in South Africa: Lacking in Principle but delivering on Justice, p 5. Available at <http://www.isrc.org/Papers/2004/Terblanche.pdf>. Accessed on 15 February 2005.

⁸⁵ See the approach adopted by Levinson J in *S v Majalefa* (Judgement delivered on 22 October 1998).

only if substantial and compelling circumstances justifying a lesser sentence exist. Furthermore, it is my submission that the courts should also look on the intention of the legislature when it enacted minimum sentence legislation that in the case of more serious cases, the prescribed minimum sentence be imposed. It is therefore evident that our courts do not follow the extreme interpretation as pronounced by Stegmann J in *S v Mofokeng* but follow the wider approach set out in *S v Malgas*.



CHAPTER 4

YOUTH SENTENCING IN SOUTH AFRICA

1. Introduction

This chapter provides an overview of the sentencing policy in South Africa, with specific reference to the incarceration of juvenile offenders who have been convicted of serious offences.

Further, this chapter will provide an overview of the constitutional provisions relating to children who are in conflict with the law and the sentencing principles applicable to them. Furthermore, this chapter will highlight the role of international instruments on the protection of rights of juveniles who are in conflict with the law, and more particularly detention thereof. In this chapter I will critically evaluate the application of section 51 of the Criminal Law Amendment Act 105 of 1997 on juvenile offenders and the impact which the Constitution and international instruments have on section 51 of the Criminal Law Amendment Act 105 of 1997.

2. General Principles for Sentencing Young Offenders

Common law has long recognized that youthful immaturity should be a factor that mitigates sentence. First, tender age affects the consideration of the moral culpability of the accused child: the lower the convicted child's age, the less mature the child is likely to be. Secondly, the age and maturity of the accused at the time the sentence is imposed

may be relevant in determining a sentence which will suit the needs of an individual accused.⁸⁶

A balance needs to be struck between society's need to punish crime while not overlooking the interests of a juvenile offender. Thus in *S v Jansen*⁸⁷ Botha J A remarked as follows:

“The interest of society cannot be served by disregarding the interests of the juvenile, for a mistaken form of punishment might easily result in a person with a distorted personality being eventually returned to society.”

3. CONSTITUTIONAL PROVISIONS RELATING TO THE RIGHTS OF CHILDREN IN SOUTH AFRICA

The rights of children in South Africa are protected by section 28 of the Constitution. In my discussion on this constitutional provision, I will focus on section 28 (1)(g) and section 28 (2) of the Constitution of the Republic of South Africa Act 108 of 1996. Section 28 (1)(g) provides:

‘(1) Every child has the right:-

(g) Not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under Sections 12 and 35, the child

⁸⁶ Sloth-Nielsen J.: “Child Justice and Law Reform” in C J Davel: Introduction to Child Law in South Africa, 448 para 22.9.3.

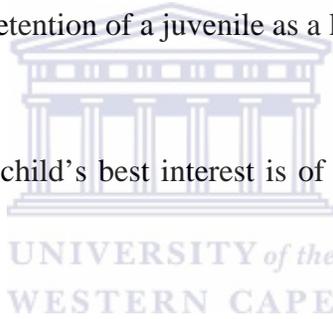
⁸⁷ 1975 (1) SA 425-428A. See too *S v Nkosi* 2000(2) SACR 135 at 143c, *S v Williams* 1995 (3) SA 632, *S v Z* 1999 (1) SACR 427 (ECD), *S v Tshisa* 2003 (1) SACR 171 (O). In *Tshisa* the court found that although the murder was callous and reprehensible, the fact that the appellant's ages were 17 years at the time of the commission of the offence, the imposition of life imprisonment would be an injustice as the appellants could still develop into responsible adults. Life imprisonment was therefore replaced with 22 years imprisonment.

may be detained only for the shortest appropriate period of time, and has the rights to be-

- (i) Kept separately from detained persons over the age of 18 years; and
- (ii) Treated in a manner, and kept in conditions, that takes account of the child's age.'

This constitutional provision in clear terms views the incarceration of juvenile offenders in a serious light as it regards detention of a juvenile as a last resort.

Section 28 (2) provides that a child's best interest is of paramount importance in every matter concerning the child.



