CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 98/08
[2009] ZACC 18

CENTRE FOR CHILD LAW	Applicant
versus	
MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
MINISTER FOR CORRECTIONAL SERVICES	Second Respondent
LEGAL AID BOARD	Third Respondent
and	
NATIONAL INSTITUTE FOR CRIME PREVENTION AND THE RE-INTEGRATION OF OFFENDERS	Amicus Curiae

Heard on : 5 March 2009

Decided on : 15 July 2009

JUDGMENT

CAMERON J:

Introduction

[1] The applicant applies for confirmation of declarations of statutory invalidity made by the North Gauteng High Court, Pretoria. The High Court (Potterill AJ)

struck down various provisions of the Criminal Law Amendment Act[1] (CLAA) in the form it took after amendment by section 1 of the Criminal Law (Sentencing) Amendment Act[2] (the Amendment Act). The impugned sections make minimum sentences applicable to offenders aged 16 and 17 at the time they committed the offence. The High Court found these sections inconsistent with provisions of the Bill of Rights pertaining to children.[3]

[2] The applicant, the Centre for Child Law (the Centre), is a law clinic established by the University of Pretoria and registered with the Law Society of the Northern Provinces. Its main objective is to establish and promote child law and to uphold the rights of children in South Africa. Invoking the standing provisions of the Bill of Rights,[4] the Centre asserts that it brings the application in its own interest, on behalf of all 16 and 17 year old children at risk of being sentenced under the new provisions,

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[1] 105 of 1997.

[2] 38 of 2007.

[3] Section 28(1)(g) of the Constitution provides:

> "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 only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and
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> (ii) treated in a manner, and kept in conditions, that take account of the child's age".

Section 28(2) of the Constitution provides: "A child's best interests are of paramount importance in every matter concerning the child."

[4] Section 38 of the Constitution provides that the persons who may approach a competent court alleging that a right in the Bill of Rights has been infringed or threatened are:

> "(a) anyone acting in their own interest;
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> (b) anyone acting on behalf of another person who cannot act in their own name;
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> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
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> (d) anyone acting in the public interest; and
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> (e) an association acting in the interest of its members."

and in the public interest. In addition to supporting confirmation of the High Court's order, the Centre now seeks relief in respect of children already sentenced under the new provisions which the High Court did not grant.

[3] The respondents are the Minister for Justice and Constitutional Development (the Minister), the Minister for Correctional Services, and the Legal Aid Board, an autonomous statutory body[5] providing legal services to indigent persons. The second and third respondents did not oppose the application and filed notices to abide by the outcome. The Minister opposed the relief in the High Court, opposed confirmation of the declarations of invalidity, and lodged a notice of appeal with this Court against the High Court's findings.

Background: the minimum sentencing regime

[4] Section 51 of the CLAA creates a minimum sentencing regime for specified classes of serious offences.[6] It was introduced on 1 May 1998 as a temporary measure for two years.[7] Since then it has been extended from time to time;[8] and the Amendment Act has rendered it permanent.[9]

[5] Established by the Legal Aid Act 22 of 1969.

[6] The Schedules of the CLAA generally cover the following crimes: murder and rape, when committed in particular circumstances or against certain persons; various offences referred to in the Protection of Constitutional Democracy Against Terrorist and Related Activities Act 33 of 2004; various offences under the Drugs and Drug Trafficking Act 140 of 1992; trafficking in persons for sexual purposes; sexual exploitation of a child or mentally disabled person; offences related to the dealing in or smuggling or possession of ammunition, firearms, explosives or armaments; any offence relating to exchange control, extortion, fraud, forgery, uttering, theft, involving certain sums of money or committed under certain circumstances; and treason, sedition or robbery if committed with a firearm that one intends to use in the commission of that offence.

[7] CLAA section 53(1) (pre-amendment).

[8] Section 53(2) of the CLAA (pre-amendment) empowered the President, with the concurrence of Parliament, to extend the operation of sections 51 and 52. It was extended for 12 months with effect from 1 May 2000 (Government Gazette 21122 GN 23, 20 April 2000); for two years with effect from 1 May 2001 (Government

[5] Before the Amendment Act came into force, this regime had limited application to children who were under 18 at the time of the offence. The CLAA created a distinctive regime for this group,[10] and exempted those under 16 altogether.[11] In *S v B*[12] the Supreme Court of Appeal held that under the legislative scheme the fact that an offender was under 18 though over 16 at the time of the offence automatically conferred a discretion on the sentencing court, leaving it free without more to depart from the prescribed minimum sentence; that offenders in this group do not have to establish substantial and compelling circumstances to avoid the minimum sentences; but that the prescribed sentences, as the sentences Parliament has ordinarily ordained for the offences in question, nevertheless operate as a "weighting factor", conducing to generally heavier sentences.

Gazette 7059 GN 29, 30 April 2001); for two years with effect from 1 May 2003 (Government Gazette 24804 GN 40, 30 April 2003); for two years with effect from 1 May 2005 (Government Gazette 27549 GN 21, 29 April 2005); and for two years with effect from 1 May 2007 (Government Gazette 29831 GN 10, 25 April 2007).

[9] Section 3 of the Amendment Act repealed section 53 of the CLAA.

[10] Before the Amendment Act, CLAA section 51(3) provided as follows:

> "(a) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and may thereupon impose such lesser sentence.
>
> (b) If any court referred to in subsection (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older, but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decision on the record of the proceedings."

[11] CLAA section 51(6): "The provisions of this section shall not be applicable in respect of a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question."

[12] 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA) at para 24.

[6] On 31 December 2007, the Amendment Act came into force.[13] Its effect (and, according to the answering affidavit of the Minister, its express object) was to reverse the decision of the Supreme Court of Appeal in *S v B* and to apply the minimum sentencing regime to children who were 16 or 17 at the time of the offence. Section 51(6) now makes incontestably clear that only children under the age of 16 at the time of the offence are excluded. Section 53A, a transitional provision, applies the new provisions to trials of 16 and 17 year olds that are already under way at the time of its coming into force.[14]

[7] On 3 March 2008, the Centre launched these proceedings.

The proceedings in the High Court

[8] In the High Court, the Minister raised two preliminary objections, challenging the Centre's legal standing and asserting that the application is purely academic and without any factual basis. The High Court found that while the Centre did not allege that the rights of any specific child were threatened, the rights of all 16 and 17 year old children are threatened, as the Amendment Act subjects them to the minimum

[13] Government Gazette 30638 GN 1257, 31 December 2007.

[14] Section 53A of the CLAA as amended now provides:

> "If a regional court has, prior to the date of the commencement of the Criminal Law (Sentencing) Amendment Act, 2007—
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> (a) committed an accused for sentence by a High Court under this Act, the High Court must dispose of the matter as if the Criminal Law (Sentencing) Amendment Act, 2007, had not been passed; or
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> (b) not committed an accused for sentence by a High Court under this Act, then the regional court must dispose of the matter in terms of this Act, as amended by the Criminal Law (Sentencing) Amendment Act, 2007."

sentencing regime. It found that in attacking the CLAA's constitutional validity on principle, the Centre—

> "does not require a set of facts; the facts speak for themselves. The child will be 16 or 17 years old, has committed a serious offence of either rape, robbery or murder, and the Presiding Officer will have to start the sentencing process with the minimum sentence prescribed by the Legislature."[15]

The High Court concluded that the Centre therefore did not have a merely academic or hypothetical interest, and was acting in the public interest and on behalf of all 16 and 17 year olds and therefore had legal standing.

[9] On the substance of the challenge, the High Court found that applying minimum sentences to 16 and 17 year olds negates the Constitution's principles of imprisonment as a last resort and for the shortest appropriate period of time. Before the Amendment Act and under *S v B*, the court began with a "clean slate" when sentencing child offenders, although giving the ordained sentences a weighting effect. In contrast, the Amendment Act "has left Courts in applying the minimum sentencing regime with no discretion but to start with the minimum sentence, clearly not a clean slate, but imprisonment as a first resort."[16]

[10] The Centre also sought orders requiring the first and second respondents to have the sentences of those children already sentenced under the Amendment Act

[15] *Centre for Child Law v Minister for Justice and Constitutional Development and Others*, Case No 11214/08, 4 November 2008, as yet unreported, at para 9.

[16] Id at para 22.

reconsidered. The High Court did not deal with these prayers, but postponed them indefinitely (*sine die*). It accordingly granted an order declaring—

> "that ss 51(1), 51(2), 51(6), 51(5)(b) and 53A(b) of the Criminal Law Amendment Act, Act 105 of 1997, as amended by section 1 of the Criminal Law (Sentencing) Amendment Act, 38 of 2007 are inconsistent with section 28(1)(g) and 28(2) of the Constitution".

The High Court reserved costs and referred the declarations to this Court for confirmation in terms of section 172(2)(a) of the Constitution.

Intervention of amicus curiae

[11] The National Institute for Crime Prevention and the Re-integration of Offenders (NICRO), a non-profit organisation working towards crime reduction and for community rehabilitation of offenders, applied for and was granted admission as amicus curiae. In its written submissions, NICRO supported the confirmation of invalidity, but focused its argument on the unconstitutionality of section 51(6) (which exempts only those under 16 from minimum sentences). NICRO contended that it is irrational and unfairly discriminatory to subject offenders aged 16 and 17 to the regime, since section 28 of the Bill of Rights (the children's rights provision) affords special protective guarantees for all children under 18.

Abstract review

[12] Before considering the issues, it is convenient to mention at the outset that in this Court the Minister did not persist with his challenge to the Centre's legal

standing, or with the contention that the issues were purely academic.[17] That approach was in my view correct. Although the Centre did not act on behalf of (or join) any particular child sentenced under the statute as amended, its provisions are clearly intended to have immediate effect on its promulgation. So the prospect of children being sentenced under the challenged provisions was immediate, and the issue anything but abstract or academic. The Centre's stated focus is children's rights, and in this case it has standing to protect them. It was thus entitled to take up the cudgels. To have required the Centre to augment its standing by waiting for a child to be sentenced under the new provisions would, in my view, have been an exercise in needless formalism.

[13] This Court has in any event previously indicated that it may be incumbent on it to deal with the substance of a dispute about the constitutionality of legislation a High Court has declared unconstitutional, even in the absence of a party with proper standing.[18] This is for good public policy reasons, mainly to rescue disputed

[17] The Minister's notice of appeal made no mention of the standing or abstract review points. Rule 16(3) of this Court's rules requires an appellant to "set forth clearly the grounds on which the appeal is brought, indicating which findings of fact and/or law are appealed against".

