IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH DIVISION, PRETORIA

High Court Reference Nos.: 20/1

21/1

112

In the matters between:

THE STATE

And

CKM

FTM and

IMM

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.

12/1/12
DATE

SIGNATURE

REVIEW JUDGMENT

THE COURT:

1. Youthfulness has always been a factor that has been taken into account by South African courts when sentencing an offender, even before the advent of the Constitution 108 of 1996, see i.a. *S v Lehnberg & 'n Ander* 1975 (4) SA 553 (A); *Director of Public Prosecutions, Kwazulu-Natal v P* 2006 (3) SA 515 (SCA) at par [12]; *S v IO* 2010 (1) SACR 342 (C).

2. The Universal Declaration of Human Rights pronounced that the special needs and the unique nature of childhood required particular attention and protection. (Article 25(2): *"Motherhood and childhood are entitled to special care and assistance...."*)

3. The Convention on the Rights of the Child, acceded to by South Africa on the 16th June 1995, represents the most widely accepted international treaty acceded to by all but two members of the United Nations. By acceding thereto, the Republic became obliged to comply with the duties imposed upon State parties to the Convention and entitled to exercise the rights created thereby.

4. The Convention's preamble reads:

"Preamble

The States Parties to the present Convention,

Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,

Bearing in mind that the peoples of the United Nations have, in the Charter, reaffirmed their faith in fundamental human rights and in the dignity and worth of the human person, and have determined to promote social progress and better standards of life in larger freedom,

Recognizing that the United Nations has, in the Universal Declaration of Human Rights and in the International Covenants on Human Rights, proclaimed and agreed that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status,

Recalling that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance,

Convinced that the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community,

Recognizing that the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding,

Considering that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, and in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity,

Bearing in mind that the need to extend particular care to the child has been stated in the Geneva Declaration of the Rights of the Child of 1924 and in the Declaration of the Rights of the Child adopted by the General Assembly on 20 November 1959 and recognized in the Universal Declaration of Human Rights, in the International Covenant on Civil and Political Rights (in particular in articles 23 and 24), in the International Covenant on Economic, Social and Cultural Rights (in particular in article 10) and in the statutes and relevant instruments of specialized agencies and international organizations concerned with the welfare of children,

Bearing in mind that, as indicated in the Declaration of the Rights of the Child, "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth",

Recalling the provisions of the Declaration on Social and Legal Principles relating to the Protection and Welfare of Children, with Special Reference to Foster Placement and Adoption Nationally and Internationally; the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules); and the Declaration on the Protection of Women and Children in Emergency and Armed Conflict, Recognizing that, in all countries in the world, there are children living in exceptionally difficult conditions, and that such children need special consideration,

Taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child, Recognizing the importance of international co-operation for improving the living conditions of children in every country, in particular in the developing countries,

Have agreed as follows: "

5. Article 37 of the Convention addresses the position of children in conflict with the law who are exposed to the imposition of punishment by a court of law:

"Article 37

States Parties shall ensure that:

(a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

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

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

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of

his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action."

These principles echo in the African Charter on the Rights and Welfare of the Child (in particular in sections 4 and 17 thereof) and were incorporated into the Constitution in section 28:

28. Children.-(1) *Every child has the right-*
(a) to a name and a nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provide services that-
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(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;
(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
(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."

6. The spirit breathed by these words has been endorsed, emphasised and applied by our courts. In relation specifically to section 28 (1) (g), see *S v IO, supra*, and *S v N* 2008 (2) SACR 135 (SCA) at par [39]:

"*... if there is a legitimate option other than prison, we must choose it; but if prison is unavoidable its form and duration should also be tempered. Every day he spends in prison should be because there is no alternative.*" (per Cameron JA [as he then was])

Particularly apposite, with respect, is the exposition by Sachs J in *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC):

"*[14] While section 28 undoubtedly serves as a general guideline to the courts, its normative force does not stop there. On the contrary, as this Court has held in De Reuck,*[1] *Sonderup*[2] *and Fitzpatrick,*[3] *section 28(2), read with section 28(1), establishes a set of children's rights that courts are obliged to enforce. I deal with these cases later.*[4] *At this stage I merely point out that the question is not whether section 28 creates enforceable legal rules, which it clearly does, but what reasonable limits can be imposed on their application.*