4. Detention should be the last resort

4.1 The Constitution

The principle that the deprivation of liberty must be used as a last resort and for the shortest appropriate period of time,⁸⁸ limits institutionalization in two ways: in quantity and time. It means that deprivation of liberty must not be imposed unless the objectives of the measure, principally rehabilitation in the case of juveniles, could not be achieved in a non-custodial setting. The shortest possible period of time should generally be

⁸⁸ Sloth- Nielsen J: 'The Role of International Human Rights Law in the Development of South Africa's Legislation on Juvenile Justice' 2001 (1) 5 Law, Democracy and Development, p 78 Sloth-Nielsen opines that the principle that detention is a matter of last resort (and for the shortest appropriate period of time) is the *leitmotif* of juvenile justice reform. See also *S v Brandt* Case No 513/2003 (SCA) at para 18 (case not yet reported).

interpreted as the period within which custodial treatment may be expected to secure the rehabilitation of the juvenile concerned.⁸⁹

In the discussion of the constitutional provision that detention of children should be the last resort, Sloth-Nielsen states as follows:

“The thrust of these provisions is to place an additional onus on the state to ensure that children are not ordinarily held in detention at all (the ‘last resort’ principle). The second injunction is section 28 (1)(g) is that a child who is in detention must be so detained only for ‘the shortest appropriate period of time.’ This provision does not mean that children may never be detained, but that regard must be had to the age of the child, the seriousness of the offence, the interests of justice and of the child, and to a host of other factors, such as the availability of alternative placements, to determine whether detention is required at all. The requirement that, if so ordered, such detention must be for the shortest appropriate period of time affects both pre-trial detention and sentences involving deprivation of liberty.”⁹⁰

It is abundantly clear that detention of children is not encouraged at all by our courts and academic writers had echoed their views on this subject. As Professor Steytler puts it:

“Section 28 (1)(g) contains a presumption against institutionalization and requires a detained child to be ‘treated in a manner, and kept in conditions’ that take

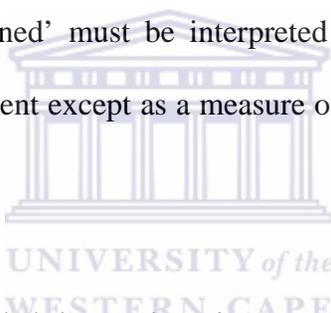
⁸⁹ Sloth-Nielsen J: The Role of International Law in Justice Reform in South Africa (unpublished doctoral thesis), UWC, 2001, p. 373.

⁹⁰ Sloth-Nielsen in Cheadle Davis Haysom: South African Constitutional Law: The Bill of Rights, Juta and Co 2002 at 524; See also *S v Brandt* Case No 513/2003, paras 19 and 20. I have discussed the case fully in this chapter.

account of the child's age. It is a significant addition to the interim constitution and further provides that every child has the 'right not to be detained, except as a measure of last resort.' There can be little doubt that the constitutional protection contained in this right embraces pre-trial as well as pre-conviction detention."⁹¹

This does not mean that children who are in conflict with the law should not be detained.

Section 35 (2) includes 'sentenced' persons within the category of detained persons. If Section 28 (1)(g) is read together with sections 12 and 35 of the Constitution it is clear, that the right not to be 'detained' must be interpreted to include the right not to be sentenced to a term of punishment except as a measure of last resort and then only to the shortest possible period.⁹²



In *S v Nkosi* Cachalia J concluded that such an interpretation⁹³ is not at odds with either the express wording or the purpose of the section which is to extend additional rights to children not afforded to adults. It also supports the 'best interest' principle in Section 28 (2). This section therefore lends itself to a generous interpretation.⁹⁴

4.2 International Law

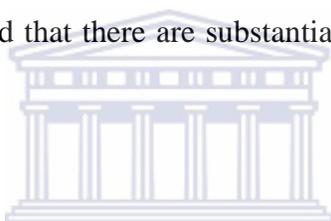
⁹¹ Steytler Nico: Constitutional Criminal Procedure, Butterworths, 1998, p 146.

⁹² Davis Cheadle and Haysom: Fundamental Rights in the Constitution, 2nd Ed 275.

⁹³ *S v Nkosi* 2002 (1) SACR, 145a. This relates to the interpretation of section 28 (1)(g) read with sections 12 and 35 of the Constitution which includes the right not be sentenced to a term of imprisonment as a form of punishment except as a measure of last resort and only to the shortest possible time.

⁹⁴ *S v Nkosi*, p 145 para a-b.

In *S v Blaauw*⁹⁵ the Court placed reliance on international law and more particularly took into account South Africa's obligations under international law. Among such international obligations is the ratification by South Africa of the UN Convention on the Rights of the Child in 1995. The Court was of the opinion that the obligation incurred upon ratification includes giving effect in municipal law to the principle of detention as a measure of last resort. The imposition of prescribed minimum sentences upon children aged below 18 years, would as far as this Convention applies, offend the principle. It seems that minimum sentences imply the use of imprisonment as a first resort notwithstanding that a judicial officer may be permitted to deviate from the prescribed sentence if he or she is satisfied that there are substantial and compelling circumstances for doing so.⁹⁶



Article 37 (b) of the United Nations Convention on the Rights of the Child (CRC) states that children may be arrested, detained or imprisoned 'only as a measure of last resort and for the shortest possible period of time.' The CRC was ratified by South Africa on 16 June 1995 thereby imposing upon it an obligation to incorporate it as part of the domestic law.⁹⁷

Thus in *S v Nkosi* Cachalia J stated that the interpretation accorded to section 28 (1) (g) read with subsection 12 and 35 of the Constitution finds support in the key international instruments that animated the insertion of section 28 (1)(g).⁹⁸

⁹⁵ 2001 (2) SACR 255. See also *S v Brandt* at para 19-20.

