JUVENILE JUSTICE · REGSPLEGING TEN OPSIGTE VAN MINDERJARIGES

Juvenile justice review 1996

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This review follows the 1995 review, the first in this journal, and similarly reviews the period until 30 September 1996. In the year presently under review the principle focus of juvenile justice concern was yet again the matter of pre-trial detention of arrested juveniles. The question as to where juveniles should be held pending finalization of criminal trials was the subject-matter of legislative reform in May 1996, when the Correctional Services Amendment Act 14 of 1996 was promulgated with immediate effect. The genesis and intended purport of this amendment is described in J Sloth Nielsen 'Pre-trial detention of children revisited: amending section 29 of the Correctional Services Act' (1996) 9 *SACJ* 60. The content of the legislation allowing selected children to be incarcerated pending criminal trial will therefore not be raised again, but new practical and textual problems that have arisen with the implementation of the new section since May 1996 will be discussed.

1 Practical results flowing from the amending legislation

The 1996 amendment to s 29 of the Correctional Services Act rapidly resulted in the return of children to prisons pending trial. The numbers of children awaiting trial in prisons on 30 September 1996 were as follows:

KwaZulu Natal (principally in Durban Youth Correctional Centre)	143
Gauteng	34
Mpumalanga	5
Northern Cape	13
North West	3
Northern Province	2

Western Cape	230
Free State	41
Eastern Cape	227
TOTAL	698

(Figures supplied by the Department of Correctional Services)

These statistics, however, are limited to unconvicted children awaiting trial, and are based on those prisoners identified as children by virtue of the ages on their warrant. In some areas, visits to prisons have shown underestimation of the numbers of 'children' in detention because children's ages are reflected as being above the age of 18 years on warrants of detention. They are obviously then excluded from official prison statistics.

A second category of excluded children are those who have been convicted but not yet sentenced. Some, but not all, of these children are reflected as awaiting-trial children. At present, owing to interpretation problems with s 29(8), introduced by the 1996 Amendment Act, children who are convicted but unsentenced are being regarded in many jurisdictions as falling outside the provisions of the amendment, and therefore not subject to any of the limitations on (for example) the length of time for which a child may be remanded to prison before the next court appearance; additionally, they would appear to escape statistical classification as 'awaiting-trial children' in some prisons.

A third category of children to be found in prison, but unrecorded in the above statistics, are those who have been sentenced to attend a reformatory, where such institution has not yet been designated by the appropriate authorities (in the education departments). These children who can remain in prison awaiting transfer to a reformatory for six months or longer are not reflected as awaiting-trial children.

In sum, then, the figures supplied above are a lower estimate of the true number of unsentenced children in prison on the given date. Clearly too the available data indicates that the number of children in pre-trial detention in prisons at that date varies considerably across provinces and regions.

At the time of writing, no secure places of safety are yet in operation and the number of children in prisons indicates that the situation is almost equivalent to that pertaining when the first amendment to s 29 of the Correctional Services Act was promulgated on 8 May 1995. At that time approximately 700 children were released from prison, by and large a similar number to those presently in detention according to the (limited) statistics available.

2 Monitoring the implementation of the new law allowing pre-trial detention of juveniles

In July 1996 a national monitoring project commenced under the auspices of the Inter Ministerial Committee on Youth at Risk. The project was designed

to include children in prisons, examination of charge sheets at courts, and inspection of police cells. The purpose of the project was, inter alia, to examine compliance with the new law, to report to various interested ministries, and to make recommendations for law reform upon expiry of the present amendment (i e in either May 1997 or May 1998, depending on whether an extension of one further year of operation of s 29 is allowed by Parliament).

The implementation of the project has been undertaken by non-governmental organizations in various parts of the country and regular reports have been complied by participants, with the author as project manager. The information that follows is therefore based on the writer's actual experiences and the overall results of the monitoring activity.

Thus far monitoring has been implemented in six provinces, covering the major prisons where juveniles are currently detained, together with their chief feeder courts. They reveal, generally speaking, considerable problems being experienced by courts with the implementation of aspects of the new legislation. In addition, in part owing to the continuing lack of appropriate placement options, some provisions have been ignored or breached. The major problems are detailed here.

