FROM imprisonment TO correctional supervision
Correctional supervision as a sentencing option in terms of s 276A(3) of the Criminal Procedure Act 51 of 1977 (the 1977 Act) was made applicable to the whole of the Republic on 1 April 1992 (s 42 of the Correctional Services and Supervision Matters Amendment Act 122 of 1991). It has been stated that persons convicted after 1992 cannot be recommended by the commissioner or his delegate for their sentences of imprisonment to be reconsidered with a view to converting them to correctional supervision in terms of s 276A(3) of the 1977 Act (Department of Correctional Services circular 1/811, 9-1-1998). The prohibition is maintained despite the fact that such persons may be prime candidates for correctional supervision. This article attempts to find if such a view is not in conflict with the intention of the legislation.

After s 276A(3) came into operation, a good motivation when referring a convicted person to court for his sentence of imprisonment to be reconsidered for conversion into correctional supervision was that correctional supervision was not a sentencing option before 1991 (Terblanche The Guide to Sentencing in South Africa (1999) 371). Persons convicted before this date were then given priority when referral of suitable cases to court by the commissioner to have their sentences of imprisonment converted into correctional supervision was considered. The underlying philosophy seems to be that courts did not have an opportunity to consider correctional supervision as a sentencing option before 1992.

It is correct to state that this motivation has become increasingly less important (Terblanche ibid). The aim of s 276A(3)(a) is not necessarily to convert a sentence of imprisonment into correctional supervision only but to have a sentence reconsidered for persons convicted and sentenced to a term of imprisonment (s 276A(3)(a)(i) and (d) of the 1977 Act). It seems that the motivation referred to above has been the cause of an impression within the Department of Correctional Services that conversion of a sentence from imprisonment into correctional supervision is not necessary after 1992. It is assumed by the Department that after 1992 correctional supervision was considered for all cases when a decision to impose a sentence of imprisonment was arrived at by a court. This gave rise to a situation where members of the Correctional Supervision and Parole Board in some prisons denied themselves an opportunity of drawing the attention of the commissioner to the possibility of considering convicted persons who are fit to be subjected to correctional supervision to have their sentences reconsidered in terms of s 276A(3) of the 1977 Act.

Background

For our purposes, the types of punishments that may be imposed by a court on an offender in terms of s 276(1) of the 1977 Act are:

(b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in s 286B(1); ... (h) correctional supervision;

(i) imprisonment from which such a person may be placed under correctional supervision in his discretion by the commissioner.'

Section 276A of the 1977 Act elaborates on the features of those punishments that are closely related to correctional supervision as in discussion here. Section 276A provides that

'(1) punishment shall be imposed under s 276(1)(b) only

(a) after a report of a probation officer or a correctional official has been placed before the court; and

(b) for a fixed period not exceeding three years.'

A decision to place a convicted person under correctional supervision in terms of subs (1) of s 276A is, strictly speaking, not within the domain of the Department. A convicted person is placed under correctional supervision directly in the discretion and on the authority of a trial court when imposing a punishment (Elsa Jones 'Correctional Supervision in South Africa: The Practical Application' 1993 DR 982; S v Govender 1995 I SACR 492 (N) at 498g). A sentence in this case must not exceed three years (S v Manamela 2000 I SACR 176 (W) at 180e; Joubert (ed) Criminal Procedure Handbook (1999) 279). A role that a member of the Department may in certain circumstances play in his capacity as a correctional officer is that of compiling a required report only. Such a report has been found to be vital in the determination of imposition of correctional supervision in terms of s 276A(1) (S v D 1996 I SACR 259 (A) at 267a; S v Sekobone 1997 I SACR 32 (T) at 37e; and S v L 1998 I SACR 463 (AD) at 486e).

Section 276A further provides that

'(2) Punishment shall only be imposed under s 276(1)(b) –

(a) if the court is of the opinion that the offence justifies the imposing of imprisonment, with or without the option of a fine, for a period not exceeding five years; and

(b) for a fixed period not exceeding five years'.

In terms of this subsection, a decision that a convicted person is fit to be placed under correctional supervision is made by a trial court (Jones ibid). The discretion is, however, left to the commissioner to place the convicted person without referring him to court again (Joubert ibid). Section 276A(2) should be read together with s 287(4) of the 1977 Act which also provides for placement on correctional supervision of an offender who is imprisoned in default of paying a fine in the discretion of the commissioner of the Department. A court may not consider correctional supervision when the sentence likely to be imposed may exceed five years (S v Manamela at 180e). A person sentenced under this subsection is required to serve at least one-sixth of his sentence before he is placed under correctional supervision at the discretion of the commissioner (s 73(7)(a) of the Correctional Service Act 111 of 1998 – the 1998 Act).

