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Ten years into the Child Justice Act 75 of 2008 – Locating the position of imprisonment within the restorative justice framework.

Rochelle Celene Mohan

214553497

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Supervisor: Mr. K. Khumalo

2020

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ABSTRACT

Prior to the Child Justice Act 75 of 2008, South Africa's child justice system was regulated by the Constitution, the common law and various legislations. Child offenders were processed in the same criminal justice system as adult offenders. The adoption of the Child Justice Act created the procedural framework that is influenced by restorative justice principles and Ubuntu, for dealing with child offenders. In the midst of this rights-based approach child justice system, Chapter 10 of the Child Justice Act regulates the process of sentencing child offenders and provides a list of sentencing options, which includes imprisonment. The essential question to this study is whether the child justice courts are effectively applying the provisions pertaining to the imprisonment of child offenders in terms of the Child Justice Act. Court judgments where the sentencing of child offenders were an issue are examined. The existence of these cases illustrates that the effective application of the imprisonment provisions (these being section 69(1) and (4) of the Child Justice Act) remains a challenge even though the child justice courts have had ten years since the promulgation of the Child Justice Act to ensure these provisions are effectively and consistently applied.

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CHAPTER 1

INTRODUCTION

1.1. PURPOSE OF THE STUDY

The Preamble to the Child Justice Act[1] sets out that children represent a vulnerable group in society, that they are not mature to understand and appreciate the wrongfulness of their actions, that children in conflict with the law deserve the same protection afforded to other South Africans and that the protection needed by such children must be designed for the unique vulnerabilities experienced by children within the criminal justice system.

The Child Justice Act which is South Africa's legislative framework specifically for children in conflict with the law took effect in April 2010.[2] The Act creates a rights-based approach[3] child justice system.[4] The Act also provides a procedural framework[5] influenced by restorative justice principles and Ubuntu, for dealing with children who in are conflict with the law.[6] Chapter 10 of the Act regulates the process

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[1] The Child Justice Act 75 of 2008.

[2] South African Dept of Justice and Constitutional Development *Child Justice Act, 2008 (Act No 75 of 2008) National Policy Framework* (2010) 4. Available at https://www.justice.gov.za/vg/cj/2010_NPF_ChildJustice_tabled21may.pdf (Accessed on 15 October 2020).

[3] According to UNICEF 'A human rights-based approach is a conceptual framework for the process of human development that is normatively based on international human rights standards and operationally directed to promoting and protecting human rights. It seeks to analyse inequalities which lie at the heart of development problems and redress discriminatory practices and unjust distributions of power that impede development progress.' This is achieved through provisions and procedures centred on the promotion of the rights of the child offender. https://www.unicef.org/policyanalysis/rights/index_62012.html (Accessed on 15 October 2020).

[4] South African Dept of Justice and Constitutional Development *Child Justice Act, 2008 (Act No 75 of 2008) National Policy Framework* (2010) 4. Available at https://www.justice.gov.za/vg/cj/2010_NPF_ChildJustice_tabled21may.pdf (Accessed on 15 October 2020).

[5] The structure created by the Legislature to regulate the provisions, processes and procedures which are utilised to manage child offenders within South Africa. These concepts are mentioned in the Preamble of the Child Justice Act 75 of 2008.

[6] South African Dept of Justice and Constitutional Development *Child Justice Act, 2008 (Act No 75 of 2008) National Policy Framework* (2010) 4. Available at https://www.justice.gov.za/vg/cj/2010_NPF_ChildJustice_tabled21may.pdf (Accessed on 15 October 2020).

of sentencing child offenders and provides a list of sentencing options, which includes imprisonment. The subject of child justice is convoluted and will stimulate further academic discourse as the law develops. While there is a respected and burgeoning body of research on the specific sub-topic of imprisonment of child offenders in terms of the Child Justice Act there is, however, one aspect of imprisonment of child offenders that is yet to receive attention. This aspect is that of the effective application of the provisions pertaining to the imprisonment of child offenders in terms of the Child Justice Act. The purpose of this study is, therefore, to determine whether these provisions find effective application in the midst of the restorative justice framework of the Act. Assessment of the effective application of these provisions will be used as an instrument to locate the position of imprisonment and how imprisonment as sentencing option works within the restorative justice framework of the Act.

1.2. RESEARCH QUESTIONS AND METHODOLOGY

The essential question to this study is if the child justice courts are effectively applying the objectives and factors that must be considered before imposing a sentence of imprisonment upon a child offender, as contained in section 69(1) and (4) of the Child Justice Act. In attempting to answer this question, the study will also establish the developments of the child justice system within South Africa, the theories of criminal justice, international and regional instruments which have influenced the Child Justice Act, provide an overview of the Child Justice Act, the sentencing options available in terms of the Act and an in-depth discussion of imprisonment.

In terms of answering the study's ultimate question, the research method to be pursued in this study will be that of desktop research, where secondary sources (such as journals, cases, unpublished theses and internet sources) will be utilised alongside primary resources (these being the relevant legislation and court judgments). No empirical research will be done hence no ethical issues are foreseen for this study.

1.3. CHAPTER BREAKDOWN

Chapter 1 – Introduction

This chapter entails the purpose of the study, a brief overview of the developments of the child justice system within South Africa from the period of colonization till the promulgation of the Child Justice Act.

Chapter 2 – Examination of the theories of criminal justice, international and regional instruments which have influenced the Child Justice Act.

This chapter entails the examination of theories of criminal justice which were incorporated into the Child Justice Act and the international and regional instruments that are given effect through the Child Justice Act.

Chapter 3 – An overview of the provisions of the Child Justice Act.

This chapter entails a brief overview of the Child Justice Act, the sections which relate to the sentencing process, an examination of the sentencing options available to a child justice court and an in-depth discussion of imprisonment in terms of the Child Justice Act.

Chapter 4 – An analysis of whether the child justice courts are effectively applying the Child Justice Act's provisions pertaining to the imprisonment of child offenders.

This chapter analyses court judgments where the sentencing of a child offender had to be decided upon and when imposing an appropriate sentence section 69(1) an (4) of Child Justice Act applied.

Chapter 5 – Conclusion.

1.4. BACKGROUND TO CHILD JUSTICE IN SOUTH AFRICA

Skelton and Tshehla[7] submit that child justice within South Africa may have been influenced by pre-colonial practices and African customary law[8]. According to African customary law, children were defined by certain characteristics[9] rather than age, the

[7] It is difficult to outline what model influenced South Africa's criminal justice system prior to this as there is a lack of authority that documents the developments within such a topic area. A Skelton & B Tshehla 'Overview of South African developments' in 'Child justice in South Africa' (2008) *Monograph 150 Institute for Security Studies* 29-34. Available at https://issafrica.s3.amazonaws.com/site/uploads/MONO150FULL.PDF (Accessed on 30 November 2020).

[8] European South Africa was documented in history from 1652 as a result of colonization. Prior to being colonized, South Africa was home to communities of Bantu, Nguni and Sotho-Tswana people.

[9] Children were identified through certain characteristics such as circumcision or the setting up of a separate household.

welfare or well-being of the child was connected to the shared welfare his or her extended family.[10] This resulted in ultimately being asked the question of who had a stronger title to the child.[11] If the child committed an offence, it was treated as harm done between a person and the families that lived in the community and were affected by the offence.[12] These offences had to be dealt with in a manner that promoted the well-being and peace of society. Such offences were heard by informal courts overseen by traditional leaders.[13]

Following the colonisation of South Africa[14] Roman-Dutch and English law seemed to overhaul African customary law and its practices. More punitive forms of punishments dominated customary law practises of addressing a child that committed an offence.[15] South Africa's sentencing practices and options became retributive for the most part.[16] Sentencing practices and options for children also became the same as those of their adult counterparts, the only difference was the place where these sentences were carried out.[17]

Skelton and Tshehla[18] outline that William Porter, Attorney General of the Cape Colony, established the first reform school around 1872 – called the Porter Reform School. The school dealt with child offenders through rehabilitation and education practices.[19] Shortly after, other reform schools were established and were overseen by the Department of Education.[20]

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[10] Skelton & Tshehla op cit note 7 at 3.

[11] Ibid.

[12] Ibid.

[13] Ibid.

[14] With the arrival of the Dutch East India Company in 1652. Roman Dutch law followed soon behind. Roman Dutch law governed the refreshment post set up by Dutch East India Company in the Cape. Upon the British invasion effectively from 1806, English law governed the Cape and Natal area of South Africa. English parliamentary supremacy and common law together with remnants of Roman Dutch law compose an important feature of South Africa's current law.

[15] Skelton & Tshehla op cit note 7 at 3.

[16] Ibid.

[17] Ibid.

[18] A reform school was a penal or correctional institution used as a sentencing alternative to imprisonment for child offenders. Ibid.

[19] Adult offenders were sentenced to imprisonment for the same offences.

[20] Alan Paton, principal for Diepkloof Reformatory moved for the removal of fences around all reform school. Skelton & Tshehla op cit note 7 at 3.

The state then created a statutory provision found in the Prisons and Reformatories Act.[21] This statutory provision limited the imposition of imprisonment upon child offenders.[22] This Act established the principle that imprisonment of child offenders should be limited by, creating industrial schools as a form of a sentencing option. However, such a sentencing option did not guarantee that imprisonment of child offenders would cease to exist.

The Children's Protection Act[23] added to the partial protection offered to child offenders in conflict with the law. It declared that the imposition of imprisonment was a limited possibility through the Prisons and Reformatories Act[24]. The Children's Protection Act[25] also provided for the release of child offenders by police officials, and for child offenders to be released into a place of safety while awaiting trial. Both the Prison and Reformatories Act and the Children's Protection Act made further provisions that empowered the courts to stop prosecution against a child that committed an offence with the option of sending him or her to industrial schools.[26]

Whilst these provisions addressed the underlying needs of child offenders to not be imprisoned, these Acts never established a formal separate court for child offenders to be dealt with.[27] Many child offenders were processed through the same criminal justice system as adult offenders where punitive style sentences were imposed upon them.

Skelton and Tshehla[28] note that the Children's Act[29] introduced amendments to the then existing legislation related to children, such as raising the minimum age of criminal capacity, no imprisonment of children under sixteen years, abolishment of the death penalty of child offenders, the categories of persons that can refer

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[21] 13 of 1911.

[22] Ibid.

[23] Children's Protection Act 25 of 1913.

[24] Supra (n21).

[25] Supra (n22).

[26] Skelton & Tshehla op cit note 7 above at 3.

[27] The Children's Protection Act 25 of 1913 provided for a children's court where children charged with criminal offences could be referred to. However, such an option was rarely ever utilised.

[28] Skelton & Tshehla op cit note 7 at 3.

[29] Children's Act 31 of 1937.

children's cases to the children's court and allowing the sentencing of children to reform schools. This was another missed opportunity to establish a separate child justice system within South Africa.[30]

From 1870 till the early 1990's, corporal punishment was utilised to a great extent in punishing child offenders.[31] Corporal punishment was viewed as reformist in manner rather than imposing imprisonment upon the child offender.[32]

According to Skelton and Tshehla[33] child offenders were imprisoned for political offences committed throughout the 1970s and 1980s. Many organisations and non-governmental organisations (hereafter referred to as NGO's) rallied in support for the release of these children. Child offenders that were imprisoned for non-political offences during this same period were believed to have committed such offences as a result of socio-economic problems.[34] It is believed that both political and non-political offences were influenced either directly or indirectly by apartheid policies and law. Such disregard for child offenders' human rights was prominent during this period, as adults were also treated in a cruel and degrading manner. By the end of the 1980s, imprisonment of child offenders for political offences decreased, however, a large number of children were still in detention for other non-political offences.

Between 1992 and 10 April 2010 – the date of commencement of the Child Justice Act[35] – a number of developments took place. It can be argued that these developments may have been the reason for government to create a new framework to regulate the child justice system. A brief discussion of these developments will follow.

In 1992, a 13 year old boy named Neville Snyman was bludgeoned to death by other detainees – detainees who were under the age of 21 years – that were in the cell

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[30] Skelton & Tshehla op cit note 7 at 3.

[31] Ibid.

[32] *S v Williams* (1995 (7) BCLR 861 (CC) held that corporal punishment was unconstitutional as it constituted cruel and degrading punishment.

[33] Skelton & Tshehla op cit note 7 at 3.

[34] Ibid.

[35] Supra (n1).

with him.[36] Prior to this incident NGO's had been calling on the government to the address the issue of child offenders within the criminal justice system.[37] This incident only aggravated NGO's called for law reform on the issue of child offenders within the criminal justice system.[38] Neville Snyman's death brought the issue of child offenders within the criminal justice system into the public spotlight.[39] This was exactly the push the government needed to address the issue. The government created a national working committee to look into children that were detained in prison.[40] NGO's such as Lawyers for Human Rights increased their efforts to effect a change within the criminal justice system with a campaign called 'Free a child for Christmas'.[41] Other NGO's drafted proposals urging for law reform for child offenders within the criminal justice system.[42] With the end of apartheid nearing, these proposals signified a change in the child justice system of South Africa.

1.5. CHILD JUSTICE IN POST-APARTHEID SOUTH AFRICA

The proposals by NGO's towards the end of apartheid played a major role in the push for the introduction of a child justice system centered on restorative justice.[43] While these proposals did not gain official status, it would form the foundation upon which the Child Justice Act would be created.

In 1994, South Africa's first democratically elected President Nelson Mandela assured the public that the topic of child justice would be addressed.[44] It seemed the government took a hasty step to address the issue by making amendments to the legislation that dealt with children being detained in prison while awaiting trial.[45] This legislation was passed in 1994 and was implemented in 1995, to halt the detention of

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[36] A Skelton & M Courtenay 'The Child Justice Act: practice and procedure' in C Bezuidenhout (ed) *Child and youth misbehavior in South Africa – A holistic approach* (2013) 200.

