

Sentencing minors in South Africa: Reflections on statute and legal precedents

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Abstract

This article delves into the intricacies of sentencing minors who find themselves in legal trouble, with the focus on those between the ages of 12 and 17. Under South African law, the provisions outlined in the Child Justice Act 75 of 2008, the Child Justice Amendment Act 28 of 2019, and the Criminal Procedure Act 51 of 1977 play a pivotal role in governing children's court proceedings. These Acts detail the processes and considerations for diversion – a mechanism aimed at steering children away from the formal criminal justice system where appropriate – as well as sentencing in case proceedings involving a child. In examining these legislative frameworks, the article provides an analysis of how minors are treated in the criminal justice when they come into conflict with the law. It also assesses the alignment of these provisions with section 28 of the Bill of Rights, which enshrines the rights of children in the Constitution of South Africa. Via this examination, the article highlights the nuances of sentencing minors, the importance of considering the best interests of the child, and the way in which South African legislation navigates the balance between accountability, rehabilitation, and the protection of children's rights.

Keywords: Child Justice Act; criminal justice system; Criminal Procedure Act; diversion; section 28 of the Constitution; Child Justice Amendment Act; child justice courts; legal precedents; sentencing; rehabilitation

1 INTRODUCTION

Despite the Child Justice Act 75 of 2008 (hereafter “CJA”) and Child Justice Amendment Act 28 of 2019 (hereafter “CJAA”) being in place to consolidate the laws pertaining to children specifically, the Criminal Procedure Act 51 of 1977 (hereafter “CPA”) contains provisions for procedures and related matters in criminal proceedings concerning minors. However, it also includes provisions concerning minors (that is, children, meaning persons under the age of 18).

Child justice is a complex issue where finding the right balance between punishing child offenders and rehabilitating them is key. Punishment involves holding child offenders accountable for their actions, while rehabilitation is about helping them change their behavior and become productive members of society. Despite many studies on child sentencing and rights protection, there is still much to learn about achieving this balance effectively. Scholars highlight that child justice has not yet been achieved.¹

This article aims to contribute to the ongoing conversation on child justice by offering ideas and viewpoints for future research, practice and policy. It explores the elements that shape child justice in South Africa, considering the constitutional protections for children’s rights (section 28) and the role of child justice courts in applying them in the field of child justice.

2 THE COMMON LAW POSITION

It is rebuttably assumed that children between the ages of 12 and 14 lack the potential to commit crimes.² The state may demonstrate differently, but it is a difficult effort because, for this age

¹ Brits J “Is your child in trouble? A look at criminal liability for the youth of South Africa” available at <https://jrrinc.co.za/child-trouble-look-criminal-liability-youth-sa/> (accessed 11 August 2025); Songca R “A comparative analysis of models of child justice and South Africa’s unique contribution” (2019) 44(1) *Journal for Juridical Science* 63; and Terblanche SS “The Child Justice Act: Procedural sentencing issues” (2013) 16(1) *PELJ* 320.

² Section 2(1)(a) of the CJAA.

group, it must demonstrate beyond a reasonable doubt that the child was able to understand right from wrong and behave appropriately.³

Children older than 14 but under the age of 18 have the same criminal ability as adults, and there is no assumption that they lack it.⁴ Until the contrary is demonstrated, they can be held fully responsible for their acts and punished equally to adults.⁵

Since 19 August 2022, the CJAA has changed these common law principles by increasing the minimum age of criminal capacity from 10 to 12 years old and offering specific processes such as diversion programmes, restorative justice, and sentencing options that prioritise rehabilitation over imprisonment for minors who have broken the law.⁶ These alternatives aim to address the child's needs and circumstances and, in certain cases, can extend to young adults up to 21 years of age – for example, where the accused committed the offence while under 18 but is between the ages of 18 and 21 during the court proceedings. This is where section 28 of the Constitution comes into play.

Section 28 is a vital provision that underscores the importance of prioritising children's rights and well-being. By emphasising the paramountcy of the best interests of the child, it ensures that the decisions affecting children – whether in matters of custody, protection, or justice – are made with the welfare of the child foremost in mind. This helps safeguard children from harm and supports their development into capable adults.

3 THE IMPACT OF SECTION 28 OF THE CONSTITUTION

The Constitution is the supreme law of the land, and all other laws must be consistent with it to be valid.⁷ In other words, the Constitution regulates the South African legal framework and obliges all legislations to advance and promote its transformative principles and values.