First, the limitations on pre-trial detention of children below the age of 14 as embodied in the 1995 amendment (see J Sloth Nielsen 'No child should be caged: Closing the doors on the detention of children' (1995) 8 *SACJ* 47) were not altered in the 1996 version, which amended only those sections pertaining to children between 14 and 18 years. Yet instances have been noted where children under the age of 14 are held on remand from courts in both prisons and police cells. It is difficult to argue that detention warrants which do not accord with provisions of the law can be regarded as valid, yet prison authorities in some jurisdictions have operated on the basis that if a warrant appears valid on the face of it (i e signed by a magistrate etc), the child will be admitted, even if that child is under the applicable age as permitted by law.

Secondly, the legislature included a finite period of detention (14 days) to enable continuous review of the juvenile's detention in prison, and to allow judicial overseeing of the progress of the case so as to ensure detention for the shortest appropriate period of time (s 29(5)*(a)*; see also s 28(1)*(g)* of the 1996 Constitution). Numerous monitoring reports have, on examination of warrants of detention of children in prisons, found breaches of this provision, where remand dates exceed the 14-day limit. In some jurisdictions steps have now been taken to improve compliance, particularly at lower-court level. With respect to the prioritization of juvenile cases on the rolls of regional courts, much work needs to be done.

Thirdly, the new Act requires that oral evidence be led prior to the judicial decision to remand a matter involving a juvenile in custody (s 29(5A)*(b)*). The evidence should pertain to one of three criteria, all intended to foster an

individual assessment of the personal circumstances surrounding the detention of each child. The criteria are: the risk of the child absconding from a place of safety; the risk of harm to other children in a place of safety; and the disposition of the accused to commit offences (s 29(5A)*(a)*).

Initially compliance with this requirement was sporadic in many jurisdictions, and no oral evidence (e g from an investigating officer, child care worker, probation officer) was led at all. In effect, it is submitted, the omission, if tested in court, might render the subsequent detention of a child in prison unlawful, as s 29(5A)*(b)* states that 'before the detention of a person in terms of subsec (5) is ordered, oral evidence *shall* [my emphasis] be presented by the State with regard to the factors referred to in para *(a)*'. However, the situation regarding the non-compliance with this aspect would appear to have improved, with monitors reporting a substantial decrease in cases where no oral evidence has been led prior to detention in a prison.

A related aspect concerns the content and import of oral evidence. For one, some prosecutors have simply addressed the court from the bar, which, it is submitted would not comply with the ordinary meaning of oral evidence; the latter refers to evidence under oath, subject to the usual rules of cross-examination. Secondly, a practice has been noted in some jurisdictions of evidence being presented which does not accord with the intention of the legislature, and is thus of questionable validity if it is accepted that the evidence referred to above is a necessary pre-requisite to a lawful detention order. Two examples illustrate this point: first, cases in which co-accused are charged, and evidence (e g previous convictions or abscondments) is presented to justify prison detention of the one accused, but the other accused (about whom no personally specific evidence has been led) is remanded in custody 'by association' as it were; secondly, a fairly commonplace practice in some jurisdictions, where escapes from the local place of safety are fairly prevalent, of calling child care workers to testify pro forma as to whether children abscond (ever?) from that particular institution. Apart from lacking the proposed individualization (many more children of course do not abscond), frustrations have been expressed by child care workers and probation officers when improvements in the conditions of detention at places of safety are not accorded any weight, because the focus in court is only on past abscondments.

However, regular monitoring of charge sheets and consultations with court personnel might have led to some improvement in this regard too, as fewer cases of this kind are being reported.

Thirdly, it is clear from statistical analysis of the detention figures supplied by the Department of Correctional Services that the majority of juveniles are detained in custody as a consequence of having been alleged to have committed 'any other offence in circumstances so serious as to warrant such detention' (s 5*(a)*). This is in contradistinction to the detention for an offence referred to

in the schedule of 'serious offences' developed by the legislature in both the 1995 and more recent 1996 amending legislation, to provide guidance as to when a detention in prison can be ordered. The leeway to detain for offences other than those named in the schedule was felt necessary in order to provide for exceptional situations where detention for other offences may be necessitated: possession of unlawful firearms or multiple counts of motor vehicle theft, to cite two obvious examples of offences treated as serious in the criminal justice system, and often warranting trial in the regional courts with increased sentence jurisdictions, but absent from the schedule. The schedule refers to: murder, rape, robbery where the wielding of a firearm or any other dangerous weapon or the infliction of grievous bodily harm or the robbery of a motor vehicle is involved, assault with intent to commit grievous bodily harm or when a dangerous wound is inflicted, assault of a sexual nature, kidnapping, any offence under any law relating to the illicit conveyance or supply of dependence-producing drugs, and/or any conspiracy, incitement or attempt to commit any offence referred to in the schedule.