[37] Ibid.

[38] Ibid.

[39] Ibid.

[40] Ibid.

[41] Ibid.

[42] Ibid.

[43] Ibid.

[44] Ibid.

[45] Correctional Services Amendment Act 17 of 1994. This amendment allowed for government to not completely rule out the detention of children in prison while awaiting trial. Ibid.

children in prisons while awaiting trial.[46] The lack of planning, co-operation between the relevant government departments and stakeholders within the criminal justice system and lack of alternative detention facilities led to the failure of these amendments to the legislation.[47]

The ratification of the United Nations Convention on the Rights of the Child in 1995 set in motion the policy and legislative reform concerning child offenders and imprisonment within the criminal justice system.[48] The Constitution[49] reflects the ideals found within the United Nations Convention on the Rights of the Child. Section 28 of the Constitution deals with the rights of children, which includes children in conflict with law. The relevant portions of section 28 provides as follows;

'(1) Every child has the right –

(g) not to 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 may be detained for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of eighteen years, and

(ii) treated in a manner, and kept in conditions that take account of the child's age.

(2) A child's best interest are of paramount importance in every matter concerning the child.'

In 1996, the same legislation concerning children being detained in prison while awaiting trial underwent another amendment.[50] This resulted only in children who

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[46] J Sloth-Nielsen 'The business of child justice' (2003) *Acta Juridica* 175-193.

[47] Skelton & Courtenay op cit note 36 at 7.

[48] The United Nations Convention on the Rights of the Child came into force on 2 September 1990. South Africa ratified the United Nations Convention on the Rights of the Child on 16 June 1995. The United Nations Convention on the Rights of the Child illustrates the minimum standard in which a child must be treated by the state. Other international instruments that deal with children in conflict with the law are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), United Nation Rules for the Protection of Juveniles Deprived of their Liberty, United Nation Guidelines for the Prevention of Juvenile Delinquency and the African Charter of the Rights and Welfare of the Child. South Africa ratified the African Charter on the Rights and Welfare of the Child on 7 January 2000. See further J Le Roux-Bower 'Juvenile offenders in South African criminal law' in C Bezuidenhout (ed) *Child and youth misbehavior in South Africa – A holistic approach* (2013) 217.

[49] Constitution of the Republic of South Africa Act 108 of 1996.

[50] The Correctional Service Amendment Act 17 of 1994 was enacted to decrease the use of detaining a child in prison while awaiting trial. Section 23 of the Correctional Service Amendment Act 17 of 1994 provides as follows:

'Detention of unconvicted young persons and women

were above the age of 14 years and that committed specific types of offences to be detained in prison while awaiting trial.[51] These amendments gave the government time to seek out other alternatives other than detaining children in prison while they awaited trial.[52] The government's initial goal was to outlaw the detaining of children

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29. (1) Notwithstanding anything to the contrary in any law contained- (a) but subject to subsection (2), an unconvicted person under the age of 14 years

(b) but subject to subsections (2) and (5), an unconvicted person who is 14 years or older but under the age of 18 years, shall not be detained in a prison or a police cell or lock-up.

(2) A person referred to in paragraph (a) or (b) of subsection (1) may be detained in a police cell or lock-up after his or her arrest until he or she is brought before a court within a period not exceeding 24 hours, if-

(a) such detention is necessary and in the interests of justice; and

(b) the person concerned cannot be placed in the care of his or her parent or guardian, any other suitable person or any institution or place of safety as defined in section 1 of the Child Care Act, 1983 (Act No. 74 of 1983), for the period in question.

(3) Where a person is detained in a police cell or lock-up as contemplated in subsection (2) the member of the South African Police Service or the peace officer responsible for ordering such detention shall-

(a) provide the court before which the person first appears with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up and to keep him or her there until his or her first appearance before the court; or

(b) if the person is released before he or she appears in a court, provide the magistrate of the magisterial district in which the detention took place with a written report setting out the reasons for the detention and an explanation as to why it was necessary to detain the person concerned in a police cell or lock-up.

(4) The report referred to in subsection (3)(b) shall be submitted to the magistrate referred to in the said subsection not later than one court day of the person concerned being released from detention.

(5) A person referred to in subsection (1)(b) who is accused of having committed an offence referred to in Schedule 2, may on the order of a court be detained in a prison or a police cell lock-up specified in such order for a period not exceeding 48 hours if-

(a) the court has ordered such person to be placed in any place of safety as defined in section 1 of the Child Care Act, 1983; and place

(b) the court is satisfied on the basis of evidence adduced that admission to such place of safety cannot immediately take

(6) A person referred to in subsection (2) or (5) who is detained in a prison or a police cell or lock-up or who is being moved in custody to or from a court or who, while in custody, attends a court or a preparatory examination, shall be kept separate from any person over the age of 18 years who is in custody: Provided that he or she may be permitted to have contact with such a person in custody who has been or is to be charged jointly with him or her, if the member of the Department in charge of the prison or the member of the South African Police Service in charge of the police cell or lock-up in which he or she is detained, is of the opinion that such contact will not be detrimental to him or her.

(7) When a woman under the age of 18 years is detained or in custody as aforesaid, she shall be under the care of a woman.'

[51] While children were still being detained in prison while awaiting trial, only children above the age of 14 years old and that committed certain types of offences would be detained in prison while awaiting trial. Sloth-Nielsen op cit note 46 at 8.

[52] Ibid.

in prison while awaiting trial completely. An overnight amendment such as this would not give the government time to find alternative places to detain the children while awaiting trial.

The Cabinet created the Inter-Ministerial Committee on Young People at Risk to address the problem of a high number of children being detained in prisons.[53] This was due to the unfettered discretion that presiding officers had and imposed sentences of imprisonment for offences not demanding of such a serious nature.[54] The Inter-Ministerial Committee on Young People at Risk, in 1996, through policy making brought about pilot programs to address children detained in prison while awaiting trial.[55] These pilot programs included managing children immediately after an arrest, one stop child justice centres and family group conferences.[56] The Committee on the Management of Juvenile Offenders Awaiting Trial was also created to monitor and collect information on child offenders detained in prison.[57] The Committee on the Management of Juvenile Offenders Awaiting Trial, with the assistance of NGO's visited prisons that housed child offenders regularly and monitored prison conditions.[58]

In 1997, the government tasked the South African Law Commission to examine and collate data on the issues that dealt with juvenile justice.[59] Project Go was created in 1998, with the purpose of freeing up spaces in welfare institutions for children who were detained in prison while awaiting trial.[60] The Inter-Ministerial Committee on Young People at Risk, the Committee on the Management of Juvenile Offenders Awaiting Trial and Project Go did not achieve the purposes for which they were created – to reduce the number of children detained in prison awaiting trial.[61]

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[53] Ibid 9.

[54] Ibid.

[55] Skelton & Courtenay op cit note 36 at 7.

[56] Ibid.

[57] The Inter-Ministerial Committee on Young People at Risk and the Committee on the Management of Juvenile Offenders Awaiting Trial were different committees created with different mandates. Sloth-Nielsen op cit note 46 at 8.

[58] Ibid.

[59] Skelton & Courtenay op cit note 36 at 7.

[60] Sloth-Nielsen op cit note 46 at 8.

[61] Ibid.

The United Nations Child Justice Project assisted the government, the National Interim Protocol for the Management of Children Awaiting Trial was created with the aim of helping to reduce the number of child offenders detained in prison.[62] However, this failed to make any change in the number children being detained in prison while awaiting trial.[63] The government tried many 'quick fixes' in an attempt to reduce the number of children being detained in prison.[64] It can be deduced that this trial and error method adopted by the government illustrated the urgent need for an answer with a concrete foundation to address such a problem. The South African Law Commission seemed to come up with a solution to address South Africa's fragmented child justice system after a period of investigating and collecting information on juvenile justice.

The Juvenile Justice Project Committee was created by the South African Law Commission.[65] The Juvenile Justice Project Committee published a discussion paper and draft bill for comment in 1999.[66] In August 2000, a final report was handed to the Minister of Justice.[67] The Child Justice Act – providing the framework for a new child justice system – was based on this discussion paper, draft bill and final report. After a number of delays and amendments during the passing of the draft bill,[68] the Child Justice Act was adopted by the National Assembly on 25 June 2008 and was to take effect from 1 April 2010.[69]

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[62] The United Nations Child Justice Project partnered with the government to help assist with developing a new child justice system. Ibid 10.

[63] Ibid.

[64] These 'quick fixes' could be seen as the amendments to the legislation, the multiple Committees that were set up by the government and programs and policies created to address the growing body of children being detained in prison while awaiting trial. While many of these amendments pertain to the detention of children while awaiting trial, these amendments played a vital role in changing the principles that govern the sentencing of child offenders to imprisonment.

[65] Skelton & Courtenay op cit note 36 at 7.

[66] Ibid.

[67] Ibid.

[68] See further South Africa Department of Justice & Constitutional Development *Child Justice Act National Policy Framework* (2010) 4. Available at https://www.justice.gov.za/vg/cj/2010_NPF_ChildJustice_tabled21may.pdf (Accessed on 15 October 2020.

[69] Ibid.

There are two important changes to note from the above discussion. These include, that the early 1990s saw the movement of NGO's calling for law reform within South Africa's criminal justice system.[70] By the late 1990s, the government had appointed the South African Law Commission with the task of investigating any juvenile justice related matters, in an attempt to build a solid foundation for a new child justice system.[71] The most significant period of the drafting process – for the new child justice system – took place from 1997-2000. The groundwork for the Child Justice Act's restorative justice framework took place within this period. The early drafts of the Child Justice Act had three important features:

(i) Emphasis on restorative justice – as illustrated in the Child Justice Act's provisions on diversion, sentencing options and the Child Justice Act's objectives.[72]

(ii) International instruments were encapsulated in the provisions of the Child Justice Act.[73]

(iii) The Child Justice Act providing a framework within which diversion is regulated.[74]

It can be inferred that there is some correlation between the developments – as outlined above – and the decision to create a new framework for South Africa's child justice system as previous attempts to remedy the defects of the existing child justice system failed. It can be deduced that with a new Constitution and a fractured child justice system in the spotlight there was pressure mounting on the courts to be more lenient in their use of imprisonment and child offenders.

Other post-apartheid developments in connection with child justice can be traced from case law that was decided after the end of apartheid, but before the promulgation of the Child Justice Act. The following court judgments are considered significant, as they illustrate that the courts have incorporated the principles of section 28 of the Constitution and have been more careful in the sentencing of child offenders. The discussion of these court judgments are used to illustrate how the

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[70] Sloth-Nielsen op cit note 46 at 8.

[71] Ibid.

[72] Ibid.

[73] Ibid.

[74] Ibid.

developments within the child justice system at a period when the eyes of South Africa were on the criminal justice system and the management of child offenders after Neville Snyman's death.[75] South Africa's ratification of various international and regional instruments related to children and the Constitution were reflected in principles of sentencing that were created by these courts and the application of these principles.

The Court in *S v Z*[76] set out a few general guidelines for sentencing:

(i) Before a trial starts, the court must look at interventions to promote rehabilitation.[77]

(ii) The court must enquire into the correct age of the child.[78]

(iii) The court within its available means finds out all relevant information and circumstances about the child. Such information is important and may be obtained in the form of a pre-sentence report. The pre-sentence report must be compiled if the child has committed a serious offence or has a record of previous convictions. The court may not impose a sentence of imprisonment or a suspended sentence of imprisonment if a pre-sentence report is not obtained.[79]

(iv) The sentence imposed must be individualised, taking into account the circumstances of the child and the nature and gravity of the offence committed.[80]

(v) The court's starting point, if the circumstances permit, a sentence of imprisonment must be avoided. The younger the child is, the more wary a court should be to impose a sentence of imprisonment. The court must also approach a case with the same wariness if the child is a first time offender. If in the appropriate circumstances and if all the objectives of a sentence are considered

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[75] Prior to the enactment of the Child Justice Act 75 of 2008, the courts set the standard on how children in conflict with the law were treated. See further L Mutingh & C Ballard 'Are the rights of children paramount in prison legislation' (2013) 3 *SACJ* 337.

[76] *S v Z en Vier Ander Sake* 1999 (1) SACR 427 (E) at para 441 and 442.

[77] Ibid.

[78] Ibid.

[79] Ibid.

[80] Ibid.

and imprisonment is the only appropriate option, then the court should impose the sentence of imprisonment.[81]

(vi) If it is decided in a set of circumstances that the sentence of imprisonment is inappropriate then in the same set of circumstances a suspended sentence of imprisonment should also be deemed inappropriate to impose.[82]

These guidelines were drawn up after much consideration after an enquiry was held by the Eastern Cape provincial government into the principles governing and options available under the sentencing of child offenders.[83] After the enquiry was complete a report was drawn up containing these guidelines. This situation arose when the High Court was reviewing cases where child offenders were given suspended imprisonment sentences.[84]

In *S v Kwalase*,[85] the Court stated that section 28(1)(g) of the Constitution requires that effect must be given to international instruments that relate to child justice. In this particular case the United Nations Convention on the Rights of the Child and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (hereafter referred to as the Beijing Rules). The rules that are of importance in these circumstances are rule 5(1) that states that the treatment of a child should always be in proportion to the circumstances of the offence, and rule 16 that states that the background and circumstances of the child and the circumstances in which the offence was committed must be enquired into unless the offence was minor. The Court held further that the law had to be developed for the sentence to be individualised, taking into account the nature and gravity of the offence; the interests and needs of society; and the interests and needs of the child.[86] The sentence must promote the reintegration of the child into his or her family and community. The Court found that the trial court had failed to elicit the required information about the child

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[81] Ibid 13.

[82] Ibid.

[83] *S v Z* supra note 76.

[84] *S v Z* supra note 76.

[85] *S v Kwalase* 2000 (2) SACR 135 (C).