[18] *Lawyers for Human Rights and Another v Minister of Home Affairs and Another* [2004] ZACC 12; 2004 (4) SA 125 (CC); 2004 (7) BCLR 775 (CC) per Yacoob J for the majority at para 24 (where the Court held that the applicant in fact had standing):

> "It may in any event be incumbent on this Court to deal with the substance of a dispute concerning the constitutionality of legislation that reaches this Court pursuant to section 172(2) of the Constitution. This is because a High Court has already declared a particular provision to be inconsistent with the Constitution. There are good public policy reasons to suggest that the uncertainty in relation to constitutional consistency ought not to be allowed to prevail. There is therefore a strong argument that the purpose of section 172(2) of the Constitution is to ensure that the uncertainty generated by the High Court decision of unconstitutionality is eliminated and that the substance of the debate raised by the declaration is finally determined."

See also the judgment of Madala J at para 80: "[T]hese are confirmation proceedings. The application must be dealt with on its merits so that finality can be reached in respect of the Court *a quo*'s findings."

provisions from the limbo of indeterminate constitutionality[19] or, as it was expressed in *Phaswane*,[20] to achieve "the constitutional purpose of avoiding disruptive legal uncertainty". Although this Court will not do so in every case where the High Court ought not to have decided the question,[21] in general, "the only circumstances in which a court may not deal substantively with an application for confirmation is where no uncertainty will arise".[22] These reasons apply even more strongly in a case concerning penal provisions, which have imminent and adverse effects on those the statute targets. That is the case here.

The premises of the High Court judgment

[14] On appeal the Minister opposed confirmation of the declarations of invalidity, while the Centre and NICRO urged that they be confirmed. The Centre in addition pressed for the structural relief regarding already-sentenced youths that the High Court postponed. The parties' opposing positions raise important issues about the way the criminal justice system treats children. These, in turn, raise difficult issues of constitutional power and interpretation. For clarity it may therefore be convenient to set out first the premises that underlie the judgment of the High Court. These may be compacted in a series of short propositions:

[19] *Van der Merwe v Road Accident Fund and Another (Women's Legal Centre Trust as Amicus Curiae)* [2006] ZACC 4; 2006 (4) SA 230 (CC); 2006 (6) BCLR 682 (CC) at para 21.

[20] *Director of Public Prosecutions, Transvaal v Minister for Justice and Constitutional Development, Albert Phaswane and Aaron Mokoena (Centre for Child Law, Childline South Africa, RAPCAN, Children First, Operation Bobbi Bear, POWA and Cape Mental Health Society as Amici Curiae)* [2009] ZACC 8 at para 61.

[21] Id at para 68.

[22] Id at para 63.

(a) The intention and effect of the minimum sentencing regime is to require courts to impose harsher sentences – that is, to send more offenders in the scheduled categories to jail, for longer periods.

(b) Under the minimum sentencing regime, in default of a finding that substantial and compelling circumstances exist, a sentencing court is obliged to impose the minimum sentence. The starting point, and default position, is therefore the minimum sentence.

(c) By contrast, before the Amendment Act, under *S v B*, the starting point in sentencing 16 and 17 year old offenders in the scheduled categories was without predisposing constraints regarding the appropriate sentence, which would depend on individualised factors relating to the crime and the offender, while taking into account the interests of society, including the fact that the legislature had ordinarily ordained the prescribed sentences.

(d) The children's rights provision creates a stark but beneficial distinction between adults and children. It draws a distinction between adults and children below the age of 18 and requires that those under 18 be treated differently from adults when authority is exercised over them.

(e) It operates as a substantive constraint on the exercise of certain types of authority and imposes a legislative restraint on Parliament. It requires all those bound by the Constitution, including the judiciary and Parliament, to respect and apply its provisions.

(f) The effect of the Amendment Act is to impose the minimum sentencing regime on 16 and 17 year old offenders in the scheduled categories, resulting in tougher sentences for them.

(g) This removes the constitutionally mandated distinction between them and adult offenders, and requires sentencing courts to start with the obligation to impose the minimum sentences, and depart from these only in rare circumstances, when substantial and compelling circumstances are found to exist.

(h) This limits the rights in section 28.

(i) No sufficient or any justification has been tendered for the limitation.

(j) It therefore constitutes an unconstitutional violation of the rights of the children at issue.

[15] I now examine these propositions. I do so under these headings: the minimum sentencing regime; the children's rights provision in the Bill of Rights; the effect of the Amendment Act; and whether any limitation of rights has been justified.

The minimum sentencing regime

[16] There can be no doubt that the intention and effect of the minimum sentencing regime introduced in May 1998 was to impose a harsher system of sentencing for the scheduled crimes. In *S v Malgas*,[23] the Supreme Court of Appeal emphasised that under the minimum sentencing regime the discretion entrusted to courts of law was

[23] 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA).

not expunged, but was substantially constrained. For sentencing courts it was no longer to be business as usual:

> "First, a court was not to be given a clean slate on which to inscribe whatever sentence it thought fit. Instead, it was required to approach that question conscious of the fact that the Legislature has ordained life imprisonment or the particular prescribed period of imprisonment as the sentence which should *ordinarily* be imposed for the commission of the listed crimes in the specified circumstances. In short, the Legislature aimed at ensuring a severe, standardised, and consistent response from the courts to the commission of such crimes unless there were, and could be seen to be, truly convincing reasons for a different response."[24]

[17] Under *Malgas*, the minimum sentencing legislation had two operative effects. First, the statutorily prescribed minimum sentences must ordinarily be imposed. Absent "truly convincing reasons" for departure, the scheduled offences are "required to elicit a severe, standardised and consistent response from the courts" through imposition of the ordained sentences.[25] Second, even where those sentences do not have to be imposed because substantial and compelling circumstances are found, the legislation has a weighting effect leading to the imposition of consistently heavier sentences.[26]

[18] In *S v Dodo*[27] this Court endorsed *Malgas*. It found that the *Malgas* approach to sentencing steered "an appropriate path, which the Legislature doubtless intended, respecting the Legislature's decision to ensure that consistently heavier sentences are

[24] Id at para 8.

[25] Id at para 25.

[26] Id at para 8.

[27] [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC) at para 11.

imposed in relation to the serious crimes" while at the same time promoting the spirit, purport and objects of the Bill of Rights. *Dodo* thus upheld the constitutional validity of a minimum sentencing regime requiring consistently heavier sentences for adults, so long as it retained a residual discretionary overlay. Legislative power to constrain the courts' sentencing discretion derived, *Dodo* said, from the fact that "[b]oth the Legislature and the Executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity".[28] The courts thus do not enjoy sole authority in determining sentence:

> "While our Constitution recognises a separation of powers between the different branches of the State and a system of appropriate checks and balances on the exercise of the respective functions and powers of these branches, such separation does not confer on the courts the sole authority to determine the nature and severity of sentences to be imposed on convicted persons."[29]

[19] One thing is beyond question: the minimum sentences have bitten hard, both in the courts' approach to sentencing, and in outcome. More offenders have been sent to jail for longer periods. In *Vilakazi v S*,[30] the Supreme Court of Appeal described the aftermath of the new regime in these stark terms:

> "That it has indeed not been 'business as usual' is reflected in the dramatic change in the profile of the prison population since the Act [the CLAA] took effect. Published figures indicate that the number of prisoners serving sentences of imprisonment between ten and fifteen years increased almost three times from 1998 to 2008. Those

[28] Id at para 23.

[29] Id at para 33.

[30] [2008] 4 All SA 396 (SCA).

> serving sentences of life imprisonment increased over nine times."[31] (Footnotes omitted.)

[20] In addition, figures from the Department of Correctional Services show that the proportion of sentences being served that are longer than five years is now 66%. In 1997 only 25% of prisoners were serving sentences of two years or longer.[32]

[21] By contrast, before enactment of the Amendment Act, under *S v B*, 16 and 17 year old offenders in the scheduled categories felt the "weighting effect" of the minimum sentences, but were not subject to them. The court in *S v B* held that section 51(3)(b) allowed a sentencing court, while mindful of the new harsher sentences, to start with a "clean slate". This does not mean that the court starts the sentencing process void of any considerations – for that is impossible – but only that the court's approach to sentencing is not bounded by obligatory predisposing constraints. Instead, sentence depends on individualised factors relating to the crime and the offender, while taking into account the interests of society.

[22] In the answering affidavit filed on behalf of the Minister in these proceedings, Mr Rudman, a senior official in the Department of Justice and Constitutional Development who heads its legislative branch, puts on record the government's position that *S v B*'s interpretation of section 51(3)(b) "clearly departed" from the legislative intention to subject 16 and 17 year olds to minimum sentences. The

[31] Id at para 51.

[32] These statistics are available at http://www.dcs.gov.za/WebStatistics, accessed on 4 June 2009.

Amendment Act, he avers, sets out to repair the position. As will become clear when I revert to this evidence in dealing with justification, government's objective in enacting legislation is relevant to determining its validity in the face of constitutional challenge. It does not of course determine what the statute means.

[23] The question, to which I now turn, is whether the amending provisions accord with the Constitution.

The children's rights provision in the Bill of Rights

[24] Section 28 of the Bill of Rights provides, in relevant part:

> "(1) Every child has the right—
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> 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 only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and
>
> (ii) treated in a manner, and kept in conditions, that take account of the child's age;
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> (h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
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> (i) not to be used directly in armed conflict, and to be protected in times of armed conflict.
>
> (2) A child's best interests are of paramount importance in every matter concerning the child.
>
> (3) In this section 'child' means a person under the age of 18 years."

[25] It is evident that this provision draws upon and reflects the Convention on the Rights of the Child.[33] Amongst other things section 28 protects children against the undue exercise of authority. The rights the provision secures are not interpretive guides. They are not merely advisory. Nor are they exhortatory. They constitute a real restraint on Parliament. And they are an enforceable precept determining how officials and judicial officers should treat children.

[26] The Constitution draws this sharp distinction between children and adults not out of sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability. Children's bodies are generally frailer, and their ability to make choices generally more constricted, than those of adults. They are less able to protect themselves, more needful of protection, and less resourceful in self-maintenance than adults.

[27] These considerations take acute effect when society imposes criminal responsibility and passes sentence on child offenders. Not only are children less physically and psychologically mature than adults: they are more vulnerable to influence and pressure from others. And, most vitally, they are generally more capable of rehabilitation than adults.

[28] These are the premises on which the Constitution requires the courts and Parliament to differentiate child offenders from adults. We distinguish them because

[33] The Convention on the Rights of the Child was adopted by the United Nations General Assembly on 20 November 1989 and entered into force on 2 September 1990. It was ratified by South Africa on 16 June 1995.

we recognise that children's crimes may stem from immature judgment, from as yet unformed character, from youthful vulnerability to error, to impulse, and to influence. We recognise that exacting full moral accountability for a misdeed might be too harsh because they are not yet adults. Hence we afford children some leeway of hope and possibility.