The obvious offences which were excluded from the schedule, but which are prevalent in practice, are theft (for example, theft out of motor vehicles) and housebreaking charges.

The figures for 30 September 1996 reflecting the proportion[1] of juveniles detained for scheduled offences and for other offences, respectively, are as follows:

	Scheduled offences	Other offences
KwaZulu Natal	64	79
Gauteng	10	24
Mpumalanga	3	2
Northern Cape	5	8
North West	3	0
Northern Province	1	1
Western Cape	98	132
Free State	17	24
Eastern Cape	79	148
TOTAL	280	418

It is apparent that detentions under this 'escape' clause outnumber by nearly 30 % the detentions under the schedule. Monitoring has revealed that the

[1] The figures supplied by the Department of Correctional Services are once again predicated upon the possible omissions enumerated above, such as convicted but unsentenced children.

detentions under the head 'offences committed in circumstances so serious as to warrant such detention' range from shoplifting of a bar of chocolate (report from Lawyers for Human Rights, Pietermaritzburg) and attempted theft of a bicycle (first monitoring report, Westville prison) to charges that could indeed be construed as serious: four counts of theft of motor vehicles and two counts of housebreaking (monitoring report, East London).

Such wide, and in some instances, it is submitted, almost mischievous, judicial interpretations raise concern about the ability of legislation, framed to allow judicious exceptions in extreme cases, to regulate the exercise of judicial discretion in a meaningful way. This is pertinent given the past concerns about juvenile detention, when widely framed legislation (to wit the formerly applic-able s 29 allowing juvenile detention only when such detention was necessary) resulted in no *de facto* control over juvenile detention at all (see, for example, *No Child Should Be Caged* Community Law Centre 1993; *Letting in the Light* Community Law Centre 1992). It is also illuminating to remember that the previous attempt, in 1995, to redress the situation by curtailing altogether options for the exercise of judicial discretion, was widely criticized by justice personnel; even the allowances now granted in the 1996 legislation are felt by many who deal with juvenile accused on a day-to-day basis to represent unwarranted legislative interference with judicial discretion. The monitoring experience seems to indicate, though, that, whatever the protestations of justice officials, clearly formulated, practicable curbs on judicial discretion are the only meaningful way in which to control the admission of children to prisons.

A fifth concern relating to the implementation of s 29 relates to the expeditious processing of juvenile cases where juveniles are being detained in prison (see s 29(5A)*(d)*). Initial indications are that the 14-day remand period is easily renewed . . . and renewed . . . and renewed, with children spending months in custody awaiting finalization of cases. Based on the figures monitors have collected, an average of four months, extending to nine months in a substantial proportion of cases, would be a realistic approximation of the time spent in detention in prison. According to the statistics furnished by the Department of Correctional Services relating to juvenile detentions on 30 September, 201 children (out of a total of 698) had been in custody for longer than six weeks. Sadly, all role players admit that these children are in the vast majority of cases not going to receive prison sentences when convicted (one magistrate estimated approximately 5 % of the children in detention in the local prison could receive a prison sentence) so the periods spent in prison are in a very real sense punishment by process.

Lastly, monitoring has revealed that, despite the provisions of the interim Constitution, reiterated in s 29(5A)*(c)*, to the effect that a person detained in terms of the new law shall 'as soon as possible after arrest be afforded the

opportunity to obtain legal representation as contemplated in section 25 of the Constitution and section 3 of the Legal Aid Act, 1989', a minute percentage of children presently detained in prison have availed themselves of this right. Interviews with children in prisons have elicited three key reasons why they routinely refuse legal aid:

(i) they allege that lawyers acting on instruction from legal aid cause delays in the case, which lengthens their period of imprisonment;
(ii) they allege that lawyers force them to plead guilty;
(iii) they allege that, by accepting the offer of legal aid, they create the impression that they must be guilty (otherwise they would not have needed a lawyer!).

