CHAPTER 19

The sentence

10.6 Juvenile offenders

10.6.1 *Introduction*

The SA Law Commission completed its investigation into a completely separate juvenile justice system in 2000. Its *Report: Juvenile Justice* contains recommendations in terms of which all child offenders (persons under the age of 18 when they commit the offence) will have to be dealt with. These recommendations have to a large extent been accepted and included in the Child Justice Act 75 of 2008 (in this part referred to as 'the Act'). In terms of s 100 of the Act it will come into operation by not later than 1 April 2010. Until then the current provisions and sentencing principles, as they relate to children, are still in place.

10.6.2 *Current general principles*

All the sentences that are available in the case of adult offenders may, generally, also be imposed on juvenile offenders (ie offenders under the age of 21 years old). But, even under common law, it was accepted that such offenders should not be punished as harshly as adult offenders would be—cf *Mohlobane* 1969 (1) SA 561 (A). Today, especially in the case of children (ie people under 18 years old), this has become a constitutional issue. Children are afforded various rights in s 28 of the Constitution. In particular, they should not be detained except 'as a measure of last resort', and then for the shortest possible time. The child's best interests are always of paramount importance—cf, in general, *Nkosi* 2002 (1) SACR 135 (W).

Apart from the other forms of punishment, s 290 of the Criminal Procedure Act contains provisions for specific use in the case of young offenders.

10.6.3 *Section 290*

Section 290 makes provision for different methods of dealing with juvenile offenders. This section provides that, in the case of an offender under the age of 21 years old, the court may, instead of imposing any punishment upon him for that offence, order:

(1) that he be placed under the supervision of a probation or correctional officer; or
(2) that he be sent to a reformatory—s 290(1).

If the offender is younger than 18 years old, he may also be placed in the custody of another suitable person. The Act also allows the court to issue an order in terms of s 290 if it sentences the juvenile offender to a fine—s 290(2). No other combination of sentences is possible. Because a section 290 sentence is imposed 'instead of imposing any punishment', it has been held that it may be imposed instead of a prescribed minimum sentence as well—*Hattingh* 1978 (2) SA 826 (A). This position should also apply in the case of the minimum sentences prescribed in Act 105 of 1997 (see 5.3 above).

Being sent to a reformatory (or reform school) is a severe punishment which resembles imprisonment. It should not be imposed without first obtaining a probation report on the offender and, generally, also not if the offender is a first offender, or has not committed a serious crime—*M* 1998 (1) SACR 384 (C).

A court which makes an order in terms of this section may order that the person who is to be sent to a reform school be detained in a place of safety until such time as the order of the court can be put into effect—s 290(4).

10.6.4 *New developments*

10.6.4.1 Introduction

Diversion from the criminal process is a central feature of the new system. This means that the child offender is not prosecuted in the criminal court, but is subjected to any number of conditions of diversion. These conditions are aimed at emphasizing restorative justice and other community-based measures. If these conditions are successfully completed the matter is considered finalised. The child offender will also not have a criminal record.
Sentencing takes place only when the prosecution determines that a criminal trial is required for some appropriate reason (these reasons are not of current importance). The trial and sentencing take place in a child justice court.

The Act contains extensive provisions on the sentencing of children. It includes both general principles and specific provisions on specific sentences. For example, there is extensivemuch detail on the crimes for which imprisonment and residence in a child care centre may be imposed. The sentences of imprisonment, fines and correctional supervision, as well as measures such as suspension of sentence and the postponement of sentencing is retained for child offenders. However, specific guidelines and principles are set for just about every kind of sentence. Several new possibilities are created and they are often provided for under some collective term, such as community based sentences, restorative justice sentences and compulsory residence in a care centre. There is not room in this work for a discussion of all the details.

