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The *South African Journal of Criminal Justice* is an accredited, specialist legal journal publishing articles, comments, surveys of recent cases and book reviews in English in the field of criminal justice, with a particular emphasis on southern Africa. The focus of the journal is on criminal law, criminal procedure, evidence, international criminal law and criminology. All articles and comments submitted for publication are reviewed by independent assessors to ensure that the Journal publishes only contributions of the highest quality, based upon original research. International scholars in criminal justice are represented on the editorial panel. The Journal, which appears three times a year, is indexed in South African Periodicals and the International Bibliography of Book Reviews of Scholarly Literature and abstracts from the Journal appear in Criminal Justice Abstracts.

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S v De Blom 1977 (3) SA 513 (A).

S v Makwanyane 1995 (2) SACR 1 (CC).

There is no need to refer to 'and Others' or 'and Another'.

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K Askin 'Sexual violence in decisions and indictments of the Yugoslav and Rwandan tribunals: Current status' (1999) 93 *AJIL* 97 at 98n8.

(iii) *Books*

CR Snyman *Criminal Law* 5ed (1990) 555.

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Criminal Procedure Act 51 of 1977.

(**Note:** do not use only the number and year (Act 51 of 1977))

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(v) *Theses*
A Dhlamini *Family Violence in South African Criminal Law* LLM (Natal) (1960) 30.

(vi) *Law Commission*
South African Law Commission Discussion Paper 102 (Project 107) 'Sexual Offences: Process and Procedure' (2002) at para 2.3.4.

(vii) *Internet references/citations*
A Dworkin 'The United States and the International Criminal Court: A briefing' *Crimes of War Project*, 15 May 2002, available at *http://www.crimesofwar.org/onnews/news-us-icc.html*, accessed on 27 February 2003. (**Note:** Citation from the official, hard copy compilation is preferred. Where necessary, internet citations are acceptable but must be meticulously checked for accuracy and must be complete. The actual website is to be written in italics without brackets and the date on which the site was accessed must be reflected. If no page references are available, then the author must locate the citation by means of paragraph and/or section headings.)

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S v De Blom supra (n000) at 123B-C.
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(ii) *Journal articles*
Burchell op cit (n000) 123.

(iii) *Books*
Snyman op cit (n000) 234.
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(h) The style of the Journal avoids the use of capital letters. Thus, as a general rule, write 'a court', 'the judge', 'the minister', 'the government', 'the state'. Capitals should be used where referring to individual institutions with given names: 'the Appellate Division', 'the Natal Provincial Division', 'the United Nations', etc. Examples:

1 CR Snyman *Criminal Law* 5ed (1990) 555.
2 Ibid.
3 JM Burchell 'Wilful blindness and the criminal law' (1985) 9 *SACJ* 261.
4 *S v Makwanyane* 1995 (2) SACR 1 (CC).
5 *S v Makwanyane* supra (n4) at 478I-J.
6 Snyman op cit (n1) 179.
7 Burchell op cit (n3) 262.
8 Section 2 of the Criminal Procedure Act 51 of 1977. Cf s 29.
9 A Dhlamini *Family Violence in South African Criminal Law* LLM (Natal) (1960) 30.
10. Dhlamini op cit (n9) 78.

Child justice

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1 Introduction

The review period covered in this contribution is mid-2016 until the end of April 2018 (the preceding update was M Reyneke 'Child Justice: recent cases' (2016) 29 *SACJ* 376). April 2018 marks 10 years into the implementation of the Child Justice Act 75 of 2008. The Department of Justice and Constitutional Development has recently (in early 2018) appointed a service provider to review the implementation of the Act, the findings of which will hopefully illuminate the successes and failures related to implementation. Current information on the implementation of the Act is limited to Departmental annual reports, the last of which was tabled in 2016/7.

Although the period under review is not an extensive one, it must be noted that cases in which higher courts have pronounced on aspects of the Child Justice Act remain, in the view of the author, rather few. In some high courts, there is no case law during the period under consideration. Whilst this phenomenon could be the product of seamless implementation of the Act's provisions, it is rather probably related to the dwindling numbers of child justice cases entering the criminal justice system in the first place (see J Sloth-Nielsen 'Child Justice' in CJ Boezaart (ed) *Child Law in South Africa* 2ed (2017) 725), coupled with the widespread use of diversion which then obviates further contact with the criminal justice system. According to the annual reports filed by the Department of Justice and other stakeholders on the implementation of the Child Justice Act, the numbers of charges against children aged below 18 years dropped from 75 000 in 2011/2012 to 45 000 in 2015/6 (the South African Police Services do not keep data on the number of arrests, only on the number of charges). The declining numbers permeate all aspects of the child justice system: there are fewer children in diversion programmes, fewer assessments and preliminary inquiries, and fewer children's trials being held. The question as to why the numbers of children in contact with the law has shrunk so markedly is one issue that the study team exploring the implementation of the Act will attempt to answer.