[15] The ambit of the provisions is undoubtedly wide. The comprehensive and emphatic language of section 28 indicates that just as law enforcement must always be gender-sensitive, so must it always be child-sensitive; that statutes must be interpreted and the common law developed in a manner which favours protecting and advancing the interests of children; and that courts must function in a manner which at all times shows due respect for children's rights. As Sloth-Nielsen pointed out:

> *"[T]he inclusion of a general standard ('the best interest of a child') for the protection of children's rights in the Constitution can become a benchmark for review of all proceedings in which decisions are taken regarding children. Courts and administrative authorities will be constitutionally bound to give consideration to the effect their decisions will have on children's lives."*[5]

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[1] *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division, and Others 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC); 2003 (2) SACR 445 (CC) at paras 54-5.*

[2] *Sonderup v Tondelli and Another 2001 (1) SA 1171 (CC) also reported as LS v AT and Another 2001 (2) BCLR 152 (CC) at para 29.*

[3] *Minister of Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC); 2000 (7) BCLR 713 (CC) at para 17.*

[4] *See below para 26.*

[5] *Sloth-Nielsen "Chicken soup or chainsaws: some implications of the constitutionalisation of children's rights in South Africa" (1996) Acta Juridica 6 at 25. The change is illustrated by alterations made to the Child Care Act. As Sloth-Nielsen observes, before interim amendments were brought about by the Child Care Amendment Act 96 of 1996, the principal Child Care Act was not child-centred, but focused on parents' unfitness or inability to care for their child. The best interests of the child were not expressly a paramount consideration for decisions regarding children in terms of the Child Care Act. Children living on the street, children with disabilities, and other significant groups of vulnerable children in especially difficult circumstances in South African society were accordingly largely ignored in the statutory framework before the new constitutional order came into being (Sloth-Nielsen "The Child's Right to Social Services, the Right to Social Security, and Primary Prevention of Child Abuse: Some Conclusions in the Aftermath of Grootboom" (2001) 17 SAJHR 210 at 211).*

[16] Secondly, section 28 must be seen as responding in an expansive way to our international obligations as a State party to the United Nations Convention on the Rights of the Child (the CRC).[6] *Section 28 has its origins in the international instruments of the United Nations.*[7] *Thus, since its introduction the CRC has become the international standard against which to measure legislation and policies, and has established a new structure, modelled on children's rights, within which to position traditional theories on juvenile justice.*[8] *I do not suggest that a children's rights model for juvenile justice, where children themselves are directly in trouble with the law, should automatically be transposed to sentencing in cases where children are only indirectly affected because their primary caregivers are about to be sentenced. What should be carried over, however, is a parallel change in mindset, one that takes appropriately equivalent account of the new constitutional vision.*

[17] Regard accordingly has to be paid to the import of the principles of the CRC as they inform the provisions of section 28 in relation to the sentencing of a primary caregiver. The four great principles of the CRC which have become international currency, and as such guide all policy in South Africa in relation to children, are said to be survival, development, protection and participation.[9] *What unites these principles, and lies at the heart of section 28, I believe, is the right of a child to be a child and enjoy special care.*[10]

[18] Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents,

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[6] *The CRC was ratified by South Africa on 16 July 1995.*

[7] *See Mthiyane JA in P above at para 15.*

[8] *Per Ponnan AJA in* Brandt *above at para 17. In P above n 8 at paras 19-20 the Supreme Court of Appeal further pointed out that the overarching thesis of the international instruments and the Constitution was that child offenders should not be deprived of their freedom except as a measure of last resort and then only for the shortest possible period of time, and adds at para 14 even then the sentence must be individualised so as to prepare the child offender for reintegration into society upon his or her release from prison. It added at para 16 that the principles guiding a sentencing officer in arriving at a suitable sentence for a juvenile offender are the principles of proportionality and the best interests of the child.*

[9] *SALC The Review of the Child Care Act (18 April 1998) Issue Paper 13 Project 110 at para 2.1.*

[10] *Article 25(2) of the Universal Declaration of Human Rights states that "[m]otherhood and childhood are entitled to special care and assistance . . . ".*

umbilically destined to sink or swim with them. The unusually comprehensive and emancipatory character of section 28 presupposes that in our new dispensation the sins and traumas of fathers and mothers should not be visited on their children.