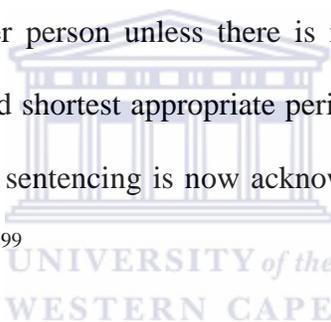
⁹⁶ Article 40, June 2001 No 2 Vol 3 at p 3. Available <http://www.communitylawcentre.org.za/children/2001> Accessed on 7 February 2005

⁹⁷ *S v Kwalase* 2000 (2) SACR 135, 138 para (i-j).

⁹⁸ *S v Nkosi*, p 145 para c.

In *Nkosi Cachalia J* made reference to the Beijing Rules as follows:

“In the same vein Rules 19.1 of the UN Standard Minimum Rules for the Administration of Juvenile Justice, which must be considered in conjunction with the CRC, asserts that the placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period. Rule 17.1 (b) requires that ‘restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the minimum possible.’ Rule 17.1 (c), which is of direct relevance to the appellant’s case, permits the deprivation of liberty where the juvenile is adjudicated of a ‘serious act involving violence against another person unless there is no other appropriate response.’ That the ‘last resort’ and shortest appropriate period of time principle is of direct application to custodial sentencing is now acknowledging by experts of juvenile justice in South Africa.”⁹⁹



In *Nkosi*, Cachalia J placed reliance on the study conducted by Sloth-Nielsen on the role of international law in the sentencing process of juveniles in South Africa.¹⁰⁰ In her discussion on the subject, Sloth-Nielsen opines as follows:

“The objective to sentencing that is derived from CRC is the desirability of ‘promoting the child’s reintegration and assuming a constructive role in society’ and article 40 (4) requires that a ‘variety of dispositions such as care, guidance and supervision orders; counseling; probation, foster care; education and vocational training programmes and other alternatives to institutional care’ should

⁹⁹ *S v Nkosi* 2002 (1) SACR 135, 145 para d-g.

¹⁰⁰ Sloth-Nielsen J: *The Role of International Law in Justice Reform in South Africa* (Unpublished LLD Thesis), UWC, 2001.

be ensured by the States Party. Similarly, Rule 18.1 of the Beijing Rules calls for a ‘large variety of disposition’ measures allowing for flexibility so as to avoid institutionalization to the greatest extent possible.”

5. Child’s Best Interest

In each and every matter where the rights of the child will be affected, the child’s best interests should be taken into consideration. The enactment of section 28 (2) of the Constitution ensured that the rights of children are protected by the Constitution. However, the best interest principle applied even before the adoption of both the 1993 Constitution and the 1996 Constitution.¹⁰¹



5.1 The Constitution

Our courts view the issues of the best interests of the child in a very serious light even in both criminal and civil cases.¹⁰² In the case of *The Minister for Welfare and Population Development v Sara Jane Fitzpatrick*¹⁰³ Goldstone J had this to say:

“Section 28 (1) is not exhaustive of children’s rights. Section 28 (2) requires that a child’s best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of Section 28 (2) cannot be limited to the right enumerated in Section 28 (1) and Section 28 (2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in Section 28 (1).”

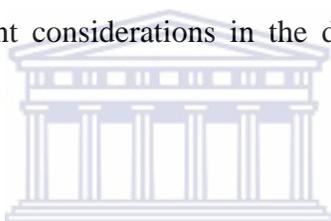
¹⁰¹ *Fletcher v Fletcher* 1948 (1) SA 130 (A).

¹⁰² *Fraser v Naude and others* 1999 (1) SA 1.

¹⁰³ 2000 (3) SA 422 para 17.

This means the court must not only look at the provisions contained in section 28 (1) but also at other provisions contained in important legal instruments, for example, international law. Section 28 (c) of the Constitution is an important constitutional provision as it emphasizes the importance of the child's best interests in each and every matter affecting the child.¹⁰⁴

With respect to child offenders the 'best interests' principle it has been said that it is now crucial element in the proportionality inquiry.¹⁰⁵ The well-being and the needs of the juvenile are therefore important considerations in the determination of an appropriate sentence for a child offender.¹⁰⁶



In *S v Kwalase*,¹⁰⁷ Van Heerden J described the application of the principle of proportionality to juvenile as follows:

“The judicial approach towards the sentencing of juvenile offenders must therefore be re-appraised and developed in order to promote an individualized response which is not only in proportion to the nature and gravity of the offence and the needs of society, but which is also appropriate to the needs and interests of the juvenile offender. If at all possible, the sentencing judicial officer must structure the punishment in such a way as to promote the reintegration of the juvenile concerned into his or her family and community.’