2 Issues related to age and to criminal capacity

A few cases concerned errors in the age of accused which came to light during the course of the prosecution. In *S v N* (CA&R 15/2018) ZAECGHC 3 (16 June 2018), a special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 was brought on the basis that the accused had informed his legal representative as the trial commenced that he was a minor. School records confirmed that he was 17 years old, rather than 19 years old as recorded on the charge sheet. The review court set aside the proceedings that had taken place thus far in the East London District Court, in order for proceedings to recommence under the Child Justice Act.

In *S v N* (14/2016) [2016] ZANCHC 73 (28 October 2016), the docket recorded the age of an accused arrested for shoplifting six pairs of trousers as 18 years. He elected not to apply for bail and remained in police custody until he eventually tendered a guilty plea. In addressing the court on sentence, his Legal Aid attorney then submitted, as a mitigating factor, that the accused was only 17 years old. This was followed by several postponements to verify the date of birth of the accused, during which period the accused remained incarcerated, but at least then at a place of safety (now termed child and youth care centres, in accordance with the Children's Act 38 of 2005). When his correct age was verified, the magistrate stopped proceedings and remitted the case for the conviction to be set aside. The magistrate expressed the view that prejudice had occurred insofar that the accused had not been diverted due to the oversight as to his true age on the part of his attorney. The court raised it as a cause for concern that the attorney seemed not to have realised the implications of the accused's age, particularly in the context of the protection afforded child offenders in terms of the Child Justice Act (at para [6]):

> 'Even if the attorney had only after conviction become aware of the correct age of the accused, one would have expected him to have immediately addressed the Magistrate on the issue of prejudice and on the possible need to submit the case for review.'

Due to the relatively low value of the goods, the fact that they had been recovered upon his apprehension, and the fact that the accused was a first offender, the review court opined that the conclusion was inescapable that potential prejudice had been suffered due to the error in age, and non-consideration of diversion. However, the court said that in the circumstances it was unnecessary to consider whether the fact that an error regarding the age of an accused had resulted in diversion not being considered, would always lead to a finding of prejudice and to the setting aside of such a conviction (comparing the

case to *S v Gani NO* 2012 (2) SACR 468 (GSJ), which it did not regard as being comparable to this case).

A further comment is apposite here: diversion could have been considered even though the accused's age was recorded as 18 years, which would have eliminated the need for pre-trial custodial measures. Section 4(2)*(b)* of the Child Justice Act not only makes provision for the consideration of diversion for persons aged between 18 and under 21 years, but so-called 'adult diversion' is in any event always available after temporary withdrawal of the charges. The detention of the child was hence unnecessary, and not a matter of last resort, and the fact that such detention was in a welfare facility rather than a correctional centre does not alter this.

In *S v SP* (unreported, RCD 117/2016; Review Judgment 16 February 2017, High Court Ref: 780) the accused himself provided an incorrect age (19 years, instead of 17 years) upon his arrest for robbery with aggravating circumstances. The same age was provided to the presiding magistrate, earlier in the proceedings. The accused pleaded guilty and was convicted on the basis of his guilty plea given under s 112(2) of the Criminal Procedure Act 51 of 1977. Only during sentencing did it emerge that he was still a minor. The magistrate placed on record that because the accused was a minor, certain pre-trial procedures should have been considered in terms of the Child Justice Act, including an assessment of the juvenile offender and consideration of the possibility of diversion. However, the court was of the view that, notwithstanding the fact that the accused was not properly assessed in accordance with the Child Justice Act, no undue prejudice was caused to him, particularly as the accused was in fact the cause of the error (at paras [7]-[8]). The matter was then adjourned, and the sentencing proceedings were conducted as provided for in terms of s 16 of the Child Justice Act: s 16(3) provides that,

> 'Subject to subsection (1), if a presiding officer is of the opinion that an error regarding age has not caused any prejudice to the person, the presiding officer must continue with the proceedings in terms of the provisions of this Act, in accordance with his or her age, as altered.'

A comprehensive pre-sentence report was filed and the accused's probation officer recommended that the accused be sentenced to compulsory residence in a child youth care centre, as envisaged in s 76(1) of the Child Justice Act, but for a period of three years, which is below the statutorily prescribed period of five years (at para [15]). This sentence rendered the decision subject to automatic review in terms of s 85(1) of the Child Justice Act, in any event. It should however be noted that the review judge incorrectly characterised the maximum period of five years in a child and youth care centre provided for in s 76(1) as a 'prescribed minimum period'.

The review court considered whether any undue prejudice resulted from the error in the accused's age, and whether, as a result, his right to a fair trial was infringed. The review court held that this did not occur, as the presiding officer had taken every precaution to ensure that there was due compliance with the provisions of the Child Justice Act once the true age of the child was known.