[19] Individually and collectively all children have the right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma.

[20] No constitutional injunction can in and of itself isolate children from the shocks and perils of harsh family and neighbourhood environments. What the law can do is create conditions to protect children from abuse[11] *and maximise opportunities for them to lead productive and happy lives. Thus, even if the State cannot itself repair disrupted family life, it can create positive conditions for repair to take place, and diligently seek wherever possible to avoid conduct of its agencies which may have the effect of placing children in peril. It follows that section 28 requires the law to make best efforts to avoid, where possible, any breakdown of family life or parental care that may threaten to put children at increased risk. Similarly, in situations where rupture of the family becomes inevitable, the State is obliged to minimise the consequent negative effect on children as far as it can."*

7. The imperative to make appropriate provision for children that come into conflict with the law and may have to be assisted to correct their actions, or

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[11] *In Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC) at paras 77-8 Yacoob J pointed out that the fact that section 28(1)(b) contemplated that a child had the right to parental or family care in the first place, and the right to alternative appropriate care only where that was lacking, did not mean that the State incurred no obligation towards children who are being cared for by parents or members of family. He stated that the State must provide the legal and administrative infrastructure necessary to ensure that children are accorded the protection contemplated in section 28. Normally that obligation would be fulfilled by enacting legislation and implementing enforcement mechanisms for the maintenance of children, their protection from maltreatment, abuse, neglect or degradation, and the prevention of other forms of abuse of children mentioned in section 28.*

may have to be subjected to punitive measures that might include involuntary residence in an appropriate facility, (of which a prison would be the last resort), the Child Justice Act 75 of 2008 ("the Act") was placed upon the statute book. It commenced on the 1st April 2010. It introduced a comprehensive system of dealing with child offenders and children coming into conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care and correcting errant actions as far as possible by diversion, community based programs, the application of restorative justice processes and reintegration of the child into the community. (See, generally, the as yet unreported review judgment of *S v Snyders and Others, Western Cape High Court, Cape Town,* High Court Ref No.: 11942, dated 2011 -10-03, from par [24] *in fine*).

The Preamble to the Act explains its purpose:

"PREAMBLE
RECOGNISING
•that before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law;

AND MINDFUL that -

the Constitution of the Republic of South Africa, 1996, as the supreme law of the Republic, was adopted to establish a society based on democratic values, social and economic justice, equality and fundamental human rights and to improve the quality of life of all its people and to free the potential of every person by all means possible;
• the Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right -
not to be detained, except as a measure of last resort, and if detained, only

for the shortest appropriate period of time;

* *to be treated in a manner and kept in conditions that take account of the child's age;*
* *to be kept separately from adults, and to separate boys from girls, while in detention;*
* *to family, parental or appropriate alternative care;*
* *to be protected from maltreatment, neglect, abuse or degradation; and*
* *not to be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development; and*
- *the current statutory law does not effectively approach the plight of children in conflict with the law in a comprehensive and integrated manner that takes into account their vulnerability and special needs;*

AND ACKNOWLEDGING THAT•

there are capacity, resource and other constraints on the State which may require a pragmatic and incremental strategy to implement the new criminal justice system for children;

THIS ACT THEREFORE AIMS TO•

establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning our Constitution and our international obligations, by, among others, creating, as a central feature of this new criminal justice system for children, the possibility of diverting matters involving children who have committed offences away from the criminal justice system, in appropriate circumstances, while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts;

- *expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed;*
- *recognise the present realities of crime in the country and the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending;*
- *balance the interests of children and those of society, with due regard to the rights of victims;*
- *create incrementally, where appropriate, special mechanisms, processes or procedures for children in conflict with the law*