[86] *Kwalase* supra.

offender's circumstances.[87] The presiding officer of the trial court failed to obtain a pre-sentence report and did not take into account that the previous suspended sentence did not affect the child offender. The Court stated that other international instruments must be given effect such as the United Nations Rules for the Protection of Juveniles Deprived of Liberty and the United Nations Guidelines for the Prevention of Juvenile Delinquency.

In *S v Nkosi*[88] the Court had to differentiate between section 51(3)(a) and section 51(3)(b) of the Criminal Law Amendment Act[89](hereafter referred to as the CLAA). The trial court held that the youthfulness of the child offender constituted substantial and compelling circumstances which justified a lesser sentence being imposed but the trial court did not impose such a sentence as it was of the view that youthfulness did not justify the imposition of a lesser sentence.[90] The Court held that section 51(3)(a) of the CLAA applies to offenders above the age of eighteen years and limits the court's discretion. Section 51(3)(b) of the CLAA applies to child offenders between the ages of sixteen years and eighteen years old at the time of the commission of the offence. In this instance, the court has the discretion to impose any appropriate sentence and if a sentence of life imprisonment is imposed the reasons for imposing such a sentence must be recorded.[91] The Court overturned the trial court's sentence of life imprisonment and sentenced the child offender to eighteen years imprisonment. After the analysis of the law, the Court drew up a set of principles to guide the presiding officer's discretion when imposing an appropriate sentence[92]:

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[87] *Kwalase* supra.

[88] *S v Nkosi* 2002 (1) SACR 135.

[89] Criminal Law Amendment Act 105 of 1997. Section 51(1) states as follows: 'Notwithstanding any other law but subject to ss (3) and (6), a High Court shall, if it has convicted a person of an offence referred to in Part 1 of Schedule 2 sentence the person to life imprisonment.' Section 51(3)(a) states has follows: 'If any court referred to in ss (1) or (2) is satisfied that substantial and compelling circumstances on the record of proceedings may thereupon impose such lesser sentence.' Section 51(3)(b) states as follows: If any court referred to in ss (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was sixteen years of age or older but under the age of eighteen years at the time of the commission of the act which constituted the offence in question, it shall enter the reason for its decision on the record of proceedings.'

[90] *Nkosi* supra note 88.

[91] *Nkosi* supra.

[92] *Nkosi* supra.

1. ‘Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first time offender.
2. Imprisonment should be considered as measure of last resort, where no other sentence can be considered to be appropriate. Serious violent crimes should fall into this category.
3. Where imprisonment is considered appropriate. It should be for 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 interest of the child offender.
4. If at all possible, the presiding officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his or her family or community.
5. The sentence of life imprisonment may only be considered in exceptional circumstances, such circumstances would be present where the child offender is a danger to society and there is no reasonable prospect of his or her rehabilitation.’[93]

The Court in *S v M*[94]did not deal explicitly with the sentencing of child offenders, but the Court noted very important principles that a court must take into account when dealing with a case regarding a child and their rights, specifically concerning section 28 of the Constitution. In the interpretation of section 28, the courts must always be child-sensitive. The law and common law must be interpreted and developed in such a way as to give effect to international instruments that relate to children’s rights.

In *Director of Public Prosecutions, Kwazulu Natal v P*[95]when the child offender appeared in the High Court, it noted she was twelve years old at the time of the commission of the offence of murder of her grandmother and fourteen years old at the time of sentencing. The High Court had postponed the passing of the sentence on condition that the child offender completes 36 months correctional supervision. The Supreme Court of Appeal overturned the sentence, with a sentence of seven years imprisonment suspended on condition the child offender completes 36 months of correctional supervision. This was in complete contrast to the judgment in *S v Z*[96] where the Court stated in the circumstances where a sentence of imprisonment

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[93] *Nkosi* supra.

[94] *S v M & Another* 2005 (1) SACR 481 (E).

[95] *Director of Public Prosecutions, Kwa Zulu Natal v P* 2006 (1) SACR 243 (SCA).

[96] *Z* supra note 76.

would be inappropriate, a suspended sentence of imprisonment would also be inappropriate in those circumstances. The Supreme Court of Appeal noted that the child offender acted like an ordinary criminal despite her age and background. Section 28(1)(g) and (2) of the Constitution encourages that the sentencing of the child had to be given a broader and wider scope to the effect that a child offender must not be detained except as a measure of last resort, and if imprisonment could not be avoided, only for the shortest appropriate period of time. Child offenders under the age of eighteen years must be kept separately from adult offenders. The gravity and the nature of the offence in question were too serious to avoid the sentence imposed by the Supreme Court of Appeal.

In *S v B*[97]the child offender committed the offence of murder when he was seventeen years and seven months old. The Court held that 'guiding principles must therefore include the need for proportionality (see *S v Kwalase* 2000 (2) SACR 135 (C)). The overriding message of international instruments as well as of the Constitution is those child offenders should not be deprived of their liberty except as a measure of last resort and, where incarceration must occur, the sentenced must be individualised with emphasis on preparing the child offender from the moment of entering the detention facility for his or her return to society'[98]. The issue brought before the Court to decide; did section 51(3)(b) of the CLAA apply to the present set of circumstances. The Court held that if the offender is between the age of sixteen and eighteen years at the time of the commission of the act constituting the offence, the prescribed minimum sentence is life imprisonment but the court has the discretion to depart from the minimum sentence – as contained in section 51(3)(b). Further, the child offender does not have to prove the existence of 'substantial and compelling circumstances' as section 51(3)(a) does not apply to child offenders under the age of eighteen years at the time of the commission of the offence. The Court in *S v Nkosi*[99] also held that section 51(3)(b) applies to a child offender between the age of 16 and 18 years. The reasoning was that the courts have the discretion to impose any appropriate sentence and if a sentence of life imprisonment

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[97] *S v B* 2006 (1) SACR 311 (SCA), [2005] 2 All SA 1 (SCA).

[98] *B* supra note 97 para 19.

[99] *Nkosi* supra note 88.

is imposed the reasons for imposing such a sentence must be recorded. The process in which the courts arrive at these conclusions are different but these judgments indicate the consistency of the courts in the interpretation and application of section 53 of the CLAA.

In *Mocumi v S*[100]the High Court was of the view that a fifteen-year term of imprisonment for a child offender who was fourteen years old at the time of the commission of the offence was shockingly inappropriate.

In *Ntaka v S*[101]the Court reiterated the importance of section 28 of the Constitution, including the Child Justice Bill. The Supreme Court of Appeal noted that if a sentence of imprisonment is considered, a child's liberty may only be deprived as a measure of last resort and for the shortest appropriate period of time and if imprisonment cannot be avoided such a sentence must be individualised that focuses on rehabilitation of the child, the sentence must be in proportion to the seriousness of the offence while balancing the interests of the child and that of the community.

In *Centre for Child Law v Minister of Justice and Constitutional Development,*[102]the Constitutional Court in its majority judgment declared that section 51(1) and (2) of the CLAA as amended by the Criminal Law (Sentencing) Amendment Act[103], are inconsistent with the Constitution and invalid, to the extent that it applies to persons who are under the age of eighteen years at the time of the commission of the offence. This judgment brought the issue of the interpretation and application of section 51(3) of the CLAA to finality.

From the above discussion of court judgments, the principles that may guide the courts when deciding to impose a sentence of imprisonment on a child offender can be summarized as follows:

(i) When sentencing a child offender effect must be given to the Constitution – section 28 – and South Africa's international obligations.

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[100] *Mocumi v S* [2006] JOL17525 (NC).

[101] *Ntaka v S* [2008] 3 All SA 170 (SCA).

[102] *Centre for Child Law v Minister of Justice and Constitutional Development and others* (CC798/2008), [2009] (6) SA 632 (CC), 2009 (11) BCLR 1105 (CC).

[103] Criminal Law (Sentencing) Amendment Act 38 of 2007.

(ii) The best interests of the child when being sentenced is vital.

(iii) A sentence of imprisonment imposed on a child offender must be avoided, unless there exist exceptional circumstances such as the existence of a prescribed minimum sentence for specific offences committed[104], the existence of a serious offence committed or other non-custodial sentences imposed on the child offender have failed to deter the child from committing another offence.

(iv) If a sentence of imprisonment is considered, the period of imprisonment must be for the shortest possible time, a pre-sentence report must be obtained before a sentence of imprisonment is imposed, the court must take into account the seriousness of the offence, the circumstances of the child offender and the interests of society, and the court must also take into account the rehabilitation and reintegration of the child offender with his or her family once the sentence of imprisonment is imposed.

It can be seen that the reluctance of courts to impose a sentence of imprisonment on a child offender may be attributed to the parallel developments of the newly elected government, the Constitution and attempts to fix the already fragmented child justice system. These developments and court judgments have the laid the foundation upon which the Child Justice Act rests. The next chapter will explore the legal theories such as the welfare model, the justice model and restorative justice; and international and regional instruments that have influenced and how it has influenced the current child justice regime in South Africa.

[104] Criminal Law Amendment Act 105 of 1997.

CHAPTER 2

LEGAL THEORIES AND INSTRUMENTS THAT INFORMED THE CHILD JUSTICE REGIME LOCATED IN THE CHILD JUSTICE ACT

2.1. INTRODUCTORY REMARKS

This chapter examines the theories of criminal justice, as well as the international and regional instruments, that influenced the Child Justice Act. The child justice regime located in the Child Justice Act is founded on two popular child justice models, the welfare model and the justice model. The Child Justice Act also incorporates restorative justice processes and principles within its framework. It is important to outline each model, as this will provide a background to the legal framework on which the Child Justice Act is based. The applicable international and regional instruments will be discussed later in the chapter.

2.2. CRIMINAL JUSTICE THEORIES

2.2.1. Welfare Model

The welfare model views child offenders as immature and vulnerable. This model argues that a child offender is unable to completely rationalise his or her thoughts or actions and are subject to influences from his or her background or environment.[105] Thus, the child offender cannot be held responsible for the offence committed. The state in this model takes a protective and paternalistic role over the child offender.[106] The state comes to the aid of the child offender and views the offence as a result of the child offender's circumstance or background. This model's approach is to aid the child offender by organising interventions that will educate him or her. These types of interventions are indeterminate and depend on the child offender's response to it.[107]

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[105] Sloth-Nielsen op cit note 46 at 8.

[106] Ibid.

[107] Ibid.

The welfare model resists trying to punish the child offender for the offence committed.

At the end of the nineteenth century in the United States of America, there was an increase in popularity in the welfare model of child justice.[108] The welfare model led to the development of alternative sentencing options and trying child offenders in a juvenile justice court.[109] The welfare model of dealing with child justice could be linked to parallel developments within the social behavioural field.[110] During the 1880s and 1890s the social aspects of individuals'[111] lives were argued to be influenced by free market processes and industrialisation.[112]

By the late 1960s, the weaknesses within the welfare model could be seen in practice.[113] The lack of enforcement of due process rights in respect of the child offender became a cause for concern.[114] It seemed that viewing the child offender as innocent and in need of help was not the central point of the American legal system anymore.[115] Child offenders began to be viewed as rational beings, which had free will, hence the need to hold them accountable for the offence committed while ensuring the promotion and protection of due process rights.

2.2.2. The justice model

Songca[116] states that the justice model originates from the due process model. The due process model ensures strict adherence to judicial protocols to ensure a fair, just and equitable trial as opposed to the goal of successfully prosecuting the offence

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[108]The welfare model became popular in foreign jurisdictions such as the United States of America. It is unclear what type of child justice model governed foreign child justice systems prior to the nineteenth century. Skelton & Tshehla op cit note 7 at 3.

[109] Ibid.

[110] This is the study where one observes how the social interactions between individuals influence other individuals' behaviour. Ibid.

[111] Social aspects of individuals' lives can be defined as how individuals interact with each other or behave within society and adapt to its rules and regulations. Ibid

[112] Free market processes and industrialisation could have influenced criminal activity during this time. Ibid.

[113] Ibid.

[114] Ibid.

[115] Ibid.

[116] R Songca 'A comparative analysis of models of child justice and South Africa's unique contribution' (2019) 44(1) *Journal for Juridical Science* 63-69.

with no regard for the offender's rights and the judicial process. The due process model treats all offenders equally without taking into account his or her background or personal circumstances. In terms of child justice, this model is known as the justice model as it takes into account that the offender is a child. Whilst the justice model finds its origins in the due process model, the justice model is adapted to make provision for the unique needs of child offenders. The justice model while taking into account the best interests of the child offender deliberates the most appropriate long term plan for the offender.

The justice model emphasises the idea of the child offender taking individual responsibility for the harm caused through such an offence.[117] The important components of the justice model are respecting due process rights, taking into account the offence committed, less intrusive interventions of dealing with the personal life of the child offender and the importance of determinate sentencing.[118] This model is concerned with the concept of the sentence being proportionate to the offence committed. In other words, the justice model emphasises individual responsibility.[119] This model respects the rights of the child offender and allows for the child offender to take responsibility for his or her actions.[120]

The main aim of the justice model is the minimising of criminal activity.[121] This model shares the sentiment of most societies that the law must be tough on crime.[122] It encourages harsher penalties, such as imprisonment, as a deterrent for committing crimes.[123] However, society is only protected from the offender for a limited time until he or she is released into the community again.[124] In certain circumstances harsh sentences such as imprisonment are not encouraged for child offenders, as these sentences are considered disproportionate when taking into account the capacity of the child offender.

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[117] Skelton & Tshehla op cit note 7 at 3.

[118] Ibid.

[119] Ibid.

[120] Ibid.

[121] Ibid.

[122] Ibid.

[123] Ibid.

[124] Ibid.