Section 28(1)(g) of the Constitution addresses a child's rights, emphasising that a child may be detained only as a last resort and for the least amount of time (within reasonable limits).⁸

³ Legal Aid South Africa “Children and the criminal justice system” (n.d.) available at <https://legal-aid.co.za/2018/09/26/children-and-the-criminal-justice-systme/> (accessed 11 August 2025).

⁴ Section 7 of the CJA.

⁵ Legal Aid South Africa (n.d.).

⁶ Section 7 of the CJA, as amended by section 4 of the CJAA.

⁷ Section 2 of the Constitution of the Republic of South Africa, 1996 (hereafter “Constitution”).

⁸ Section 28(1)(g) of the Constitution.

Additionally, children must be handled with consideration for their age and kept apart from other incarcerated individuals older than 18.⁹

The impact of section 28 of the Constitution can be seen in the case of *Fredericks v S*.¹⁰ In this case, on the night of 6 July 1999, the appellant and his co-accused entered the complainant's property with the goal of breaking into the house and stealing.¹¹ After awaking and bundling all the occupants into one room, the appellant and his co-accused started to remove goods after failing to obtain money from the complainant.¹²

While looting the house, the appellant sexually assaulted one of the complainant's children, 15 years old at the time, who was later also raped by the co-accused.¹³ The co-accused also raped the complainant's 18-year-old child.¹⁴ Both the appellant and his co-accused received prison sentences: the appellant would serve a total of 25 years in prison, while the co-accused would serve 35 years.

The appellant, who was 14 years and 10 months old at the time of sentencing, challenged the sentence imposed on him on appeal.¹⁵ The appellant and co-accused contended that the trial court neglected to consider the constitutional requirement that the imprisonment of minors is a last resort and should be for the shortest possible period. They further contended that an effective sentence of 25 years' imprisonment was remarkably inappropriate in the light of section 28(1)(g) of the Constitution and section 77 of the CJA.¹⁶ It was claimed that the trial court did not follow the guidelines for sentencing minors.¹⁷ The court's failure to follow the guidelines for sentencing minors did not contribute to the balance sought between punishment and rehabilitation.

The court decided that the severity of the offence, its effects on the victims, and the interests of society at large must all be considered when determining a sentence.¹⁸ Though the law does not

⁹ Section 28(1)(g)(i) and (ii) of the Constitution.

¹⁰ *Fredericks v S* (208/11) [2011] ZASCA 177 (29 September 2011) (hereafter "*Fredericks* (2011)").

¹¹ *Fredericks* (2011) para 3.

¹² *Fredericks* (2011) para 3.

¹³ *Fredericks* (2011) para 4.

¹⁴ *Fredericks* (2011) para 4.

¹⁵ *Fredericks* (2011) para 5.

¹⁶ Section 77(4)(a) and (b) of the CJA "[a]llows for a sentence of imprisonment for a period not exceeding 25 years or a sentence envisaged in section 276(1)(i) of the Criminal Procedure Act [CPA] 51 of 1977".

¹⁷ *Fredericks* (2011) para 5.

¹⁸ *Fredericks* (2011) para 11.

prohibit the incarceration of children, section 28 (1)(g) provides that the child “may be detained only for a reasonable shortest period of time” – not so long that the child misses too much of his or her childhood because of imprisonment, but long enough that he or she is punished for the crime committed. Certainly, the word “may” implies that incarceration can be imposed where it is the only acceptable punishment.¹⁹

Some authors argue that the principle of the “shortest possible period” is vague and creates inconsistency in sentencing, as it does not provide clear guidelines for judges.²⁰ After considering the time the appellant had served previously, the court determined that a shorter sentence was required in accordance with section 28(1)(g) of the Constitution. As a result, the appellant was sentenced to 12 years in prison following this case.

This case showcases the courts’ role in safeguarding children’s rights and ensuring that laws and practices prioritise their best interests, especially in situations where their interests may be exploited, such as in cases of abuse (of the victims), inadequate consideration of a minor’s status (sentencing the appellant without properly considering his or her age), and lack of best-interests application (the court’s failure to apply the “best interests of the child” principle). The court ultimately upheld section 28 of the Constitution, reinforcing the commitment to protecting the rights and well-being of children.

4 CHILD JUSTICE COURTS

According to section 5(4)(b) of the CJA, if a child is suspected of committing a crime, has not been determined to be a child in need of care and protection, and no diversion order has been issued, the case must be referred to the child justice courts for a trial unless it has been withdrawn or referred to the children’s court.²¹ This is because detention is kept as a last resort.