10.6.4.2 General principles

Section 68 requires a child justice court to impose sentence in accordance with chapter 10 of the Act. In addition, s 69 contains a number of principles that has to be complied with in the process of establishing an appropriate sentence. For example, the objectives of the Act must be kept in mind. In addition, sentencing of child offenders has the following objectives:

(a) encouraging the child to understand the implications of the crime and to accept responsibility for the harm;
(b) to find a balance, within the facts of the specific case, between the interests of the child and society and the seriousness of the crime;
(c) promoting the reintegration of the child into the family and community and ensuring that the child receives the required guidance and supervision to this end;
(d) avoiding imprisonment as far as possible.

10.6.4.3 Imprisonment

Section 77 contains a number of unique provisions applying to child offenders. For example, imprisonment can not be imposed on an offender under the age of 14

years (at the time of sentencing—s 77(1)*(a)*), except when the child is sentenced in terms of the minimum sentences legislation; in some instances a child may only be imprisoned if he or she has a criminal record and there are substantial and compelling circumstances requiring the imposition of imprisonment (s 77(3)). Apart from a minimum sentence a child may not be sentenced to more than 25 years' imprisonment (s 77(4)).

In addition to the limitations in s 77, s 69(4) contains a number of guidelines that have to be followed in determining whether imprisonment should be imposed. For example, the court has to attend very specifically to the seriousness of the crime, the protection of society, and the impact of the crime on the victim. For the first time in South African legislation, the seriousness of the crime is directly linked to the harm caused or risked by the offence, and the offender's blameworthiness for such harm (this is the same as the Law Commission's recommendations on sentencing in general—cf 3 above).

Section 76(3) contains an interesting new provision allowing for imprisonment to follow compulsory residence in a care centre. Before such a child may be transferred to a prison the head of the care centre has to report to the court on the child's progress during residence in the centre. The court may then reconsider the original sentence.

10.6.4.4 Compulsory residence in a care centre

Amongst other things, s 76 provides that such residence is limited in duration to 5 years, or to the date when the child offender reaches 21 years of age. The centre involved is a 'child and youth care centre' as defined in the Children's Act 38 of 2005. The court must specify the centre in which the child is to reside, in accordance with the recommendations in the probation officer report. It can be assumed that these centres will largely replace the current useworthless reformatories verbetering schools.

Additional considerations that have to be taken into account in imposing this sentence are set out in s 69(3). These include that the seriousness of the offence should indicate that the child has a tendency towards harmful conduct, the question whether the offence caused such harm that a residential sentence is appropriate and that the child has a need for the kind of services offered at the centre.

10.6.4.5 Correctional supervision

In terms of s 75 any child may be sentenced to correctional supervision.

10.6.4.6 Fines

Section 74(1) authorises a child justice court to impose a fine, but it emphasises that this should only take place following a proper investigation into the means of the offender, parent or guardian to pay the fine. The court should ensure that the child is not imprisoned simply for being unable to afford the fine. Subsection (2) provides for a number of alternatives to the fine, such as payment of an amount of money as a form of symbolic restitution, or delivering a service instead of a

fine. These alternatives are aimed at achieving the general principle that the child offender should assume responsibility for the committed crime.

10.6.4.7 Restorative justice

As mentioned above, the Act emphasises diversion of child offenders. In this process the principles of restorative justice are of particular importance. Specific provision is made in s 73 for measures related to restorative justice to be imposed as sentences. Specific reference is made to family group conferences and victim-offender mediation, in which case the processes prescribed for diversion have to be followed. Any procedure that would fit in with the definition of 'restorative justice' could also be imposed as a sentence by the court.

10.6.4.8 Community-based sentence

According to s 72 a community-based sentence is a sentence which allows a child to remain in the community. Any of the diversion options provided for in s 53 of the Act, and any combination thereof, could be included with such a sentence, including correctional supervision. A probation officer should be appointed to oversee compliance with such a sentence—a 72(2)*(a)*.

