FEATURE

Access to Justice through Diversion of Child Offenders: Reflections on Emerging Case Law

Karabo Ozah and Zita Hansungule

Introduction

The United Nations (UN) High Commissioner for Human Rights defines access to justice as the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards, including the Convention on the Rights of the Child (CRC). It applies to civil, administrative and criminal spheres of national jurisdictions and covers all relevant judicial proceedings, affecting children without limitation, including children alleged as, accused of, or recognised as having infringed the penal law.

International law places an obligation on states to treat children in conflict with the law with dignity and respect. Article 37 of the CRC calls on states to ensure that the arrest, detention or imprisonment of children in conflict with the law are used as measures of last resort. The African Charter on the Rights and Welfare of the Child (ACRWC) supplements this, in article 17, by calling on states to treat children in conflict with the law 'in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others'.

A definition of child-sensitive justice developed by the Council of Europe, as referred to by the UN General Assembly (2013), finds application here:

> *[child-sensitive justice] means creating a justice system which guarantees the respect and the effective implementation of all children's rights, giving due consideration to the child's level of maturity and understanding and to the circumstance of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights.*

One of the challenges in relation to child offenders is the perception that older children commit more heinous crimes than younger ones and as a result should face harsher sentences. In South Africa this was the reason given by the state when it passed the Criminal Law Sentencing Amendment Act 38 of 2007 ('the Minimum Sentence Act') and made the minimum sentences applicable to child offenders who are 16 and 17 years old. The Constitutional Court, in Centre for Child Law v Minister of Justice and Others [2009] ZACC 18; 2009 (6) SA 632 (CC) (minimum sentences case) found the application of the minimum sentence legislation to be unconstitutional. The Court stated:

> *We distinguish them [from adults] because 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.*

The Constitutional Court has noted that, when a child is found to have a committed a crime, obligations set out in human rights instruments call for states to take

measures to recognise that children are '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'. The Court also emphasised that childhood ends at 18 years and that there is hence no justification for including 16- and 17-year-olds under the Minimum Sentencing Act.

This article examines the impact of the Child Justice Act 75 of 2008 ('the Act') on child offenders who are 16 and 17 years old at the time of committing their offences, with the focus on how the courts have interpreted their obligations to ensure that these children also benefit from diversion and its rehabilitative objectives.
The basis of this examination is that the Child Justice Act came into effect after the minimum sentencing judgment of the Constitutional Court and therefore adopted the principles set out in the judgment.

This article examines the impact of the Child Justice Act 75 of 2008 ('the Act') on child offenders who are 16 and 17 years old at the time of committing their offences, with the focus on how the courts have interpreted their obligations to ensure that these children also benefit from diversion and its rehabilitative objectives. The basis of this examination is that the Child Justice Act came into effect after the minimum sentencing judgment of the Constitutional Court and therefore adopted the principles set out in the judgment.

Overview of the South African legislative scheme

Historically, the use of diversion in South Africa was largely unregulated by law until the introduction of the Child Justice Act (Sloth-Nielsen 2017: 683). Prior to the Act, diversion programmes were introduced and run by non-governmental organisations (Mujuzi 2005: 44; ibid). Diversion operated by way of prosecutorial discretion: prosecutors would withdraw charges against children pending their referral to and successful completion of diversion programmes (ibid). However, even with guidance having been provided in the Act, there are prosecutors who still use this unregulated approach, which is not in line with the protective provisions of the Act – this has been seen in cases such as *S v LM*, High Court of South Africa, Johannesburg, Case Nos. 97/18, 98/18, 99/18 and 100/18.

Diversion is part of the Child Justice Act's increased emphasis on seeking effective rehabilitation and reintegration of children in order to minimise the potential for re-offending. The Act creates these processes with the recognition that 'before 1994 [during apartheid], South Africa … had not given many of its children, particularly black children, the opportunity to live and act like children'. The Act aims to combat these injustices and give children in conflict with the law a fighting chance.