These three reasons are common to every jurisdiction visited thus far, and show the existence of deep-seated beliefs about both the effect and effectiveness of legal-aid-appointed lawyers for children. Questioning of these same children tends, at the same time, to elicit numerous queries and misconceptions from them about the criminal process itself, revealing their obvious need for representation during criminal proceedings. Clearly a careful study needs to be conducted to improve children's effective participation in accusatorial procedures, and to attempt to reverse the culture of refusal of legal aid. This should ideally be coupled with improvements in the standard of services actually provided by lawyers who accept briefs from the legal aid board relating to children, since their reported perception that lawyers cause delays has been shown to be fully justified in many instances: verified instances of several (telephonic) requests for remands, for example, because lawyers are busy with other trials, while the child returns for another 14 days to prison is fairly commonplace. It is perhaps noteworthy that with respect to the prisons so far included in the monitoring programme it has been uniformly reported that lawyers have not (as yet) ever arrived at the prison gate to interview juvenile clients.

3 Alternative care for juveniles awaiting trial

Despite the fact that s 29, as amended, ' shall cease to have effect after the expiry of a period of one year from the commencement thereof: provided that Parliament may at the expiry of the one year period, extend the period for one further year', no secure places of safety have yet been completed, and, in addition, many places of safety that admit awaiting trial juveniles are at the time of writing still plagued with the same problems which bedeviled the implementation of the 1995 amendment. Abscondments, staff problems, and gangsterism are three usual complaints. Many jurisdictions still do not have nearby places of safety at all, and some places have closed for renovations. Plans for new or improved facilities seem, at the moment, to provide insufficient

spaces to cater for those at present in detention,[2] which suggests that the amendment Act is likely to be renewed in 1997.

4 Juvenile justice and the 1996 Constitution

The 1996 Constitution enshrines greater rights for children in the juvenile justice system. Section 28(1)*(g)* provides that a child has the right

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

The formulation of these improved rights for juveniles is derived from international instruments such as the Convention on the Rights of the Child (1989), which South Africa ratified in June 1995 (see arts 37 and 40), the Standard Minimum Rules for the Administration of Juvenile Justice, and the United Nations Rules for the Juvenile Deprived of their Liberty.

5 Offences and convictions

No report on offences and convictions seems to have been released by the Department of Statistical Services to update the last one (viz Report No 00-11-01 for the period July 1993 to June 1994. This means that more recent information on juvenile convictions and sentences is not available. It is hoped that this information will become available in due course, as the extent of juvenile offending, and more particularly whether there has been an upsurge in juvenile offending, is information sought by policy makers and public alike.

6 Sentenced children

Statistics made available by the Department of Correctional Services indicate that there has been a substantial increase in the numbers of juveniles sentenced to periods of imprisonment in the period under review. The statistics do not give information relating to annual increases, but rather survey the number of children serving sentences in South African prisons on two dates, a year apart. From the difference between the numbers of children serving sentences on the two dates it is inferred that the rate of imprisonment for juveniles has increased.

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[2] Enkusulweni in Port Elizabeth, for example, will reportedly accommodate 75 awaiting trial children when renovations are completed in May 1997. However, there are presently approximately 150 children in the local prison (St Albans) alone. The place of safety should also accommodate children from East London, where there is no facility, but where approximately 32 children are presently detained awaiting trial.

In the tables below, the descriptive categories used are those used by the Department of Correctional Services.

Sentenced children in South African prisons: a comparison between 31-07-1995 and 31-07-1996

Table A: Children in prison serving sentences on 31-07-1995

Age	7–13	14	15	16	17	TOTAL
Economic	1	3	16	72	256	348
Aggression	0	2	19	47	158	226
Sexual	0	2	5	17	68	92
Narcotics	0	0	0	0	4	4
Other	0	0	0	4	14	18
TOTAL	1	7	40	140	500	688

Table B: Children in prison serving sentences on 31-07-1996

Age	7–13	14	15	16	17	TOTAL
Economic	3	7	32	92	286	420
Aggression	0	6	18	71	211	306
Sexual	0	2	10	39	78	129
Narcotics	0	0	0	0	6	6
Other	1	0	3	13	18	35
TOTAL	4	15	63	215	599	896