In *S v MM* 2018 (1) SACR 18 (GP), the accused, who was legally represented, tendered a s 112(2) guilty plea. At the sentencing stage it was discovered that the accused was in fact under the age of 14 when he committed the offence; however, the tendered plea contained no statement relating to his criminal capacity. Hence, the matter stood down for a special review. The Office of the Director of Public Prosecutions agreed that where an accused pleads guilty but is below the age of 14 years, an appropriate admission regarding criminal capacity must be contained in the s 112(2) plea, which relieves the state of the duty to prove criminal capacity. In the absence of such admission *in casu*, the conviction could not stand.

However, there was a difference as regards the course of action the review court ought to take: either to set aside the conviction, or to remit the matter with the direction that the trial court record a s 113 plea (which the lower court is empowered to do). The latter is the course of action that the review court took. However, the question that arises is the correctness of the prosecution's view that an admission in a s 112(2) guilty plea can relieve the state of the obligation to prove that a child aged between 10 and under 14 years has criminal capacity. The Child Justice Act provides that the onus lies on the state to rebut the presumption of incapacity applicable to children of these ages; at minimum very comprehensive indications as to the child accused's stage of development, level of education, appreciation of the wrongfulness of the act and ability to act in accordance with appreciation would need to be furnished in the s 112(2) guilty plea in order for the state to be relieved of the obligation to rebut the presumption (see *S v TS* 2015 (1) SACR 489 (WCC), discussed in J Sloth-Nielsen 'Recent cases: Child justice' (2015) 28 *SACJ* 437).

The review of the minimum age of criminal capacity envisaged in s 8 of the Child Justice Act has taken place, but the report on the findings and potential amending legislation is yet to be tabled in Parliament.

3 Criminal charges involving non-South African children

S v HJ 2016 (1) SACR 629 (KZD) concerned a foreign-born migrant Malawian child, orphaned in South Africa. His conviction related to a contravention of s 49(1)*(a)* read with ss 1, 9, 10, 25, 26 and 32 of the Immigration Act 13 of 2002, in that he entered into, or remained in

South Africa without a valid permit. He had pleaded guilty, but before being sentenced informed the sentencing officer that he was 17 years of age (and not 18 years, as reflected on the charge sheet). The magistrate having been informed that the child's parents were deceased and that he was living with a friend, remitted the matter for special review and ordered that the child be detained in Westville Correctional Facility. The magistrate confirmed at the time that he did not apply the Child Justice Act, and that the conviction could not stand.

As the review court points out, there is more to the matter than that: the accused is a minor, a foreign child whose parents are both dead and his only brush with the law, as far as is known, is his failure to be in possession of a valid permit to be in South Africa. The accused's background, what became of his parents, how he entered South Africa, for what reason, how long he has been here, and who, if anyone, is caring for him are just some of the matters that require thorough investigation. Setting aside the conviction, the court referred to the constitutional standard of the best interests of the child (s 28(2)); the guiding principle set out in s 3*(a)* of the Child Justice Act to be taken into account that all consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society; and the need to consider diversion, which the court thought would be appropriate and in the interests of justice in this matter.

This last conclusion is not, in the circumstance, necessarily incorrect. However, it does beg the question concerning the interplay between the immigration and refugee regime, the child care and protection system, and the child justice/criminal justice system. There is considerable guidance to be had on this topic in international law (see, e.g., UN Committee on the Rights of the Child (CRC) 'General comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin', 1 September 2005, (CRC/GC/2005/6); see, too, the recent 'Joint General Comment No. 3 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families and No. 22 (2017) of the Committee on the Rights of the Child on the general principles regarding the human rights of children in the context of international migration' (CMW/C/GC/3-CRC/C/GC/22); 'Joint General Comment No. 4 (2017) of the Committee on the Protection of the Rights of All Migrant Workers and Members of Their Families' and No. 23 (2017) of the Committee on the Rights of the Child on State obligations regarding the human rights of children in the context of international migration in countries of origin, transit, destination and return' (CMW/C/GC/4-CRC/C/GC/23). 'Unaccompanied children (also called unaccompanied minors) are children who have been separated from both parents and other relatives and are not

being cared for by an adult who, by law or custom, is responsible for doing so' ('General Comment 6: Treatment of unaccompanied and separated children outside their country of origin', para 7). Such children may (or may not) qualify as asylum seekers, which would depend on whether they comply with the criteria set out in s 3*(a)*, *(b)* or *(c)* of the Refugees Act 130 of 1998). Section 3*(a)* of the Refugees Act states that a person qualifies for refugee status if that person is outside, and unable or unwilling to return to their country of origin, 'owing to a well-founded fear of being persecuted by reasons of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group,… is unable or unwilling to avail himself or herself of the protection of that country'. Section 3*(b)* of the Refugees Act applies to a person who flees his or her place of habitual residence as a result of external occupation, foreign domination, or events seriously disrupting public order. Section 3*(c)* of the Refugees Act allows for the dependant of the asylum seeker to derive similar status.