[29] This is not to say that children do not commit heinous crimes. They do. The courts, which deal with child offenders every day, recognise this no less than Parliament. The affidavit on behalf of the Minister rightly points to legislators' concern about violent crimes committed by under-18s. The Constitution does not prohibit Parliament from dealing effectively with these offenders. The children's rights provision itself envisages that child offenders may have to be detained. The constitutional injunction that "[a] child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail. It means that the child's interests are "more important than anything else",[34] but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment.

[30] It is in accordance with this approach, and recognising Parliament's due role in setting public policy standards in sentencing, that *S v B* enjoined courts to take into

[34] See the definition of "paramount", *New Oxford Dictionary of English*, (Oxford University Press, Oxford 1998).

account the weighting effect of the minimum sentences when sentencing 16 and 17 year olds.

[31] But while the Bill of Rights envisages that detention of child offenders may be appropriate, it mitigates the circumstances. Detention must be a last, not a first, or even intermediate, resort; and when the child is detained, detention must be "only for the shortest appropriate period of time". The principles of "last resort" and "shortest appropriate period" bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time.

[32] In short, section 28(1)(g) requires an individuated judicial response to sentencing, one that focuses on the particular child who is being sentenced, rather than an approach encumbered by the rigid starting point that minimum sentencing entails. The injunction that the child may be detained only for the shortest "appropriate" period of time relates to the child and to the offence he or she has committed. It requires an individually appropriate sentence. It does not import a supervening legislatively imposed determination of what would be "appropriate" under a minimum sentencing system.

[33] The general considerations mitigating the treatment and punishment of child offenders find resonance with comparable systems of justice. In declaring unconstitutional the death penalty for offenders under 18, the Supreme Court of the United States of America has held that, as a category, children are less culpable.[35] It observed that—

> "as any parent knows and as scientific and sociological studies . . . tend to confirm, '[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.'"[36]

[34] That court also alluded to the fact that juveniles are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure". In part, this is due to the fact that "juveniles have less control, or less experience with control, over their own environment".[37]

[35] As already pointed out, since the character and personality of children under 18 are not yet fully formed, child offenders may be uniquely capable of rehabilitation. Juveniles are still engaged in the process of defining their own identity. The United States Supreme Court has therefore pointed out that their "vulnerability and comparative lack of control over their immediate surroundings mean juveniles have a greater claim than adults to be forgiven for failing to escape negative influences in their whole environment". Hence:

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[35] *Roper, Superintendent, Potosi Correctional Center v Simmons* 543 U.S. 551 (2005) at 567.

[36] Id at 569.

[37] Id.

> "From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed."[38]

[36] The Supreme Court of Canada has similarly found that because of their heightened vulnerability, relative lack of maturity and reduced capacity for moral judgment, children are entitled to a presumption of diminished moral culpability.[39] This, the Court found, is "fundamental to our notions of how a fair legal system ought to operate".[40] The Court therefore allowed a challenge based on the Canadian Charter of Rights to a statute that required the imposition of adult sentences on certain categories of violent child offenders unless the young person could justify why an adult sentence should not be imposed.

[37] In a practical and entirely unsentimental sense, children embody society's hope for, and its investment in, its own future. The Bill of Rights recognises this. This is why it requires the state to afford them special nurturance, and affords them special protection from the state's power.[41]

[38] Another provision of the Bill of Rights reflects these facts about children. The franchise guarantee, section 19, provides that every "adult citizen"[42] has the right to

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[38] Id at 570.

[39] *R v B (D)* 2008 SCC 25; (2008), 293 D.L.R. (4th) 278 at para 41.

[40] Id at para 68.

[41] See too Illinois Coalition for the Fair Sentencing of Children, *Categorically Less Culpable: Children sentenced to life without possibility of parole in Illinois* (DLA Piper, Chicago 2008).

[42] Section 1(xxv) of the Electoral Act 73 of 1998 defines "voter" as follows:

vote in elections and to stand for public office. Children, as non-adults, are both disenfranchised and incapacitated from holding public office. Their constitutional incapacities stem from the very disabilities of judgment and insight that warrant their constitutional protection against the full rigour of adult punishments.

[39] There is no intrinsic magic in the age of 18, except that in many contexts it has been accepted as marking the transition from childhood to adulthood. The Constitution's drafters could conceivably have set the frontier at 19 or at 17. They did not. They chose 18. For so long as the Bill of Rights stipulates that 'child' means a person under the age of 18 years,[43] its benefits and protections must be afforded to all those under the age of 18 years. This is a bulwark that the legislature cannot overturn without cogent justification. The question is whether the amending provisions attempt to do so.

The effect of the amending provisions

[40] The expressly intended effect of the Amendment Act is to obliterate the distinction between offenders who are 16 and 17 at the time of the offence, on the one hand, and adults on the other. This applies the full rigour of the minimum sentencing regime to them. As explained earlier, under *Malgas*,[44] *Dodo*[45] and *Vilakazi*,[46] the

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"[A] South African citizen—

(a) who is 18 years or older; and

(b) whose name appears on the voters' roll".

[43] Section 28(3) of the Constitution provides: "In this section 'child' means a person under the age of 18 years."

[44] Above n 23.

[45] Above n 27.

starting point for a sentencing court is the minimum sentence, the next question being whether substantial and compelling circumstances can be found to exist. This is answered by considering whether the minimum sentence is clearly disproportionate to the crime.

[41] This is very far from the approach to sentencing that the Bill of Rights demands for children. The Minister argued that certain mitigating features of the amended regime lighten the position. He pointed to the effect of section 51(5)(b) of the amended statute.[47] This permits the suspension of up to half of a minimum sentence imposed on 16 and 17 year olds. The Minister contended that this distinguishes these children from adult offenders. In addition, the court may take into account the amount of time spent incarcerated as an awaiting trial prisoner; while parole might also reduce the period of incarceration. The net result, it was urged, is that a juvenile offender will be subjected to detention for the shortest period of time.

[42] But the power given to suspend half a minimum sentence merely underscores the impact of the new provisions, since it constricts the powers the courts had before the amendment. Before the Amendment Act, they could suspend the entire minimum sentence. Far from giving, the amendment only takes.

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[46] Above n 30.

[47] CLAA section 51(5)(b) provides:

> "Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297(4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question."

[43] In argument the Minister contended that the legislation respected the "last resort" and "shortest appropriate period" precepts, albeit that it was Parliament that had made the determination in question. It is Parliament, the argument proceeded, that has stipulated that, for 16 and 17 year olds committing the scheduled offences, absent substantial and compelling circumstances, the option of last resort, and the shortest appropriate period, consists of the prescribed minimum sentences. Nothing in the children's rights provision, counsel contended, precludes Parliament from itself making the determination in question.

[44] It is correct that Parliament has a role in the individuation of sentences, including sentences of child offenders. This *S v B* recognised by affording the legislatively ordained minimum sentences a weighting effect. But final individuation of sentences is the preserve of the courts. And that must occur in accordance with the children's rights provisions in the Bill of Rights. Parliament cannot without weighty justification take it away. That is the basis of the *Dodo* dispensation.

[45] Counsel for the Minister conceded, as he had to, the principle of judicial individuation of sentence. This creates a difficulty in dealing with the impact of minimum sentences on the children's rights provision. The very nature of minimum sentences is to diminish the courts' power of individuation by constraining their discretion in the sentencing process. The Supreme Court of Appeal in *Vilakazi*[48] has recently emphasised that under *Malgas* and *Dodo* "disproportionate sentences are not

[48] Above n 30 at para 18.

to be imposed and that courts are not vehicles for injustice."[49] Nevertheless, in its very essence the minimum sentencing regime makes for tougher and longer sentences. While the hands of sentencing courts are not bound, they are at least loosely fettered. As this Court noted in *Dodo*, the very object of the regime is to "ensure that consistently heavier sentences are imposed".[50]

[46] The minimum sentencing regime does this in three ways. First, it orientates the sentencing officer at the start of the sentencing process away from options other than incarceration. Second, it de-individuates sentencing by prescribing as a starting point the period for which incarceration is appropriate. Third, even when not imposed, the prescribed sentences conduce to longer and heavier sentences by weighing on the discretion.

[47] The first two elements go against the direct injunctions of the children's rights provision. Those rights do not apply indifferently to children by category. A child's interests are not capable of legislative determination by group. As Ngcobo J has recently affirmed, albeit in a different context:

> "What must be stressed here is that every child is unique and has his or her own individual dignity, special needs and interests. And a child has a right to be treated with dignity and compassion. This means that the child must 'be treated in a caring and sensitive manner.' This requires 'taking into account [the child's] personal situation, and immediate needs, age, gender, disability and level of maturity'. In

[49] Id.

[50] Above n 27 at para 11.

> short, '[e]very child should be treated as an individual with his or her own individual needs, wishes and feelings.'"[51] (Footnotes omitted.)

[48] The children's rights provision thus applies to each child in his or her individual circumstances. This is no less so in the sentencing process than anywhere else. As Sachs J wrote for the Court in *S v M*:[52]

> "A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a predetermined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

[49] The conclusion is therefore unavoidable that the Amendment Act limits the rights in section 28. The question is whether the limitation is justifiable in terms of section 36.[53]

Has the limitation of children's rights been justified?

[50] In *Dodo*, this Court gave the minimum sentencing framework its imprimatur for adults. Here, in clear limitation of section 28(1)(g), Parliament has applied that

[51] Above n 20 at para 123.

[52] *S v M (Centre for Child Law as Amicus Curiae)* [2007] ZACC 18; 2008 (3) SA 232 (CC); 2007 (12) BCLR 1312 (CC) at para 24.

[53] Section 36(1) of the Constitution provides:

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

framework to 16 and 17 year old offenders. While Parliament itself may not be called upon to explain its enactments, where a criminal statute limits a provision of the Bill of Rights, the executive, which initiates the great bulk of legislation enacted by Parliament and is charged with enforcing statutes,[54] is obliged to tender an adequate justification for purposes of a limitations analysis.

[51] In determining whether a limitation is reasonable and justifiable within the meaning of section 36 of the Constitution, "it is necessary to weigh the extent of the limitation of the right, on the one hand, with the purpose, importance and effect of the infringing provision on the other, taking into account the availability of less restrictive means to achieve this purpose."[55]

[52] The purpose of the present limitation appears from portions of the affidavit submitted on behalf of the Minister. The affidavit records views expressed in the legislature in 1997 when the CLAA was originally adopted. These views, as previously observed,[56] are relevant to assessing governmental purpose in enacting the legislation, as opposed to determining statutory meaning. Concern was then expressed at "growing tendencies . . . that indicate that many juveniles are committing the more serious of serious offences, particularly sexual offences"; since the legislation was "targeting the most serious crimes", Parliament could not completely

[54] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 138.

[55] *Richter v Minister for Home Affairs and Others (with Democratic Alliance and Others Intervening, and with Afriforum and Another as Amici Curiae)* [2009] ZACC 3 at para 71.