» *that in broad terms take into account*

- *the past and sometimes unduly harsh measures taken against some of these children;*
- *the long-term benefits of a less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases; and*
- *South Africa's obligations as party to international and regional instruments relating to children, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;*

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in specific terms, by•

raising the minimum age of criminal capacity for children;

- *ensuring that the individual needs and circumstances of children in conflict with the law are assessed;*
- *providing for special processes or procedures for securing attendance at court of, the release or detention and placement of, children;*
- *creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of children by*

allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases;
- *providing for the adjudication of matters involving children which are not diverted in child justice courts; and*
- *providing for a wide range of appropriate sentencing options specifically suited to the needs of children,..."*

(The age of criminal capacity referred to in the preamble is raised to ten years by section 7 of the Act. If the child is 10 years or older, but under 14 years of age he or she is presumed to lack criminal capacity unless the State proves the existence of criminal capacity beyond a reasonable doubt, as set out in section 11).

7. The Guiding Principles encapsulating the ideals of the Preamble are found in section 3 of the Act:

"Guiding principles

3. In the application of this Act, the following guiding principles must be taken into account:
(a) All consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.
(b) A child must not be treated more severely than an adult would have been treated in the same circumstances.
(c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.
(d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.
(e) Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
(f) All procedures in terms of this Act should be conducted and completed without unreasonable delay.
(g) Parents, appropriate adults and guardians should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them.
(h) A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.
(i) The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child."

8. The Act emphasizes the intention to prevent children from coming into contact with the criminal justice system as far as possible. To this end, offences that a

child could be accused of having committed are categorized in three Schedules to the Act, with minor offences such as common assault and petty theft listed in the first Schedule, and the most serious such as treason and rape in the third.

9. Diversion of children into approved programs enjoys great importance. The prosecution can divert children into approved programs in appropriate circumstances after assessment by a probation officer, which must be effected before a decision concerning the potential diversion can be taken.

10. Children who are not diverted by the prosecutor and who are older than 10 years (and may therefore potentially be held to be *doli capax*) must appear at a preliminary inquiry, conducted before a magistrate inquisitorially to consider the probation officer's report and to establish whether diversion is possible in the individual case. (See, generally in this respect, *Aysha Ismail Gani NO o.b.o. Ms P.S. and The State;* Review Judgment in Case No H 47/11; South Gauteng High Court, Johannesburg, undated and as yet unreported)

11. If the matter must go to trial, the child will appear in a child justice court unless the enquiry concludes that the question whether the child is in need of care must be considered by a children's court, to which the matter will be transferred if necessary.

12. Throughout the process the child is entitled to be assisted by a parent or guardian or another adult who is able to look after the child's interests. Whenever the child appears before a child justice court, he or she is entitled to legal representation, which right may not be waived.

13. As far as sentencing after conviction is concerned, the Act underlines the desire to avoid incarceration as far as possible:

*"**69. Objectives of sentencing and factors to be considered.**—(1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to—*

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

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

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

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

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

(2) In order to promote the objectives of sentencing referred to in subsection (1) and to encourage a restorative justice approach, sentences may be used in combination.

(3) When considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, which provides a programme referred to in section 191 (2) (j) of the Children's Act, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment, consider the following:

(a) Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;

(b) whether the harm caused by the offence indicates that a residential sentence is appropriate;

(c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and

(d) whether the child is in need of a particular service provided at a child and youth care centre.

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

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

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

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

(b) the protection of the community;

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

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

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

14. The child and youth care centre referred to in section 191 (2) (j) of the Children's Act 38 of 2005 is an institution that replaced a reform school as

determined in section 290 of the Criminal Procedure Act 51 of 1977 prior to its being repealed. It is obvious that the referral to a reform school, which amounts to an involuntary, compulsory admission to a facility where the convicted child is obliged to participate in various programs, represents a serious invasion of the child's rights to freedom of movement and decision making. Such a sentence should therefore not be imposed lightly or without compelling reasons.

