CONSTITUTIONAL COURT OF SOUTH AFRICA

Centre for Child Law v Minister for Justice and Constitutional Development and Others (with the National Institute for Crime Prevention and the Re-integration of Offenders as Amicus Curiae)

CCT 98/08
[2009] ZACC 18

Date of Judgment: 15 July 2009

MEDIA SUMMARY

The following media summary is provided to assist in reporting this case and is not binding on the Constitutional Court or any member of the Court.

The Constitutional Court has ruled that the Constitution prohibits minimum sentencing legislation from being applied to children aged 16 and 17 years old. In a judgment handed down today, the Court has found that while the Constitution permits Parliament to deal effectively with child offenders, including through the imposition of long sentences, the approach required by the minimum sentencing legislation unjustifiably infringes the protections the Bill of Rights affords to all children under 18.

On 31 December 2007, the Criminal Law (Sentencing) Amendment Act 38 of 2007 (the Amendment Act) took effect. This statute made minimum sentences for certain serious crimes applicable to 16 and 17 year old children. The Centre for Child Law at the University of Pretoria (the Centre) challenged the statute. The respondents were the Minister for Justice and Constitutional Development, the Minister for Correctional Services and the Legal Aid Board. On 4 November 2008, the High Court in Pretoria (Potterill AJ) upheld the challenge. The High Court granted an order of constitutional invalidity declaring various provisions of the Criminal Law Amendment Act 105 of 1997 (CLAA), as amended by the Amendment Act, invalid.

Before the Amendment Act, the minimum sentencing regime established by the CLAA had limited application to children who were under 18 at the time of the offence. The Amendment Act applies the minimum sentencing regime to such children. The High Court found that this negates the Constitution's principles of imprisonment as a last resort and for the shortest appropriate period of time for all children under 18.

In addition to seeking confirmation of the declarations of invalidity, the Centre argued that children already sentenced under the amended provisions should be identified and brought before a competent court in order to have their sentences reconsidered.

In the Constitutional Court, the National Institute for Crime Prevention and the Re-integration of Offenders (NICRO) was admitted as an amicus curiae.

The majority of the Court confirmed the High Court's judgment. Cameron J, with whom Langa CJ, Moseneke DCJ, Mokgoro, O'Regan, Sachs and Van der Westhuizen JJ concurred, considered the scope and purpose of the children's rights provision in the Bill of Rights. He emphasised that the Constitution itself recognises children's greater physical and psychological vulnerability. The Constitution requires an individuated judicial response to sentencing for children that focuses on the particular child who is being sentenced.

The majority found that the minimum sentencing regime constrains the discretion of sentencing officers by orientating the sentencing officer away from options other than incarceration, by de-individuating sentencing, and by conducing to longer and heavier sentences. The Court held that the Amendment Act therefore limits the children's rights enshrined in section 28 of the Constitution. No adequate justification was provided for the limitation.

The Court however declined to grant the relief the Centre sought in relation to children already sentenced under the Amendment Act, as it is inconsistent with the proper approach to retroactivity in criminal proceedings. Instead, it issued an order requiring government to identify all child offenders sentenced under the impugned provisions since January 2008, so that appeals or reviews could be brought on their behalf.

In the result, the High Court's order of invalidity was confirmed in its essential respects.

Yacoob J wrote a dissenting judgment with which Ngcobo, Nkabinde and Skweyiya JJ concurred. Yacoob J held that the Constitution does not require the discretion of a court that sentences children to be wholly unlimited. The minimum sentencing regime must be interpreted on the basis that all children are the beneficiaries of the rights conferred by section 28(1)(g) of the Constitution. Because the Amendment Act does not require sentencing officers to ignore the requirements of the children's rights provision, it does not oblige sentencing officers to impose unconstitutional sentences.

In order to avoid unjust sentences, the sentencing court is required to consider whether there are substantial and compelling circumstances that would justify the imposition of a lesser sentence. Yacoob J held that the Bill of Rights provisions protecting children's rights will often in itself amount to a substantial and compelling circumstance entitling a sentencing officer to depart from the required minimum sentence in a given case. He concluded that the minimum sentencing legislation in so far as it is applicable to children who are 16 and 17 years old is not inconsistent with the Constitution. He would therefore have declined to confirm the order of unconstitutionality made by the High Court.