[56] Above at [22].

exclude juveniles. The affidavit relates further that the government's original objective was to include 16 and 17 year old offenders in the minimum sentencing regime, and to exclude only under-16s. Contrary to this intent, however, the Supreme Court of Appeal decided in *S v B* that the regime did not apply to under-18s. Hence the necessity for the Amendment Act.

[53] From this it appears that government sought the enactment of the amendment to counter the detrimental social impact of scheduled crimes committed by 16 and 17 year olds, and that the purpose of the limitation is to elicit the social benefits that a legislative bulwark against them will deliver.

[54] The difficulty is that the Minister's affidavit tenders no facts from which the legitimacy of this purpose, and the efficacy of its execution, can be assessed. This Court has said that justification does not depend only on facts, but may derive from policy objectives based on reasonable inferences unsupported by empirical data.[57] But even the clear articulation of such policy objectives is lacking. What is more, even in the case of a policy objective—

> "the party relying on justification should place sufficient information before the Court as to the policy that is being furthered, the reasons for that policy and why it is considered reasonable in pursuit of that policy to limit a constitutional right. That is important, for if this is not done the Court may be unable to discern what the policy is, and the party making the constitutional challenge does not have the opportunity of rebutting the contention through countervailing factual material or expert opinion."[58]

[57] *Minister of Home Affairs v National Institute for Crime Prevention and the Reintegration of Offenders (NICRO) and Others* [2004] ZACC 10; 2005 (3) SA 280 (CC); 2004 (5) BCLR 445 (CC) at paras 35–6.

[58] Id at para 36.

[55] Such information would be particularly pertinent in this case. The Amendment Act lowers a line the Constitution itself expressly draws. For purposes of the application of minimum sentences, it supplants the distinction the Bill of Rights draws between under-18s and over-18s, and draws a new line instead at 16. The new broader sweep of the legislation targets specifically 16 and 17 year olds. It could therefore reasonably have been expected that the Minister would set out reasons or policies that pertain specifically to this group: in other words, what specific conduct and social patterns within the age-group previously exempt, but now encompassed, created the need to impose a limitation on the rights in section 28?

[56] Pertinent would be the frequency of offences in these categories; such offences as a proportion of other scheduled offences; and the increase in trend, if any. Thus, the Minister's affidavit could have set out—

(a) How many of each of the scheduled crimes have been committed by 16 and 17 year olds within any recent statistical year;

(b) What proportion of the total number of such crimes consist of offences by 16 and 17 year olds;

(c) Whether there has been an absolute statistical increase in such crimes;

(d) Whether such crimes have increased as a proportion of the total.

[57] In addition, it would have assisted this Court's assessment if the affidavit set out what specific social objectives the new framework's added severity aimed to

achieve: whether it sought to attain ends such as deterrence; or whether it was aimed at satisfying rightful public anger at juvenile crime.

[58] Given the Minister's explanation that the government's objective in enacting the Amendment Act was to reverse the outcome of *S v B*, one would have expected an explanation of the respects in which this regime (which the Supreme Court of Appeal crafted in the light of the pre-amendment provisions) was insufficient. But this is entirely lacking. Nor does the affidavit say how the new, tougher regime will achieve any constitutionally permitted objective.

[59] It was debated during argument whether the Court can take judicial notice that serious crime in all categories has increased. This is open to question since it has been a publicly presented article of faith of government that serious crime has stabilised and that in most categories it has in recent years come down. What the Court can take note of is that, generally, levels of crime are enormously and unacceptably high, especially those in the scheduled categories,[59] and that there is well-warranted public disquiet and anger about this.

[60] But high crime levels and well-justified public anger do not provide justification for a legislative intervention overriding a specific protection in the Bill of Rights. The effect of the Amendment Act is to single out one precisely defined group

[59] The statistics released by the Department of Correctional Services for the latest available period (2007/8) give a telling account of the pervasiveness of the scheduled crimes: see http://www.dcs.gov.za/WebStatistics, accessed on 1 June 2009.

of offenders and limit the rights the Constitution specially affords them. Justifying the limitation of their rights requires information or policies bearing directly on this group. But the Minister offers no such evidence, nor any stated policy objectives. In its absence, it is difficult to appraise less restrictive means.

[61] The Centre rightly submitted that several international law instruments count in favour of the view that minimum sentences should not apply to child offenders.[60] The principles evident from these documents regarding child sentences are: proportionality (children must be dealt with in a manner "appropriate to their well-being and proportionate both to their circumstances and the offence");[61] imprisonment as a measure of last resort and for the shortest appropriate period of time;[62] that children must be treated differently from adults;[63] and that the well-being of the child is the central consideration.

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[60] Key amongst these are the United Nations Convention on the Rights of the Child; United Nations Standard Minimum Rules for the Administration of Juvenile Justice (General Assembly resolution 40/33, 1985) (the Beijing Rules); United Nations Rules for the Protection of Juveniles Deprived of their Liberty (General Assembly resolution 45/113, 1990) (JDLs); and the United Nations Guidelines for the Prevention of Juvenile Delinquency (General Assembly resolution 45/112, 1990) (the Riyadh Guidelines).

[61] Rule 17(1)(a) of the Beijing Rules provides in relation to sentencing juveniles that the sentencing authority must be guided by the principle that "[t]he reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of society".

[62] This principle is emphasised by Rule 17(1)(b) of the Beijing Rules; Rule I(1) of the JDLs; and article 37(b) of the United Nations Convention on the Rights of the Child, which provides—

> "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."

[63] Article 40(1) of the Convention on the Rights of the Child provides—

> "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."

[62] The Centre further submitted – and counsel for the Minister accepted – that the only comparable country that imposes minimum sentences on children is the United States of America. While the situation varies from country to country, counsel were agreed that children in comparable systems (such as the United Kingdom)[64] appear to be either excluded from minimum sentencing legislation applicable to adults, or to be subject to much shorter prescribed sentences.

[63] It is plain that the Bill of Rights in our Constitution amply embodies these internationally accepted principles. Its provisions merely need to be given their intended effect. This leads to the conclusion that no maintainable justification has been advanced for including 16 and 17 year olds in the minimum sentencing regime. Legislation cannot take away the right of 16 and 17 year olds to be detained only as a last resort, and for the shortest appropriate period of time, without reasons being provided that specifically relate to this group and explain the need to change the constitutional disposition applying to them.

[64] In these circumstances the premises underlying the judgment of the High Court, set out earlier,[65] are correct. It must follow that the limitation of section 28(1)(g) is unconstitutional and must be so declared.[66]

[64] Section 226 of the United Kingdom Criminal Justice Act, 2003 makes provision for detention for life or detention for public protection for serious offences committed by those under 18. The section applies where an offender under 18 is convicted of a serious offence and that if a court is of the opinion "that there is a significant risk to members of the public of serious harm occasioned by the commission by him of further specified offences." If in such cases the offence is one in respect of which the offender would anyhow be liable to detention for life, and "the court considers that the seriousness of the offence, or of the offence and one or more offences associated with it, is such as to justify the imposition of a sentence of detention for life", the court must impose that sentence.

[65] See [14] above.

[65] I have had the opportunity of reading the judgment of my colleague Yacoob J, who finds that the amending provisions can be read so as to avoid conflict with section 28. I regret I do not find my colleague's approach persuasive and cannot endorse his conclusion. In my view the provisions are not reasonably capable of the interpretation he urges. This is for two reasons. The first is that my colleague's position entails an internal inconsistency. The second is that his position would, if enforced, give rise to grave practical difficulties in sentencing child offenders.

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[66] The Centre referred the Court to the Child Justice Act 75 of 2008, which Parliament passed on 19 November 2008, and which was assented to (after the hearing in this Court), on 11 May 2009 (see Government Gazette 32225 GN 549). According to section 100 of the Act, it will take effect on 1 April 2010 or any earlier date fixed by the President by proclamation in the Government Gazette. Section 77(2) of the Act provides that:

> "Notwithstanding any provision in this or any other law, a child who was 16 years or older at the time of the commission of an offence referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act no. 105 of 1997) must, if convicted, be dealt with in accordance with the provisions of section 51 of that Act."

Section 69(4) of the Act provides:

> "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."

Section 77(6) provides:

> "In compliance with the Republic's international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment."

[66] First, my colleague's judgment equivocates between acknowledging that the amending provisions subject children to the prescribed minima and reading them as if they have no effect at all. While my colleague states that the Amendment Act "without doubt" makes the regime of prescribed minima applicable to 16 and 17 year old children (at [104] below), he denies that it does so in a de-individuating way since, he says, the statute does not oblige courts "to impose a sentence on children that is in excess of that mandated by section 28(1)(g)" (at [101] below). In my view this creates an untenable duality in his position. Both the propositions cannot simultaneously be true. The fact is that the minimum sentencing regime by its very nature de-individuates sentencing, thereby conducing to consistently longer sentences. Because of these features, applying that regime to children limits section 28 rights in a way that requires justification.

[67] Second, the approach of Yacoob J entails serious operational perils for the sentencing of child offenders. Because it equivocates in the way I have shown, it does not adequately explain how far the minimum sentencing regime can legitimately push sentences upwards. It therefore leaves an especially vulnerable group with a significant degree of uncertainty about the content of their constitutional rights. As this Court said in *Richter*, "a law that regulates a fundamental right should be expressed in a manner which will enable citizens to determine with relative clarity what rights they have and do not have."[67]

[67] Above n 55 at para 64.

[68] In my view the unconstitutional impact of the amending provisions cannot reasonably be interpreted away. It is therefore this Court's duty to declare them invalid.

What relief should be granted?

[69] As will be seen from the order of invalidity the High Court granted,[68] it included the provisions of section 53A(b).[69] This provision requires regional courts with pending sentencing proceedings that have not yet committed the accused persons for sentencing in the High Court to "dispose of the matter in terms of this Act, as amended". Before this Court, the Centre did not however contend that, should the Amendment Act be struck down for 16 and 17 year olds, section 53A has any offensive retrospective working. It seems to me the transitional provision can and should be interpreted to deal solely with the jurisdiction of the regional court to impose higher sentences. It gives no power to sentence 16 and 17 year olds whose offences predated the Amendment more harshly. It therefore has no retroactive effect and must be excluded from the declaration of invalidity.

[70] The rest of the order granted by the High Court, declaring the amended minimum sentence provisions "inconsistent with sections 28(1)(g) and 28(2) of the Constitution", was not as precise as the order the Centre sought in its notice of motion, which was in part:

[68] See [10] above.

[69] Above n 14.