Accommodation of separated and unaccompanied children in alternative care is covered in para 40 of the General Comment cited above, which elaborates principles such as avoidance of deprivation of liberty, the necessity of keeping siblings together, and the desirability of continuity in a child's upbringing. Article 20 of the UN Convention on the Rights of the Child, which advocates for a range of alternative care placements to be available, is emphasised.

Turning to the relevant provisions in the Refugees Act, s 32 is apposite. It provides as follows:

> '(1) Any child who appears to qualify for refugee status in terms of section 3, and who is found under circumstances which clearly indicate that he or she is a child in need of care as contemplated in the Child Care Act, 1983 (Act No. 74 of 1983), must forthwith be brought before the Children's Court for the district in which he or she was found.
> (2) The Children's Court may order that a child contemplated in subsection (1) be assisted in applying for asylum in terms of this Act.'

This confirms the legal position established in *Centre for Child Law v Minister for Home Affairs* 2005 (6) SA 50 (T), concerning the immigration detention of a group of foreign children pending deportation. The court there held that unaccompanied children must first be brought before a children's court for a determination as to whether they are in need of care and protection, before they are returned to their country of origin (if they do not qualify to apply for asylum). The Department of Social Development's Guidelines on Dealing with Migrant Children (2011) state that unaccompanied [foreign] children should be assumed to be children 'in need of care and protection'. The circumstances in which unaccompanied children are found and brought to court, commonly results in placement in alternative care. (Alternative care placement

includes placement in child and youth care centres as provided for in the Children's Act, temporary safe care placements and foster care placements; as J Sloth-Nielsen and M Ackermann demonstrate in their socio-legal study, placements in alternative care frequently do not lead to family reunification or durable solutions (J Sloth-Nielsen J and M Ackermann 'Unaccompanied and separated children in the care system in the Western Cape: a socio-legal study' (2016) 19 *PELJ* 1.) This is to ensure that appropriate investigations as to the child's home circumstances are undertaken, as part and parcel of a best interests determination as to the solution to be arrived at. A recent case in which the primacy of the children's court route was confirmed, was *Mubake v Minister of Home Affairs* 2016 (2) SA 220 (GP), albeit that the facts of this case differed wholly from the present example.

Hence, the assumption that diversion might be the appropriate route is not good in law or in practice: the unaccompanied child would have to have been referred to the children's court, as is now accepted, and the National Director of Public Prosecutions directives (GN R252, *GG* 33067, 31 March 2010) state that diversion of matters before the preliminary inquiry should not take place in (for example) circumstances where the child 'has been abandoned or orphaned, and is without visible means of support' (Directive G6(c)).

A final point concerns the referral of the child to the Westville Correctional Centre, where he was held for a month after his true age became known, pending the special review of the erroneous conviction. In the light of the Constitutional Court decision in *Lawyers for Human Rights v Minister for Home Affairs* (CCT 38/16) [2017] ZACC 22; 2017 (10) BCLR 1242 (CC); 2017 (5) SA 480 (CC) (29 June 2017) in which administrative detention pending deportation (s 32 of the Immigration Act) was found to be unconstitutional, and given that the circumstances enumerated indicated that the child accused in this matter had an address at which he lived, the detention order must be regarded as questionable. It smacks of a form of deportation detention 'by the back door' as it were. As Japhta J noted in *Lawyers for Human Rights* supra (at para [33]),

> '[t]his right [s 12(1)*(b)* of the Constitution] outlaws arbitrary detentions. There must be a rational connection between the detention and an objectively determinable and legitimate governmental purpose. Absence of that connection would mean that the substantive aspect of the right is breached. A breach of this aspect of the right may also occur where a rational connection exists but the purpose or cause for the detention is not just.'

Admittedly the section impugned in that case related to the powers of immigration officials and the non-necessity of a court appearance, whilst detention in the *S v HJ* (supra) matter was sanctioned by a court,

but the further overriding constitutional principle of detention of children as a matter of last resort is still applicable (s 28(1)*(g)*).

4 Failure to hold a preliminary inquiry

S v N (R431/2017) [2017] ZAFSHC 202 (26 October 2017) resulted in an approach that cannot be supported. The accused, arrested for possession of housebreaking implements when they were 17 years of age, were served with a notice to appear before a preliminary inquiry on 25 April 2013. However, it appeared that such inquiry was never conducted, nor were they assessed. The accused appeared in court again on a summons issued in terms of s 54 of the Criminal Procedure Act four years later, by which time they were now 20 years old.