¹⁰⁴ *S v Brandt* para 13.

¹⁰⁵ *S v Nkosi* 2002 (1) SACR p 135 at p 146g.

¹⁰⁶ *S v Nkosi* 2002 (1) SACR p 135 at p 146g

¹⁰⁷ 2000 (2) SACR p 135, at p 146 para H. See also *S v Brandt* at para 19.

5.2 International Law

It is my submission that international instrument have played a profound role in the evolution of legislation relating to the sentencing of juveniles in South Africa.¹⁰⁸ This view has found support from South Africa case law. In *S v Kwalase*¹⁰⁹ Van Heerden J emphasized the importance of international instruments as follows:-

“The Committee on the Rights of the Child (the supervisory body provided for by the CRC for the international implementation of its provisions) has stated categorically that the provisions of CRC relating to juvenile justice have to be considered in conjunction with other relevant international instruments, for example, the UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) (‘the Beijing Rule’), the UN Rules for the Protections of Juveniles Deprived of their Liberty (1990) and the UN Guidelines for the Prevention of Juvenile Delinquency (1990) (‘the Riyadh Guidelines’).”

6. Application and Interpretation of the Provision of Section 51 to Juvenile Offenders

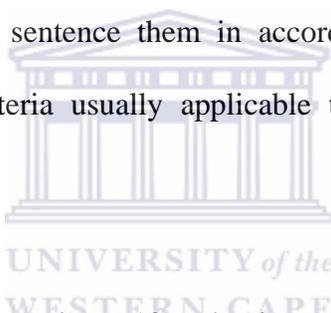
As I have mentioned in the Chapter 3 that our courts have on numerous occasions been tasked to apply and interpret the provisions of section 51 of the Criminal Law

¹⁰⁸ Sloth-Nielsen J: ‘Child Justice and Law Reform’ in C J Davel: Introduction to Child Law in South Africa para 22.9.

¹⁰⁹ *S v Kwalase* 2000 (2) SACR p 135 (C), at 138 -139 para (j-a-b); See Rule 5 (1) of the Beijing Rules. See also *S v Brandt* para 16.

Amendment Act 105 of 1997 in so far as they apply to adult offenders. In this chapter I will deal with the application and interpretation of section 51 on juvenile offences.

In *S v Mofokeng*¹¹⁰ Stegmann interpreted section 51 (3) (b) of Act 105 of 1997 as implying that in respect of children aged 16 and 17 years at the time of the commission of the offence, the court is not obliged to pronounce the minimum sentence imposed by Parliament but is left free to sentence them in accordance with its own discretion, according to the ordinary criteria usually applicable to the determination of a fair sentence.



In *S v Blaaw*¹¹¹ although the accused was 18 at the time of the commission of the offence, the Court did not impose a sentence of life imprisonment. In this case the accused, an 18 year old man was convicted of the rape of a five year old girl. As the accused had turned 18 years about six weeks before the offence was committed, the provisions of section 51 (3)(b) did not apply. Although the court described the offence as repulsive and requiring a severe sentence, there were many factors which forced the Court to reconsider the prescribed mandatory sentence of life imprisonment. The Court took into account the

¹¹⁰ 1999 (1) SACR 502 (W) p 520. In *Mofokeng*, the accused were convicted of rape and kidnapping in the Regional Court. Both were 20 years old at the time of the commission of the offences. Inasmuch as section 51 (1) of the Act provided that a person convicted of an offence referred to in Part 1 of Schedule 2 had to be sentenced to imprisonment for life, which the Regional Magistrate had no jurisdiction to impose, the accused were committed for sentencing in the High Court. Stegmann J held that certain jurisdictional facts had to be present before the High Court was invested with the statutory power to proceed. One of the jurisdictional facts is that the person to be sentenced must not have been under the age of 16 years at the time of the commission of the act that constituted the offence (Section 51 (6)).

¹¹¹ 2001 (2) SACR 255.

unfavourable background of the accused, the effect of liquor on him at the time of committing the crime and also youthfulness.