Conversion of a sentence of imprisonment into correctional supervision in terms of s 276A(3) of the 1977 Act

Conversion of a sentence of imprisonment into correctional supervision does not relate to the above provisions of subs (1)
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and (2) of s 276A, but to subs (3) which provides that

'(a) Where a person has been sentenced by a court to imprisonment for a period -
(i) not exceeding five years; or
(ii) exceeding five years, but his date of release in terms of the provisions of the Correctional Services Act 8 of 1959, and the regulations made thereunder is not more than five years in the future, the commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the clerk or registrar of the court, as the case may be, to have that person appear before the court a quo in order to reconsider the said sentence'.

Section 276(3)(a) caters for a situation of convicted persons who are not sentenced to correctional supervision under subs (2) or who cannot be placed on correctional supervision on the discretion of the commissioner under subs (3) above. The persons who are eligible to be considered for conversion are inter alia, those whose sentences have an element of punishment of imprisonment as provided under s 276(1)(b) above (see also Terblanche op cit at 370).

The discretion to decide whether or not a convicted person is eligible and suitable for reconsideration lies solely with the commissioner or his delegate, not the court.

'The court is vested with the discretion to reconsider the sentence and the commissioner is vested with the discretion to have the clerk of the court put the matter on the roll.' (Du Toit et al Commentary to the Criminal Procedure Act (Annual revision) 28-101).

The clerk of the court has to inform the commissioner in writing of the date for which the matter has been set down on the roll and he must request the commissioner to furnish him with a written motivated recommendation before that date for submission to the judicial officer (s 276A(3)(b)(ii) of the 1977 Act). It was indicated that preferably 'the judicial officer who heard the case and imposed the sentence should be the one who reconsidered the sentence imposed by himself, if available' - S v Van Rooyen 2000 1 SACR 372 (N) at 374F.

Nothing, however, prevents the commissioner from taking cognizance of the remarks made by a court at the time of sentencing regarding the suitability of the convicted person for his placement on correctional supervision (s 42(2)(d)(i) of the 1998 Act (the 1998 Act repealed the Correctional Services Act 8 of 1959 with effect from January 2000)). It is doubtful whether a court may determine that a person convicted under s 276(1)(b) is not to be assessed at all by the commissioner or his delegate with a view to refer him to court for reconsideration of a sentence (S v Nkosi 1984 (4) SA 94 (T)).

Although the sentiments in Nkosi refer to parole situations, I submit that they could
find reference in the situation of correctional supervision. The favourable exercise of a discretion by the commissioner towards a convicted person does not mean that he will ultimately have his sentence converted to correctional supervision by a trial court. The trial court makes that ultimate decision after hearing recommendations from the commissioner, the convicted person or his legal representative and the version of the State. The absence of the commissioner’s opinion that the prisoner is fit to be subjected to correctional supervision, ‘the required jurisdictional fact’, is fatal to the application for conversion of a sentence in terms of s 276A(3)(a) – S v Leeb 1993 I SACR 315 (T) at 316b; Terblanche ‘Korrektiewe toesig: Pérel en sandkorrel?’ 1992 (5) SACJ 265.

**Required attributes of an offender**

The convicted person needs to have an excellent record as a prisoner, generally referred to as a ‘model prisoner’ – S v Elliot 1996 2 SACR 531 (E) at 533e; S v Van Rooyen at 375f.

Among other things, employment and a place to stay on release will be considered as required attributes in considering conversion of sentence into correctional supervision (Elliot case at 533b).

**Period served**

It is also advisable that an offender must have served more than only a small portion of the sentence for the court to consider him seriously – Terblanche ‘The Guide to Sentencing’ at 371; Elliot case at 535a. Section 73(7)(c) of the 1998 Act provides that a person sentenced for

‘i) a definite period under section 276(1)(b) of the Criminal Procedure Act [51 of 1977] ... shall serve at least a quarter of the effective sentences imposed or the non-parole period, if any, whichever is the longer before being considered for placement under correctional supervision, unless the court has directed otherwise’.

It is also required that an applicant’s date of release in terms of the provisions of the Correctional Services Act 8 of 1959, and the regulations made thereunder, is not more than five years in the future (s 276A(3)(a)(ii) of the 1977 Act). I submit that a date of consideration for release of a convicted person on parole, if it is not more than five years in the future, could be used to determine eligibility for considering correctional supervision.

**Circumstances**

The court in considering conversion of a
sentence of imprisonment under s 276A(3) takes into account, inter alia, circumstances that arose during imprisonment (Elliot case at 535a; Van Rooyen case at 374-375). In Elliot, in an application for consideration of correctional supervision in terms of s 276A(3)(a), it was decided that the personal circumstances of a prisoner are to be weighed against the nature of the crime, the requirements of society, the sentence originally imposed and the period lapsed since imprisonment. The decision in Elliot was in the Van Rooyen case found to be in accordance with sound sentencing principles when compared to that of S v Cloete 1995 1 SACR 367 (W) at 369f. It was indicated in Cloete that

"the nature and circumstances of the crime are of far less importance than they had been at trial" (369f).