15. Having sketched some aspects of the development of the present child sentencing regime the facts of the three trials that are the subject matter of this review can be considered. Children were the accused in each instance. All three matters were heard in the Mankweng Magistrate's Court, apparently by the same magistrate, who the court was informed from the Bar is no longer in office. All three children were convicted and sentenced to be admitted to a reform school. They were all three sent to the Ethokomala Reform School in Mpumalanga, from which they allegedly escaped repeatedly and to which they were allegedly re-admitted after being apprehended from time to time. On the last occasion they were apprehended after having escaped they were taken to the Polokwane Secure Care Centre, an awaiting trial facility. They were assigned to this centre administratively, without a court order and without having been charged with any offence in respect of which they were awaiting trial. Their transfer to the Secure Care Facility was arranged by the social worker responsible for the pre-sentencing reports presented to the trial court prior to the accused being assigned to the reform school..

16. The accused CKM appeared before the trial court for the first time on the 9th September 2009. He was charged together with IMM and JM with assault, for

allegedly having hit one FT on the 5th September 2009 with open hands and "*... tripping him causing him to fall down.*" He was fourteen years old at the time. There was no allegation of any injuries that were said to have been suffered by the complainant FT. The charge clearly amounted to no more than a minor instance of common assault, such as might occur daily between school boys at countless schools across the country. He pleaded guilty and was convicted without any evidence having been led. No previous convictions were proved against the accused.

17. The child accused had been placed in a diversion program prior to being charged. The diversion feedback report recorded that the accused had failed to attend any of the individual counselling sessions that formed part of the program, which failure led to the accused being charged.

18. The magistrate sentenced the accused to detention in a reform school on the strength of the recommendation that was contained in the probation officer's report, based upon the fact that the child accused was without supervision by a parent and had developed into a difficult child. It appears not to have occurred to the magistrate that the child accused might be a child in need of care. Sending the child to a reform school was clearly, indubitably and self-evidently unjustified on the facts before the trial court. Neither the trial court nor the pre-sentencing report referred at any stage to the fundamental principle that incarceration of a child – or detention in a reform school – should be the least preferred options under all and any circumstances.

19. The magistrate failed to send the matter on review after having imposed the unfortunate sentence, as he was obliged to do. When the child ran away from

the reform school, he was placed in the Secure Care Centre as set out above, where he was admitted on the 5th April 2011.

20. The child spent some six months in the awaiting trial facility before the matter was eventually sent on special review to this court.

21. This accused was charged together with IMM. The particular charge of common assault was withdrawn against the latter, but IMM appeared before the same magistrate on a different charge of assault with the intent to commit grievous bodily harm, upon which he was convicted and sent to the reform school aforementioned. His committal to that school was confirmed on review by a judge of this Division. IMM was, however, also placed in the Secure Care Facility when he absconded repeatedly from the reform school, apparently at the same time the other two children were admitted to that centre.

22. FTM, the third child, was convicted by the same trial court of housebreaking with intent to commit an unknown crime. He, too, had developed into a troubled and troublesome child and a similar recommendation was made in his case as in that of CKM by the social worker responsible for the pre-sentencing report, also after this accused failed to participate in a diversion program. He, too, ended up in the awaiting trial detention facility at the same time and for the same reasons as CKM and IMM.

23. Eventually, after they had spent six months in the Secure Care Facility, their cases were sent on special review to this court and were placed before Tolmay, J.

24. The reviewing judge referred the matter to a Full Bench for oral argument in terms of section 304 of the Criminal Procedure Act 51 of 1977 and invited the Centre for Child Law to make submissions as *amicus curiae*, together with

counsel for the accused instructed by Legal Aid South Africa and counsel for the State. The court is indebted to Dr Ann Skelton for the *amicus,* Mr Alberts for the accused and Ms Meintjes for the State for their comprehensive heads of argument and their incisive submissions during oral argument, which were of great assistance to the court.

25. The first question that arises for decision is whether the provisions of the Act apply in respect of CKM and FTM. The question is irrelevant in respect of IMM's case as the latter's conviction and his committal to a reform school were confirmed on review.