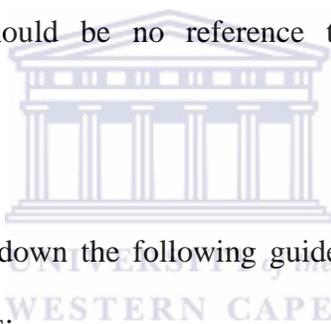
Until recently, the most authoritative case on the issue was *S v Nkosi*¹¹² where the Full Bench of the court had to consider various issues, namely, analysis of the relevant provisions of the Act, the constitutional provisions and also the role of international law in the sentencing process of juvenile offenders. In *Nkosi* the appellant who was 16 years old at the time of the commission of the offence, was convicted of murder while acting pursuant to a common purpose. As the accused had acted in pursuit of a common purpose in committing the crime of murder, the offence fell within the ambit of Part 1 of the Second Schedule of the Criminal Law Amendment Act 105 of 1997 which prescribed certain minimum sentences. Section 51 (3) (b) of the Act which was applicable to children between the ages of 16 and 18 contained no reference to substantial and compelling circumstances, but required a court which decided to impose a minimum sentence to enter the reasons for its decision on the record of proceedings. The court a quo had made no distinction between section 51 (3) (a) and section 51 (3) (b) and that Court having found that substantial and compelling circumstances did not exist, imposed the minimum prescribed sentence, namely life imprisonment.

On appeal to the Full Bench, Cachalia J, passing judgement of the court, emphasized the importance of the distinction between sections 51 (3) (a) and 51 (3) (b) remarked as follows:

¹¹² 2002 (1) SACR 135.

“The distinction between section 51 (3) (a) and 51 (3) (b) lies in the nature of the discretion that a Court has when considering the positions of the two classes of offenders. In the former case a court should ordinarily impose the prescribed sentence unless there is some weighty justification for the imposition of a lesser sentence. The legislature has therefore limited the discretion of a court to depart from the minimum sentence. In the latter case there is no reference at all to substantial and compelling circumstance.”¹¹³

The Court on appeal clearly set out the position with regard to offenders under 18 years in clear terms that there should be no reference to substantial and compelling circumstances.



In *Nkosi's* case the Court set down the following guidelines¹¹⁴ when dealing with the sentencing of juvenile offenders:

1. Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender;
2. Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category;
3. Where imprisonment is considered appropriate it should be the shortest possible period of time having regard to the nature and gravity of the offence and the needs of society as well as the particular needs and the interests of the child offender;

¹¹³ *S v Nkosi*, P 141 para (g)-(i).

¹¹⁴ *S v Nkosi*, P 141 para (f)-(i).

4. If at all possible, the judicial officer must structure the punishment in such as to promote the rehabilitation and reintegration of the child concerned into his/her family or community.

The sentence of life imprisonment may only be considered in exceptional circumstances.

In *Direkteur Van Openbare Vervolgings v Makwetsja*,¹¹⁵ the court held that the legislature, by section 51 (3) (b) of the Criminal Law Amendment Act, deemed it necessary for the specific noting of the reasons why youthfulness is not regarded as a substantial and compelling circumstance for the imposition of a higher sentence, precisely to remind the court to sentence a youthful offender with caution. The court was of the view that the minimum sentence should be imposed on children between the ages of 16 and 18 years but only in the extreme cases. The court went further to say that does not mean that the legislature did not intend that the minimum sentences are applicable to everyone above the age of 16 years. Sloth-Nielsen points out that the construction in *Makwetsja* rests on the reasoning that if the legislature had wanted to exempt 16 and 17 year olds from the application of minimum sentences law, this would have been done expressly, as was done in section (6) in relation to offenders below 16 at the time of the commission of the offence.¹¹⁶

Sloth-Nielsen puts it in clear terms that in *Makwetsja*, “the Court was of the view that the applicable legislation should be construed so as to ordinarily require the imposition of the statutory prescribed minimum sentence (via section 51 (3) (9) (a)) upon juvenile

¹¹⁵ 2004 (2) SACR 1.

¹¹⁶ Sloth Nielsen J: Juvenile Justice Comes of Age: 2005 Stellenbosch Law Review (Forthcoming).

offenders aged between 16 and 18 years, but only in extreme circumstances – youth itself would generally constitute a substantial and compelling circumstances justifying deviation from the minimum sentence.”¹¹⁷

Sloth-Nielsen contends that this construction rests on the reasoning that, if the legislature had wanted to exempt 16 and 17 year olds from the application of the minimum sentence law, this would have been done expressly, as was in fact done in section 51 (6) in relation to offenders aged below 16 at the time of commission of the offence.¹¹⁸

In *Makwetsja* the Court concluded that section 51 (3) (b) expects of a court to set out clearly the reasons for imposing a minimum sentence on a youthful offender.

The Supreme Court of Appeal in the case of *Brandt*¹¹⁹ had to consider whether a sentence of life imprisonment imposed on the appellant, who at the time of the commission of the offence was 17 years and 7 months, was the appropriate sentence. In the court quo, the trial judge convicted the appellant on charges of murder, robbery with aggravating circumstances and attempted robbery. The trial judge therefore imposed the statutorily prescribed minimum sentence of life imprisonment for the murder because he did not find any substantial and compelling circumstances. However, the judge did not take into consideration the appellant’s age at the time of the commission of the offence.