The matter was remitted on special review (s 304(4) of the Criminal Procedure Act) after conviction, but prior to sentencing, because the magistrate was of the opinion that a failure of justice might have occurred due to the preliminary inquiry that had not been convened. After citing various sections of the Child Justice Act related to when proceedings fall to be dealt with in terms of this statute (s 4(2)*(a)*), factors prosecutors should consider in relation to decisions around diversion (ss 51 and 52), when assessment must take place (s 5(2)), and when a preliminary inquiry must be held (s 5(3)) – the court concluded that the irregularity in this case was not of such a nature that it *per se* resulted in a failure of justice.

Motivating this conclusion, that court said as follows (at paras [21]-[22]):

> 'The accused's legal guardians were notified when the accused were arrested at age 17. The legal guardians signed the written notices that were served on the accused. The accused had a legal representative throughout the trial. The accused's version of the events that was put to the state witnesses was an indication that accused 4 and 5 clearly understood the charges against them and the proceedings of the trial. The absence of a preliminary inquiry therefore does not result in a gross irregularity in respect of accused 4 and 5.'

This judgment is objectionable for three reasons. First, the learned judge has failed wholly to understand that the preliminary inquiry is no mere procedural device (see J Sloth-Nielsen 'Paperweight or powertool: a critical appraisal of the potential of the proposed preliminary inquiry procedure' (2004) 6(2) *Article 40* 3-5). The central purposes of the preliminary inquiry are to consider, with the aid of the assessment report, the possibility of diversion (as well as release or placement if the child is in custody, which was not the case in this matter, as the accused had been served a notice to appear at the preliminary inquiry and were clearly no longer in custody).

Having bypassed the preliminary inquiry procedure, the opportunity to be considered for diversion was foregone. The whole point of a separate criminal process for person below the age of 18 (as set out in detail in the objects of the Act) is wholly undermined if convictions without the prior opportunity to appear before a preliminary inquiry are effectively condoned. The benefits that the accused should have enjoyed due their being aged below 18 at the time of commission of the offence are nullified, not least of which is the opportunity to avoid having a criminal record.

Second, the judicial condonation extends to what is an unexplained but ultimately objectionable bureaucratic set of facts. The court said that Exhibits B and C of the record showed that accused 4 and 5 were given notices to appear at a preliminary inquiry on 25 April 2013. Exhibit D of the record book J546, shows both accused names were entered in a preliminary enquiry (at para [13]). Nevertheless, it is clear that the preliminary inquiry did not take place as scheduled. The failure to follow up on the fact that for a period of four years, the scheduled preliminary enquiry did not take place escapes without any adverse comment from the bench, although the Child Justice Act's provisions relating to the need for speedy finalisation of trials involving children are cited by the judge (at para [19]). Moreover, the resuscitation of charges and the issuance of a summons four years on does raise some concerns about the appropriate exercise of prosecutorial discretion to pursue the matter (seemingly with vigour, since the charges were contested by the accused).

Third, the line of reasoning employed in this judgment could have the consequence that the state is incentivised to delay convening preliminary inquiries until after accused children turn 18. They are then permitted to pursue charges at a suitable later date (as long as 4 years later!), outside the purview of the child justice system, and with no sanction pertaining to any form of irregularity. Such actions would be in direct contrast with the intention of the legislature in enacting a separate child justice statute.

In the event, the conviction was upheld and the matter remitted to the trial court for sentence.

In *S v DW* 2017 (1) SACR 336 (NCK), the accused was 17 years and 11 months at the time of the commission of the offence, but was not assessed prior to appearing before court for trial. The offender was legally represented. He pleaded guilty to the charge in terms of s 112(2) of the Criminal Procedure Act, which plea was accepted by the prosecutor. From the presiding officer's questioning it became apparent that the offence committed was in fact housebreaking with intent to trespass, and trespass. His age become apparent only at the sentencing stage, whereupon he was sentenced to R1500 or five

months' imprisonment, which was wholly suspended for five years on conditions. 'The issue for determination is whether the failure by the court, to implement the Child Justice Act prior to the commencement of the trial, vitiates the proceedings', according to the review court (at para [7]).

If the Child Justice Act were correctly applied to this case, seeing that the child offender was below the age of 18 when he was arrested, the role players would have ensured that (1) his needs and circumstances were assessed (2) he was provided special circumstances or procedures to secure his attendance at court and (3) an 'informal, inquisitorial, pretrial procedure, designed to facilitate the disposal of his case in his best interests, by considering the diversion of his matter and keeping him away from the criminal proceedings, having properly assessed whether the circumstances of his case warranted same, was created' (at para [8]). The court stated explicitly that the accused was deprived of a preliminary inquiry and the possibility of diversion. Had an assessment been conducted immediately after he was charged, he would in all probability have been diverted, according to the review court (at para [15]). Did this result in a failure of justice in accordance with established principles?