Even if a court has heard the application for placement of a convicted person under correctional supervision during sentencing and decided against it, it is not a bar to exercising the provisions of s 276A(3) by the commissioner (Elliot case at 534g), neither should a dismissal of appeal against the convicted person be an obstacle for the commissioner to exercise his discretion as aforesaid (Van Rooyen case at 374d and Cloete case at 369d).

That 'a prisoner may have committed a horrendous crime or he may have exhibited a propensity towards the commission of certain crimes' is not to be held against him as far as consideration of referral by the commissioner is concerned (Van Rooyen case at 375e; Sebe v Minister of Correctional Services and Others 1999 1 SACR 244 (Ck) at 244f).

Provisions of the Correctional Services Act

That the commissioner is required to consider the conversion of a term of imprisonment is emphasised in a number of provisions of the 1998 Act. Section 42(2) provides that the case management committee must:

'...(d) submit a report, together with the relevant documents, to the Correctional Supervision and Parole Board regarding ...

(vi) the possible re-placement of such prisoner under correctional supervision ... in terms of conversion of such prisoner's sentence under section 276A(3)(e)(ii) ...

Section 63 of the repealed Correctional Services Act 8 of 1959, which was made
The authoritative cited here fail to support the view that the commissioner or his delegate is prohibited from referring convicted persons after a certain period to court if he is of the opinion that a convicted person is fit to be subjected to correctional supervision according to his own assessment. Orders that a court is entitled to make during an application for conversion also, by virtue of conversion of such prisoner's sentence into correctional supervision under section 276A(3)(e)(ii) and the period for which and the condition on which such person may be so subjected to correctional supervision, etc.

The role of an attorney: the practical application

The 1997 Act and the 1998 Act make no provision for a convicted person or his attorney to initiate an application for a conversion of sentence of imprisonment into correctional supervision in terms of s 276A(3) directly to the trial court. Nothing, however, prevents an attorney from making representations on behalf of a convicted person to the commissioner with a view of directing his attention to the possibility of considering recommending his client to a trial court for consideration of placing him on correctional supervision. The practice is that such representations should be referred to the provincial commissioner of the Department under whose jurisdiction a convicted person is. The chairperson of the Correctional Supervision and Parole Board of an area in which a convicted person is incarcerated often responds to such representations.

In the event of the response of the Board being contrary to the applicable law and/or regulation, an attorney may assist a convicted person by way of a notice motion to a relevant court for declaratory relief (Sebe case above). Provision is made for an attorney to represent a convicted person who has been recommended by the commissioner to court for the consideration of conversion of sentence of imprisonment into correctional supervision (second proviso s 276A(3)(d) of the 1977 Act).

An attorney who intends to represent a convicted person in an application for conversion of sentence into correctional supervision is required to formulate, in consultation with the state prosecutor concerned, permissible and appropriate conditions under which a sentence of correctional supervision should be served (Cioeke case at 370b). A blind acceptance and/or handing over to court of the standard form prepared by the Department is discouraged (Crou Kamp case at 442d-f). A refusal by a trial court of a fully motivated application for conversion of sentence of imprisonment into correctional supervision in terms of s 276A(3) could be appealed against (Cioeke case above).

Conclusion and recommendations

On numerous occasions the Department has been taken to task regarding its release policy. Some Comparative Perspectives (Sep 2000) Dissertation (SA) 1-2. On many occasions the perception was that dangerous people are allowed to flood the streets to the detriment of public safety. Loss of morale on the part of members of the criminal justice system including the judiciary was also cited. It is submitted that an application under s 276A(3), as far as it applies to the discretion of the commissioner, may help allay fears expressed by members of society. There are, however, advantages and disadvantages in the application of this system.

The advantages

- A variety of role-players are able to participate in the implementation of this non-custodial measure.
- The court is again a referee of the executive assessment of persons to be put out of prison.
- The goal of reducing the prison population is achieved with less tension, especially between the judiciary and the executive.
- Monitoring of persons so placed is stricter than all other methods of placement (see Roman v Williams 1998 (1) SA 270 (C)) for the general application of monitoring methods, procedure and consequences of failure to adhere to the conditions of placement; and Jones op cit 985.
- It serves the extrinsic purpose of encouraging productiveness among convicted persons.

The disadvantages

- Society is less convinced that correctional supervision is a severe form of penalty (Elliot case at 534g).
- There are no provisions for the victims or next of kin to be present during the hearing of the application (Van Rooyen case at 383b).
- It is debatable whether correctional supervision in general serves the purpose of deterrence (Elliot case at 534i; S v D 261c).

I recommend that the application of the provisions of s 276A(3) should be seriously considered as one of the better methods of exercising control of suitable persons who the commissioner thinks do not need to be further imprisoned. I also recommend that attorneys should be accorded a role in the initiation of an application for conversion of a sentence of imprisonment into correctional supervision or the reconsideration of a sentence of a convicted person in terms of s 276A(3) of the 1977 Act directly to a court that sentenced him.