¹¹⁷ Sloth-Nielsen J: Juvenile Justice Comes of Age: 2005 Stellenbosch Law Review (Forthcoming). Sloth-Nielsen opines that the majority in *S v Brandt* followed the view of the court in *S v Makwetsja* which I have already mentioned above.

¹¹⁸ Sloth Nielsen J: Juvenile Justice Comes of Age: 2005 Stellenbosch Law Review (Forthcoming).

¹¹⁹ Case No. 513/2003 (SCA).

The appellant from the court quo was granted leave to appeal to the Full Court of the Eastern Cape Division. The Court was split in decision and the majority of the court (per Liebenberg J, Parker A J), considering the application of section 51 (3) (b), concluded that the sentence of life imprisonment was appropriate. The majority of the court refused to follow the interpretation of section 51 (3) (b) by Cachalia J (Bleeden J and Jordaan A J) in *S v Nkosi*. It was also refused to allow the approach adopted by Heerden J in *Blaauw*.¹²⁰ This indicates that the court could not agree on the interpretation of section 51 (3) (b). The minority decision (as per Pillay J) followed the decision in *S v Nkosi*.

The trial judge concluded that there were no substantial and compelling circumstances and as a result imposed the prescribed minimum sentence of life imprisonment for murder. The Supreme Court of Appeal questioned the sentence of life imprisonment on the grounds that, given the appellant's relative youthfulness, rehabilitation was a prospect.

In *Brandt's* case, the Supreme Court of Appeal confirmed that the minimum sentencing legislation must be read in the light of the values enshrined in the Constitution and interpreted in a manner that respect those values.¹²¹ Further, when a sentencing court is faced with the task of sentencing a juvenile offender, it should also take into account the provisions of some international instruments, which do not encourage detention of juveniles.¹²² Sloth-Nielsen points out that international law has ushered a 'revolution' for

¹²⁰ 2001 (2) SACR 255.

¹²¹ *S v Brandt*, para 9. The court referred to section 28 of the Constitution which defines a child as person under the age of 18 years.

¹²² *S v Brandt*, para 16 where reference is made to international instruments which specifically deal with children in conflict with the law.

the administration of justice.¹²³ Furthermore, the court affirmed that the traditional aims of punishment in respect of child offenders have to be re-appraised and developed to accord with the Constitution and that they should be aimed at the reintegration of the child offender to society.¹²⁴ Punishment of the child offender should be aimed at re-socialization and re-education. Sloth-Nielsen opines that the aims of re-socialization and re-education must now be regarded as complementary to the judicial aims of punishment applicable to adult offenders.¹²⁵ A child offender charged with an offence must be dealt with in a manner which takes into account his/her age, circumstances, maturity as well as intellectual and emotional capacity.¹²⁶

This case also confirmed that section 51 distinguishes between adult offenders and child offenders.¹²⁷ This case further confirmed that the Act envisages two categories of child offenders, namely, those below the age of 16 and those between the ages of 16 and 18 years. It has also confirmed that section 51 does not apply at all to a child who was under the age of 16 years at the time of the commission of the offence.

The *Brandt* case clearly made a distinction concerning the enquiry to be followed in the case of the two categories where the Act does apply. In the case of adult offenders, the enquiry starts by looking at the minimum sentence prescribed by the legislature.

¹²³ See: Sloth-Nielsen 'Child Justice and Law Reform' in D J Davel, Introduction to Child Law in South Africa, para 22.1.2.

¹²⁴ *S v Brandt*, para 15. See also Sloth-Nielsen J: 'No child should be caged-closing the doors on the caged. However, in practice there will always be cases that are so serious that imprisonment would be the only appropriate punishment. See Terblanche S S: The Guide to Sentencing in South Africa, para 3.4.

¹²⁵ Sloth-Nielsen 'Child Justice and Law Reform' in C J Davel, Introduction to child Law in South Africa, para 22.9.

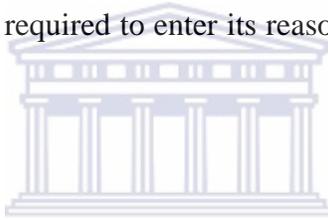
¹²⁶ *S v Brandt*, para 15.

¹²⁷ *S v Brandt*, para 9.