Although they are not formally created by the CJA, child justice courts are described as “any court provided for in the CPA dealing with the bail application, plea, trial, or sentencing of a child” in

¹⁹ Fredericks (2011) para 11.

²⁰ Gurahoo J *Sentencing of juveniles according to the Child Justice Act: A critical evaluation of application of the principle that “detention must be a measure of last resort and for the shortest possible period of time” in the case law* (unpublished LLM thesis, University of KwaZulu-Natal 2016) at 63–64.

²¹ Section 5(4)(b) of the CJA.

section 1.²² Although the CPA provides for “magistrates’ courts,” “lower courts,” “superior courts,” and “supreme courts,” it is startling that the CPA is referenced in describing child justice courts given its limited role in establishing or governing those courts since it only provides a general framework for courts handling criminal procedures (bail, plea, trial, sentencing) but it does not specifically set up or regularly decide the powers of child justice courts²³

Building on this, Terblanche notes that “it is reasonable to assume that the legislature meant for all courts that handle ‘bail application, plea, trial or sentencing’ in the nation to be referred to as ‘Child Justice Courts’ when they implement or are obligated to implement the Act’s provisions.”²⁴ In other words, district magistrates’ courts, regional courts and high courts may all operate as child justice courts.

The child’s best interests are of paramount importance in every matter concerning the child, as set out in section 28 of the Constitution.²⁵ Therefore, the child justice court must see to it that the child’s best interests are upheld. This was confirmed in the case of *S v Ndwandwe*,²⁶ where the court, citing the principle of section 63(4)(b) of the CJA,²⁷ said that the child justice courts must make sure that there is no hostility during the trial, especially when a child is being cross-examined, and that questions are suitable for the child’s age and level of knowledge. The child justice court may also divert²⁸ the matter at any time before the conclusion of the case and postpone the proceedings, pending the child’s compliance with the diversion order.

Until the child justice court is certain that the child is following the diversion order, it will not issue an order to end the proceedings. When a child is found guilty, however, the child justice court imposes a sentence in accordance with Chapter 10 of the CJA.²⁹ Prior to initiating the child justice court procedure, the court must consider diversion.

²² Terblanche SS “The Child Justice Act: Sentencing of young offenders” (2012) (15)5 *PELJ* 435 at 447 (hereafter “Terblanche (2012)”).

²³ Section 1 of the CPA.

²⁴ Terblanche (2012) at 448.

²⁵ Section 28(2) of the Constitution.

²⁶ *Ndwandwe v S* (AR99/12) [2012] ZAKZPHC 47 (hereafter “*Ndwandwe* (2012)”).

²⁷ *Ndwandwe* (2012) para 15.

²⁸ See note 1 above.

²⁹ Section 68 of the CJA.

5 DIVERSION

Before the CJA was passed, diversion programmes were implemented and managed by non-governmental organisations in South Africa, during which time the practice was largely unregulated by legislation;³⁰ there was, that is to say, little legislative control of how diversion was practised. Diversion functioned by using prosecutorial discretion to withdraw charges against minors while they were referred to and successfully completed diversionary programmes.³¹

Given the unique circumstances of each case and the child involved, this is an approach that ought to be applied universally to all children irrespective of age group. South African case law highlights that a comprehensive legislative framework serves merely as an initial step in strengthening the child justice system, underscoring the need for case-specific considerations.³²

6 LEGAL PRECEDENTS

As mentioned, the child justice court is responsible for ensuring that the child's best interests are respected.³³ This means that the court is to do everything in its power to avoid punishing or sentencing a child if doing so will not be in the child's best interests, as outlined in the case of *S v M*,³⁴ where the Constitutional Court emphasised the importance of considering a child's best interests in sentencing decisions. However, if a conviction is unavoidable, the court is to punish or sentence the child in a manner that considers the child's best interests.³⁵

³⁰ "Diversion" in the criminal context refers to diverting offenders, especially minors or first-time offenders, away from the formal criminal justice system into alternative programmes or interventions. These aim to address the underlying cause of the offence, promote accountability and reduce reoffending. Practices considered are alternatives such as restorative justice, counseling or community service, and diversion programmes that focus on rehabilitation rather than punishment of minor offences. See Ozah K & Masungule Z "Access to justice through diversion of child offenders: Reflections on emerging case law" (2021) 22(1) *ESR Review* 9 at 10.

³¹ Mujuzi JD "Diversion in the South African criminal justice system: Emerging jurisprudence" (2015) 1 *SACJ* 40 at 46.