10.6.4.9 Suspension of sentence and postponement of sentencing

In terms of s 78 the provisions of s 297 of the Criminal Procedure Act basically apply in the case of child offenders as well. A number of conditions, that are not available in the case of adult offenders, are also provided for.

10.7 Caution and discharge

Subject to the same exceptions as are discussed below in 11.2, a court may discharge any offender with a mere caution—s 297(1)*(c)*. This is the lightest sentence which the law permits—cf *Magidson* 1984 (3) SA 825 (T). Although the discharge has the effect of an acquittal, the conviction is still recorded and counts as a previous conviction.

11 SUSPENDED AND POSTPONED SENTENCES

11.1 General

Sentences are frequently *suspended*, which means they are imposed in full but, subject to certain conditions, not executed. A sentence that is wholly suspended is not executed unless the conditions for its suspension have been broken by the offender. Sentences can also be partly suspended. In such cases the unsuspended part is executed, but the suspended part not, unless the conditions are breached.

Courts are generally also empowered to *postpone* the imposition of sentence. This may be done conditionally or without any conditions. In such a case the offender is released without a sentence, but may be ordered to appear before the court at some later date.

The whole statutory framework for these forms of punishment is contained in s 297, which is criticised by Hiemstra 754 for the mass of words the reader has to wade through before getting to the main purpose of the particular provision.

11.2 Exclusionary provisions

Any court may, according to s 297, postpone sentencing or suspend any sentence, for any offence *except* an offence for which a *minimum penalty* is prescribed (see, with respect to minimum sentences, 5.3 above). In these cases the sentences may *only* be *partly* suspended—s 297(4).

11.3 Postponement of passing of sentence

The court may postpone the passing of sentence for a period not exceeding five years and release the offender unconditionally, or on one or more conditions (which are discussed in 11.5 below). The offender may then be ordered to appear before the court if called upon before the expiry of the relevant period. If the offender is not called to appear before the court, or if the court finds that the conditions have been met, no sentence is imposed and for record purposes the result of the trial is a caution.

11.4 Suspension of sentence

All imposed sentences may be suspended, although it is mostly done with imprisonment and fines. The suspension of most other forms of sentence will rarely make much sense.

Suspended sentences have two main functions:

(1) to serve as alternative to imprisonment in situations where the offender cannot afford a fine and where other forms of punishment are improper, mainly because the offence was not particularly serious; and
(2) to serve as individual deterrent to the offender as it hangs like a sword over his head—cf *Allart* 1984 (2) SA 731 (T).

The maximum term for which a sentence may be suspended is five years. In the Free State exceptional circumstances are required before the maximum of five years is employed (cf *Nabote* 1978 (1) SA 648 (O)), but this is not required in the other divisions—cf *Cobothi* 1978 (2) SA 749 (N); *Van Rensburg* 1978 (4) SA 481 (T). The Free State point of view gives the impression that it is unreasonable to expect of people not to commit crime, a view that cannot be supported.

Where part of a sentence of imprisonment has been suspended, the period of suspension runs from the date on which the person is released from prison after serving the unsuspended portion, and not from the date of imposition of the sentence—*Ex parte Minister of Justice: In re Duze* 1945 AD 112. The result is that the prisoner is not under threat of the suspended portion of the sentence, a situation which has on occasion been criticised—*Mbombo* 1984 (1) SA 390 (D).

A suspended sentence is inextricably linked to its conditions of suspension. Without conditions it would not be a legally enforceable form of sentencing.

11.5 The conditions

When considering the conditions of suspension it is useful to distinguish between *negative* and *positive* conditions (even though our courts do not use this distinction, but see Hiemstra 754). *Negative* conditions are the most common conditions and require of the offender not to repeat the crimes specified. *Positive* conditions require positive action by the offender in order to fulfil the conditions of suspension. When positive conditions are imposed, they are usually combined with a negative condition as well.