In the view of the court, the answer was no, for three reasons. The accused was only a month short of his 18th birthday when the offence was committed; his rights to legal representation were explained to him; he availed himself of the legal aid offered and, apart from the lapse of this person in establishing his true age at the time of the commission of the offence, he enjoyed competent legal representation and pleaded guilty. In the view of the court, a retrial where there has not been shown to have been a gross irregularity vitiating the trial would be improper and unprocedural.

However, the court did interfere with the sentence, replacing the fine with alternative imprisonment with a caution and discharge.

Whilst mindful of the need for finalisation of matters, the same comments can be made as regards condoning the absence of procedures specifically designed by the legislature for criminal procedures involving persons who were under the age of 18 years at the time of the commission of the offence as were made in regard to the previous case. Assessment might have brought to light the underlying reasons surrounding the accused engaging in trespassing (which could relate to social welfare issues: the review judge is possibly aware of this, as amongst the persons upon whom a copy of the judgement was ordered to be furnished were staff at the provincial Department of Social Development); and he now has a criminal record which could have been averted had he been offered the possibility of diversion.

5 Sentencing

Up for consideration in *P v S* (CA 152/2016) [2017] ZAECGHC 2 (10 January 2017), was the sentence imposed for six counts (housebreaking with intent to commit robbery and murder, murder, attempted murder, robbery with aggravating circumstances, and unlawful possession of firearms), committed in what was essentially a 'farm murder' of two elderly inhabitants (the charge for the second victim was attempted murder). Accused 1 was 13 years of age at the time of commission of the offences. His sentence was an effective 10 years' imprisonment. He appealed the sentence as unjust and shockingly inappropriate and severe in view of the following factors: his youthful age when the offences were committed; no previous convictions; he only actively participated in the offences after the victims had been incapacitated; he did not assault any of the victims; there was no evidence of premeditation in respect of the offence of murder, attempted murder and robbery; he pleaded guilty and gave a credible plea explanation. It was further submitted that the sentencing court below neglected to consider the effect of the period of 1 year and 2 months spent by the appellant in custody awaiting trial.

Citing s 77(5) of the Child Justice Act, the appeal court conceded that the sentencing court had not considered ante-dating the sentence imposed by a period equal to the period spent in custody prior to sentencing, as the legislation then required (this section was substituted by s *4(d)* of the Judicial Matters Amendment Act 14 of 2014; it now provides that '[a] child justice court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentence being imposed').

Regarding the question as to the appropriateness of an effective prison sentence of 10 years, the appeal court had regard to s 69(4) of the Child Justice Act, which refers amongst others to the need to consider the seriousness of the offence, the harm caused by the offence, the culpability of the child in causing or risking the harm, the protection of the community, the severity of the impact of the offence on the victim, and the desirability of keeping the child out of prison (at para [10]). This was a very serious attack, and the impact upon the victim, her family and the community was detailed during sentencing stage. The appeal court was persuaded that the sentence imposed was proportional to the crime, the offender and the needs of the society and was the shortest possible period in the circumstances. Moreover, the court was not prepared to substitute the sentence of direct imprisonment with a sentence to be served in a child and youth care centre.

In *S v K* (A539/17) [2017] ZAGPPHC 102 (10 October 2017) the accused child was sentenced to 2 years' imprisonment for malicious

damage to property after he 'aggressively pushed a door and the glass broke'. The accused, who was legally represented, pleaded guilty and a pre-sentence report was presented. On review, the court asked for reasons for the choice of this sentence, and whether alternative sentences were considered. At para [4], the review court explains the circumstances surrounding the commission of the offence:

> 'At the time of the commission of the offence, the accused was an in-patient at a treatment centre for drug addiction. On the day in question the accused was in the dining room. After having been verbally reprimanded by a caretaker, the apparently agitated accused, in leaving the room, pushed a glass door, breaking the glass and cutting his hand in the process.'

The probation officer had recommended that the sentence the court imposed should be suspended on condition that the accused should be treated as an inpatient at a named treatment centre in order to address his substance abuse.

The review court found several factors relative to the lower court proceedings which pointed to a failure of justice: the seeming triviality of the offence; the failure to consider that, from the version of the accused it seems that he did not have *dolus directus*, and that the form of *mens rea* was *dolus eventualis*; and the direct sentence of 2 years' imprisonment was not commensurate with the nature and extent of the crime, and was shockingly inappropriate. The conviction was confirmed, but the sentence set aside and replaced with a caution and discharge.