³² In *S v M* 2008 (3) SA 232 (CC) the Constitutional Court ruled that sentencing a minor must take into consideration the specific circumstances of the child, including age, the background and the nature of the offence, rather than applying a blanket statutory penalty. The judgement of the court reinforced that a comprehensive legislative framework is only a starting point and that each case requires a tailored judicial consideration to protect the child's rights and promote rehabilitation.

³³ Section 28(2) of the Constitution.

³⁴ *S v M* (2008) para 33.

³⁵ Terblanche (2012) at 437.

In *MR v Minister of Safety and Security*,³⁶ the court dealt with the arrest and detention of children in terms of sections 20 and 21 of the CJA, stressing the need for the police to consider alternatives and prioritise the best interests of the child. The court's judgment promotes a child-centered approach which recognises that children have unique needs and rights that should be respected and protected in matter of criminal justice.³⁷ This case demonstrates the judiciary's commitment to upholding children's rights and ensuring that laws and practices prioritise their best interests.

The sentencing grounds for child offenders changed substantially when the Constitution was adopted.³⁸ This change was warranted by section 28 of the Constitution. The impact of this change was seen in the case of *S v Lakay*,³⁹ where the court dealt with the matter of sentencing child offenders. The court's approach in this case was to sentence the child offender in accordance with section 28 of the Constitution.⁴⁰

The time at which the offence was committed is disregarded when it comes to sentencing a child, as seen in *S v Lakay*, where Mr Lakay, despite the fact that the CJA was not in effect when he committed the offence, was sentenced in terms of the CJA in 2012, the court applied section 77⁴¹ to impose a sentence involving imprisonment under section 69(4) of the CJA, taking into account the following factors:⁴² (i) The gravity of the offence; (ii) community protection; (iii) the impact of the offence on the victim; (iv) the child's prior inability, if any, to comply with non-residential alternatives; and (e) the need to keep the kid out of jail.⁴³

Disregarding of the time the offence was committed can also be seen in the case of *S v Lukhele*,⁴⁴ where the court said that even if the crime were committed after the CJA came into effect, the review of the proceedings had to adhere to the CJA's sentencing regime.⁴⁵ With these guidelines in mind regarding the application of the CJA's sentencing regime, the process of sentencing a child involves specific considerations.

³⁶ *MR v Minister of Safety and Security* (2016) (2) SACR 540 (CC) (hereafter "*MR* (2016)").

³⁷ *MR* (2016) para 9.

³⁸ Terblanche (2012) at 436.

³⁹ *Lakay v S* 2012 (2) SACR 399 (WCC) (hereafter "*Lakay* (2012)").

⁴⁰ *Lakay* (2012) para 21.

⁴¹ Section 77 of the CJA.

⁴² Section 69(4) of the CJA.

⁴³ *Lakay* (2012) para 17.

⁴⁴ *S v Lukhele* (A125/2012) [2012] ZAGPPHC 27 (02 March 2012) (hereafter "*Lukhele* (2012)").

⁴⁵ *Lukhele* (2012) paras 7-9.

Sentencing a child has to be done in accordance with Chapter 10 of the CJA – more specifically, in terms of section 68 of the CJA – and is only done after conviction for an offence. The court does not just impose a punishment on a minor; rather, it considers a number of criteria and has specific aims.

These objectives include the following:

- (a) Encourage the child to take responsibility for the harm they have caused and to understand the consequences;
- (b) Support an individualized response that balances the child's circumstances, the nature of the offence, and the interests of society;
- (c) Support the child's reintegration into the family and community;
- (d) Make sure that the child receives any necessary supervision, guidance, treatment, or services that are part of the sentence to aid in this process; and
- (e) Only use imprisonment as a last resort and for the shortest amount of time that is appropriate.⁴⁶

The objectives above prioritise the rehabilitation and reintegration of child offenders in South Africa's child justice system. They aim to ensure that sentencing is fair, rehabilitative, and considers the best interests of both the child and society.

When a child offender reaches the sentencing phase, the CJA expressly provides a range of reasonable sentencing options specifically fit for the needs of children. The sentencing options available to the court to impose when sentencing a child are as follows:

- (i) Community-based sentence.
- (ii) Fine or alternative to fine.
- (iii) Sentences of correctional supervision.
- (iv) Sentence of compulsory residence in child and youth care centres.
- (v) Sentence of imprisonment.⁴⁷

⁴⁶ Section 69(1)(a)–(e) of the CJA.

⁴⁷ Sections 72 and 73–77 of the CJA.