> "(1) Declaring that sections 51(1) and (2) of the Criminal Law Amendment Act, 105 of 1997, as amended, are inconsistent with the Constitution and invalid, to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence.
>
> (2) Declaring that:
>
> (a) section 51(6) of the Criminal Law Amendment Act, 105 of 1997, as amended, is inconsistent with the Constitution and invalid; and
>
> (b) to remedy the defect, section 51(6) of the Criminal Law Amendment Act, 105 of 1997, as amended, is to read as though it provides as follows:
>
> 'This section does not apply in respect of an accused person who was under 18 at the time of the commission of an offence contemplated in subsection (1) or (2).'
>
> (3) Declaring that section 51(5)(b) of the Criminal Law Amendment Act, 105 of 1997, as amended, is inconsistent with the Constitution and invalid."

[71] These prayers, while less compressed than the order granted by the High Court, have the merit of greater precision. Paragraph 1 of the order of the High Court should therefore be set aside and replaced with an order as sought in paragraphs 1, 2, and 3 of the notice of motion.

[72] Paragraphs 5, 6 and 7 of the Centre's notice of motion, which the High Court postponed, sought structured relief aimed at securing reconsideration of sentences passed on juveniles under the amended provisions. The Centre sought an order directing the Minister and the Minister for Correctional Services to take all steps necessary to ensure that persons under 18 who have been sentenced under the CLAA as amended have their sentences reconsidered. The relief the Centre sought included identifying the children within two months, and causing them to be brought before a

competent court in order to have their sentences reconsidered, with adequate legal representation.

[73] These prayers aim to remedy the fact that children have been subject to unconstitutional sentencing decisions since 31 December 2007. The Centre contends that it would be intolerable if no relief was provided to such children. In the light of the fact that those affected are children and that they might not become aware of this Court's decision, it argues that the state is under a duty to take all steps necessary to ensure that such children have their sentences reconsidered in the light of the unconstitutionality of the Amendment Act. The Centre thus submits that it is appropriate to require the Ministers involved to file affidavits regarding the steps taken.[70]

[74] But is the relief sought here compatible with the proper approach to retroactivity in criminal proceedings? In *S v Bhulwana*,[71] this Court stated:

> "Central to a consideration of the interests of justice in a particular case is that successful litigants should obtain the relief they seek. It is only when the interests of good government outweigh the interests of the individual litigants that the Court will not grant relief to successful litigants. In principle, too, the litigants before the Court should not be singled out for the grant of relief, but relief should be afforded to all people who are in the same situation as the litigants. On the other hand, as we stated

[70] A similar order was made in *Sibiya and Others v Director of Public Prosecutions: Johannesburg High Court and Others* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC), when after *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) abolished the death penalty, the state was required to ensure the substitution of death sentences with alternative suitable sentences. *Sibiya* granted a detailed supervisory order ensuring that those still detained under sentence of death were identified, their particulars provided, and affidavits filed with this Court by particular dates.

[71] *S v Bhulwana; S v Gwadiso* [1995] ZACC 11; 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC) at para 32.

> in *S v Zuma* (at para [43]), we should be circumspect in exercising our powers under section 98(6)(*a*) so as to avoid unnecessary dislocation and uncertainty in the criminal justice process." (References omitted.)

[75] In *National Coalition*,[72] this Court declared the common law offence of sodomy unconstitutional, retroactive to the adoption of the interim Constitution in 1994. It nevertheless declined to grant an order of unqualified retrospectivity. It reasoned that—

> "Persons might act directly under the order to have convictions set aside without adequate judicial supervision or institute claims for damages. The least disruptive way of giving relief to persons in respect of past convictions for consensual sodomy is through the established court structures. On the strength of the order of constitutional invalidity such persons could note an appeal against their convictions for consensual sodomy, where the period for noting such appeal has not yet expired, or, where it has, could bring an application for condonation of the late noting of an appeal or the late application for leave to appeal to a Court of competent jurisdiction. In this way effective judicial control can be exercised. Although this might result in cases having to be reopened, it will in all probability not cause dislocation of the administration of justice of any moment."

[76] A less disruptive alternative to the relief the Centre seeks would thus be to follow the lead in *National Coalition*, while at the same time issuing directions requesting further information on affidavit from the two Ministers. The information sought should set out the number of affected juveniles sentenced under the Amendment Act between its coming into effect on 1 January 2008 and the date of this

[72] *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* [1998] ZACC 15; 1999 (1) SA 6 (CC); 1998 (12) BCLR 1517 (CC) at para 97.

Court's order. This will be combined with orders making it possible for those affected to initiate appeals against sentences imposed on them under the Amendment Act.

Costs

[77] In accordance with the now-established practice in this Court, the Centre, having succeeded in vindicating constitutional rights against a government respondent, should get its costs both in this court and the court below, including the costs of two counsel. There should be no order as to the amicus' costs.

Order

[78] The following order is granted:

1. The declarations of invalidity granted by the North Gauteng High Court, Pretoria (case number 11214/08) dated 4 November 2008 are set aside, and are substituted by the following order:
    a. It is declared that sections 51(1) and (2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, are inconsistent with the Constitution and invalid, to the extent that they apply to persons who were under 18 years of age at the time of the commission of the offence.
    b. It is declared that:
        i. Section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law

(Sentencing) Amendment Act 38 of 2007, is inconsistent with the Constitution and invalid; and

ii. To remedy the defect, section 51(6) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is to read as though it provides as follows:

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

c. It is declared that section 51(5)(b) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, is inconsistent with the Constitution and invalid.

2. In terms of section 172(1)(b) of the Constitution, the order in paragraph 1 above shall not invalidate any sentence imposed for scheduled offences in terms of sections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007, on persons who were younger than 18 and older than 16 at the time of the commission of the act that constitutes the offence, unless either an appeal from, or a review of, the relevant sentence is pending, or the time for noting of an appeal has not yet expired, or condonation for the late noting of an appeal or late filing of an application for leave to appeal is granted by a competent court.

3. The first and second respondents are directed by 30 September 2009 to furnish a report to the applicant, and to lodge a copy with this Court, setting out—

    (a) the name of every person younger than 18 and older than 16 at the time the offence was committed who was sentenced for a scheduled offence in terms of sections 51(1) and 51(2) of the Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007;

    (b) the number of the case in which such sentence was passed;

    (c) the court that passed the sentence; and

    (d) the date on which the sentence was passed.

4. The first respondent is ordered to pay the costs of the applicant, in this Court and the High Court, including the costs of two counsel.

Langa CJ, Moseneke DCJ, Mokgoro J, O'Regan J, Sachs J and Van der Westhuizen J concur in the judgment of Cameron J.

YACOOB J:

Introduction

[79] This case raises important questions concerning the respective roles of the legislature and the courts in the sentencing of children, as well as the true impact of section 28(1)(g) of our Constitution on the sentencing of children. More specifically, the question to be answered is whether provisions of a law[1] which made certain minimum sentencing provisions applicable to 16 and 17 year old children are inconsistent with the Constitution.[2] The applicant for confirmation contended and the High Court held that the law offends the constitutional prescript that children must be subject to detention only as a "matter of last resort" and then only "for the shortest appropriate time".

[80] I have read the judgment (the majority judgment) of my colleague Cameron J who eloquently concludes that the law is an unjustifiable limitation of the section 28(1)(g) right. I am regrettably unable to agree with this conclusion. I agree with much of the judgment of Cameron J particularly where my colleague expands upon the vulnerability of children, their immaturity, the fact that they are easily influenced as well as the circumstance that the possibilities of the rehabilitation of children and their reintegration into society must always be carefully considered by a sentencing court. It is indeed beyond debate that the Constitution requires children to be treated with special care and concern when they are sentenced. The main differences between

[1] Criminal Law Amendment Act 105 of 1997, as amended by the Criminal Law (Sentencing) Amendment Act 38 of 2007.

[2] In particular, section 28(1)(g).

this judgment and that of Cameron J concern the exposition of the meaning and impact of section 28(1)(g) of the Constitution and the minimum sentencing regime in so far as it relates to children who are 16 and 17 years of age.

[81] This judgment essentially reaches the following conclusions:

(a) The executive, the legislature and the judiciary all have a role in the sentencing process in so far as it concerns children.

(b) It is the duty of all three arms of government to respect, protect, promote and fulfil the rights of children in the Constitution.

(c) The law that makes the minimum sentencing provisions applicable to 16 and 17 year old children is Parliament's response to certain perceived evils in society and its contribution to the sentencing process.

(d) It is a court, and only a court, that sentences children and, in doing so, is bound by section 28(1)(g) of the Constitution.

(e) The law would be unconstitutional only if it obliges a court to ignore the prescripts of section 28(1)(g) of the Constitution.

(f) The legislature cannot do so, has not done so expressly, and, on a proper construction of the statute, plainly has not done so by necessary implication either.

(g) In the circumstances the law is constitutionally compliant.

[82] This judgment discusses the following topics:

(a) the meaning, scope and effect of section 28(1)(g) of the Constitution;

(b) the role of Parliament and the executive in the sentencing of children and its limits;

(c) the meaning and effect of the minimum sentencing regime in general and in so far as it relates to children in particular; and

(d) whether the minimum sentencing legislation in so far as it relates to children is inconsistent with the Constitution.

The meaning, scope and effect of section 28(1)(g) of the Constitution

[83] Section 28(1)(g) provides:

> "(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 only for the shortest appropriate period of time, and has the right to be—
>
> (i) kept separately from detained persons over the age of 18 years; and
>
> (ii) treated in a manner, and kept in conditions, that take account of the child's age". (My emphasis.)

[84] It is apparent that section 28(1)(g) is not concerned simply with the sentencing of children by courts. It has a wide impact and applies to detentions of all kinds. It is not necessary in this judgment for us to consider any detention other than incarceration consequent upon the imposition of a sentence of imprisonment. I will accordingly develop this section of the judgment with respect to custodial sentences imposed upon children.

[85] The Constitution provides that the whole of the Bill of Rights, including section 28(1)(g), applies to all law and is binding on the legislature, the executive and the judiciary. It is the duty of all three arms of government therefore to respect, protect and fulfil the rights of children in the Bill of Rights. Our Constitution, however, envisages that sentencing is a judicial function and that this function will be performed by the courts and only the courts. Indeed any effort by an administrative, executive or legislative entity to impose a sentence on anyone would be inconsistent with the Constitution. In so far as section 28(1)(g) applies to sentencing, therefore, it is essentially and primarily an injunction to our courts; an injunction which must be taken seriously and which can under no circumstances be ignored; an injunction which no legislation can override constitutionally. This does not mean however that the legislature and the executive do not have obligations imposed upon them by this provision.

[86] All our courts are obliged when imposing sentence to ensure that a sentence of imprisonment must be imposed on any child, who by definition is any person under the age of 18 years, only as a matter of last resort and only for the shortest appropriate period. Each of these concepts must be examined briefly.

[87] Certain pronouncements by our courts on the meaning of the phrase “last resort” imply that the phrase renders appropriate a distinction between “first resort”

and "last resort" or even first resort, intermediate resort, and last resort.[3] This approach implies that a court is obliged to consider all options other than imprisonment, exclude them one by one and consider imprisonment as a form of punishment only after it has concluded that each of the other methods of punishment are inappropriate in the circumstances. The approach is, with respect, somewhat mechanical and not conducive to giving the constitutional provision its full effect in the protection of children.