26. The Act provides in section 98 (1) thereof that *"All criminal proceedings in which children are accused of having committed an offence, which were instituted prior to the commencement of this Act and which are not concluded before the commencement of this Act, must be continued and concluded in all respects as if this Act had not been passed." Prima facie,* therefore, the Act does not apply to the proceedings against the children involved in this review, as their matters were concluded before the commencement of the Act on the 1st April 2010. Even if it could be argued that the special review forms part of, or reopens the proceedings against them, section 98 appears to stand in the way of applying the provisions of the Act to them.

27. Ms Meintjes has argued, however, that the provisions of the Act are less onerous than the sentencing regime that existed prior to its introduction. The court should therefore apply an expansive interpretation to section 98 in the light of section 35 (3) (n) of the Constitution 108 of 1996, which ensures that an accused is entitled to the least severe punishment prescribed if the

sentence determined for the offence the accused has been convicted of has been changed between the date of the commission of the offence and the date of sentencing. By adopting this approach the way would be opened to set aside the referrals to a reform school and to apply sections 35 (a), 50 or 64 of the Act and to convert the proceedings before the court *a quo* into children's court enquiries in the light of the fact that the accused do appear to be children in need of care. Section 28 of the Constitution entrenches the paramountcy of children's rights. It is indubitably in the children's best interest to be treated as children in need of care rather than to be sentenced to be restricted to residency in a reform school. It must be born in mind that every statute must be interpreted to promote the values underlying the Bill of Rights – see *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism and others* 2004 (4) SA 490 (CC) at paras 72, 80 and 90. The decision emphasizes that any statutory interpretation must proceed from the premise that every statute must accord with and further the values and fundamental rights enshrined in the Constitution in its Bill of Rights. See further *Media 24 Limited & Others v National Prosecuting Authority & Another* 2011 (2) SACR 321 (GNP).

28. In determining disputes in litigation before them, our courts should allow constitutional issues to be determinative of the subject matter to be decided only as a measure of last resort. If the facts or other issues of law not involving constitutional aspects are decisive of the matter constitutional disputes should not be addressed. They should only be dealt with if they alone are decisive of the issue between the parties: *S v Mlungu & Others* 1995 (7) BCLR 793 (CC) at para [59]; *Prokureursorde van Transvaal v*

Kleynhans 1994 (4) BCLR 48 (T); (1995 (1) SA 839 (T) 849D - 850D); *Zantsi v Council of State, Ciskei & Others* 1995 (10) BCLR 1424 (CC), (1995 (4) SA 615 (CC).

29. Attractive though Ms Meintjes' argument may be, it is not necessary to undertake a constitutional (and amending) reading of section 98 of the Act. As Dr Skelton for the *amicus curiae* has correctly pointed out, constitutional principles enshrined in the Bill of Rights must have been applied by the courts generally, and by the magistrate trying the child accused in the matters before us in particular, at the time the children were prosecuted. These principles are the paramountcy of a child's best interest that must be observed and given effect to in all circumstances (section 28 (2) of the Constitution); and the children's right not to be incarcerated except as a measure of last resort and for the shortest time possible (section 28 (1) (g) of the Constitution). As has been stated above, the trial court's motivation when sentencing the child accused – and the pre-sentencing reports presented to him – are devoid of any reference to these considerations.

30. Sending a child to a reform school – or a child and youth care centre as defined in section 191 (2) of the Children's Act 38 of 2005, which centres replace reform schools – is a sentence as this concept is understood in the Criminal Procedure Act 51 of 1977; See the report "*A Situational Analysis of Reform Schools and Schools of Industry in South Africa*", prepared by the Child Justice Project of the Department of Justice and Constitutional Development; *S v M & 'n Ander* 1998 (1) SACR 384 (C); *"Owing to the severity of a committal to a reform school, such punishment should be imposed only after particularly careful consideration"* – S S Terblanche: Guide

to Sentencing in South Africa, 2nd ed. 2007, p 331; *S v Williams* 1988 (3) SA 836 (A) at 847. The constitutional principles that inform sentencing of children therefore apply to such an order: *Centre for Child Law v Minister of Justice and Others (National Institute for Crime Prevention and Reintegration of Offenders as amicus curiae)* 2009 (2) SACR 77 (CC) and *S v IO supra, S v M (Centre for Child Law as amicus curiae), supra* and *Director of Public Proecutions, KwaZulu Natal v P supra.*