In *B v S* (A481/16) [2017] ZAWCHC 18; 2017 (1) SACR 553 (WCC) (23 February 2017) an effective 19-year sentence imposed on a person who was 16 at the time of the commission of the offences of one count of murder, two counts of attempted murder, one count of possession of an unlicensed firearm and one count of possession of ammunition was challenged. Although the sentence was confirmed on automatic review, to which is was subject in terms of s 85 of the Child Justice Act, it was subsequently appealed. While it was contended that it was appropriate for the trial court to impose a long term of imprisonment given that from the facts his conduct was premeditated and he showed no remorse, it was material that the appellant was 16 years old when he committed the offences and was 18 when he was sentenced. The state conceded that the sentence was not imposed 'for the shortest appropriate period of time' as required by the Child Justice Act and that some of the sentences should run concurrently to produce an effective term of 13 years' imprisonment. The appeal court cited the dictum in *S v N* 2008 (2) SACR 135 (SCA) at para [39], to the effect that prison must be a last resort for a child offender and where unavoidable, its form and duration should also be tempered on the basis that '(e)very day he spent in prison should be because there is no alternative' (at para [23]). The court (at para [25]) also referred to *S v BF* 2012 (1) SACR

298 (SCA) at paras [13] and [14] where the trial court was found to have over-emphasised the seriousness of the offences at the expense of the youthfulness of the offender in sentencing a 14-year-old to 25 years' imprisonment, a sentence which was found to be 'disturbingly inappropriate'. In addition, a misdirection was committed in failing to take into account the cumulative effect of the sentences or to order that the sentences imposed, or part thereof, run concurrently.

The court concluded that, given the grave nature of the offences committed in this matter, their cumulative effect insofar as there were three victims on the same scene and the absence of any explanation as to the motive, nor any sign of remorse shown, a custodial sentence is the only appropriate sentence in the circumstances of the matter. However, the effective sentence of 19 years' imprisonment was regarded as startlingly inappropriate, and it (at para [30]),

> 'does not reflect an appropriate regard to the imposition of a sentence for the shortest appropriate time and in my mind visits a punishment on the appellant which is so long for a young person that it does little to allow the offender to keep the hope of a different life, outside of a world of crime, alive.'

The cumulative sentences were therefore reduced to an effective 13 years' imprisonment.

A v S (42/2015) [2016] ZANCHC 5, (15 April 2016) related to a conviction for rape of a child who was 15 years old at the time of the commission of the offence. He was sentenced to 6 years' imprisonment and it was ordered that he serve his sentence in the Bosasa Youth and Child Care Centre in De Aar until he reached the age of 21 years, when the court would, upon receipt of a report from the centre, consider whether further imprisonment would be appropriate. The magistrate imposing this sentence conceded that the sentence was incorrectly formulated and, therefore, not competent. Section 76(1) of the Child Justice Act provides for a sentence of 'compulsory residence' in a child and youth care centre; not for a sentence of imprisonment to be served at such a centre, as the court noted (at para [11]):

> 'That a sentence of imprisonment is to be distinguished from a sentence of compulsory residence at such a centre is evident from the provisions of section 76(3)*(a)* of the Act, which provides that a sentence of imprisonment, to be served after completion of the period of compulsory residence in a child and youth care centre, may be imposed "in addition to" a sentence of compulsory residence in such a centre'.

According to the review court, '[s]uch additional imprisonment may only be imposed "if substantial and compelling reasons exist" which would justify it, and then "only … as a measure of last resort and for the shortest appropriate period of time"'. Even then the need for such an additional sentence of imprisonment to be served will, in terms

of s 76(3)*(b)* and *(c)*, have to be reconsidered upon completion of the period of compulsory residence at the centre (at para [12]).

The regional magistrate had stated that he intended the accused to remain in the centre until the age of 21 years, but also to impose an additional sentence of 2 years' imprisonment in view of the seriousness of the offence. It was not clear that the regional magistrate was aware of the requirement of substantial and compelling reasons for such an additional sentence of imprisonment and, if so, what the regional magistrate considered to be such reasons. The review court found many mitigating factors, such as the accused's limited intellectual capacity and his particularly small physique, his age at the time of the commission of the offence, plea of guilty and lack of prior convictions. The social worker had recommended only compulsory residence as a sentence and had advised against the imposition of imprisonment. The sentence was therefore set aside and the matter remitted for the fresh imposition of sentence in the light of the above.

S v M (34/2016) [2016] ZAFSHC 67 (12 May 2016) concerned a conviction of a 17-year-old upon a s 112(2) plea of guilty for theft of cash in the amount of R1666 and cigarettes to the value of R265, leading to the imposition of a sentence of 6 months' imprisonment wholly suspended on conditions for 5 years. However, s 77 of the Child Justice Act requires a pre-sentence report prepared by a probation officer, even where a sentence of imprisonment is suspended. The review court held that it was satisfied that the conviction is in order, but ordered that the matter should be re-submitted to the magistrate to ensure that a pre-sentence report is obtained and considered before the accused is sentenced afresh.