[88] The injunction that children must be sentenced to imprisonment as a matter of last resort means simply that a child must be sentenced to a term of imprisonment only if, after considering all the relevant circumstances, the court concerned concludes that there is no option but to sentence the child to imprisonment. These circumstances would include the nature and gravity of the offence, any mitigating circumstances, all the personal circumstances concerning the child as well as the requirements of society. Particular attention must of course be paid to the vulnerability of the child concerned, the fact that the child can easily be influenced, the child's lack of maturity as well as the important aspect of rehabilitation. All these factors must be considered against the backdrop of an understanding of the preventive, rehabilitative and punitive purposes of punishment. It is only after all these facts are considered that a court can properly determine whether imprisonment is the only appropriate option. If it is, the shortest appropriate period of imprisonment must be imposed. Indeed, courts would be failing

[3] See, for example, *S v B* 2006 (1) SACR 311 (SCA); [2005] 2 All SA 1 (SCA) at para 22.

in their duty if, where imprisonment is the only appropriate option, they impose a lesser sentence out of undue sympathy for the child concerned.

[89] Nor does a court err if it forms an initial view that a prison sentence is appropriate. It is beyond doubt that this could often be an unobjectionable first response in the case, for example, of a 16 year old child who has committed a heinous murder, demonstrates the maturity of an adult and has relevant serious previous convictions. To start an evaluation of what the appropriate sentence is for a child on this basis cannot and does not mean that a court regards imprisonment as a matter of first resort. Whatever its initial views might be, and the Constitution does not preclude any court from having a prima facie view, the court complies with section 28(1)(g) if it takes into account all the relevant circumstances and, in the ultimate analysis, makes a proper determination whether imprisonment is the only appropriate option in the case at hand.

[90] Concepts such as first resort and intermediate resort confuse the analysis. Simply put, if a court concludes that imprisonment is the only appropriate option, a custodial sentence complies with the Constitution. It does not matter where the court starts in the sentencing process; all that matters for the purposes of section 28(1)(g) is whether the sentence eventually imposed is unavoidable in the circumstances and is the shortest appropriate period. I emphasise that the Constitution prescribes no starting point in a court's reasoning concerning sentence.

[91] The next phrase that needs some attention is the phrase "for the shortest appropriate period of time". It is difficult to see how this phrase has practical application to a court that is bound by it. This is because any court, after concluding that a sentence of imprisonment is appropriate, must determine, in all the circumstances, the appropriate period of incarceration. There cannot ordinarily be two appropriate periods, the one shorter than the other. The phrase does however have some practical significance but only in those cases in which the presiding officer is in some doubt about whether a shorter period of imprisonment or a somewhat longer one is appropriate. If this happens, courts would err if they imposed the longer prison term.

[92] I agree with the Supreme Court of Appeal[4] that:

> "Having regard to section 28(1)(*g*) of the Constitution and the relevant international instruments, as already indicated, it is clear that in every case involving a juvenile offender, the ambit and scope of sentencing will have to be widened in order to give effect to the principle that a child offender is 'not to be detained except as a measure of last resort' and if detention a of child is unavoidable, this should be 'only for the shortest appropriate period of time'."

I would add that section 28(1)(g), quite apart from widening the enquiry, as rightly pointed out by the Supreme Court of Appeal, both changes and concentrates the focus of the enquiry. Two specific questions must be asked: is imprisonment appropriate in the circumstances? If it is, what is the appropriate shortest period? I also agree that:

[4] *Director of Public Prosecutions, KwaZulu-Natal v P* 2006 (3) SA 515 (SCA); 2006 (1) SACR 243 (SCA) at para 18.

> "Even in the case of a juvenile . . . the sentence imposed must be in proportion to the gravity of the offence."[5]

[93] I agree with the principles as set out in *Nkosi*[6] as being made applicable by section 28(1)(g) in imposing sentences on children. These are set out as follows:

> "(i) Wherever possible a sentence of imprisonment should be avoided, especially in the case of a first offender.
>
> (ii) Imprisonment should be considered as a measure of last resort, where no other sentence can be considered appropriate. Serious violent crimes would fall into this category.
>
> (iii) 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 interests of the child offender.
>
> (iv) If at all possible the judicial officer must structure the punishment in such a way as to promote the rehabilitation and reintegration of the child concerned into his/her family or community.
>
> (v) The sentence of life imprisonment may only be considered in exceptional circumstances. Such circumstances would be present where the offender is a danger to society and there is no reasonable prospect of his or her rehabilitation."[7]

[94] It must be emphasised that there are three requirements that section 28(1)(g) decidedly does not stipulate. The first is that the section does not require the sentence ultimately imposed on children to be necessarily lower than the sentence that is imposed on an adult for the same offence. The differentiation is exacted, not so much in relation to the ultimate sentence that is imposed, but rather in the way in which the

[5] Id at para 22. See also above n 3 at para 20.

[6] *S v Nkosi* 2002 (1) SA 494 (W); 2002 (1) SACR 135 (W).

[7] Id at 505G-J; 147F-I.

sentence to be imposed is determined. A lower sentence for children might well be the result of the proper approach by a court in a large number of cases, but certainly not necessarily so. One can think of cases in which the sentence imposed on a child who is 17 years old might, in all the circumstances, quite properly be identical to a sentence imposed on an older accomplice. One can also imagine a situation, not so out of step with reality, in which a 25 year old person for example could be found to have been less mature and more susceptible to influence than a dominant 17-year-old child. In these circumstances, the child who is 17 years old could well receive a much heavier sentence than the adult.

[95] Secondly, section 28(1)(g) by no stretch of the imagination requires that the appropriate sentences for children be determined in isolation of the appropriate sentences for adults. It is right for a court to take into consideration what the appropriate term of imprisonment would be if the offence in question had been committed by a mature adult and, in that context, determine the sentence appropriate to a child convicted of the same offence after giving full weight to the special features of vulnerability, immaturity and rehabilitative possibilities in respect of that child. It is entirely appropriate, in my view, for a court, in the process of sentencing a child, to take into account, if that be the case, that the sentences being imposed on adults for similar offences have increased substantially in the recent past. Indeed, a court will be obliged to take this factor into account in its effort to comply with the requirement of proportionality. The sentences imposed on children committing the same offences as

adults could become disproportionately low if imposed without regard to a consideration of the sentences being imposed on adults for similar offences.

[96] It is an inevitable consequence of the requirement of proportionality that increases in sentences imposed on adults for certain offences would exert upward pressure on the sentences imposed on children for similar offences. And this consequence does not follow in the one direction only. Decreases in sentences imposed on adults for particular offences would have the concomitant result that the sentences imposed on children for similar offences would also go down. I therefore do not understand the concern that higher sentences are now being imposed upon children. If this is a consequence of the higher sentences being imposed on adults, it is in my view painfully unavoidable.

[97] Thirdly, section 28(1)(g) in no way either expressly or by implication limit the role of the executive and the legislature in the determination of sentences. The majority judgment does not say, and could not legitimately say, that this is so. Indeed, the section does not prevent Parliament from enacting minimum sentencing legislation in respect of children, nor does the Constitution require that all minimum sentences for children will be invalid. A law cannot therefore be in conflict with section 28(1)(g) merely because it provides for minimum sentences in relation to children. The majority judgment, to the extent that it favours a contention that section 28(1)(g) has deprived the legislature of the power to determine discretionary minimum sentences in relation to children, is not acceptable.

The role of Parliament and the executive in the sentencing of children and its limits

[98] It is now settled that the legislature and the executive have a legitimate role in the sentencing process. This Court has said in *Dodo*:[8]

> "Both the Legislature and Executive share an interest in the punishment to be imposed by courts, both in regard to its nature and its severity. They have a general interest in sentencing policy, penology and the extent to which correctional institutions are used to further the various objectives of punishment."[9] (Footnote omitted.)

This Court said further:

> "The executive and legislative branches of State have a very real interest in the severity of sentences. The Executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.
>
> In order to discharge this obligation, which is an integral part of constitutionalism, the executive and legislative branches must have the power under the Constitution to carry out these obligations. They must have the power, through legislative means, of ensuring that sufficiently severe penalties are imposed on dangerous criminals in order to protect society."[10]

And I may add that a court should not unduly limit this necessary power.

[8] *S v Dodo* [2001] ZACC 16; 2001 (3) SA 382 (CC); 2001 (5) BCLR 423 (CC).

[9] Id at para 23.

[10] Id at paras 24-5.

[99] It has not been suggested, nor could it be, that the legislature and the executive do not have an equally important role in so far as the sentencing of children is concerned. They undoubtedly do. As I have pointed out earlier, nothing in section 28(1)(g) or anywhere else in the Constitution suggests that the legislature's important role in this regard should be curtailed other than to the extent described in the next paragraph. The legislature therefore cannot be said to be in violation of the Constitution merely because it passed legislation that has an impact on the sentences to be imposed on children. The Constitution does not reserve this power as the sole prerogative of the courts, and all courts are obliged to ensure that the appropriate role of the legislature is not negated but, on the contrary, is respected and protected.

[100] But there are also important limits to the power of the legislature. As was said in *Dodo*:

> "The Legislature's powers are decidedly not unlimited. . . . [Legislative] power ought not, on general constitutional principles, wholly to exclude the important function and power of a court to apply and adapt a general principle to the individual case. This power must be appropriately balanced with that of the Judiciary. What an appropriate balance ought to be is incapable of comprehensive abstract formulation, but must be decided as specific challenges arise. In the field of sentencing, however, it can be stated as a matter of principle that the Legislature ought not to oblige the Judiciary to impose a punishment which is wholly lacking in proportionality to the crime. This would be inimical to the rule of law and the constitutional State. It would *a fortiori* be so if the Legislature obliged the Judiciary to pass a sentence which was inconsistent with the Constitution and in particular with the Bill of Rights. The clearest example of this would be a statutory provision that obliged a court to impose a sentence which was inconsistent with an accused's right not to be sentenced to a

> punishment which was cruel, inhuman or degrading as envisaged by s 12(1)*(e)* of the Constitution, or to a fair trial under s 35(3)."[11] (Footnote omitted.)

[101] For the purpose of this judgment it must be emphasised that the legislature does have an important role and interest in the punishment to be imposed by courts on children but that, as has been authoritatively held by this Court, the legislature cannot oblige any court to pass a sentence that is inconsistent with the Constitution and in particular the Bill of Rights. The sentencing regime in relation to children would therefore be inconsistent with the Constitution if it obliged courts to impose a sentence on children that is in excess of that mandated by section 28(1)(g). If the court is obliged to impose a sentence that is in excess of that required by section 28(1)(g), the applicability of the minimum sentencing system to children who are 16 and 17 years old would be inconsistent with the Constitution. If the law places no obligation on any court to impose on a child a sentence in excess of that mandated by section 28(1)(g), it cannot be said to be inconsistent with the Constitution. In other words, if the impugned law does not have an impact on the court's duty to apply section 28(1)(g) of the Constitution, it cannot be inconsistent with this injunction.