Table C: Children sentenced to serve prison sentences per region

Totals for	1995	1996
Gauteng	216	272
Northern Cape	9	19
North West	44	43
Northern Province	29	60
Eastern Cape	49	78
Western Cape	88	140
Mpumalanga	33	53
Free State	50	66

Kwa Zulu Natal	167	165
TOTAL	688	896

A comparison between Tables A and B shows a percentage increase in children serving prison sentences over the year of 29,99 %. Analysis of the same information pertaining to the overall prison population serving prison sentences on 31 July 95 and 31 July 96 shows a 10 % increase in the prison population (i e adults and juveniles). This is cited to illustrate the extraordinary increase in the use of imprisonment as a sentence for juveniles. There may be various reasons explaining this phenomenon: inter alia, the use of imprisonment as a sentence in lieu of the now abolished sentence of whipping, a real increase in serious juvenile offending, or judicial responses to media attention to juvenile offending.

The statistics were also analysed to show the percentage change in relation to the ages of the offenders. This is shown in Table D.

Table D: Percentage increase in children sentenced to serve prison sentences according to age of children, comparing 31-07-95 with 31-07-96

Age	Percentage increase %
between 7 and 13 years	400
14 years	100
15 years	57
16 years	53
17 years	20

Clearly, the greatest increase in the use of prison sentences for children applies to the younger groups of children. The children under 14 were sentenced for economic offences (3) and the category 'other' (1). The children of 14 years had received prison terms for economic offences (7), offences involving aggression (6), and sexual offences (2).

Finally, the data tends to show differential use of imprisonment as a sentence, relative to population densities of the provinces; the data was also analysed on a provincial basis in order to test whether increases in the numbers of children sentenced to imprisonment varied. Table E shows the percentage change by region of children serving sentences on 31 July 95 and 31 July 96.

Table E: Regional variations in increases of children serving sentences

	%
Gauteng	26
Northern Cape	110

North West	0
Northern Province	106
Eastern Cape	58
Western Cape	60
Mpumalanga	61
Free State	32
KwaZulu Natal	0

The figures given above show widely varying increases in prison sentences per region, with some regions showing large increases, while others have shown no increase in the use of prison sentences for children. The question that arises is whether the increase in sentenced children per province is linked to actual increases in crime, or once again, whether it is linked to other factors, such as judicial perceptions about juvenile offending.

7 Policy

The Inter Ministerial Committee on Youth At Risk, set up under the chairpersonship of the Deputy Minister of Welfare, has not yet completed a final report. The Committee set itself the task of designing policy for the transformation of the South African child and youth care system. The brief was precipitated by the crisis occasioned by the release of awaiting trial children from prisons, and their subsequent accommodation in places of safety in 1995.

Drawing from a draft discussion document dated October 1996, which is due to be finally revised shortly, it is apparent that the Committee envisages wide-ranging policy changes which, if implemented, are intended to reshape juvenile justice practices.

Some suggestions include: the development of national guidelines on the powers of the police to arrest in cases involving persons under the age of 18. The purpose would be to assist in changing current attitudes that arrest is the primary way of police intervention with young people in trouble with the law. They would also refer to the duty of the arresting officer to establish, where possible, the age of the young person, and to obtain documentary proof of this. It is envisaged that reception centres (see the description of assessment centres detailed in (1995) 8 *SACJ* 333ff) would be a key component of referral of cases, and that the current 'bank' of options be improved and extended. Referral decisions should be monitored and evaluated. Both international rules and policy dictate that diversion should be central to the youth justice system.

The discussion document advises that the Children's Court Inquiry should become far more central to youth justice than is at present the case. Children in need of care should be referred to these courts.

Several recommendations concern the proposed legal review of statutory aspects of juvenile justice. It has been indicated that the process of drafting a

juvenile justice law, to be conducted by the South African Law Commission, will commence in 1997. The Inter Ministerial Committee's proposals include revisiting the minimum age of criminal capacity, the possibility of legislative limitations on the period of time that may elapse between arrest and commencement of the trial where the child is in custody, and the desirability of specialized courts for most jurisdictions, including regional court jurisdictions, for young people. Separation of trials where adults and children are co-accused is advocated, as is the possibility of incorporating sentencing guidelines in legislation.

The above suggestions are, as stated above, not yet finalized, and have yet to be approved by Cabinet. Nevertheless, they are likely to influence juvenile justice trends and approaches in the following year.