The objectives of diversion as set out in section 51 of the Act include that:

- a child be dealt with outside the formal criminal justice system in appropriate cases;
- the child be encouraged to be accountable for the harm caused and that the particular needs of the individual child be met – this includes the promotion of the child's reintegration into his or her family and community, and provision of an opportunity to those affected by the crime committed to express their views on the impact of the crime;
- victims be provided with some symbolic benefit or the delivery of some object as compensation for the harm;
- reconciliation be promoted between the child and the person or community affected by the harm caused;
- diversion aim at preventing the stigmatisation of the child and protecting him or her from the adverse effects of exposure to the criminal justice system;
- the potential for re-offending is reduced and the child is prevented from having a criminal record; and
- the dignity and well-being of the child and the development of his or her sense of self-worth and ability to contribute to society is promoted.

The Act states that in order for a child to be diverted, he or she must acknowledge responsibility for the

offence; there must be a *prima facie* case against the child; the child and the parent or appropriate guardian or caregiver must consent to the diversion; and the prosecutor agrees that matter be diverted. Diversion occurs at different levels of the child's interaction with the criminal justice system:

- Prosecutorial diversion: when a child is charged with an offence but before he or she appears before a preliminary inquiry, the National Prosecuting Authority can decide to divert the child.
- Diversion at the preliminary inquiry: an informal pre-trial procedure is conducted during which, among other things, reports by probation officers are considered, as is the question of whether the child concerned can be sent to a diversion programme.
- Sentencing courts are also given the power to impose community-based sentences; they can harness the options provided in the provisions dealing with diversion. Compliance with this sort of sentence is monitored by probation officers.

Diversion programmes include 'life skills training, community service, arts and music, mentoring, involvement of the family and victims and the outdoors' (Steyn 2012: 77). In order for the principles, purposes and objects of the Act to benefit children sufficiently, it is important that implementation and interpretation of the Act are aligned with the Act itself as well as the Constitution. What follows is a discussion of selected case law on the diversion of 16- and 17-year-old children in conflict with the law.

Emerging case law

Since the enactment of the Child Justice Act, courts have deliberated on the manner in which diversion should be implemented to serve the best interests of the child offender as well as the interests of the victim and the community.

1. S v ZG [2019] ZAWCHC 45; 2019 (2) SACR 162 (WCC)

State actors must have comprehensive knowledge of the Child Justice Act

In this case, the child offender, ZG, was apprehended and charged for the unlawful possession of cannabis. He was 17 years old at the time. He was accompanied to the police station by his mother. The police officers, knowing that ZG was under 18 years, advised him and his mother that if an admission of guilt fine were paid, he would be released and the matter would not pursued further. A written notice was given to ZG which made provision for the payment of the fine in terms of section 56(1)(c) of the Criminal Procedure Act 51 of 1977. At no stage did the police officers concerned explain to ZG or his mother the full consequences of the payment of an admission of guilt fine. His mother paid the fine and ZG was released from custody.
The matter was referred to the High Court by the magistrate with the recommendation that the admission of guilt fine and the conviction in terms of section 56(6) of the Criminal Procedure Act be set aside.

The High Court took the correct view that the case had been handled irregularly. It noted, first, that provisions in section 18 of the Child Justice Act had not been applied at all. Section 18(2) of the Act expressly states that section 56(1)(c) of the Criminal Procedure Act does not apply to a written notice in terms of the Child Justice Act. Secondly, ZG and his mother were not informed of ZG's rights and the consequences of paying an admission of guilt fine. Thirdly, since the advent of the Constitution, courts have insisted that fair procedure be followed when an accused is faced with option of paying an admission of guilt fine.

> **The High Court found that the Child Justice Act had been ignored in its entirety and the payment of the fine was not in accordance with justice.**

and did not follow the provisions of the Child Justice Act. The conduct of the arresting officer fell far short of what was required by law. Further, the magistrate should have picked up the irregularity. If the magistrate had acted properly, he or she would have noticed that ZG was a child and that the payment of the admission of guilt fine was prohibited by section 18 of the Child Justice Act. The High Court found that the Child Justice Act had been ignored in its entirety and the payment of

the fine was not in accordance with justice. It ordered that the admission of guilt be set aside and that the entering of ZG's particulars in the criminal record book be set aside and the particulars expunged.