31. The trial magistrate's failure to observe the application of these principles is a significant misdirection resulting in justice having failed the accused, warranting this court's intervention on review in respect of the two instances that were not referred to automatic review after sentence was imposed. In addition, the committal to a reform school of CKM and FTM must certainly be regarded as inappropriate. One was convicted of a minor offence, both were first offenders and both appear to have suffered parental neglect, strongly suggesting that a referral to a children's court was the most appropriate course of action to follow. In neither instance was proper cognisance taken of the approach that must be followed in sentencing children, as set earlier in this judgment. It is therefore clear that the sentence imposed by the trial court and the consequent committal to the reform school must be set aside.

32. The question is what order should be made to substitute the committal. To refer the matter to a children's court now would appear to be as futile as it may have been appropriate in 2009. Both children are almost eighteen years old by now and will hardly reap any benefit from being declared in need of care, if that were to be the outcome of the children's court enquiry. The Department of Social Development has, through its probation officer, filed a

belated further report in the nature of a pre-sentencing report, suggesting that the accused should be committed to a youth care facility until they reach the age of 21 years. This suggestion is unacceptable – if implemented, it would amount to an increase of the sentence the trial court imposed in the inappropriate fashion outlined earlier in this judgment and would in itself ignore the constitutional principles the trial court failed to pay heed to.

33. If the matter were to be referred to a children's court, an inevitable delay would follow before the proceedings could be finalised. By that time, any order would be a *brutum fulmen*. The court might, as was the case in *S v Mahlangu* 2000 (2) SACR 210 (T), consider setting aside the committal and referring the matter back to the trial court, but as the trial magistrate is no longer available, additional delays would be caused by forcing another presiding officer to familiarise herself or himself with the matter, obtaining a new pre-sentencing report and deal with the matters *de novo*. This would indubitably redound to the child accused's detriment and conflict with the constitutional principle that trials should be concluded without unreasonable delay as defined in section 35 (3) (d) of the Constitution.

34. The approach followed in *S v Felix and Two Similar Cases* 2007 (2) SACR 129 (E) commends itself as the appropriate resolution in the present instance. By the time argument was heard in this review, 19 and 13 months respectively had passed since the accused had been sentenced. Bearing in mind that part of this period was spent in the Secure Care Facility – about which more will be said below – which detention lacked any semblance of legality, the fairest order that would do justice to all concerned would be to set aside the

committal to a reform school and to substitute therefore a caution and discharge: see *S v Z and 23 Similar Cases supra.*

35. Such an order was accordingly made in the cases of CKM and FTM.

36 It is however necessary to comment upon the fact that all three accused were held in the Polokwane Secure Care Facility for some six months following upon their repeated absconding from the reform school. This committal was effected administratively and was clearly not in accordance with the orders made by the trial court in respect of each of the accused. No person may be incarcerated or otherwise held in detention without a valid order of a competent court. In this connection the recent decision of *C & Others v Department of Health and Social Development, Gauteng & Others* (CT 55/11)[2012] ZACC 1 (11/1/2012);(per Skweyiya J), underlines the importance of the principle that a child's right to liberty, care and family life enjoys the protection of the paramountcy laid down on section 28 of the Constitution. Any invasion or limitation thereof must be subject to strict judicial control:

"23 The *coercive removal of a child from her or his home environment is undoubtedly a deeply invasive and disruptive measure. Uninvited intervention by the state into the private sphere of family life threatens to rupture the integrity and continuity of family relations, and even to disgrace the dignity of the family, both parents and children, in their own esteem as well as in the eyes of their community. Both sections 151 and 152 of the Children's Act authorise removals, yet neither section subjects removals to automatic review, which would enable the affected family, including the removed child, to make representations on whether removal was in the best interests of the child. Accordingly, it must be determined whether the impugned provisions impose limitations on any rights enshrined in the Constitution.*

24. The removal of a child from the reach of her or his family clearly constitutes a limitation of the child's right to "family care or parental care" in terms of section 28(1)(b) of the