2.2.3. Restorative justice

Restorative justice is centred on the concept that all individuals affected by the offence (such as the offender, the victim and society) must be encouraged to participate in the process whereby what is lost through the harm caused by the offence committed may be restored in a humane and dignified manner.[125]

Restorative justice gained popularity in the last two decades of the twentieth century.[126] Restorative justice is said to have garnered conceptualization by civil organisations in the early 1990s through social experiments.[127] The restorative justice approach urges that child offenders be treated in a humane and dignified manner.[128] There are three values of restorative justice, which includes constraining values, maximizing values and emergent values.[129] Restorative justice processes aim to deal with the impact of offence at the time it was committed and the consequences of the offence after it was committed on the offender, the victim and the community.[130]

Child rights within South Africa became an important focus after the Harare International Children's Conference held in 1989.[131] With the call for basic human rights to become the focal point within South Africa as the legacy of apartheid still hang in the air, South Africa needed a child justice system that addressed the specific needs of child offenders within its jurisdiction.[132] In the early 1990s diversion and restorative justice sentencing options were made available.[133]

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[125] Ibid 22.

[126] Ibid.

[127] A Skelton 'Restorative justice: A contemporary South African Review' (2008) 21(3) *Acta Criminologica* 37-51.

[128] Ibid.

[129] Skelton op cit note 127 at 23.

[130] Ibid.

[131] Skelton & Tshehla op cit note 7 at 3.

[132] Ibid.

[133] The South African National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) started an initiative in 1992, which allowed courts to impose alternative diversion and sentencing options to child offenders. However, there was no enabling legislation. Ibid.

The best interests of the child being of paramount importance stems from the welfare model while the interests of society comes from the justice model.[134] While the interests of the child and the interests of society are important, one cannot be placed above the other.[135] The best interests of the child must be balanced against the interests of society when sentencing a child offender.[136] The welfare model seeks to identify the psychological problem interfering with the child's behaviour. Such a problem must be dealt with in a therapeutic way.[137] Diversion, correctional supervision and restorative justice are therapeutic ways of addressing the child offender's underlying problem, non-custodial sentences and imprisonment as a measure of last resort and for the shortest appropriate period of time is a move from harsh punishment.[138] While the welfare model and justice model have their inherent weaknesses, if these models are to co-exist within a single child justice system incorporating the principles of each of these models, this provides an ideal child justice system within which a child offender is to be dealt with.

The South African Legislature worked along the same thought process by creating the Child Justice Act. The Child Justice Act incorporates the main concept of the justice model and the welfare model within its framework.[139] As it will be discussed in the next chapter, the Child Justice Act has created a framework where restorative justice processes must be promoted while ensuring the child offender is held accountable for the offence committed.[140] The Child Justice Act provides a unique child justice system within which child offenders in South Africa are dealt with, as it blends the welfare model, and justice model with restorative justice processes.

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[134]The welfare model emphasises that a child offender is not at fault and as such should not be punished for the offence committed. The underlying causes of the offence such as the child offender's home environment, financial situation, etc must be treated rather than imposing a harsh sentence on a child offender. The justice model believes that the child offender must take responsibility for the offence committed, that sentence must be in proportion to the offence committed and the child offender must be afforded a fair and just trial. Ibid 23.

[135] Ibid.

[136] Ibid.

[137] Ibid.

[138] Ibid.

[139] Ibid.

[140] Preamble supra note 1.

2.3. INTERNATIONAL AND REGIONAL INSTRUMENTS

The United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child are the foundation upon which section 28 of the Constitution was enacted.[141] The Legislature has given effect to South Africa's international law obligations by incorporating certain articles contained within the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child in section 28 of the Constitution. The provisions of the Child Justice Act are the instrument through which the rights that relate to child justice contained within the Constitution are enforced.

2.3.1. United Nations Convention on the Rights of the Child

According to Dugard[142] a convention or treaty 'is a written agreement between states or between states and international organisations, operating within the field of international law.' These type of treaties are known as law making treaties, which has no effect on states that have not ratified it. International instruments are not binding. The United Nations Convention on the Rights of the Child was ratified by South Africa in 1995. In other words, the United Nations Convention on the Rights of the Child would not have any legal force within South Africa.[143] In order for the articles contained in the United Nations Convention on the Rights of the Child to be enforced in South Africa, it had to become a part of domestic law.[144]

The United Nations Convention on the Rights of the Child creates the principle of universality in terms of the minimum standard of dealing with children and children's rights. It regulates the protection and treatment of children. Each article contained within the United Nations Convention on the Rights of the Child are connected and interdependent. The United Nations Convention on the Rights of the Child is the most ratified treaty in the world. The only states that have not ratified the treaty are Somalia and the United States of America. Certain provisions of the Beijing Rules, United Nation Rules for the Protection of Juveniles Deprived of their Liberty and

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[141] Section 28 of the Constitution pertains to children's rights in South Africa.

[142] J Dugard *International law. A South African perspective* (2013) 24-41.

[143] Skelton & Tshehla op cit note 7 at 3.

[144]See further section 28 of the Constitution. Ibid.

United Nation Guidelines for the Prevention of Juvenile Delinquency were incorporated into the United Nations Convention on the Rights of the Child.[145] Wakefield[146] states the United Nations Convention on the Rights of the Child 'was the first treaty that solely focused on codifying the rights of children in the international arena'.

The United Nations Convention on the Rights of the Child contains a wide range of articles dealing with different aspects of the protection and treatment of children, the following three articles may have influenced the Legislature when drafting the Child Justice Act:

(i) Article 3[147] emphasises the importance of the child's best interests during the legal process. The best interests of the child is a primary consideration. It is one of the important factors that influence any decision regarding the child.

(ii) Article 37[148] deals with the protection of children against punishment that is cruel and degrading. It further states that detention of children should be as a measure of last resort and for the shortest appropriate period of time.[149] It does not allow

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[145] Ibid 25.

[146] L Wakefield 'The CRC in South Africa 15 years on: does the new Child Justice Act 75 of 2008 comply with international children's rights instruments?' (2011) 62(2) *Northern Ireland Quarterly* 167-182.

[147] Article 3 states as follows; '1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.' UN Convention on the Rights of the Child.

[148] Article 37 of the UN Convention on the Rights of the Child states as follows; 'States Parties shall ensure that: (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.'

[149] Skelton & Tshehla op cit note 7 at 3.

for capital punishment or life imprisonment without the possibility of early release for the child.[150]

(iii) Article 40[151] regulates the right to legal representation and fair treatment within the justice system while protecting the rights of the child. Article 40(1) represents

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[150] Ibid 26.

[151] The UN Convention on the Rights of the Child states; '1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

(a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

(b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

(i) To be presumed innocent until proven guilty according to law;

(ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

(iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

(iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;

(v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;

(vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;

(vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

(a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;

(b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.'

a child centered approach towards the administering of justice in any matter concerning a child.[152] The second part of article 40(1) refers to the reintegration of the child and as such taking up a responsible role in society.[153] It also explicitly mentions use of a restorative justice approach when dealing with such a child.[154] Article 40(2) makes provision for the child's due process rights, which apply to every child that is conflict with the law.[155] If the circumstances permit, as stipulated in article 40(3)(b), child offenders should be dealt with without exposing them to a formal legal process.[156] In other words, diverting a child offender wherever possible. Lastly, article 40(4) refers to the need for alternative sentencing options.

The United Nations Convention on the Rights of the Child has had an influence on how children's human rights are regulated in South Africa. Section 39(1) of the Constitution implies that international law must be given effect when interpreting any piece of South African legislation.[157] The Constitution states further in section 233 that the interpreting of legislation must be consistent with international law.[158] The Constitutional Court has emphasised that when interpreting the Bill of Rights, international law that is binding and non-binding must be given effect.[159]

2.3.2. African Charter on the Rights and Welfare of the Child

Each continent adopts regional conventions as it 'complement(s) and reinforce(s) universal human rights conventions'.[160] Dugard states that these 'conventions are likely to be more successful than their universal counterparts because political and cultural homogeneity and shared judicial traditions and institutions within the regions

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[152] Skelton & Tshehla op cit note 7 at 3.

[153] Ibid.

[154] Ibid.

[155] Refer to 28(1)(g) and 35 of the Constitution which affords children in conflict with law protection. These sections are also enhanced by the Child Justice Act 75 of 2008. Skelton & Tshehla op cit note 7 at 3.

[156] Ibid.

[157] Ibid.

[158] Ibid.

[159] *S v Williams and Others* (CCT20/94) [1995] ZACC 6; 1995 (3) SA 632; 1995 (7) BCLR 861 (CC) at para 22.

[160] Dugard op cit note 142 at 25.

provide the basis for confidence in the system, which is necessary for effective implementation.'[161]

It is the instrument that relates to children's rights within the African region.[162] The adoption of the African Charter on the Rights and Welfare of the Child has led many countries in Africa to reform their laws on child's rights, though development remains staggered. In January 2000, South Africa ratified the African Charter on the Rights and Welfare of the Child. With the promulgation of the Child Justice Act in 2008, South Africa's adoption of the African Charter on the Rights and Welfare of the Child's provisions into domestic law went further than the Constitution.

Article 1 of the African Charter on the Rights and Welfare of the Child imposes an obligation on states that are party to it, to create domestic legislation to give effect to the provisions contained in the African Charter on the Rights and Welfare of the Child. The best interests of the child is the most important consideration in every matter concerning the child as stipulated by article 4.[163]

Article 17 of the African Charter on the Rights and Welfare of the Child regulates the administration of juvenile justice. Children in conflict with the law require special protection and must be treated in a manner that emphasises their human dignity and self-worth.[164] A child that is detained must not be treated in a degrading or inhuman manner that amounts to torture.[165] When detained, the child must be separated from adults [166] Rehabilitation, reformation and reintegration are important in the child

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[161] Ibid 28.

[162] A Skelton 'The development of fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments' (2009) 4 *AHRLJ* 483-500.

[163] The Constitutional Court has stated that within the right circumstances the best interests of the child are not the most important consideration in every matter concerning a child. This right can be limited in terms of section 36 of the Constitution. See *Centre for Child Law v Minister of Justice and Constitutional Development and others* (CC798/2008), [2009] (6) SA 632 (CC), 2009 (11) BCLR 1105 (CC).

[164] Article 17(1) of the African Charter on the Rights and Welfare of the Child.

[165] Article 17(2) of the African Charter on the Rights and Welfare of the Child.

[166] Article 17(2) of the African Charter on the Rights and Welfare of the Child.

justice process.[167] A child that has committed an offence may not be prosecuted if he or she is below a certain age.[168]

While the African Charter on the Rights and Welfare of the Child has fundamental provisions that provided the foundation for the Child Justice Act, it has not been as influential as the United Nations Convention on the Rights of the Child, but has had some influence.[169]

These legal theories of criminal justice, international and regional instruments have influenced the provisions of section 28 of the Constitution and the Child Justice Act. Section 28 of the Constitution has been created to give effect to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The legal theories of criminal justice have played a significant role in the creation of Child Justice Act. The enforcement of provisions pertaining to diversion has been consistent as will be seen from the statistics in the chapter below. These provisions were also influenced by the above theories, international and regional instruments. However, applicability of Child Justice Act as a whole has not been so consistent in practice, as will be discussed in chapter 4. The next chapter will provide a brief overview of Child Justice Act, the sentencing options for child offenders available under the Child Justice Act and the provisions that pertain to such sentencing options.

[167] Article 17(3) of the African Charter on the Rights and Welfare of the Child.

[168] Article 17(4) of the African Charter on the Rights and Welfare of the Child.

[169] SS Terblanche 'The Child Justice Act: A detailed consideration of section 68 as a point of departure with respect to the sentencing of young offenders' (2012) (15)5 *PER* 436-475.

CHAPTER 3

AN OVERVIEW OF THE PROVISIONS OF THE CHILD JUSTICE ACT 75 OF 2008

3.1. INTRODUCTION

The promulgation of the Child Justice Act in 2008 meant that the provisions contained within section 28 of the Constitution must be followed by the child justice courts.[170] In order to understand how the Child Justice Act enforces provisions of section 28 of the Constitution this chapter will provide a brief overview of the Child Justice Act, the important features of the Act and will lastly focus on the issue of imprisonment of child offenders in terms of the Act.[171]

3.2. AN OVERVIEW OF THE CHILD JUSTICE ACT

The Child Justice Act created a separate justice system for children in conflict with the law while affording them with the protection they deserve. The Child Justice Act provides a separate child justice system that must give effect to the Constitution and South Africa's international obligations. This framework incorporates traditional theories of punishment, such as deterrence, and contemporary theories of punishment, such as restorative justice and the concept of Ubuntu. The concept of Ubuntu and restorative justice is illustrated in the process of diversion and alternative sentencing options.[172] One of the main aims of the Child Justice Act is to divert as many children away from the criminal justice system as possible. Children who are not diverted and appear within the child justice court must be dealt with in a manner that is reflective of restorative justice principles. Children are encouraged to take responsibility and be held accountable for their actions.

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[170] Skelton & Courtenay op cit note 36 at 7.

[171] The Child Justice Act 75 of 2008 can be viewed as an appendage to section 28 of the Constitution and international and regional instruments. M Schoeman & MS Thobane 'Practitioners' perspectives about the successes and challenges in the implementation of the Child Justice Act' (2015) 28(3) *Acta Criminologica: Southern African Journal of Criminolgy* 34-49.

[172] The Child Justice Act 75 of 2008 is more centred on a child offender avoiding imprisonment, especially detention while awaiting trial. Mutingh & Ballard op cit note 75 at 13.

The Child Justice Act encourages child justice courts to give effect to the rehabilitation and reintegration of the child. Rehabilitation and reintegration of the child are effective methods to decrease the possibility of the child reoffending.[173] When a child justice court deals with a child offender, the child justice court must balance the interests of the child and the community while considering the rights of the victim.