Although not dealing specifically with the issue of diversion, this matter emphasises the need for state actors interacting with children in conflict with the law to have comprehensive knowledge of the Act, particularly of how it affects their functions, irrespective of how old the child is. This allows them to determine adequately how a child should be dealt with, including referral to diversion, particularly in cases like this where an admission of guilt fine is not applicable.

2. S v NS [2016] ZANCHC 73

The importance of the correct determination of the age of a child offender

The question of whether an accused is dealt with as an adult or child offender hinges on the accurate determination and recording of the accused's age. Failure to carry out this function could lead to an infringement of his or her right to just administrative action. In this matter, the accused was arrested, held in custody and charged for the theft of six pairs of trousers. The police docket and charge sheet both indicated that he was 18 years. The accused – who was legally represented – pleaded guilty and was convicted.

When the accused's legal representative addressed the court on mitigating factors to consider during sentencing, it was revealed that the accused was actually 17 years old. There were several postponements because of the need to verify his age. He remained detained in a child and youth care centre during that time. The trial magistrate then stopped the proceedings and submitted the matter for review to the High Court.

The High Court found that the accused had been prejudiced by the fact that the matter had not been conducted in terms of the Child Justice Act. The High Court held that a real prospect existed that the accused could have been diverted away from the criminal justice system. The High Court took this view because

the offender was a child and did not count it against him that he was an 'older' child. This was the correct manner in which to approach the case and in line with the pronouncements made by the Constitutional Court in the minimum sentencing judgment.

The High Court went on to express concern at the manner in which the accused's attorney and the police conducted their duties. The fact that the attorney did not seem to realise the implications of the age of the accused, especially in the context of the Child Justice Act, was troubling. The police, as well as prosecutors, should be careful about determining the age of youthful offenders.

On the question of how to proceed, the High Court held that the proceedings in the trial court had, strictly speaking, not been conducted in terms of the Child Justice Act and therefore a review could not take place on the basis of provisions of the Act. The High Court further declined to try the matter de novo. The High Court took the view that the accused could be charged again if the prosecution decided to do so. Should the decision be made to divert the accused, then the period he spent in detention could be taken into account. The High Court ordered that the proceedings in the magistrate's court be set aside.

3. S v LR 2015 (2) SACR 497 (GP)

Raising the option of diversion and inclusion of victims in the process

Section 52 of the Child Justice Act provides, inter alia, that for a child to be diverted at the preliminary inquiry stage, the prosecutor must indicate whether a matter may be diverted after considering the views of the victim or any person who has a direct interest in the affairs of the victim. The prosecutor must also have consulted with the police officer tasked with investigating the matter.

In this matter, a 16-year-old boy faced a charge of culpable homicide. He drove recklessly and without a licence, and caused a motor vehicle accident that led to the death of a victim. His legal representative brought an application for diversion at the preliminary inquiry. The magistrate referred the matter for diversion.

The magistrate's decision was referred to the High Court on review by the senior magistrate. The High Court found that the magistrate had misdirected himself by accepting the child's acknowledgement of responsibility for the offence without considering the provisions of section 52 of the Act. The Court found no evidence of either the deceased's family or any person with a direct interest in the affairs of the accused or of the police official responsible for the investigation of the matter demonstrating having been consulted before diverting the matter. The court subsequently ordered that the diversion order be set aside and that the accused be referred to the Child Justice Court for trial.

4. S v MK 2012 (2) SACR 533 (GSJ)

When diversion and the child's circumstances can be considered

This matter affirmed the fact that diversion of a child offender can be considered at different stages of the criminal justice process. The matter also affirmed that the individual circumstances of the child concerned must be taken into account in order for decisions to have the necessary impact.