Constitution. Although section 28(1)(b) itself also contemplates "appropriate alternative care when removed from the family environment", this is a secondary right, not an equivalent alternative right. It does not necessarily render a removal constitutionally compatible with the primary right to family care or parental care. If that were the case, the primary right would be entirely superfluous and legally meaningless, and section 28(1)(b) would entrench only a right to appropriate care, irrespective of environment. In my view, Van Dijkhorst J was correct in his interpretation of section 28(1)(b) in Jooste v Botha,[39] namely that it envisages—

"a child in [the] care of somebody who has custody over him or her. To that situation every child is entitled. That situation the State is constitutionally obliged to establish, safeguard and foster. The State may not interfere with the integrity of the family."

25. *This interpretation is fortified by the formulation of the right in international law, which we are bound by section 39(1)(b) of the Constitution to consider. The African Charter on the Rights and Welfare of the Child (ACRWC) provides that "[e]very child shall be entitled to the enjoyment of parental care and protection and shall, whenever possible, have the right to reside with his or her parents", while the United Nations Convention of the Rights of the Child (UNCRC) guarantees every child's right "to know and be cared for by his or her parents", and "to preserve his or her identity, including . . . family relations as recognized by law without unlawful interference".*

26. *That section 28 creates distinct rights that are not subject to a single internal qualification is also apparent from this Court's decision in Fitzpatrick:*

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

27. *In my view, therefore, the impugned provisions also impose a limitation on the "expansive guarantee", in section 28(2) of the Constitution, that "[a] child's best interests are of paramount importance in every matter concerning the child." In S v M this Court held:*

"The paramountcy principle, read with the right to family care, requires that the interests of children who stand to be affected receive due consideration. It does not necessitate overriding all other considerations. Rather, it calls for appropriate weight to be given in each case to a consideration to which the law attaches the highest value, namely, the interests of children who may be concerned."

Section 28(2) of the Constitution requires an appropriate degree of consideration of the best interests of the child. Removal of a child from family care, therefore, requires adequate consideration. As a minimum, the family, and particularly the child concerned, must be given an opportunity to make representations on whether removal is in the child's best interests. Accordingly, the impugned provisions of the Children's Act inflict a limitation on the right in section 28(2), in that they do not provide for adequate consideration of the best interests of the child.

28. *In addition to the limitation of the right to family or parental care, removal without automatic judicial review also infringes the right of access to courts under section 34 of the Constitution. Although section 45(1) of the Children's Act provides that the children's court "may adjudicate any matter" relating to the care, protection or well-being of a child, and section 53 entitles any person acting in the interest of the child to approach the children's court, this does not mean that the right of affected families to access to courts is not impaired in practice. Although their access to courts is not denied, it is no doubt delayed. This Court has held before that an affected party's right of recourse to a court of law after the limitation of a right "does not cure the limitation of the right; it merely restricts its duration." "* (*Footnotes omitted). (per* Skweyiya J).

37 In the case of the accused now before court their absconding from the reform school should have been dealt with as provided for in sections 170 to and including section 173 of the Act, by either bringing the child before the trial magistrate in terms of section 170 or requesting the provincial head of social development to make an appropriate determination, which might have included a transfer to another youth care centre. (It is not necessary to consider the potential complications that might have arisen if this course of action had been followed due to the fact that the reform school is in the province of Mpumalanga while the children were sentenced in Limpopo.) The

Polokwane Secure Care Facility has been created – and is therefore only empowered – to solely accommodate awaiting trial detainees. The three accused were therefore held unlawfully in this facility. This state of affairs could not be allowed to continue. Hence the order to release IMM together with the other two accused. It is a matter for concern and comment that the committal to the Secure Care Facility was effected by a professional official of the Provincial Department of Social Development. It is clear that such action cannot be countenanced and should not be allowed to occur again, particularly not in respect of children whose interests were gravely compromised by their unlawful detention.

Signed at Pretoria on this 12th day of January 2012.

E BERTELSMANN

Judge of the High Court

R G TOLMAY

Judge of the High Court

Date of the hearing	:	23 November 2011
Date of the Judgment	:	19 January 2012-01-17
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