[102] The question for our decision is not whether the discretion of the court in the imposition of a sentence on a child is limited in any way by making minimum sentencing legislation applicable to 16 and 17 year old children. The Constitution does not require the discretion of a court that sentences children to be wholly unlimited. Nor is the issue for our determination whether the minimum sentence

[11] Id at para 26.

legislation would result in higher sentences being imposed on children for the offences in respect of which minimum sentences are specified. The only questions we must answer in this case are whether the application of the minimum sentence legislation to 16 and 17 year old children would oblige a court to, or have the effect that a court would—

(a) impose a sentence of imprisonment when it is not appropriate to do so; or

(b) impose a period of imprisonment that is longer than is considered to be appropriate by a court after considering all the relevant circumstances.

These questions must now receive attention in the context of a discussion of the meaning and effect of minimum sentences applicable to children.

The meaning and effect of the minimum sentencing regime generally and in its applicability to children

[103] Section 51 of the Act[12] to the extent relevant provides:

> "(1) Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life.
>
> (2) Notwithstanding any other law but subject to subsections (3) and (6), a regional court or a High Court shall sentence a person who has been convicted of an offence referred to in—
>
> (*a*) Part II of Schedule 2, in the case of—
>
> (i) a first offender, to imprisonment for a period not less than 15 years;
>
> (ii) a second offender of any such offence, to imprisonment for a period not less than 20 years; and

[12] Above n 1.

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 25 years;

(*b*) Part III of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 10 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 15 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 20 years; and

(*c*) Part IV of Schedule 2, in the case of—

(i) a first offender, to imprisonment for a period not less than 5 years;

(ii) a second offender of any such offence, to imprisonment for a period not less than 7 years; and

(iii) a third or subsequent offender of any such offence, to imprisonment for a period not less than 10 years:

Provided that the maximum term of imprisonment that a regional court may impose in terms of this subsection shall not exceed the minimum term of imprisonment that it must impose in terms of this subsection by more than five years.

(3)(*a*) If any court referred to in subsection (1) or (2) is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence than the sentence prescribed in those subsections, it shall enter those circumstances on the record of the proceedings and must thereupon impose such lesser sentence: Provided that if a regional court imposes such a lesser sentence in respect of an offence referred to Part 1 of Schedule 2, it shall have jurisdiction to impose a term of imprisonment for a period not exceeding 30 years.

. . . .

(5)(*a*) Subject to paragraph (*b*), the operation of a minimum sentence imposed in terms of this section shall not be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977).

(*b*) Not more than half of a minimum sentence imposed in terms of subsection (2) may be suspended as contemplated in section 297 (4) of the Criminal Procedure Act, 1977, if the accused person was 16 years of age or older, but under the age of 18 years, at the time of the commission of the offence in question.

(6) This section does not apply in respect of an accused person who was under the age of 16 years at the time of the commission of an offence contemplated in subsection (1) or (2)."[13]

[104] The minimum sentences prescribed by the Act have now without doubt been made applicable to children who are 16 and 17 years old. The legislature has done so in the exercise of its role and responsibilities in relation to the sentencing of children. This law is therefore Parliament's response to certain perceived evils in society and its contribution to the sentencing process. The relevant provisions must be interpreted on the basis that all children are the beneficiaries of the rights conferred by section 28(1)(g) of the Constitution. This is underlined by the fact that the legislature now clarifies that the imposition of the minimum sentences is discretionary and not mandatory.[14]

[105] We must determine the impact of this legislation and its application to children in the context of the circumstance that, as I have already said earlier, section 28(1)(g)

[13] The Schedule covers extreme cases of murder, robbery and rape, offences under the Protection of Constitutional Democracy against Terrorist and Related Activities Act 33 of 2004, drug and drug trafficking offences, human trafficking and other serious offences.

[14] The law changes the heading of its relevant section from "Minimum sentences for certain serious offences" to "Discretionary minimum sentences for certain serious offences".

of our Constitution is binding on all courts; courts are obliged to give full effect to the provision. The legislation does not expressly require courts to ignore the provisions of section 28(1)(g) nor does it expressly oblige any court to impose a sentence on any child that is inappropriate. The only question to be answered therefore is whether the section does so by necessary implication. I pause here to point out that the majority judgment, on its own terms, does not conclude that courts have become obliged to impose a sentence that is inconsistent with the provisions of section 28(1)(g).

[106] The majority judgments approach is that the application of the minimum sentencing legislation to children would result in consistently heavier sentences being imposed on them.[15] The judgment says that this is achieved by orientating the judge or magistrate away from options other than imprisonment. Secondly, the system de-individuates sentence by prescribing a period of imprisonment as a starting point. These two propositions taken together might imply that the nett effect of the legislation is the imposition of sentences higher than those mandated by section 28(1)(g) of the Constitution. I examine these criticisms of the sentencing regime later. I must first develop the proposition that no court in this country is obliged to impose a sentence on any child inconsistently with the Constitution.

[107] The advent of our constitutional democracy with the principle of the supremacy of the Constitution that it introduced requires a fundamental change to the way in which the task of statutory interpretation is carried out. The effect of the supremacy

[15] Above [45].

of the Constitution is that the Constitution (and every provision of it) permeates the law to every corner. In "one fell swoop" our supreme law brought about a decisive transformation of our legal system and the way we interpret statutes.[16] To borrow a phrase, "it was no longer going to be business as usual" – that business being the statute as the starting point. The starting point is no longer the statute but the Constitution itself. This means the starting point is no longer what the statutory provision says but what the Constitution says.

[108] This interpretive injunction is expressly ordained by section 39(2) of the Constitution. There is a long line of judgments of this Court in which we have repeatedly emphasised the rule, by now axiomatic, that where a statutory provision is reasonably capable of a construction that would bring it in line with the Constitution, it is that construction which must be preferred provided that it is not strained.[17] Judges and magistrates alike have the duty to comply with section 39(2). This means that a court construing a statute must first consider whether the statute is capable of a construction that will bring it within constitutional bounds.

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[16] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) at para 36.

[17] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and Others* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 72; *National Director of Public Prosecutions and Another v Mohamed NO and Others* [2003] ZACC 4; 2003 (4) SA 1 (CC); 2003 (5) BCLR 476 (CC) at para 35; *Olitzki Property Holdings v State Tender Board and Another* 2001 (3) SA 1247 (SCA); 2001 (8) BCLR 779 (SCA) at para 20; *S v Dzukuda and Others; S v Tshilo* [2000] ZACC 16; 2000 (4) SA 1078 (CC); 2000 (11) BCLR 1252 (CC) at para 37; *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21-6; *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) at paras 23-4; *De Lange v Smuts NO and Others* [1998] ZACC 6; 1998 (3) SA 785 (CC); 1998 (7) BCLR 779 (CC) at para 85; and *Bernstein and Others v Bester and Others NNO* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 59.

[109] A fundamental difference between the application of the minimum sentencing legislation to children who are 16 and 17 years old and the application of the legislation to adults must be stressed. When an appropriate sentence for adults is considered, section 28(1)(g) of the Constitution is not directly applicable. But the section is applicable to the sentencing of children. Courts that sentence children are engaged in the process of determining an appropriate sentence by making two focused enquiries. First, is imprisonment the only appropriate option? Secondly, what is the shortest appropriate period of imprisonment? Our Constitution requires judges and magistrates to apply themselves assiduously to these two questions.

[110] The Supreme Court of Appeal has determined the practical effect of minimum sentencing legislation in so far as it is applicable to adults.[18] The approach has been approved by this Court in *Dodo*[19] and is now binding. We must keep at the forefront of our minds the fact that all courts that sentence children are bound by the provisions of section 28(1)(g) of the Constitution and, in that context, investigate if and how the statement in *Malgas* concerning the application of the minimum sentencing regime on adults has implications for the application of minimum sentences to children who are 16 and 17 years old.

[111] It was said in *Malgas* that:

[18] *S v Malgas* 2001 (2) SA 1222 (SCA); 2001 (1) SACR 469 (SCA).

[19] Above n 8.

"What stands out quite clearly is that the courts are a good deal freer to depart from the prescribed sentences than has been supposed in some of the previously decided cases and that it is they who are to judge whether or not the circumstances of any particular case are such as to justify a departure. However, in doing so, they are to respect, and not merely pay lip service to, the Legislature's view that the prescribed periods of imprisonment are to be taken to be ordinarily appropriate when crimes of the specified kind are committed. In summary:

A. Section 51 has limited but not eliminated the courts' discretion in imposing sentence in respect of offences referred to in Part 1 of Schedule 2 (or imprisonment for other specified periods for offences listed in other parts of Schedule 2).

B. Courts are required to approach the imposition of sentence conscious that the Legislature has ordained life imprisonment (or the particular prescribed period of imprisonment) as the sentence that should *ordinarily* and in the absence of weighty justification be imposed for the listed crimes in the specified circumstances.

C. Unless there are, and can be seen to be, truly convincing reasons for a different response, the crimes in question are therefore required to elicit a severe, standardised and consistent response from the courts.

D. The specified sentences are not to be departed from lightly and for flimsy reasons. Speculative hypotheses favourable to the offender, undue sympathy, aversion to imprisoning first offenders, personal doubts as to the efficacy of the policy underlying the legislation and marginal differences in personal circumstances or degrees of participation between co-offenders are to be excluded.

E. The Legislature has, however, deliberately left it to the courts to decide whether the circumstances of any particular case call for a departure from the prescribed sentence. While the emphasis has shifted to the objective gravity of the type of crime and the need for effective sanctions against it, this does not mean that all other considerations are to be ignored.

F. All factors (other than those set out in D above) traditionally taken into account in sentencing (whether or not they diminish moral guilt) thus continue to play a role; none is excluded at the outset from consideration in the sentencing process.

