Youthfulness and sentencing prior to the operation of the Child Justice Act

A CASE REVIEW OF FREDERICKS v THE STATE

By Clare Ballard

In “Fredericks v The State” (29 September 2011), the appellant had appealed to the Supreme Court of Appeal (SCA) against the sentence handed down by the Parow Regional Court and confirmed by the High Court of the Western Cape. He and his co-accused had been convicted of robbery with aggravating circumstances (involving the use of a knife and a firearm) and rape. The appellant was sentenced to an effective sentence of 25 years imprisonment – 15 years for the robbery conviction, and 10 years for the rape conviction. The only issue before the SCA was whether, given the circumstances of the case, the trial court had misdirected itself in imposing a lengthy sentence of imprisonment on a child who was 14 years old at the time of the commission of the offence.

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This case note will discuss the approach of the SCA in overturning the lengthy sentence imposed on the appellant, a child at the time of the offence, by the regional court. The judgment is a good example of the courts’ progressive attitude towards children in conflict with the law at a time when the prescripts of the Child Justice Act 75 of 2008 had yet to come into force.

**Applicable legislation and case law**

The Constitution acknowledges that children are physically and psychologically more vulnerable than adults. It affords them a specific set of rights designed to nurture and protect their particular interests and development. In particular, the Constitution recognises the fact that lengthy periods of imprisonment are generally harmful to children. In many ways, it is essentially an articulation of international law (which came into being long before the Constitution) dealing with children in conflict with the law.

Section 28(1)(g)(i) and (ii) of the Constitution states that:

“Every 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 may be detained only for the shortest appropriate period of time, and has the right to be... kept separately from [from adults] and treated in a manner, and kept in conditions, that take into account the child’s age.”

Although the commission of the offences in *Fredericks* by the appellant occurred at a time when the Child Justice Act had yet to be promulgated, there were nevertheless, in addition to the Constitution, guidelines on the sentencing of children which had been authoritatively laid down in case law.

*S v Z en Vier Ander Sake* 1999(1) SACR 427 (E) was the first reported judgment in the new constitutional era which considered explicitly the principles relevant to the sentencing of children.

Five matters came before the High Court on review in which child offenders had been sentenced to suspended terms of imprisonment. The court considered the options and principles applicable to child offenders and laid down the following guidelines:

a. diversion should be considered prior to trial in appropriate cases;
b. age must be properly determined prior to sentencing;
c. a court must act dynamically to obtain full particulars about the accused’s personality and personal circumstances;
d. a court must exercise its wide sentencing discretion sympathetically and imaginatively;
e. a court must adopt, as its point of departure, the principle that, where possible, a sentence of imprisonment should be avoided, and should bear in mind especially that: the younger the accused is, the less appropriate imprisonment will be; imprisonment is rarely appropriate in the case of a first offender; and short-term imprisonment is rarely appropriate; and
f. a court must not impose suspended imprisonment where imprisonment is inappropriate for a particular accused.

Subsequent judgments generally affirmed these guidelines and courts thus became receptive to the idea that a sentence should be responsive to the individualised needs of the child, and where possible, sentences of imprisonment should be avoided. In *Ntaka v The State* (unreported, [2008] ZACSA 30, 28 March 2008), for example, the appellant, who was 17 years old at the time of the commission of the offence, argued before the SCA that the High Court, in sentencing him to ten years imprisonment (of which four were conditionally suspended), had failed to investigate adequately the possibility of correctional supervision. Judge Cameron, writing for the majority found that in light of the gravity of the offence (rape), ‘a prison sentence [was] unavoidable.’ He disagreed with judge Maya however, that a six-year sentence was fitting. That sentence he said:

“disregards the youthfulness of the appellant when he committed the crime. It treats him too much like the adult he was not when he raped his victim. It may set him up for ruin, while foreclosing the possibility, embodied in his youth, that he will still benefit from resocialisation and re-education. It fails to individualize the sentence with the emphasis on preparing him, as a child offender, for his return to society.”

Judge Cameron said that a five-year prison sentence came closer to doing justice. He imposed the sentence under section 276(1)(i) of the Criminal Procedure Act 51 of 1997, which permits the placement under correctional supervision “in the discretion of the Commissioner or a parole board.”

Another notable judgment is *Brandt v S* [2005] 2 All SA 1 (SCA). In this matter, the SCA replaced a sentence of life imprisonment imposed by the High Court on an offender who was 17 years old at the time of the offence, with a sentence of 18 years imprisonment. The SCA stated (at paragraph 20):
“In sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles: including the principle of proportionality; the best interests of the child; and, the least possible restrictive deprivation of the child’s liberty, which should be a measure of last resort and restricted to the shortest possible period of time. Adherence to recognised international law principles must entail a limitation on certain forms of sentencing such as a ban on life imprisonment without parole for child offenders.”

The Fredericks Judgment

In determining the appropriateness of the sentence of the trial court, the SCA noted the difficulty that sentencing courts face when having to weigh up the child accused’s interests against the pressure to punish what are often extremely violent and brutal crimes:

“Whilst the gravity of the offences call loudly for severe sentences with strong deterrent and retributive elements, the youthfulness of the appellant required a balanced approach reflecting an equally strong rehabilitative component.”

It acknowledged, however, that although the general purpose of sentencing is to deter, punish and prevent the re-occurrence of crimes, when it comes to juveniles, “rehabilitation seems to be emphasized more.”

Having considered the relevant constitutional and international law principles, the SCA found that a sentence of imprisonment for 25 years was “shockingly and disturbingly inappropriate.” The trial court had failed, the SCA said, to take into account the fact that the appellant was a first-time offender, described by the principal of his school as a “model student” whose “behaviour and academic achievements [were] positive.” Instead, it had over-emphasised the seriousness of the offences at the expense of the appellant’s youthfulness. The SCA concluded that this amounted to a misdirection and it was therefore empowered to consider the sentence afresh.

Another material misdirection that the SCA noted, was the fact that the trial court had overlooked provisions of the Criminal Law Amendment Act. This Act exempted offenders under the age of 16 years from the minimum sentencing legislation and, on the erroneous assumption that the appellant was 16 years old at the time of the offence, the trial court applied the mandatory minimum sentence.

In order to give effect to section 28(1)(g) of the Constitution an appropriate sentence, the SCA held, was 10 years for robbery conviction, and 12 years for the rape conviction, which were to run concurrently.

Conclusion

Based on the trend in case law that was decided before the Fredericks judgment, one can certainly come to a conclusion that the deprivation of a child’s liberty and using imprisonment as a last resort was firmly grounded both in the Constitution and in case law. Therefore the trial court and the High Court in the Fredericks matter had to be guided by this precedent and law. An ignorance of the Constitution and the case law (in the absence of the Child Justice Act) amounted to a miscarriage of justice for children, based on their youthfulness.