The onus therefore lies with the adult offender to establish that substantial and compelling circumstances compelling the imposition of a lesser sentence exist.¹²⁸

In the case of child offender between the ages of 16 and 18 years, the sentencing court is free to impose such sentence as it would ordinarily have imposed.¹²⁹ In its exercise of its discretion, the court may decide to impose the minimum sentence prescribed by section 51 (2) for an offence of the kind specified in schedule 2.¹³⁰

The sentencing court is not obliged to impose the statutorily prescribed minimum sentence; and if it does so, it is required to enter its reasons for its decision on the record of proceedings.¹³¹



Brandt case clearly sets out the effect of section 51(3)(b) as automatically giving the sentencing court the discretion that it acquires under section 51 (3)(a) only where it finds substantial and compelling circumstances.¹³² A court is generally free to apply the usual sentencing criteria in deciding on an appropriate sentence to impose on a child between the ages of 16 and 18 years.

The court confirmed that the gravity of the offence must receive appropriate recognition in the determination of a suitable sentence. The court also had to look at the

¹²⁸ *S v Brandt*, para 10.

¹²⁹ *S v Brandt*, para 11.

¹³⁰ *S v Brandt* supra, para 11. The court held that the discretion to impose the minimum sentence does indeed exist is inferred from the use of the words 'decides' and 'decision' in section 51 (3) (b). The construction of the court was that the court is called upon in the exercise of its discretion to make a decision as to whether or not to impose the minimum sentence prescribed by the Act.

¹³¹ See also *S v Nkosi*, p 141b, *S v Blaauw*, p 262e – 264j.

¹³² *S v Brandt*, supra para 12.

interpretation of section 51 (3) (b). The court carefully considered the decision in *Makwetsja* where the full court emphasized that on its interpretation the legislature had merely sought to make ‘doubly certain’ that the sentencing court found the prescribed minimum sentence appropriate and suggested that a court would ‘readily’ conclude that the youth of an offender between 16 and 18 was in itself a substantial and compelling circumstance.¹³³

But the approach of the Transvaal Provincial Division in *Makwetsja* still entailed that a sentencing court would be unable to depart from the statutorily prescribed minimum unless the child offender established the existence of substantial and compelling circumstances. The Supreme Court of Appeal in *Brandt* found that this meant the offender under 18 years would be burdened in the same way as an offender over 18 years. This would infringe the principle that imprisonment, as a sentencing option, should be used for child offenders as a last resort and only for the shortest appropriate period of time.¹³⁴

The court in *Brandt* preferred the approach in *Nkosi* and *Blaaw*. In delivering the majority judgement Ponnann A J A opined as follows:

“So qualified, the reasoning of *Blaaw* and *Nkosi* in my view accords generally with internationally recognized trends and constitutionally acceptable principles relating to the sentencing of child offenders. Importantly, it ensures that the duty

¹³³ *S v Brandt*, para 22; *S v Makwetsja*, para 47.

¹³⁴ *S v Brandt* para 22. See also Skelton A ‘Juvenile Justice Reform: Children’s Rights and Responsibilities versus Crime Control’ in C J Davel (Ed), *Children’s Rights in a Transitional Society*, Protea Books, 1999, 88 at 99 – 100.

remains on the prosecution – where it ought to in the case of child offenders – to persuade a sentencing court that the minimum sentence should be imposed.”¹³⁵

The case of *Brandt* has therefore removed doubt on the interpretation and application of section 51 of Act 105 of 1997 in so far as it applies to child offenders. It has set the legal position that the legislation scheme entails that the fact that an offender is under 18 although over 16 at the time of the offence automatically confers a discretion on the sentencing court, which is without more free to depart from the prescribed minimum sentence.

The sentencing court is generally free to apply the usual sentencing criteria in dealing on appropriate sentence. This in my view means that the sentencing court should also take into account the traditional principles of sentencing when arriving at which sentence to impose.

As I have mentioned about that the court in *Brandt* preferred the approach adopted by the court in *Nkosi* and *Blaaw*, the court in *Brandt* determined that the ‘legislative scheme entails that the fact an offender is aged below 18 but over 16 at the time of the offence automatically confers a discretion on the sentencing court, which is without more free to depart from the prescribed minimum and to impose sentence in accordance with ordinary sentencing criteria. The offender under 18 though over 16 does not have to establish the existence of substantial and compelling circumstances because section 51 (3)(a) finds no application to him or her. In the case of the offender under 16 the statutory scheme

¹³⁵ *S v Brandt*, para 23.

requires that the sentencing court should take into account the fact that the legislature has ordinarily ordained the prescribed sentences for the offences in question. This operates as a weighting fact in the sentencing process.¹³⁶

The case of *Brandt* has finally brought to certainty on the interpretation and application of the provisions of Act 105 of 1997 on juvenile offenders in that it has found that the provisions of Act 105 of 1997 do not require the imposition of prescribed minimum sentences on offenders below 18 years. The Supreme Court having had due regard to the Constitution and some international instruments, affirmed that the best interests of the child criterion and the principle that detention should be used only as a last resort, now have a central role in determining sentence. Thus in *S v P*¹³⁷ the accused girl was 12 years at the commission of the offence. The girl was implicated in the murder of her grandmother by two men who had been sentenced to 25 years for the murder of the deceased, who alleged that the girl had hired them to kill the deceased. Upon conviction of the girl for the murder, Swain J declined to impose a sentence of direct imprisonment and placed the accused under correctional supervision in terms of section 276 (1) (h) of the Criminal Procedure Act 51 of 1977, with the onerous conditions attached.¹³⁸

In *S v P* the court arrived at its decision by closely following the approach adopted in *Brandt* and emphasized the reintegration of the juvenile offender into society and the

¹³⁶ *S v Brandt*, para 24 a-e.