The Preamble of the Child Justice Act contains the principles that must be borne in mind when interpreting the provisions of the Act[174] and the aims of the Act that the Legislature hopes it will achieve[175]. Chapter 1 discusses the definitions, objects and guiding principles of the Act. Chapter 2 deals with the application of the Act, the criminal capacity of a child under fourteen years and other matters pertaining to the age of the child. Chapter 3 provides the various methods a child may be brought before the child justice court, such as a written notice; summons and warrant of arrest. Chapter 4 outlines the procedure pertaining to the release, detention and placement of the child prior to sentencing and other matters related to these processes. Chapter 5 outlines the process of the assessment of the child.[176] Chapter

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[173] Child offenders that are sentenced to imprisonment are more likely to reoffend as opposed to child offenders that have received less harsher sentences. Ibid 31.

[174] Significant principles that must be borne when interpreting the Child Justice Act:

(i) The importance of the Constitution;

(ii) the best interests of the child;

(iii) a child not to be detained except as a measure of last resort and for the shortest appropriate period of time;

(iv) the child's age must be taken into account; and

(v) if a child is being detained, he or she must be kept separately from adults and further there must be segregation of boys and girls.

[175] The aims of the Child Justice Act supra (n1) can be summarized as follows:

(i) To create a separate child justice system founded upon the Constitution, bearing in mind South Africa's international obligations and in the appropriate circumstances divert the child. If the child cannot be diverted, he or she should be dealt with by a child justice court.

(ii) Enforce the principles of restorative justice whilst ensuring the child is held accountable and takes responsibility for the offence committed.

(iii) Increase the emphasis on rehabilitation and reintegration of the child to decrease the chance of recidivism.

(iv) Balance the interests of the child offender, the community and the seriousness of the offence.

[176] When a child has committed an offence, a probation officer must assess him or her. This assessment must be completed before the child attends a preliminary inquiry. The purpose of assessment could be to determine the child's age or if there is a possibility for diversion.

6 contains the provisions relating to diversion of the child by the prosecution in respect of minor offences.[177] Chapter 7 sets out the procedure to be followed at a preliminary inquiry,[178] whilst chapter 8 deals with diversion of the child.[179] Chapter 9 contains the provisions of and relating to the trial heard before a child justice court. Chapter 10 explores the sentencing options available to presiding officers.[180] Chapter 11 contains the provisions concerning the legal representation of the child. Chapter 12 provides for appeals and automatic review of certain convictions and sentences. Chapter 13 regulates the records of conviction and sentence of the child offender. Lastly, chapter 14 contains the general provisions of the Act.

3.3. IMPORTANT FEATURES OF THE CHILD JUSTICE ACT 75 OF 2008, RELATING TO THE SENTENCING OF CHILD OFFENDERS:

3.3.1. Age groups

In terms of the Child Justice Act, a person under the age of eighteen years old is considered to be a minor.[181] A child who is under the age of twelve years is irrefutably presumed to lack criminal capacity. Such a child cannot be arrested or charged with an offence.[182]

If a child who is over the age of twelve years but under the age of fourteen years, he or she is refutably presumed to lack criminal capacity.[183] This means that such a

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[177] A prosecutor may only divert a child, if he or she has committed an offence listed under schedule 1. The prosecutor may select a level 1 diversion option for the child to complete. This will become an order of the court. A prosecutor may only divert a child upon completion of the probation officer's assessment report but before a preliminary inquiry is held.

[178] A preliminary inquiry is an informal pre-trial procedure held before a presiding officer. A preliminary inquiry is held to consider the probation officer's assessment report, and if diversion is possible amongst other reasons. A preliminary inquiry will be held for every child that has committed an offence, unless the child has not been diverted by a prosecutor or is under the age of twelve years or if the matter has not be withdrawn.

[179] This chapter governs the process of diversion of the child at a preliminary inquiry or during the trial, before the close of the prosecutor's case.

[180] Most of the objectives of sentencing in the Child Justice Act are centred around restorative justice. See further J Sloth-Nielsen 'Child Justice' in T Boezaart (ed) *Child law in South Africa* 679-727.

[181] See further Chapter 1 supra (n1).

[182] Child Justice Amendment Act 28 of 2019.

[183] Ibid.

child does not have criminal capacity but the state may prove that such a child has criminal capacity.[184] A child that falls within this age group may be arrested if he or she has committed an offence.[185]

A child above the age of fourteen years is presumed to have criminal capacity.[186] Such a child that allegedly commits an offence may be arrested and prosecuted for such an offence.[187] The prosecutor dealing with the case has the discretion to divert such a child.[188]

3.3.2. Types of offences

There are three schedules of offences provided for by the Child Justice Act[189]:

1. Schedule 1 contains minor offences such as theft of property less than R2500, malicious damage to property less than R1500 and common assault.[190]
2. Schedule 2 deals with less serious offences such as theft of property worth more than R2500, robbery but excluding robbery with aggravated circumstances, assault including assault with the intent to do grievous bodily harm, public violence, culpable homicide and arson.[191]
3. Schedule 3 contains the most serious offences such as robbery, rape, kidnapping, murder, etc.[192]

At the end of March 2018, approximately 10% of sentenced child offenders received imprisonment sentences ranging from 10-15 years.[193] These child offenders

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[184] Ibid 33.

[185] Ibid.

[186] The state may prove that the offence was of such a seriousness nature, that only someone of a mature understanding and thought process could have committed such an offence. See further Section 77 supra (n1).

[187] See further Section 77 supra (n1).

[188]See further Section 77 supra (n1).

[189] The first schedule begins with the least serious offences, whilst the last schedule deals with the most serious offences. The differences between these schedules are in terms of how serious the offences are. Supra note 1.

[190] Schedule 1 supra (n1).

[191] Schedule 2 supra (n1).

[192] Schedule 3 supra (n1).

[193] 2017/2018 5th Annual Report: Implementation of the Child Justice Act 75 of 2008' available at http://www.dcs.gov.za/?page_id=3522, accessed on 04 May 2020.

committed offences of murder, attempted murder and robbery with aggravated circumstances.[194] A child offender that received a longer sentence of 15-20 years was convicted of offences such as murder, attempted murder, housebreaking and robbery.[195] By the end of March 2018, 35% of child offenders sentenced received sentences of 3-5 years.[196] These statistics express that a majority of children that were sentenced, committed offences from schedule two and three of the Child Justice Act. Such statistics evoke a negative conclusion that despite the number of children being sentenced decreasing as the years pass by, many child offenders are committing very serious offences. This urges the importance of the application of sentencing provisions. The assessment of whether the provisions pertaining to imprisonment are effectively applied is dealt with in chapter 4 below.

3.3.3. Preliminary inquiry

If the child is not diverted by the prosecutor after the assessment is completed, within the first 48 hours, a child will be required to attend a preliminary inquiry.[197] At the preliminary inquiry, the presiding officer will decide if the child will be diverted.[198]

3.3.4. Diversion

Hargovan[199] states that diversion is a process of directing a child away from the child justice system.[200] This is a positive outcome of the Child Justice Act, as it limits the exposure a child has to the child justice system and its negative effects. Once a child attends an assessment, the most appropriate diversionary option can be decided upon. Once a child commits an offence, an assessment must be performed.[201] This is usually executed before the preliminary inquiry. An assessment must be

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[194] Ibid 34.

[195] Ibid.

[196] Ibid.

[197] Chapter 7 supra note 1.

[198] Chapter 7 supra (n1). The concept of diversion will be discussed later in the heading below.

[199] H Hargovan 'Child justice in practice. The diversion of young offenders.' (2013) *SA Crime Quarterly 44.* 25-34.

[200] Since the implementation of the Child Justice Act 75 of 2008, stakeholders within the criminal justice system are of the opinion that one of the most successful achievements of the Act is diversion of child offenders. Schoeman & Thobane op cit note 171 at 31.

[201] Section 34(1) supra (n1).

performed bearing in mind the child's bests interests. A prosecutor may dispense with the execution of the assessment if its in the child's best interests or if it may cause undue delay.

Diversion can take place in the following instances, if the child that has committed the offence is twelve years or older:

(i) By the prosecutor if he or she has committed a schedule 1 offence;[202]
(ii) At a preliminary inquiry; or[203]
(iii) If the matter is not diverted or withdrawn. It will be referred to a child justice court for the plea and trial, but before the prosecution closes its case, the child may be considered for diversion.[204]

Hargovan[205] submits that if a child offender commits a schedule one offence, the prosecutor may issue a level one diversionary option.[206] Such a decision will become an order of the court if the presiding officer in chambers makes it final. If the child offender is not diverted upon the conclusion of the assessment and moves on to the preliminary inquiry, such a child may still be diverted, if he or she takes responsibility for the offence.[207] If the child concerned commits a schedule three offence, he or she may be diverted with the consent of the Director of Public Prosecutions.[208] If a schedule two or three offence is committed, a child may be diverted if the following considerations are taken into account:

(i) The opinion of the victim or any person associated with the victim;[209]
(ii) The view of the investigation officers;[210]
(iii) The seriousness of the offence committed; and[211]

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[202] Section 5(4) supra note 1.

[203] Section 5(4) supra note 1.

[204] Section 5(4) supra note 1.

[205] Hargovan op cit note 199 at 35.

[206] Section 41(1) supra (n1).

[207] If he or she has not been pressured into taking responsibility for the offence and if the state has a strong case against the child, the prosecutor may urge for the matter to be diverted. Hargovan op cit note 199 at 35.

[208] Ibid.

[209] Ibid.

[210] Ibid.

[211] Ibid.

(iv) If there is a history of previous convictions.[212]

There are also other practical considerations such as the availability of diversionary programs and NGO service providers within the area of residence of the child.[213] In the Khulisa Study[214] approximately 40% of child offenders that were diverted committed minor offences, about 50% committed moderately serious offences while 03.70% of child offenders that were diverted committed serious offences.[215] This shows that while most offenders that were diverted committed schedule two offences and barely any child offenders that committed serious offences were diverted. This illustrates the reluctance of child justice courts to divert child offenders that commit very serious offences.

3.3.5. Sentences

If a child is not diverted after the assessment, during the preliminary inquiry or before the close of the prosecution's case and if such a child is tried for the alleged offence and is convicted, chapter 10 of the Child Justice Act provides for the following list of sentences (the sentences referred to in chapter 10 of the Act can only be imposed once a trial is completed and the child offender is convicted of the offence committed):

a) Community-based sentences[216]

If a child offender is sentenced to a community-based sentence, he or she will remain within the community he or she stays.[217] Whilst remaining in the community the child offender will have to carry out any option, available under section 53 of the Child Justice Act, which the child justice court deems as a condition of his or her sentence.

Correctional supervision can also be imposed as a community-based sentence or together with a community-based sentence. This can be done according to section

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[212] Ibid 38.

[213] Ibid.

[214] Khulisa's Positive Cool Diversion Programme.

[215] Hargovan op cit note 199 at 35.

[216] Section 72 supra (n1).

[217] SS Terblanche *A Guide to Sentencing in South Africa* (2016) 349-382.

72 of the Child Justice Act. However, correctional supervision remains a separate sentence under the Act. The probation officer must monitor compliance with conditions and advise the child offender of the consequences if conditions are not complied with. As the sentence is carried out, the probation officer must submit progress reports to the child justice court. If the child offender fails to comply with the conditions stipulated, he or she will be brought to the child justice court for an inquiry in terms of section 79 of the Child Justice Act.

b) Restorative justice sentences [218]

The Child Justice Act states that a family group conference, victim-offender mediation and any other restorative justice process the child justice court considers appropriate are restorative justice sentences. Restorative justice sentences are similar to the postponement of a sentence.[219]

A family group conference[220] is where a probation officer organizes a meeting between the offender, the victim and their families. The purpose of the meeting is to devise a plan on how the offender will redress the harm done through the offence. The probation officer must organise the meeting within 21 days of the matter being referred to him or her by the child justice court. The conference usually takes place at a later date.[221]

A victim-offender mediation[222] is organised in a similar way to a family group conference, except the meeting will only involve the offender and victim. It takes place without the offender and the victim's families. The recommendation reached at the end of these restorative justice processes may be made as an order of the court.

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[218] Section 73 supra (n1).

[219] Restorative justice processes suggest to the child justice court what sentence to impose. Diversion options available under section 53 of the Child Justice Act embody restorative justice principles. Restorative justice sentences found under section 73 of the Child Justice Act can only be imposed after the child offender is convicted of the offence. Terblanche op cit note 217 at 37.

[220] Section 61 supra (n1).

[221] Terblanche op cit note 217 at 37.

[222] Section 62 supra (n1).

c) Fines or alternatives to fines[223]

A fine may be imposed as a sentence. The child justice court must inquire into the child's or child's family ability to pay the fine and if such an inability would lead to imprisonment.

Section 74(2) of the Child Justice Act offers alternatives to paying the fine or alternative imprisonment such as:

(i) Symbolic restitution to any person, group and charity.[224]
(ii) Actual compensation to any person, group and charity.[225]
(iii) If the offender is above the age of fifteen, when being sentenced, may render a service or benefit to any person, group and charity.[226]
(iv) Any other option the child justice court considers appropriate.[227]

d) Sentences of correctional supervision[228]

The child justice court may impose correctional supervision in terms of section 276 of the Criminal Procedure Act.[229] A period of correctional supervision may only be imposed for three years and a pre-sentence report must be arranged before the sentence of correctional supervision is imposed. A period of correctional supervision in terms of section 276 of the Criminal Procedure Act[230] and a period of correctional supervision in terms of section 75 of the Child Justice Act may be interpreted and applied in the same manner when imposing it on a child offender.[231]

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[223] Section 74 supra (n1).

[224] Terblanche op cit note 217 at 37.

[225] Ibid.

[226] Ibid.

[227] Ibid.

[228] Section 75 supra (n1).

[229] 51 of 1977.

[230] Ibid.