Any condition of suspension has to conform to three basic requirements:

(1) It must be *related to the committed offence*. This relationship must be clear—cf *Tshaki* 1985 (3) SA 373 (O). This requirement is aimed mainly at negative conditions, so that a sentence for assault is, for example, only suspended on condition that similar offences are not repeated. It may not always be possible to link a positive condition to the kind of offence, as would be the case if community service were imposed for a theft.

(2) It must be stated *clearly and unambiguously*, so that the offender will know exactly what is expected of him—cf *Xhaba* 1971 (1) SA 232 (T). It is undoubtedly more clear to specify the crimes which an accused should not repeat rather than to use phrases such as 'crimes of which force is an element' or 'crimes of which dishonesty is an element'—cf *Mjware* 1990 (1) SACR 388 (N) and *Goeieman* 1992 (1) SACR 296 (NC).

(3) The conditions must be *reasonable*—cf *Gaika* 1971 (1) SA 231 (C). It should not be worded in such a way that a petty offence may trigger a severe suspended sentence. In several reported cases the accused was convicted of dealing in dagga and sentenced to a (partly) suspended term of imprisonment on condition that (*inter alia*) the accused was not found guilty of the possession of dagga. One can hardly argue that these two offences are not sufficiently related, but possession of a minute amount of dagga would normally breach the conditions upon which the (usually) severe sentence for dealing in dagga was suspended. For this reason it has become customary to include an extra condition for the latter offence, such as 'for which imprisonment, without the option of a fine, of more than four months is imposed'—cf *Adams* 1986 (3) SA 733 (C); *Herold* 1992 (2) SACR 195 (W).

Examples of positive conditions include compensation, community service, correctional supervision, submission to instruction or treatment, the attendance of courses or treatment at specified centres, etc.

Community service consists of any service rendered without remuneration, which is to the benefit of the community—s 297(1)*(a)*(i)*(cc)*. It is in actual fact a different form of punishment which is imposed under the guise of a condition of suspension. It is a form of punishment with many advantages (cf *Mogora* 1990 (2) SACR 9 (T) 17C–F): it is not restricted to less serious offences, but can be imposed for serious offences where appropriate—cf *Van Vuuren* 1992 (1) SACR 127 (A). However, community service is not normally appropriate for recidivists or offenders who are suffering from some form of personality disturbance—*Abrahams* 1990 (1) SACR 172 (C).

Compensation may also be brought about by suspending an imposed sentence on condition that the victim is compensated. This approach was promoted in *Charlie* 1976 (2) SA 596 (A) and *Edward* 1978 (1) SA 317 (NC).

11.6 Breaching the conditions

Elaborate provision has been made for the procedure to be followed if any condition is breached. When a court has to consider whether a suspended sentence should be put into operation, the *audi alteram partem* rule is applied and the offender must be given the opportunity to lead evidence and to make representations—cf *Zondi* 1974 (3) SA 391 (N). If it is found that the offender did not comply with his conditions, the court may put the suspended sentence into operation, or may suspend it further on appropriate conditions. This decision is not subject to appeal, but as it amounts to an exercise of a discretion, it has to be done in a judicial manner, and is subject to review—*Callaghan v Klackers NO* 1975 (2) SA 258 (E).

12 SENTENCES FOR MORE THAN ONE CRIME

Offenders are often, during the same trial, convicted of more than one crime and the question is whether this fact should influence sentencing at all. The trial court retains its full sentencing jurisdiction for every separate crime the accused has been convicted of. For example, an offender who has been convicted of theft, assault and arson may be sentenced to a maximum of three years' imprisonment on every count by a district court. In such cases, however, it easily happens that, despite the individual sentences being suitable, the total punishment becomes unduly severe. The court then has to reduce what is called the *cumulative effect* of the various sentences in some way.