These sentencing options focus on rehabilitation and the needs of children rather than solely on punishment. By having a range of sentencing options fit for the needs of children, the court can consider what is best for the child's development and rehabilitation while also considering public safety. The options generally aim to balance accountability with the goal of helping the child offender reintegrate into society.

Several provisions in the CPA are necessary for the interests of child offenders: the power to admit evidence which the court needs in order to determine a suitable sentence; the defence's ability to present facts; the presiding officer's authority to punish the offender; the authority to mandate concurrent sentence-serving; and the authority to change a sentence which was passed improperly. These are discussed below.

- The power to admit evidence the court needs in order to determine suitable sentencing:⁴⁸ The court has the discretion to permit or reject the production of certain evidence, considering factors such as relevance, authenticity and potential impact on the case.
- The defence's ability to present facts regarding sentencing and speak to the court about an appropriate punishment:⁴⁹ Sentencing decisions of child offenders are likely to emphasise rehabilitation programmes and interventions designed to support the child's reintegration into society. The CPA might encourage the use of restorative justice processes, which involves victims, offenders and community members in addressing the harm caused by the offences and promoting healing.
- While the officer who found the offender guilty is not present, the presiding officer has the authority to punish the offender.⁵⁰ This is relevant when determining the appropriate sentencing option.
- The authority to mandate concurrent sentence serving:⁵¹ The court will assess whether the prosecution has presented a *prima facie* case, meaning one in which there is enough

⁴⁸ Section 274(1) of the CPA.

⁴⁹ Section 274(2) of the CPA.

⁵⁰ Section 275 of the CPA.

⁵¹ Section 280 of the CPA.

evidence to potentially convict the accused. The accused's right to a fair trial and legal representation are protected during this process.

- The authority to change a sentence that was passed improperly:⁵² The CJA grants the authority to review and amend a sentence that was improperly imposed, allowing for an automatic review of certain cases to ensure sentencing compliance with the law.⁵³ It is exactly for this reason that parts of the CPA are expressly incorporated into the CJA. Section 63(1)(b) does not, however, explicitly incorporate the CPA's sentence guidelines into the CJA.

The most serious form of punishment in child sentencing is imprisonment. Children are not to be sentenced to imprisonment unless such imprisonment is unavoidable, as mentioned in the case of *S v B*,⁵⁴ where the court had to determine an appropriate sentence, considering the child's age and the seriousness of the offence. It held that when sentencing child offenders, the court must start with a "clean slate" approach.⁵⁵ This means considering all circumstances and imposing a sentence guided by the constitutional principle that imprisonment should be a last resort. The court further held that alternative sentences such as correctional supervision⁵⁶ or compulsory residence⁵⁷ in a child and youth care centre must be considered before imposing imprisonment and that imprisonment should be used only when it cannot be avoided.

7 CONCLUSION

The sentencing of children in the South African justice system is a complex and nuanced issue that requires careful considerations of various factors, including the child's age (the child's brain is still developing, affecting decision-making and impulse control), maturity (degree of maturity influences understanding of one's actions and ability to participate in defence or rehabilitation), and the severity of the offence (rehabilitation needs to be balanced with justice and public safety).

⁵² Section 298 of the CPA.

⁵³ Section 85 of the CJA.

⁵⁴ *S v B* 2006 (2) SACR 589 (SCA) (hereafter "*S v B* (2006)").

⁵⁵ *S v B* (2006) para 24.

⁵⁶ Section 75 of the CJA makes provision for a child offender to receive a non-custodial sentence with supervision by a probation officer or social worker.

⁵⁷ In terms of section 76 of the CJA, a child offender is required to live in a specific place as part of his or her sentence.

From a reflection on legal precedents, it is clear that courts have grappled with issues around rehabilitation and protecting child rights.

The CJA has provided a framework for dealing with children in conflict with the law that emphasises diversion, restorative justice, and rehabilitation. However, the application of this framework is not always consistent, and the courts continue to face challenges in ensuring that children's rights are protected and that sentences are fair and proportionate.

The analysis of legal precedents further reveals that the courts have developed a variety of approaches to sentencing children ranging from diversion and restorative justice to more punitive measures. While these approaches are informed by the principles of the CJA, there is a need for greater consistency and clarity in applying these principles.

Ultimately, the sentencing of children in the South African criminal justice system requires a holistic approach that considers the complex needs and circumstances of children. This approach must prioritise rehabilitation, restorative justice, and the protection of children's rights, while at the same time ensuring accountability for the commission of offences under the legal framework.

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