[231] The same method a court uses when interpreting and applying correctional supervision as a sentence in terms of Criminal Procedure Act 51 of 1977 may be used by a child justice court when interpreting and applying section 75 of the Child Justice Act 75 of 2008. Terblanche op cit note 217 at 37.

e) Sentence of compulsory residence in a child and youth care centre[232]

This sentence involves the detaining of the child offender in a less restrictive environment than imprisonment. This provision allows for the imposing of a sentence upon a child offender at a child and youth care centre with programs referred to in section 191(2)(j) of the Children's Act.[233] The period of which a child offender may remain at the child and youth care centre may not exceed five years or before the child offender reaches 21 years old – whichever is first.[234] The child justice court must apply the provisions found in section 69(3) and (4) of the Child Justice Act, before considering if admitting the child offender to a child and youth care centre is appropriate.[235] The centre at which the sentence is to be carried must be specified by the child justice court.

Section 76(3) of Child Justice Act allows the child justice court to impose a period of imprisonment upon completion of the sentence at the child and youth care centre. This is imposed after the most serious offences are committed. Before a decision to uphold the existing prison sentence, a progress report must be submitted to the child justice court concerned by the child and youth care centre. The child justice court will then assess if the offender must carry out the existing prison sentence.

f) Sentence of imprisonment[236]

The sentence of imprisonment will be discussed in detail in the section below.[237]

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[232] Section 76 supra (n1).

[233] 35 of 2005.

[234] Section 76 supra (n1).

[235] Section 69(3) refers to additional factors the child justice court may take into account together with the factors that the child justice court must take into account when considering if imprisonment is an appropriate sentence.

[236] Section 77 supra (n1).

[237] Harsher sentences imposed on child offenders such as imprisonment impose a limitation on the rights of children found in section 28 of the Constitution. See further T Mukwende 'Balancing restorative justice and juvenile offender rehabilitation' October 2014 *De Rebus* 33-35.

3.4. SECTIONS DEALING WITH AND RELATED TO IMPRISONMENT UNDER THE CHILD JUSTICE ACT 75 OF 2008

When determining the appropriate sentence for a child offender the child justice courts must impose a sentence under chapter 10 of the Child Justice Act.[238] Section 68 acts as a starting point for a presiding officer determining an appropriate sentence for a child offender. Sloth-Nielsen[239] is of the view that chapter 10 of the Child Justice Act is far more prescriptive (mandatory or compulsory) than the common law which governed sentencing of child offenders before the Child Justice Act.[240]

Section 69 of the Child Justice Act sets out objectives of sentencing and factors to be considered by a child justice court when determining an appropriate sentence to impose on a child offender.[241] The section 69(1) reads as follows:

(1) 'In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to-

(a) encourage the child to understand the implications of and be accountable for the harm caused;

(b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;

(c) promote the reintegration of the child into the family and community;

(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and

(e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.'

Section 69(4) deals with the factors that the child justice court must take into account when considering if imprisonment is an appropriate sentence, and it provides that:

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[238] Section 68 supra (n1).

[239] Sloth-Nielsen 46 op cit note at 8.

[240] Presiding officers of child justice courts must be more careful when considering imprisonment as a sentencing option for a child offender. See further Sloth-Nielsen op cit note 180 at 33.

[241] Karel states that 'when considering a sentence of direct imprisonment the court is obliged to consider both the general aims of sentencing as well as the specific factors in section 69(4) of the Act'. See further M Karels … et al *Child offenders in South African Criminal Justice: Concepts and Process* 100-104.

(4)'When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:

(a) The seriousness of the offence, with due regard to-

(i) the amount of harm done or risked through the offence; and

(ii) the culpability of the child in causing or risking the harm;

(b) the protection of the community;

(c) the severity of the impact of the offence on the victim;

(d) the previous failure of the child to respond to non-residential alternatives, if applicable; and

(e) the desirability of keeping the child out of prison.'

In terms of section 69(1) and (4) of the Child Justice Act, these are the factors that may aggravate the degree of the sentence imposed by the child justice court:

(i) Society's need to be protected from the child offender.[242]

(ii) Previous non-custodial sentences imposed on the child offender deemed to be ineffective.[243]

(iii) The impact of the offence on the victim.[244]

Terblanche[245] notes that the basic principles of sentencing a child offender are found in section 69(1) of the Child Justice Act. The factors found within section 69(4) of the Child Justice Act must be taken into account before imposing a sentence of imprisonment.[246] Terblanche[247] is of the view that this section provides additional guidelines explicitly dealing with the imposition of imprisonment of child offenders. When imposing a sentence of imprisonment, the child justice court must explain how it decided upon imposing imprisonment.[248] If alternative sentencing options were

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[242] SS Terblanche 'Aspects of sentencing child offenders in terms of the Child Justice Act 75 of 2008' (2013) 14(2) *South African Professional Society on the Abuse of Children Child Abuse Research: A South African Journal* 1-7.

[243] Ibid.

[244] Ibid.

[245] Ibid.

[246] C Lesley & J Van Niekerk '*A Practical Approach to the Child Justice Act*' (2016) 235-236.

[247] Terblanche op cit note 242 at 42.

[248] *S v S* (A505/15) [2016] ZAWHC 24.

exhausted or if these alternative sentencing options were not exhausted, the child justice court must give reasons as to why these alternative sentencing options were not appropriate.[249] The measure of last resort principle founded upon section 28(1)(g) of the Constitution and Article 37(b) of the United Nations Convention on the Rights of the Child, emphasises the importance of examining alternative sentencing options and reasons as to why these options were unsuitable.[250]

Section 71 of the Child Justice Act makes provision for a pre-sentence report to be completed by a probation officer.[251] A pre-sentence report is not required if the offence is minor or if the child offender can pay a fine.[252]

Section 76 of the Act stipulates that a child justice court may sentence a child offender to a child and youth care centre, for a period not exceeding five years or the date on which the child offender turns 21 years old, whichever date is the earliest.[253] If the offence fell under schedule 3, was committed by an adult which warranted a sentence exceeding ten years imprisonment and substantial and compelling circumstances existed, the child justice court could impose a sentence of imprisonment on the child offender upon completion of the sentence in a child and youth care centre.[254]

Section 77 of the Child Justice Act deals directly with the concept of imprisonment. This section states that the child justice court may only sentence a child offender to imprisonment who is fourteen years or older at the time of sentencing.[255] The

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[249] Ibid 42.

[250] Ibid.

[251] Terblanche op cit note 242 at 42.

[252] Ibid.

[253] It is submitted that the sentencing a child offender in terms of section 76 rather than section 77 is a positive reinforcement of the principle that imprisonment of a child should be used as a measure of last resort. V Noncembu 'Sentencing the erstwhile child: Imprisonment and committal to a child and youth care centre' (2017) 3 *SACJ* 299-315.

[254] Section 76(3) of the Child Justice Act 75 of 2008 provides for as follows:

'(3) (a) A child justice court that convicts a child of an offence- (i) referred to in Schedule 3; and (ii) which, if committed by an adult, would have justified a term of imprisonment exceeding ten years, may, if substantial and compelling reasons exist, in addition to a sentence in terms of subsection (1), sentence the child to a period of imprisonment which is to be served after completion of the period determined in accordance with subsection (2).'

[255] Section 77(1) (a) supra (n1).

presiding officer has discretion on whether to impose a sentence imprisonment.[256] The child justice court may sentence such a child offender to imprisonment only as a measure of last resort and for the shortest appropriate period of time.[257] Terblanche[258] submits that this principle can be referred to as a constitutional demand while other principles contained in this section and section 69(1) and (4) of the Child Justice Act serve as guidelines for child justice courts to give effect to this demand. A child offender may only be sentenced to a period of imprisonment if:

(i) he or she commits a schedule 3 offence;[259]

(ii) he or she commits a schedule 2 offence and there exists substantial and compelling reasons,[260] or

(iii) he or she commits a schedule 1 offence and such a child offender has a record of previous convictions and there exist substantial and compelling reasons for the imposition of imprisonment.[261]

'Substantial and compelling reasons' are not defined in section 77(3) of Child Justice Act.[262] This is similar to the phrase 'substantial and compelling circumstances' found in the Criminal Law Amendment Act.[263] Its unclear if these two phrases can be construed to have similar meanings.[264] Such a child offender can only be sentenced

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[256] In terms of section 5(b) of the Drugs and Drug trafficking Act 140 of 1992, a child that is allegedly found in dealing drugs must be sentenced to imprisonment. It is unclear if the presiding officer still has discretion to impose any other sentence besides imprisonment is this particular case. Lesley & Van Niekerk op cit note 246 at 42.

[257] Section 77(1) (b) supra (n1).

[258] Terblanche op cit note 242 at 42.

[259] Section 77(3) (a) supra (n1).

[260] If there exist substantial and compelling reasons to impose a sentence of imprisonment upon the child offender. Section 77(3) (b) supra (n1)

[261] Section 77(3) (c) supra note 1.

[262] Lesley & Van Niekerk op cit note 246 at 42.

[263] 105 of 1997.

[264] If the child justice courts were to interpret section 77(3) of the Child Justice Court 75 of 2008 in the same manner as the section that contains 'substantial and compelling circumstances' in Criminal Law Amendment Act 105 of 1997, then the considerations that appeared in *S v Malgas* 2001(1) SACR 469 (SCA) may be applied. However, the difference between the two sections must be noted as Child Justice Act refers to 'reasons' and the Criminal Law Amendment Act makes reference to 'circumstances'. 'Substantial and compelling reasons' in terms of the Child Justice Act must exist before the child justice court considers imprisonment as an appropriate sentence. The Criminal Law Amendment Act 105 of 1997 applies unless 'substantial and compelling circumstances' are present.

to a maximum period of 25 years.[265] A child justice court is allowed to impose a 25 year period of imprisonment on the child offender per charge.[266] This refers to a single offence and does not refer to the totality of offences the child offender is charged with.[267] Before determining the period of imprisonment, the child justice court must take into account the number of days the child offender has spent in detention at a prison or child and youth care centre while awaiting trial.[268] The child justice court, when imposing a sentence of imprisonment, must give effect to South Africa's international obligations by not imposing a sentence of life imprisonment or restrict the early release of the child offender serving a sentence of imprisonment.[269]

When the position of imprisonment would be deemed as a measure of last resort is at the discretion of the presiding officer.[270] The Child Justice Act does regulate the presiding officer's discretion.[271] In determining the appropriate sentence Terblanche states

> 'these guidelines could be summarised with a list of factors which the child justice court has to address in its sentencing judgment, and has to do explicitly:
>
> - The harm caused or risked by the offence.
> - The culpability or blameworthiness of the offender.
> - The impact of the offence on the victim.
> - Whether the child offender is so dangerous that society needs to be protected against him.
> - In the case of a schedule-2 offence, whether there are substantial and compelling reasons for the imposition of imprisonment, together with an exposition of these reasons.
> - In the case of a schedule-3 offence, the relevant previous convictions.

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[265] Section 77(4) supra (n1)

[266] Terblanche op cit note 242 at 42.

[267] Ibid.

[268] Section 77(5) supra (n1).

[269] Section 77(6) supra (n1).

[270] Terblanche op cit note 242 at 42.

[271] Ibid.

- The importance of imposing a sentence that will assist the child's reintegration into society.
- The importance of imposing a sentence which will restore the harm, or other imbalances caused by the offence.
- Imprisonment may only be imposed when it is inescapable, and in coming to this conclusion, if the court is to err, it must err on the side of a non-custodial sentence.'

In conclusion, a child will be diverted depending on the type of offence he or she committed. If a child over the age of twelve years is not diverted at the end of assessment by the prosecutor, at the preliminary inquiry or during the trial before the close of the prosecution's case, he or she will be tried for the offence committed and if convicted is subjected to be sentenced by a child justice court under chapter 10 of the Child Justice Act. The provisions of chapter 10 must be followed by the presiding officer when determining an appropriate sentence for a child offender under the Child Justice Act. A pre-sentence report must be drawn up by a probation officer if the offence committed is serious or if the presiding officer decides to sentence the child offender to imprisonment.

It is imperative – as illustrated by section 28(1) (g) of the Constitution – that a sentence of imprisonment cannot be imposed lightly. Only after the provisions of section 69(1) and (4), as well as section 77 have carefully been considered and applied to the circumstances before the presiding officer can he or she decide to impose a sentence of imprisonment. Many prominent academics within the field of sentencing emphasise the importance and effective application of section 69 and 77 before sentencing a child offender to imprisonment. The provisions relating to and dealing with imprisonment as a sentencing option under the Child Justice Act must be carefully considered and effectively applied before it is deemed to be an appropriate sentence. While there is no closed list of circumstances where imprisonment will be deemed as an appropriate sentencing option, section 69 and 77 of the Child Justice Act are an attempt by the Legislature to guide the discretion of presiding officers to determine when a sentence of imprisonment will be appropriate. Section 69 and 77 help to fulfil the demand placed upon child justice courts that imprisonment must be imposed as a measure of last resort and for the shortest appropriate period of the time.

Before the Child Justice Act, the concern of role players within the criminal justice system was to decrease the number of children being imprisoned. High levels of children being imprisoned were due to the unfettered discretion presiding officers had when sentencing.

Sentences of imprisonment were imposed for minor offences. A year before the promulgation of the Child Justice Act, between 9 000 to 13 000 children were arrested. Soon after the arrest at least 43 percent of these children were released. This illustrated a positive effect of the future diversion process contained in the Child Justice Act. After the implementation of the Child Justice Act – the introduction of a framework where diversion is regulated – role players became concerned with having children being diverted from the criminal justice system. Since the implementation of Child Justice Act, the Correctional Services Department has reported an 82 per cent decrease in the number of children being sentenced to imprisonment. It can be inferred that one of the main aims of the Child Justice Act has been achieved as the number of children in prison and within the child justice system has decreased. This means the provisions on diversion under the Child Justice Act has been somewhat successfully interpreted and applied.