G. The ultimate impact of all the circumstances relevant to sentencing must be measured against the composite yardstick ('substantial and

> compelling') and must be such as cumulatively justify a departure from the standardised response that the Legislature has ordained.
>
> H. In applying the statutory provisions, it is inappropriately constricting to use the concepts developed in dealing with appeals against sentence as the sole criterion.
>
> I. If the sentencing court on consideration of the circumstances of the particular case is satisfied that they render the prescribed sentence unjust in that it would be disproportionate to the crime, the criminal and the needs of society, so that an injustice would be done by imposing that sentence, it is entitled to impose a lesser sentence.
>
> J. In so doing, account must be taken of the fact that crime of that particular kind has been singled out for severe punishment and that the sentence to be imposed in lieu of the prescribed sentence should be assessed paying due regard to the bench mark which the Legislature has provided."[20]

[112] The whole of the above passage is relevant to our enquiry. I do, however, single out certain aspects for special consideration on the understanding that each of these aspects must be seen in their context. Neither the limitation of the court's discretion[21] nor the fact that courts must now approach the sentencing of children conscious that the legislature has ordained the prescribed sentence as the one that should ordinarily be imposed[22] can, in my view, be problematic if due regard is had to the other principles mentioned by the Supreme Court of Appeal. Of seminal importance is the conclusion by the Supreme Court of Appeal that once there are truly convincing reasons for a response different from that required by the legislature, a court may depart from the minimum sentence and impose a lesser sentence. It is impossible for me to imagine a more truly convincing reason for a court to depart

[20] Above n 18 at para 25.

[21] Id at para 25(A).

[22] Id at para 25(B).

from the minimum sentence that is prescribed in relation to a child who is 16 or 17 years old than that, in all the circumstances, imprisonment is not appropriate within the meaning of section 28(1)(g) or that the minimum period of imprisonment prescribed exceeds the shortest appropriate period required to be imposed on all children by section 28(1)(g).

[113] It is true, as pointed out by the Supreme Court of Appeal that the minimum sentence law "has shifted [emphasis] to the objective gravity" of the crime and the need for effective sanctions.[23] Nevertheless, the court is obliged to take into account all the factors traditionally relevant to sentence at the outset[24] in order to determine whether these circumstances "render the prescribed sentence unjust in that it would be disproportionate to the crime".[25] The object of the exercise as rightly pointed out by the Supreme Court of Appeal, and accepted by this Court, is to prevent an injustice from being done. I infer this object from the statement that if the court concludes that an injustice would be done by imposing the particular sentence, that court is entitled to impose a lesser sentence.[26] I would add that if investigation of the circumstances at the outset leads to the conclusion that an injustice is being done the court is more than entitled to interfere. It is indeed obliged to do so.

[114] The minimum sentencing regime, therefore, far from authorising the courts to perpetrate injustice, obliges a court not to do so. The sentencing court must determine

[23] Id at para 25(E).

[24] Id at para 25(F).

[25] Id at para 25(I).

[26] Id.

the cumulative effect of all the circumstances and determine whether an injustice will be done if the minimum sentence is imposed. This process is quite often said to be a matter for judicial instinct, but it is necessary to unpack the proposition a little.

[115] We must ask this question: when can it be properly said that the imposition of a prescribed minimum sentence results in an injustice and therefore should not be imposed? The imposition of a minimum sentence can be said to perpetrate an injustice only on some kind of comparative evaluation. Practically speaking the injustice would result only if the minimum sentence is considered to be too high. But the minimum sentence can be considered to be too high only if a sentencing court has some other sentence in mind which is considered appropriate in the circumstances. It follows that a court takes into account all the relevant circumstances including the minimum sentence and arrives at a conclusion (though not necessarily final) about what the appropriate sentence should be. If the minimum sentence is too high in relation to the court's view of what the sentence should be upon consideration of all the relevant circumstances, the imposition of the minimum sentence would wreak an injustice and cannot be imposed.

[116] On this basis I am unable to agree with the suggestion that the minimum sentencing regime renders imprisonment a matter of "first resort". It does not. The court in every case does not start with the minimum sentence. The first enquiry, the enquiry conducted "at the outset" in the words of the Supreme Court of Appeal, is whether the imposition of the minimum sentence will be unjust in the sense of being

disproportionate. It is only if the court concludes, after taking into account all the circumstances at the outset, that the minimum sentence would not be unjust that a court is authorised to impose it. If the court concludes at the first stage of the enquiry that the minimum sentence is either unjust or disproportionate, the sentencing court is precluded from imposing it. The minimum sentencing regime is no authority for the imposition of unjust or disproportionate sentences. It is precisely to avoid unjust and disproportionate sentences that the court is required to consider whether there are substantial and compelling circumstances that would justify the imposition of a lesser sentence.

[117] One more feature must be borne in mind. Section 290(1) of the Criminal Procedure Act[27] empowers a court sentencing juveniles to consider options of supervision by a probation officer or other person, or detention in a reform school, in the punishment of children.[28] This provision has not been repealed by the law with which we are concerned. A sentencing court is obliged to consider the appropriateness of resorting to section 290 in every case in which a child must be sentenced.

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[27] 51 of 1977.

[28] Section 290(1) provides:

> "(1) Any court in which a person under the age of eighteen years is convicted of any offence may, instead of imposing punishment upon him for that offence—
>
> (a) order that he be placed under the supervision of a probation officer or a correctional official; or
>
> (b) order that he be placed in the custody of any suitable person designated in the order; or
>
> (c) deal with him both in terms of paragraphs *(a)* and *(b)*; or
>
> (d) order that he be sent to a reform school as defined in section 1 of the Child Care Act, 1983 (Act 74 of 1983)."

[118] It is against this background that we must examine the role of a court in applying the minimum sentencing regime to children who are 16 and 17 years old.

[119] Before the minimum sentencing regime came into force, any court sentencing a child was obliged to determine whether a sentence of imprisonment was appropriate and if so, what the shortest appropriate period of imprisonment should be. In making this determination courts took into account all the circumstances traditionally relevant to the issue of sentence with particular emphasis on the vulnerability, immaturity, susceptibility to influence and the possibilities of rehabilitation in relation to children. The fact that the minimum sentencing regime is now applicable to children who are 16 and 17 years old does not change any of this. Courts remain obliged, as they have been obliged in our constitutional dispensation, to consider all the relevant circumstances at the outset as they do in relation to a consideration of whether the minimum should be imposed on adults.

[120] But when it comes to children, the overriding purpose of considering all the circumstances is to determine whether a sentence of imprisonment is appropriate and if so whether the period of imprisonment is for the shortest appropriate period in the circumstances. If this enquiry leads to the conclusion that the imposition of a sentence of imprisonment is not appropriate the minimum sentence of imprisonment cannot be imposed because it is inconsistent with the Constitution and unjust. Equally a court is precluded from perpetrating an injustice and unconstitutionality by imposing the

minimum sentence if it concludes that, even though imprisonment is appropriate, the shortest appropriate period is less than the prescribed minimum sentence. It goes without saying that the court must take into account, as a factor, the circumstance that the legislature has prescribed minimum sentences for the children in question in determining whether a sentence of imprisonment is appropriate and if so the shortest appropriate period of imprisonment.

[121] The minimum sentencing regime authorises neither injustice nor unconstitutional conduct on the part of judges or magistrates. The majority judgment suggests that the minimum sentencing regime in some ways orientates a judicial officer away from considering alternatives to imprisonment. I disagree. The Constitution, not the minimum sentencing legislation, is supreme.[29] It is as well to emphasise that the minimum sentencing legislation is subordinate to the Constitution. All judges and magistrates are aware of this. Accordingly they know what the Constitution requires and will implement minimum sentencing legislation in a way that avoids injustice and in a way which ensures that the Constitution is observed as the primary instrument and the minimum sentencing legislation is at best secondary. The circumstance that a minimum sentence is greater than that found appropriate by a court upon a proper application of section 28(1)(g) would constitute "weighty justification" for the imposition of a lighter sentence,[30] and "truly convincing reasons

[29] Section 2 of the Constitution provides:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

[30] Above n 18 at para 25(B).

for a different response",[31] and a reason that is far from flimsy and justifies a departure from the specified sentence,[32] and substantial and compelling circumstances that "justify a departure from the standardised response",[33] and a sentence that is unjust and disproportionate to the crime.[34] The idea that the minimum sentencing law authorises a court to impose a sentence higher than that mandated by the Constitution has simply to be stated to be rejected. It is significant that the majority judgment does not support this notion.

[122] The majority also expresses the view that the application of the minimum sentences to children aged 16 and 17 years old somehow de-individuates the process of sentencing. As this Court pointed out in *Dodo*:

> "Legislation is by its nature general. It cannot provide for each individually determined case. . . . [It is an] important function and power of a court to apply and adapt a general principle to the individual case."[35]

It is not for the legislature to de-individuate sentences. The legislature sets a generalised standard; it does not purport to do anything more. This generalised standard does not and cannot result in a compromise of the power and duty of the court to ensure that sentences are appropriately individualised. That power of the court remains untouched.

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[31] Id at para 25(C).

[32] Id at para 25(D).

[33] Id at para 25(G).

[34] Id at para 25(I).

[35] Above n 8 at para 26.

[123] Although the majority judgment does not say so directly, it might advance the proposition, contended for in argument, that the minimum sentencing legislation being made applicable to children will have the effect that sentences imposed upon children would be unjust, disproportionately high or inconsistent with the sentence mandated by section 28(1)(g) of the Constitution. I cannot agree. The only basis on which it can be suggested that the effect of the discretionary minimum sentencing system will be the imposition of higher sentences on children than mandated by the Constitution is that magistrates or judges will not do their work properly. There is no basis for this suggestion. Indeed, the process to be followed by judicial officers is difficult as all sentence determinations are.

[124] Nonetheless, the process is well within the grasp of a sentencing judge or magistrate and is neither over-complicated nor unworkable:

(a) When a judge or magistrate sentences children, the only enquiry is whether a prison sentence is appropriate and what the shortest appropriate period is.

(b) If the minimum sentencing legislation is applicable, this investigation must be conducted in the light of that law.

(c) The law requires a court to consider whether there are substantial and compelling circumstances for the imposition of the sentence that is less than the prescribed minimum.

(d) A conclusion that the appropriate sentence mandated by section 28(1)(g) is less than the prescribed minimum necessarily constitutes a substantial and compelling circumstance because it is unjust, unconstitutional and improper.

(e) The prescribed minimum sentence can be imposed only if it is not more severe than the sentence mandated by section 28(1)(g). It cannot otherwise be imposed.

[125] Thus construed, the minimum sentencing regime is not unconstitutional. Indeed, the harsh, regrettable and undeniable reality is that particularly heinous crimes are committed by children who are 16 and 17 years old. If one has regard to this (as we must), the legislature is justified in reflecting society's utter outrage. Our Constitution does not say that children who are 16 and 17 years old, who commit barbaric and despicable crimes against society and prey on innocent and vulnerable people should necessarily be given different sentences than adults who commit the same crimes. Any sentencing approach that suggests that age is the only factor fails in the preventive effort. The law must certainly come down as hard as is appropriate on these offenders.

Conclusion

[126] I conclude therefore that the minimum sentencing legislation in so far as it is applicable to children who are 16 and 17 years old is not inconsistent with the Constitution. I would therefore decline to confirm the order of unconstitutionality made by the High Court.

Ngcobo J, Nkabinde J and Skweyiya J concurred in the judgment of Yacoob J.

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