6 Anonymity of child accused (and victims and witnesses)

Centre for Child Law v Media 24 Ltd 2017 (2) SACR 416 (GP) concerned the dilemma of protection of the identity of a child accused, child victims and child witnesses after they reach the age of 18 years. Occasioned initially by the well-publicised matter of the baby (known as Zephany Nurse in the media) who was kidnapped whilst a few days old, and raised as her own child by the kidnapper, until her true parents discovered her identity when she was 17 years of age, the constitutional challenge was brought to s 154(3) of the Criminal Procedure concerning the protection of the identity of child. It was contended that insofar as she was about to turn 18 years of age, s 154 appeared not to provide anonymity to a child victim, initially under the age of 18, after she turned 18 years of age; and, if the victim was not a witness in the matter (the kidnapping charge, in which she ultimately did not testify against the woman who had raised her), she

would enjoy no protection under s 154. Further, it was argued that s 63(6) of the Child Justice Act (which refers to the applicability of the provisions of s 154 of the Criminal Procedure Act with regards to the publication of information identifying an accused person), similarly failed to protect a child accused's anonymity after he or she turned 18.

Countering this, the media respondents submitted that open justice is the default position, and that it is not for the courts to impose exceptions on the open justice principle, as this falls in the domain of Parliament. It was common cause that a number of constitutional rights are at play against each other. On the one hand are the rights of the child, especially those found in s 28(2), that the child's best interests are paramount; the right to dignity found in s 10; the right to equality in s 9; the right to privacy in s 14; and the right to a fair trial found in s 35(3) of the Constitution. On the other hand, are the rights of the media and the public, such as the right to freedom of expression in terms of s 16 of the Constitution, and the right to open justice in terms of s 152 of the Criminal Procedure Act (at para [29]).

The applicants argued that,

> '…the protection afforded by s 28(2) makes provision for the "principle of ongoing protection" to children. This protection does not then cease when the child attains the age of 18, as the lifelong consequences of the child's action and experience are felt in adulthood.' (at para [33]).

The applicant (at para [31]) referred to *J v NDPP* 2014 (2) SACR 1 (CC) at para [43]:

> 'The impact of registration is reduced in practical terms and varies according to the particular child's circumstances and age. However, this court has held that consequences for the criminal conduct of a child that extend into adulthood (such as minimum sentences) do implicate children's rights.'

Countering this contention, the respondents stressed that the best interests of the child as enshrined in s 28(2) of the Constitution did not trump other rights nor was it an absolute right (at para [36]), citing *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) 539 (CC). The media argued that the language used in s 154(3) does not include a victim who is not a witness in criminal proceedings. The default position proposed by the media lies in s 152, the open justice principle, meaning criminal proceedings are to be held in open court, with exceptions where the victim is a victim of sexual offences and related cases (s 153(3)).

Regarding the failure to protect child victims who were not witnesses, the court held, on a purposive reading of s 154(3), that the purpose found in s 154(3) is such that it heralds the best interests of the child, whether the child is an accused, complainant, witness or victim in criminal proceedings; it is that purpose that highlights the scope of

the right to be found within s 154(3). That does not, in the view of the judge, render s 154(3) unconstitutional, but did permit an order extending the protection of s 154(3) to victims of crime who were aged below 18 years (at para [63]).

As regards the child's anonymity continuing beyond 18 years, the court found that it was not empowered to change an age as stipulated in the section (at para [62]). That function is ascribed to the legislature. The fact that s 154(3) provides protection until the age of 18 as enacted by the legislature can be declared unconstitutional, as it is not just and equitable. But the court, citing the specificity of ages in legislation such as the Child Justice Act (where for instance a child is defined as 'any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of s 4(2)' militated against a reading broader than the stated age of 18 years for protection of the child's identity.

Ultimately, as regards anonymity, the court reasoned that there cannot be open-ended protection in favour of children, even into their adulthood. This would violate the rights of other parties and the other rights of the children themselves when they are adults. The court justifies this by way of the following example (at para [67]):

> '… a child, having been involved in a crime, either as an accused, victim, complainant or witness, as an adult […] might seek to highlight awareness of their experience with others. This would not be possible, whether it was to bring awareness to others or purely to highlight the plight of such experience, as there would be a gag on such publication, if the protection is open ended even into adulthood. This would simply amount to stifling the adult's right of freedom of expression. This in my mind takes away an individual's right as an adult.'

It would further certain constitutional rights, such as privacy, whilst working against others, like freedom of expression. Hence it was declared that the 'adult extension' of the anonymity of protected children that was sought, fell to be dismissed, on the basis that it is neither permissible nor required by the Constitution.

This means that an accused person such as Don Steenkamp (convicted of killing his family in the so-called Griekwastad murders) (S v DD (K/S 46/2012) [2014] ZANCHC 9 (27 March 2014)), whose identity was protected until he turned 18, forfeits the benefit of the protection upon reaching 18 years of age (as in fact happened in this instance when a book was published detailing his life history on the day of his 18th birthday). However, it is reported that the judgment in this matter is being appealed.

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