¹³⁷ Case No CC155/2003 (not yet reported).

¹³⁸ In this case, rehabilitation being the primary objective, a non-custodial sentence was fashioned to serve both punitive and therapeutic considerations. The punitive elements included house arrest (save for the time spent at school) and the performance of community service. Ongoing weekly counseling and attendance at a wilderness therapy programme formed part of the therapeutic aspects, the sentencing judge requiring regular reports to be sent to him of scholastic and other progress made. See: Sloth-Nielsen: Juvenile Sentencing Comes of Age, 2005 Stellenbosch Law Review (forthcoming).

aims of re-socialization and re-education.¹³⁹ It further reported various dicta from *Brandt* that children should not be caged, and that detention should be used only as a measure of last resort, as well as the need to individualize sentence and ensure that the sentence imposed does not result in the accused returning to society with a more distorted personality.¹⁴⁰ The court decided that a sentence of direct imprisonment would not result in the successful reintegration of the accused.¹⁴¹

It should be borne in mind that the accused in *S v P* was 12 years at the time of the commission of offence, and therefore, it is my submission that the provisions of section 51 (6)¹⁴² apply.



¹³⁹ p. 308 of the record. The court regarded these factors as complementary to the judicial aims of punishment applicable to adult offenders. See also: Sloth-Nielsen J: Juvenile Sentencing Comes of Age, 2005 Stellenbosch Law Review (forthcoming).

¹⁴⁰ p. 132 of the record.

¹⁴¹ The State has however appealed against the sentence imposed on the juvenile offender on the basis that it is too light.

¹⁴² This means that the accused is exempted from the provisions of section 51 (3)(b).

CHAPTER 5

CONCLUSION

It is now settled in South Africa that minimum sentence legislation is not applicable to a juvenile offender who at the time of the commission of the offence was under the age of 16 years. The case of *S v P*, which I have already discussed above, has confirmed the sentiments raised in earlier cases that the provisions of this Act do not apply to a juvenile offender who was under the age of 16 years at the time of the commission of the offence.

In the case of a juvenile offender who was under the age of 18 years although over 16 years at the time of the offence, the legislative scheme automatically confers a discretion on the sentencing court to apply the usual sentencing criteria in deciding on an appropriate sentence. The offender under 18 though over 16 does not have to establish the existence of substantial and compelling circumstances because section 51 (3)(a) finds no application to him or her.

Further, our Constitution clearly indicates that detention of juvenile offenders should be a measure of last resort. There is support for this proposition from a number of international instruments and academics that detention of juvenile offenders should be a last resort. Our courts have affirmed that children accused of committing offences should be treated in a different manner to adults.

It also settled law that punishment of juvenile offenders should be aimed at the reintegration of the juvenile offender into society and measures aimed at resocialisation and re-education be implemented. Rehabilitation should be the primary aim in the sentencing process affecting a juvenile offender. The sentence imposed on the juvenile offender should not result in the accused returning to society with a more distorted personality.

Since this piece of legislation has been extended on several occasions¹⁴³ and more recently,¹⁴⁴ all political parties and provinces have agreed that the 'lifespan' of this legislation be extended, it my submission that it should not be extended again. Since this piece of legislation was introduced as a temporary measure, it has been a long time that it has been in place. To keep it as a temporary measure, may have negative consequences, contrary to what it was intended to achieve.¹⁴⁵

Despite the decision in *Brandt*, and *S v P* minimum sentence legislation contravene a range of internationally accepted principles, such as the principle of proportionality and the principle of incarceration as a matter of last resort in the sentencing of juvenile offenders.¹⁴⁶

¹⁴³ This piece of legislation has been in its sixth year. Now that it has been ratified by Parliament, it will be in seventh year.

¹⁴⁴ The National Assembly ratified by resolution on 12 April 2005 that this legislation be extended by another two year. Also in National Council of Provinces by resolution, all provinces voted in favour that this legislation be extended by another two years. This means it will be operational until 31 April 2007.

¹⁴⁵ See also Terblanche: Mandatory Minimum Sentences: Considering section 51 of the Criminal Law Amendment Act, 1997 (2003) Acta Juridica, 220.

¹⁴⁶ See also comment in Article 40 Vol. 3 No 2 June 2001.

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