The accused, a 16-year-old child, on his pleas of guilty, was convicted on two counts of rape of two children. He was sentenced to five year's imprisonment. During the trial, the probation officer recommended that a level two diversion option be imposed, but the trial magistrate rejected this by holding that 'the court is of the opinion that this is a diversion option which is available prior to a person being convicted'. She further reasoned that the seriousness of the crimes outweighed correctional supervision sentence options and that there are sufficient youth prisons in South Africa that are more than equipped for dealing with the accused's disorders and conducting programmes to assist him.

The matter was taken on automatic review. The review court concluded that the trial magistrate clearly misdirected herself, as the option of diversion can be considered at any time during the trial. In reconsidering what an appropriate sentence would be, the review court had regard to the Constitution, which dictates that imprisonment of children should be a matter of last resort.

Noting the convicted child's personal circumstances and environment, including the fact that he suffered from, what the court called, 'moderate mental retardation', the review court concluded that it was abundantly clear that the child was in dire need of guidance, correction, rehabilitation and reintegration into his family and the community.

The review court agreed with the social worker's recommendation, which was that the accused be dealt with in the following manner:

i. that he be detained at a mental health facility for intensive therapy and treatment;
ii. that he thereafter be referred to and be ordered to attend sexual offenders' programmes; and, finally,
iii. that he be placed under the supervision of a probation officer for monitoring and follow-up.

These recommendations have the potential to advancing the mental well-being of the child. Ultimately, they could resort in the realisation of the right to health of children. The review court remitted the matter to the child justice court to consider and impose sentence afresh in the light of the judgment.

> **The Child Justice Act provides a holistic framework that enables child offenders to be diverted to rehabilitative programmes...**

Conclusion

The Child Justice Act provides a holistic framework that enables child offenders to be diverted to rehabilitative programmes and thereby possibly reduce recidivism. This is an approach to be followed for all children no matter their age, taking into account the circumstances of the case and the individual circumstances of the child concerned. However, what the South African case law indicates is that a comprehensive legal framework is but the first step towards strengthening the child justice system.

The fact that decisions made by preliminary inquiry magistrates are set aside due to failure to follow important procedures such as correctly determining the age of a child offender, his or her criminal capacity and acknowledgment of responsibility are a grave cause for concern. Office-holders who play a critical role at the beginning stages of a child's contact with the criminal justice system seem to lack the necessary knowledge to apply the Act correctly. This highlights the need for continuous and in-depth training of these role-players on the procedures in the Act and how such procedures should be applied.

Nonetheless, it is encouraging that mechanisms such as the automatic review of decisions of the magistrate's court by the high courts have led to a child-centred jurisprudence. The latter reminds us that each child's circumstances differ and that procedures must be followed to ensure that child offenders are treated in a manner that takes into account their best interests, dignity and equality.

Karabo Ozah is the Director of the Centre for Child Law at the University of Pretoria. She is an attorney of the High Court of South Africa as well as an extraordinary lecturer in the Department of Private Law of the University of Pretoria. She was a member of the Rules Board's Children's Court Task Team, whose mandate was to draft court rules for the Children's Courts in South Africa.

Zita Hansungule the Senior Project Coordinator of the Centre for Child Law's Research, Monitoring & Evaluation Unit at the University of Pretoria. Hansungule has been responsible for coordinating the children's rights sector's engagements with international and regional human rights treaty bodies. She is also involved in a global study on children deprived of liberty and a study on the impact of the Child Justice Act in South Africa.

References

'Access to justice for children' Report of the United Nations High Commissioner for Human Rights (16 December 2013; UN Doc A/HRC/25/35)

Mujuzi JD (2005) 'Diversion in the South African criminal justice system: Emerging jurisprudence' South African Journal of Criminal Justice 28(1)

Sloth-Nielsen J (2009) 'Child justice', in T Boezaart (ed), Child Law in South Africa. Cape Town: Juta

Steyn F (2012) 'Challenges of diversion strategies in meeting the diversion objectives of the Child Justice Act (75 of 2008)' Acta Criminologica: Southern African Journal of Criminology 2