There are many sentencing options available under the Child Justice Act including imprisonment. Imprisonment is only imposed as a sentence where the child offender has committed the most serious offences or where non-custodial sentences have failed to prevent the child offender from reoffending. Given the severity of this type of sentence, the application of the provisions of imprisonment under the Child Justice Act is called into question. The provisions should be effectively interpreted and applied in the same manner that the provisions of diversion under the Child Justice Act are applied. The next chapter will examine if the objectives and factors found within section 69(1) and (4) of the Child Justice Act are applied effectively by presiding officers in child justice courts.

CHAPTER 4

AN ANALYSIS OF WHETHER THE CHILD JUSTICE COURTS ARE EFFECTIVELY APPLYING THE CHILD JUSTICE ACT'S PROVISIONS PERTAINING TO THE IMPRISONMENT OF CHILD OFFENDERS

4.1. INTRODUCTION

This chapter will explore the question of whether child justice courts are effectively applying the provisions that relate to imprisonment of child offenders under the Child Justice Act. Court judgments where the sentencing of child offenders to imprisonment was an issue will be examined to answer the above question.

4.2. LOCATING THE POSITION OF IMPRISONMENT WITHIN THE CHILD JUSTICE ACT

The analysis of whether section 69(1) and (4) of the Child Justice Act is applied effectively by child justice courts, is the instrument to locate the position of imprisonment in practice amidst the restorative justice framework. This provides for unique guidelines which the presiding officers must use when deciding if imprisonment is an appropriate sentence. The objectives and factors as contained section 69(1) and (4) of the Child Justice Act are significant when imposing a sentence of imprisonment upon a child offender. The only way to conclude if the objectives and factors as contained in section 69(1) and (4) of the Child Justice Act are effectively applied by child justice courts is upon the examination of actual cases. There is one difficulty that arises, which is that most cases involving child offenders take place in magistrate's court which go unreported.[272] The only cases that are examined in this study were those that take place in the higher courts. Such cases are limited in number.

[272]Terblanche op cit note 217 at 37.

4.3. SIGNIFICANT JUDGMENTS

The first set of cases that will be considered came in the form of reviews and appeals. These cases went on review and appeal because of the lack of effective or consistent enforcement of the objectives and factors in section 69(1) and (4) of the Child Justice Act.[273] The existence of these cases illustrates that the effective application of these objectives and factors is still a challenge, even though child justice courts have had ten years since the promulgation of the Child Justice Act to ensure these provisions are effectively and consistently applied.[274]

4.3.1. S v Snyders[275]

This case dealt with a review. The three offenders committed an offence of theft to the value of R6000. At the time of the commission of the offence, the three offenders were aged as follows:

1. Accused 1 was 18 years old
2. Accused 2 was 17 years old
3. Accused 3 was 20 years old

The offender that is of importance in this study is accused 2, who was under the age of 18 years at the time of the commission of the offence and therefore attracted the application of the Child Justice Act. At the trial, the correctional and probation officers' report stated that all three offenders were suitable candidates for correctional supervision. A social worker was called to offer an opinion as to accused 2's suitability for correctional supervision during the sentencing phase. The social worker was of the opinion that a child and youth care center may not accept the accused 2 as a result of his age. She further implied that imprisonment would be a more suitable option to be imposed by the presiding officer.[276] The opinion offered by

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[273] A court of appeal and review is generally very wary to interfere with a trial court's findings. A court of appeal and review will only interpose on a trial court's decision if it is of the opinion that the trial court has greatly misdirected itself. A Skelton 'The Mpofu case: Sentencing of child offenders in serious cases' (2013) 15(1) *Article 40 The Dynamics of Youth Justice & The Convention on the Rights of the Child in South Africa* 1-5.

[274] A number of stakeholders within the criminal justice system believe that presiding officers of child justice courts work differently, leading to different outcomes of cases involving child offenders. Schoeman & Thobane op cit note 171 at 31.

[275] *S v Snyders and others* (SBS26/11) [2011] ZAWCHC 387, 2012 (2) SACR 160 (WCC).

[276] At para 13.

the social worker was in direct contrast to the reports compiled by the correctional and probation officers. The presiding officer had already made up his mind on the imposition of imprisonment upon accused 2.[277]

The prosecutor, social worker and presiding officer made no reference to any provision in the Child Justice Act during the sentencing phase in the trial court. The presiding officer was under the impression that accused 2 had five previous convictions. However, no inquiry was made as to the veracity of these convictions, as the SAPS 69 records was vague in itself.[278] Upon further investigation, the presiding officer hearing the review noted that the accused 2 had only two previous convictions. The presiding officer of the trial court had misdirected him or herself, as this was one of the reasons the sentence of three years imprisonment was imposed upon accused 2. The court of review stated that the presiding officer of the trial court 'over emphasized the elements of retribution based on his perceptions of the "regsgevoel" (sense of justice) of the Stilbaai community, at the expense of the other equally important objectives of punishment such as rehabilitation, and importantly restorative justice'.[279] The presiding officer in the court hearing the review amended the sentence to eighteen months correctional supervision.

While the trial court made no reference to the provisions of the Child Justice Act when sentencing accused 2, the court in which the review was heard made note of significant principles with regards to sentencing a child offender and the Child Justice Act. The following must be noted:

(i) 'The intention of the legislature with this legislation is clearly to give effect, form and content to the constitutionally guaranteed rights of children as set out in section 28 of the Constitution read with section 35 of the Constitution, in the context of the criminal justice system.'[280]

[277] At para 13.

[278] At para 15.

[279] *Snyders* supra at para 21.

[280] At para 24.

(ii) 'Section 69 sets out the objectives of sentencing in terms of this Act, as well as the factors which must be taken into account by the sentencing court in deciding on the appropriate sentence, and before imposing a sentence.'[281]

(iii) 'Subsection 4 of section 69 prescribes, in peremptory terms the additional factors that must be considered in addition to the above stated factors,[282] by that court when it is considering direct imprisonment in respect of such an offender.'[283]

(iv) 'The legislature has therefore in unequivocal terms incorporated those principles, guidelines and considerations as developed by our highest courts in the case law referred to above, in this Act, and has elevated those, in the context of juvenile justice system, to having legal force and effect. Non-compliance thereof will henceforth not only be irregular, but also unlawful in violation of the principle of legality.'[284]

The presiding officer of the court hearing the review made the above points in response to the trial court's disregard of the provisions of the Child Justice Act when sentencing accused 2. These points outline the importance of effectively applying section 69(1) and (4) of the Child Justice Act before the imposing a sentence of imprisonment upon a child offender.

4.3.2. S v CS[285]

This was an appeal against the sentence imposed by the trial court. In this case, the child offender shot and killed the deceased who was driving a motorbike down the road which the offender was walking on at the time of the commission of the offence. The offender was sentenced to ten years imprisonment on the conviction of murder, three years imprisonment for the conviction for the possession of a firearm and one year imprisonment for the conviction for possession of ammunition. The offender was sixteen years old at the time of the commission of the offence. The counsel for the appellant stated that the trial court failed to comply with section 69(1) and (4) of the Child Justice Act. The court hearing the appeal made stated the following:

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[281] At para 25.

[282] Section 69(1) supra (n1).

[283] *Snyders* supra at para 26.

[284] At para 30.

[285] *S v CS* 2016 (1) SACR 584 (WCC).

(i) 'When a court sentences a child, the objectives of sentencing and factors that it must consider are set out at section 69 of the Child Justice Act.'[286]

(ii) 'It goes without saying that Judicial Officers must apply the provisions of the Child Justice Act relating to sentencing. They cannot proceed as if the Act does not exist. One of the purposes of the Act as set out in the preamble, is to establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning the constitution.'[287]

(iii) 'In applying to the Child Justice Act a court must also adhere to ordinary considerations relating to sentencing, such as the triad[288] and the aims of punishment (deterrence, rehabilitation, prevention and retribution). A Child Justice Court should also consider the objectives[289] namely, it should firstly encourage the child to understand the implications of, and be accountable for the harm caused. Secondly, it should promote an individualized response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society. Thirdly, it should promote the reintegration of the child into the family and community. Fourthly, it should ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration. Lastly, the Court should use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.'[290] The trial court when sentencing a child offender must consider and apply each of these objectives as contained in section 69(1) of the Child Justice Act.

(iv) The trial court must also take into account the factors contained in section 69(4) of the Child Justice Act in addition to the objectives referred to above.

Once these objectives and factors were considered and applied to the circumstances before the court of appeal, the court came to the conclusion that the offender failed to take responsibility for his actions and other sentencing options imposed for previous convictions failed to have any effect on the offender. The court of appeal amended the sentence to nine years and 24 days imprisonment for all convictions.

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[286] *CS* supra note 285 at para 12.

[287] *CS* supra note 285 at para 15.

[288] See *S v Zinn* 1969 (2) SA 537 (A) at 540 G where the court held that the triad consists of "the crime, the offender and the interests of society".

[289] Section 69(1) supra note 1.

[290] *CS* supra note 285 at para 18.

4.3.3. Bruintjies v S[291]

The child offender in this set of circumstances was sixteen years old at the time of the commission of the offence. He was in possession of a firearm, and he shot and killed the deceased, and attempted to kill other people. Three people placed the offender at the scene of the crime. The presiding officer in the trial court sentenced the offender to:

1. Ten years imprisonment for the conviction of murder.
2. Three years imprisonment for the two counts of attempted murder.
3. Ten years imprisonment for the conviction of unlawful possession of a firearm.
4. Three years imprisonment for the conviction of unlawful possession of ammunition.

The sentence for the conviction of murder was ordered to run concurrently with the other sentences. This amounted to an effective fourteen years imprisonment. An appeal against the sentence was lodged by counsel for the offender. The prosecutor also conceded that such a sentence was too harsh for the offender.

The court of appeal stated that a child justice court must take into account the factors referred to in section 69(4) of the Child Justice Act, while giving effect to section 28(1)(g) of the Constitution in conjunction with section 12 and 35 of the Constitution. The presiding officer of the appeal court set the sentence aside and imposed a sentence of 13 years imprisonment. The court of appeal noted the seriousness of the offence and section 69(1)(e) of the Child Justice Act in deciding that sentence.

The presiding officers in these cases had due regard to the Child Justice Act when they considered whether the sentence of imprisonment was appropriate for the child offenders. The findings of the courts of review or appeal indicate the importance of these provisions.

4.3.4. S v Mabope[292]

The child offender in this set of circumstances was charged with multiple offences. The child justice court made reference to section 77 of the Child Justice Act during

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[291] *Bruintjies v S* [2017} JOL 38021 (WCC).

[292] *S v Mabope* (CC40/2017) [2018] ZAECPHC.

the sentencing phase, but failed to mention section 69(1) and (4) of the Child Justice Act. The child justice court took note only of a portion of the Act pertaining to imprisonment but failed to take note of other sections of the Act that deals with imprisonment.

4.3.5. S v Heugh[293]

This case dealt with the sentencing of two offenders, the first accused was an adult and the second accused who was a child. The child offender was convicted of rape, kidnapping and theft. Whilst the child justice court did not explicitly mention section 69(1) and (4) of the Child Justice Act, it did make reference to the factors and objectives found within the relevant section. The child justice court stated as follows;

> 'in determining an appropriate sentence i.e. whether direct imprisonment ought to be imposed and the length of such sentence, a court will have regard to the nature of the crime and its effect; the circumstances of the accused and factors relevant to his moral blameworthiness; and to the interests of the society. It will then seek to balance these interests and to impose a sentence which, in its judgment, meets the purpose of rehabilitating the accused while serving to deter future transgressions.'[294]

These principles were applied effectively to impose a sentence of twelve years imprisonment for the conviction of rape, seven years imprisonment for the conviction of robbery with aggravated circumstances and three years imprisonment on the conviction of kidnapping. The sentence for the convictions of robbery with aggravating circumstances and kidnapping to run concurrently with sentence for the conviction of rape. The child justice court was of the view that seriousness of the offences merited the sentence of imprisonment. The child justice court emphasised the importance of the rehabilitative program for the offender to be implemented at the start of the sentence. The child justice court decided that imprisonment was the appropriate sentence after careful consideration of the facts of the case, and the provisions which pertain to imprisonment under the Child Justice Act. Imprisonment was imposed and the child offender was required to complete a rehabilitation program.

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[293] *S v Heugh and Another* (CC17/2018) [2019].

[294] *Heugh* supra at para 7.

The last two cases discussed are appeals in terms of sentences imposed upon a child offender prior to the Child Justice Act. These cases have been heard by the Supreme Court of Appeal and the Constitutional Court respectively. Each court has taken notice of the provisions governing sentencing of child offenders in the Child Justice Act and the significance of it. Despite the occurrence of these sentences being passed prior to the promulgation of the Child Justice Act, these courts have attempted to hear the appeals as if it were sitting as courts governed by the principles and legislation pertaining to child justice as it were when the sentences were passed. The courts have indirectly mentioned the provisions that are codified in section 69(1) and (4) of the Child Justice Act, signifying the importance of these provisions by superior courts.

4.3.6. S v BF[295]

This case dealt with a sentenced passed by the Regional Magistrates Court on 13 December 2000. The Regional Magistrates Court imposed fifteen years imprisonment for the conviction of robbery with aggravating circumstances and ten years imprisonment on the conviction of rape. This amounted to an effective 25 imprisonment. The Regional Magistrates Court sentenced the child offender in terms of section 51 of Criminal Law Amendment Act.[296] The Regional Magistrates Court ignored the age of the offender at the time of the commission of the offence. The child offender was fourteen years and ten months. If an offender was under the age of sixteen years at the time of the commission of the offence, section 51(6) of the Criminal Law Amendment Act[297] would apply.