The preferred method is to order the whole or part of the sentences to run concurrently (or 'at the same time'). In terms of s 280(2) of the Criminal Procedure Act all sentences of imprisonment are executed in the order in which they were imposed and the next sentence commences after the completion of the previous one, unless the court orders that they are to run concurrently. Only sentences of *imprisonment* (*Mngadi* 1991 (1) SACR 313 (T)) or correctional supervision (s 280(3) in the Criminal Procedure Act) may be ordered to run concurrently.

There are two further methods of restricting the cumulative effect of multiple sentences. *First*, every sentence may be reduced so that the total sentence is not excessive. A variation to this method is to suspend a portion or portions of the various sentences—cf *Coales* 1995 (1) SACR 33 (A). An objection against these approaches is that the sentences for the individual crimes may seem inadequate when viewed in isolation. *Secondly*, some or all of the counts can be taken together for purposes of sentencing. The Criminal Procedure Act does not specifically provide for this method, but it is part of our practice and is often used—see Hiemstra 719. The main problem with this method is that difficulties may develop on review or appeal if some of the convictions are set aside, or some misdirection took place during sentencing—cf *Young* 1977 (1) SA 602 (A); *Keulder* 1994 (1) SACR 91 (A). It is also not desirable to take convictions in respect of divergent counts together for the purpose of sentence—cf *S* 1981 (3) SA 377 (A). A court which takes different

counts together, must also ensure that the eventual sentence is a competent one for every crime that the offender has been convicted of—cf *Hayman* 1988 (1) SA 831 (NC).

13 COMPENSATION AND RESTITUTION

13.1 Compensation

The Criminal Procedure Act makes provision for compensation to the victims of crime in various ways. One of these procedures is contained in s 300. It provides that any convicted person who has caused damage to or loss of property of another person through his crime may, in certain circumstances, be ordered to compensate the victim. Such an order then has the effect of a civil judgment. For this purpose the court should shed its criminal approach and function completely as a civil court. The amount of compensation which may be ordered in the High Court is unlimited, but in the case of the regional and magistrates' courts it is presently limited to amounts of R500 000 and R100 000 respectively. These amounts are determined by the Minister of Justice by way of notices in the *Government Gazette*.

A court may act in terms of s 300 only when requested to do so by the injured party (cf *Dhlamini* 1967 (4) SA 679 (N) 679G) or the prosecutor acting on the instructions of the injured person (there must be proof of this authorisation—cf *Vanmali* 1975 (1) SA 17 (N)). What follows thereafter is a separate enquiry into the amount of damages, which is civil in nature. The court should explain to the parties (including the victim—cf *Makhae* 1974 (1) SA 578 (O)) what is taking place and must afford them the opportunity to lead evidence and to present argument. The usual calculation of the amount of damages applies as in civil claims. Evidence already led at the criminal trial is also taken into consideration—cf *Maelane* 1978 (3) SA 528 (T).

The compensation order may be given only in respect of direct loss or damage—cf *Mokwaka* 1969 (2) SA 484 (O). In *Du Plessis* 1969 (1) SA 72 (N), the court intimated that motor collision cases would be inappropriate for an award in terms of s 300 where this would necessitate a lengthy enquiry into contributory negligence. An order to pay compensation is also clearly inappropriate where the accused is sent to prison for a substantial period of time and he has no assets—*Baloyi* 1981 (2) SA 227 (T).

A person in whose favour an award has been made may, within 60 days, renounce the award and, where applicable, make a repayment. If such renunciation is not done, the accused may not later be held liable in civil proceedings in respect of the injury for which the award was made—s 300(5).

Since an order for compensation in terms of s 300 has the effect of a civil judgment, a sentence of imprisonment in default of payment cannot be imposed in the alternative—cf *Msiza* 1979 (4) SA 473 (T).

13.2 Restitution

Section 301 provides that the court may order, at the request of a *bona fide* buyer, that he (the buyer) be compensated out of money taken from the convicted thief when the latter was arrested, provided of course that the buyer returns the goods to the owner thereof.