The Supreme Court of Appeal overturned the sentences and substituted for the conviction of robbery with aggravated circumstances a ten year imprisonment sentence and on the conviction of rape a twelve year imprisonment sentence. Both sentenced were to run concurrently, which meant an effective period of twelve years imprisonment, of which to antedated from 13 December 2000.

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[295] *S v BF* 2012 (1) SACR 298 (SCA).

[296] Criminal Law Amendment Act 105 of 1997.

[297] Ibid.

The issue before the Supreme Court of Appeal was that the trial court misdirected itself as to the application of section 51 of Criminal Law Amendment Act[298] and the cumulative effect of the two sentences. The court was of the view that the process of sentencing involves a balancing of the seriousness of the offence, the interests of society, the personal circumstances of the offender while bearing in mind the interests of the victim. The sentencing process becomes trickier for the presiding officer if the offender is a child. While the sentencing of a child offender is quite difficult, such a process becomes even more onerous when the child offender has committed a serious offence demanding of harsh punishment. Whilst a serious offence committed calls for a deterrent and retributive approach to sentencing, the offender's youthfulness is also a weighty factor, such circumstances call for a balanced approach. Deterrence and retribution are one of the aims in the sentencing of serious offences but sentencing a child offender requires more emphasis on the element of rehabilitation.

The seriousness of the offence, the interests of the community and the personal circumstances of the offender cannot exist independently during the sentencing process, section 28(1)(g) of the Constitution must be taken into account. With the presence of the word 'may' imprisonment may be imposed upon a child offender if the circumstances permit. Effect must be given to international law, individualised sentencing and the reintegration of the child at the beginning of sentencing are all important factors.

The Supreme Court of Appeal stated that the 'trial court over emphasized the seriousness of the offence at the expense of youthfulness'.[299]

While the approach of the Supreme Court of Appeal is praised as it inquired diligently and with a balanced mind as to the sentence of the offender while providing sound reasons for the conclusions reached. However, it remained silent on the provisions of the Child Justice Act which codified the principles it deemed important in the process of sentencing a child offender.

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[298] Ibid 55.

[299] *BF* supra at para 13.

4.3.7. Mpofu v Minister for Justice and Constitutional Development[300]

This case dealt with an application for leave to appeal a sentence that was imposed before the commencement of the Child Justice Act, the Constitutional Court was of the view that the provisions of Child Justice Act was significant. The provisions of the Child Justice Act could be used as a guideline in deciding the appeal.

4.4. EVALUATION OF SIGNIFICANT JUDGEMENTS

In *S v Snyders*[301] the presiding officer and social worker had already decided upon a sentence of imprisonment for the child offender in direct contrast to the correctional and probation officers' reports. The presiding officer of the trial court provided no justification as to how the sentence of imprisonment was decided upon. Further, no reference was made to the provisions of the Child Justice Act. The court of review noted the importance of the provisions in section 69(1) and (4) of the Child Justice Act. Non-compliance of these provisions would be irregular and in violation of the principle of legality. The sentence of the trial court was amended accordingly.

The judgment in *S v CS*[302]noted that the trial court failed to comply with provisions set out in section 69(1) and (4) of the Child Justice Act. The appeal court emphasised that sentencing courts must take section 69(1) and (4) into account when sentencing a child offender. The sentencing court cannot proceed as if the Act does not exist. The appeal court effectively applied the provisions of section 69(1) and (4) of the Child Justice Act to the circumstances before it. The appeal court amended the sentence in line with the provisions of the Child Justice Act.

The prosecutor in *Bruintjies v S*[303] conceded that a fourteen year sentence of imprisonment for a child offender who was sixteen years old at the time of the commission of the offence was too harsh. The appeal court stated that a sentencing court must take into account the factors of section 69(4) of the Child Justice Act together with section 28(1)(g) of the Constitution.

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[300] *Mpofu v Minister for Justice and Constitutional Development* CCT 124/11 [2013] ZACC 15.

[301] *Snyders* supra (n275).

[302] *CS* supra note 285.

[303] *Bruintjies* supra (n291).

The trial court in *S v Mabope*[304] mentioned section 77 of the Child Justice Act but did not mention section 69 of the Act.

In *S v Heugh*[305] the trial court did not explicitly mention section 69(1) and (4) of the Child Justice Act but made reference to the principles contained in section 69(1) and (4) of the Act and applied these principles accordingly.

The provisions of section 69(1) and (4) of the Child Justice Act and its effective application by child justice courts represent imprisonment's place within the Act's restorative justice framework. If section 69(1) and (4) of the Child Justice Act are applied effectively, this justifies the place of imprisonment within the restorative justice framework. It can be seen from the analysis of the above cases that trial courts have experienced challenges in effectively applying the provisions of section 69(1) and (4) of the Act. However, the appeal courts and courts of review have noted how important these provisions are and have effectively applied these provisions to arrive at a just conclusion. Effective application of section 69(1) and (4) of the Child Justice Act by the appeal courts and courts of review reflect the position of imprisonment within a restorative justice environment.

The cases discussed above illustrate that section 69(1) and (4) of the Child Justice Act are not always effectively and consistently applied by trial courts.[306] There may be other cases in which child justice courts have not applied these provisions as such cases continue to remain unreported, and one may never gain knowledge of this. The sentence of imprisonment of child offenders is a serious topic, one which requires an attentive mind as to the provisions governing it. If there is a failure on the part of the presiding officer concerned to have such a mind, this can lead to a failure of the constitutional imperative of section 28 and the enforcement thereof.

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[304] *Mabope* supra note 292.

[305] *Heugh* supra (n293).

[306] Noncembu states that "whilst the Child Justice Act provisions and the objectives reflected therein are good in paper and in principle, unless there is a clear political will and serious and urgent interventions are made, it will remain a paper document which has all the good intentions, but fails to promote and to protect the best interests of the young offenders it is intended to serve." Noncemba op cit note 253 at 43.

CHAPTER 5

OVERVIEW AND CONCLUSION

Child justice in South Africa may have been influenced by pre-colonial practices and customary law. In African customary law if a child committed an offence, the offence was dealt with by an informal court, overseen by a traditional leader. After the colonization of South Africa, Roman-Dutch and English law replaced customary law practices. Sentencing options and practices became mostly retributive in nature. The first reform school was created in 1872. These offered child offenders an opportunity to be rehabilitated and educated. This was seen as reformist in manner as a child offender could be sentenced to a reform school instead of being imprisoned. However, this did not guarantee that imprisonment of child offenders would cease to exist.

Legislation was created in the early 1900s, which introduced amendments to the South African child justice system. These amendments included the raising of the minimum age of criminal capacity, abolishment of the death penalty for child offenders and the prohibition of imprisonment for child offenders under sixteen years.

It is submitted that the majority of the child offenders imprisoned during the 1970s and 1980s was a result of committing ‘political offences’. By the end of the 1980s, child offenders that were imprisoned for political offences decreased, while a large number of child offenders that were imprisoned were for non-political offences.

In 1992, the twelve year old Neville Snyman was killed while being detained in prison. NGO’s initiated a movement that called for change on how the child justice system managed children who were detained or imprisoned. The government created and implemented various programs and legislative amendments in the hope of decreasing the number of children in detention. Most of the programs and legislative amendments failed to achieve the long term goal government was hoping for. However, two developments proved fruitful for the government during this period, the adoption of the Constitution and the South African Law Commission’s investigation into juvenile justice. These two developments led to the creation of the Child Justice Bill, which incorporated provisions of section 28 of the Constitution. The Bill would be delayed for ten years until it became the Child Justice Act.

During this ten year period, the provisions of section 28 of the Constitution were reflected in a number of court judgments. Despite not having the child justice system regulated by single piece of legislation, the courts during this period interpreted and applied section 28 of Constitution in an overall fair and just manner. These court judgments are now used to help interpret provisions of the Child Justice Act. Many of the principles found in these court judgments are reflected in the Child Justice Act. This emphasizes that the importance of these provisions have remained the same over the years.

The child justice regime in South Africa is founded on the welfare model, the justice model and have aspects of restorative justice incorporated. The welfare model believes that a child cannot be held responsible for the offence committed, as the child is seen as immature and vulnerable. The welfare model believes that the sentence imposed should help the child instead of punishing him or her. The welfare model emphasizes the child's interests over punishment of the offence and de-emphasizes the child's need for a fair and just trial.

The justice model takes into account that the offender is a child and urges the child to take responsibility for the harm caused through the offence committed. The justice model emphasizes the importance of the rights of the child. The sentence imposed upon the child offender must be in proportion to the offence committed. The justice model is concerned with interests of society and believed that if the interests of society permit the imprisonment of the child despite the lack of capacity, it would view the interests of society more important.

Restorative justice is centered on the concept that the individuals involved and affected by the offence are encouraged to participate in the process whereby what is lost by the offence is restored.

The Child Justice Act has incorporated the best interests of the child being of paramount importance (welfare model), the interests of society (justice model) and restorative justice sentencing options and diversion. This has created a unique child justice regime.

The provisions of section 28 of the Constitution is founded upon the articles in the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child. The Child Justice Act can be seen as the instrument

in which these conventions are enforced in South African law. The following articles from United Nations Convention on the Rights of the Child have influenced the Act:

(i) Article 3 which states that the child's best interests are a primary consideration;
(ii) Article 37 provides that detention of a child should be as a measure of last resort and for the shortest possible period; and
(iii) Article 40 which incorporates the need for a restorative justice approach in the child justice process and the reintegration of the child.

The following articles found in the African Charter of the Rights and Welfare of the Child has helped to shape the Act:

(i) Article 1 which requires signatory states to create domestic law in an effort to enforce the provisions of the Charter;
(ii) Article 4 requires that the child's interests be the primary consideration in every decision affecting him or her; and
(iii) Article 17 which regulates the administration of justice of child offenders.

Both the Convention and the Charter have been influential in the provisions of the Child Justice Act. However, it can be argued that the Convention has had more of a significant influence on the Act.

The promulgation of the Child Justice Act is the cumulative result of the United Nations Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the welfare model, the justice model, restorative justice approach and section 28 of the Constitution. This has provided for a unique child justice system. Section 28 of the Constitution, the Convention and the Charter must be interpreted and applied by a presiding officer when deciding the appropriate sentence for the child offender.

The Child Justice Act must be looked as a whole when sentencing a child offender. There are certain provisions of the Act that have a direct influence on the sentencing process, such as:

(i) The age of the child;
(ii) The type of the offence committed;
(iii) The possibility of the child being diverted and at which stage of the child justice process will the child be diverted; and

(iv) The types of sentences available to the presiding officers.

A presiding officer may sentence a child to the following:

(i) Community-based sentences;
(ii) Restorative justice sentences;
(iii) Fines or alternative to fines;
(iv) Sentences to a compulsory residence to a child and youth care centre; and
(v) A sentence of the imprisonment.

Since the promulgation of the Child Justice Act, the South African child justice system has seen an increase in the number of children being diverted. Role players within the child justice system have adhered strictly to the provisions of diversion within the Child Justice Act. A few presiding officers sentencing child offenders to imprisonment have not followed the same strict adherence to the provisions regulating imprisonment.

Prior to the Child Justice Act, South Africa has never had a single piece of legislation to regulate its child justice system. South Africa, a nation tired of reading headlines where children have died or were abused whilst in detention, advocated for a new and separate child justice system to deal with children in conflict with the law. Although a tragic thought, this posed as a learning curve for the Legislature and sent it into a deep dive into theories of criminal justice, international and regional instruments and how such information could be helped to mold an ideal piece of legislation that regulates a system whereby children in conflict with the law can be processed in. The Child Justice Act was the final product. No piece of legislation can be perfect and the effective and consistent application of that piece of legislation proves to be even more difficult.

Its been ten years since the Child Justice Act was promulgated, this study has examined court judgments where imprisonment of child offenders were an issue. In terms of the examination of these court judgments, it can be noted that trial courts have experienced challenges in effectively applying the provisions of section 69(1) and (4) of the Child Justice Act. These provisions represent the place of imprisonment within the Act's restorative justice framework. Effective and consistent application of section 69(1) and (4) justify the place of imprisonment within the restorative justice environment. The challenges experienced by a trial court can be

overcome, if the trial court can align itself with the standard at which the appeal courts and the courts of review have set when applying section 69(1) and (4) in practice. The effective application of these provisions by the appeal courts and courts of review can be seen as how the Legislature envisaged these provisions to be applied in practice. Effective and consistent application of legislation has always posed a challenge to courts. However, the appeal courts and courts of review have no problem in effectively applying the provisions pertaining to imprisonment under the Child Justice Act. Ten years have passed since the promulgation of the Child Justice Act, with the standard set by appeal courts and courts of review in the effective application of the provisions pertaining to imprisonment under the Act. This justifies the position of imprisonment within the Act's restorative justice framework.

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UNIVERSITY OF
KWAZULU-NATAL
INYUVESI
YAKWAZULU-NATALI

Miss Rochelle Celene Mohan (214553497)
School Of Law
Pietermaritzburg

Dear Miss Rochelle Celene Mohan,

Protocol reference number: 00006710
Project title: Ten years into the Child Justice Act 75 of 2008 - Locating the position of imprisonment within the restorative justice framework.

Exemption from Ethics Review

In response to your application received on 21 September 2021, your school has indicated that the protocol has been granted **EXEMPTION FROM ETHICS REVIEW.**

Any alteration/s to the exempted research protocol, e.g., Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through an amendment/modification prior to its implementation. The original exemption number must be cited.

For any changes that could result in potential risk, an ethics application including the proposed amendments must be submitted to the relevant UKZN Research Ethics Committee. The original exemption number must be cited.

In case you have further queries, please quote the above reference number.

PLEASE NOTE:
Research data should be securely stored in the discipline/department for a period of 5 years.

I take this opportunity of wishing you everything of the best with your study.

Yours sincerely,

[redacted]

Mr Simphiwe Peaceful Phungula
Academic Leader Research
School Of Law