

JUVENILE DIVERSION: DEVELOPMENTS IN SOUTH AFRICA AND THE NETHERLANDS

1 Introduction

Juvenile justice in South Africa has undergone many changes in the last twenty years. However, in our opinion, one of the most important developments in South African juvenile justice in this period has been the idea of diverting the trials of young offenders away from criminal courts to appropriate alternative programs (Sloth-Nielsen "Reviewing the Prosecutorial Decision not to Divert – Case Discussion of *M v The Senior Public Prosecutor, Randburg*" 2001 *De Jure* 194). This development is the result of a number of events, amongst which are South Africa's adoption of the United Nations Children's Convention (*United Nations Convention on the Rights of the Child* (1989)), and the inclusion of children's rights in the South African Constitution in 1996. Juvenile diversion is an international trend. This note will highlight some of the local developments and will also illustrate some interesting similar developments in juvenile diversion in the Netherlands.

2 The South African Constitution

The rights of children are dealt with in section 28 of the Bill of Rights (ch 2 of the Constitution of the Republic of South Africa Act 108 of 1996). The part which is relevant to this discussion is subsection (1)(g), which reads as follows:

"Every child has the right –

- (g) *not to be detained except as a measure of last resort* (own emphasis), in which case, in addition to the rights the child enjoys under sections 12 and 35, the child may be detained only for the shortest possible appropriate period of time, and has the right to be –
 - (i) kept separately from detained persons over the age of 18 years, and
 - (ii) treated in a manner, and kept in conditions, that take account of the child's age."

This section clearly stipulates that preference is to be given to mechanisms and procedures that can keep the child out of detention except as a measure of last resort.

3 International Law

Article 40 of the UN Children's Convention (adopted by the General Assembly on 20 November 1989 (South Africa became a signatory on 16 June 1995)) requires of state parties to treat children who have infringed the penal law in a manner consistent with the promotion of the child's sense of dignity and worth. The reintegration of the child and getting the child to

assume a constructive role in society are also aims. Article 40 further requires (sub-art 3) from state parties to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children and, *where appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings* (own emphasis), providing that human rights and legal safeguards are fully respected. Article 40(4) prescribes a variety of dispositions, such as care, guidance and supervision orders, counselling, probation, foster care, education and vocational training programmes, as well as other alternatives to institutional care. This must ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

The Charter on the Rights and Welfare of the African Child (1990) stipulates that "the essential aim of treatment of every child during the trial and also if found guilty of infringing the penal law shall be its reformation, reintegration into its family and social rehabilitation" (art 17(3)).

Other international standards which have had an influence on South African juvenile justice are the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (also referred to as the "Beijing Rules"), as well as the United Nations Rules for the Protection of Juveniles Deprived of their Liberty (also referred to as the "JDL's").

In the case of *S v Kwalase* (2000 2 SACR 135 (C)), the principle of diversion for child offenders has been elevated to a legal norm (Louw and Van Oosten "Diverting Children from the Criminal Courts: Some Proposals" 1998 *THRHR* 123) and is already widely practiced in South Africa.

4 Current diversion possibilities applicable to children

Section 254 of the Criminal Procedure Act (51 of 1977) and section 11(1) of the Child Care Act (74 of 1983) both provide diversion possibilities whereby a criminal trial of a child may be converted into children's court proceedings. With regard to section 254, research has shown that some presiding officers were unaware of this possibility, whereas others regarded it as a waste of time to transfer the matter, since the criminal trial had already gotten underway (Zaal "Children's Courts: An Underrated Resource in a New Constitutional Era" in Robinson (ed) *The Law of Children and Young Persons in South Africa* (1997) 109). As for section 11, because it is not a procedure in the Criminal Procedure Act, even fewer criminal court presiding officers or prosecutors were aware of its existence and thus this option is not used very often (Zaal "Transferring Cases from the Juvenile Court to the Children's Court" 1995 *Law Practice and Policy: South African Juvenile Justice Today* 29).

Louw and Van Oosten (1998 *THRHR* 127) argue that the new diversion possibilities (created by the Child Justice Bill) would not necessarily mean that sections 254 and 11 will become redundant. They argue that, in the unlikely event of the court considering, during the course of the proceedings, the criminal prosecution to be inappropriate, these sections should remain options.

5 Child Justice Bill

([B49-2002] GG 23728 of 2002-08-08.) An investigation by the South African Law Reform Commission has led to their Report on Juvenile Justice (Project 106 Juvenile Justice Report (2002)) and subsequently the Child Justice Bill. The restorative justice approach forms part of the framework underpinning the new proposed juvenile justice system. The Bill envisions two phases in dealing with juvenile crime:

- Phase one: the pre-trial assessment of the individual circumstances of the child with specific focus on possible diversion (the assessment is done by a probation officer). This leads to a preliminary inquiry presided over by a magistrate, which takes place prior to the charge and plea stage.
- Phase two: a diversion hearing. This is not limited to specific offences or only to first offenders.

The Bill introduces a compulsory preliminary inquiry in all criminal proceedings of children under the age of 18 years. One of the objectives of this inquiry is to establish whether the matter can be diverted before plea and to identify a suitable diversion option. The Bill favours the compulsory consideration of diversion for all cases involving juveniles who voluntarily acknowledge their responsibility for the offence and where there is sufficient evidence to prosecute. However, it does not create a right to diversion (see the judgment in *M v The Senior Public Prosecutor, Randburg* (case 3284/00WLD unreported)) or a possibility of appeal by a juvenile unhappy with a decision not to divert. The court may make an order of diversion or may even develop an individual diversion option that meets the requirements of the particular matter. Family group conferences and victim-offender mediation, classic restorative justice instruments (defined in the Bill as “the promotion of reconciliation, restitution and responsibility through the involvement of a child, the child’s parents, the child’s family members, victims and communities”), are some of the diversion options provided for by the Bill. The Bill further creates a legislative framework for a whole host of diversion options (s 47 of the Child Justice Bill) that include:

- school attendance orders: requiring a child to attend school every day;
- family time orders: requiring a child to spend a specified number of hours with their family;
- good behaviour orders: requiring a child to abide to an agreement between them and their family concerning his or her behaviour;
- positive peer association orders: requiring the child to associate with persons who can contribute to their positive behaviour;
- reporting orders: requiring the child to report as specified to monitor his behaviour; and
- supervision and guidance orders: placing the child under the supervision and guidance of a mentor or peer to monitor and guide his behaviour.

These diversion options operate on three levels: level one (these options range from an apology to restitution of a specific object), level two (includes

all the options from level one but also allows for community service, payment of compensation, family group conference and victim-offender mediation) and level three (reserved for children over the age of 14 years and where the court is likely to impose a sentence of imprisonment to a maximum of six months), depending on the seriousness of the offence, the circumstances of the child, their age and development needs, and so on. The child and their parents have to consent to the proposed diversion programme.

6 Aspects of juvenile diversion in the Netherlands

In the Netherlands a child younger than 12 years who has committed an offence cannot be prosecuted due to an irrebuttable presumption of lack of criminal capacity (art 486 *Strafvordering* (Code of Criminal Procedure)). However, in the case of serious and/or chronic delinquent behaviour of such a young child, the court can impose a child protection measure at the request of the Prosecuting Authority or the Child Care and Protection Board. The court can, for example, order family supervision. (A family supervision order may be imposed against the will of the child or that of the parents, whereby the family is placed under supervision. The parents will still have parental authority but a family supervisor (usually a social worker) will be appointed who will assist the parents in the upbringing of the child. Art 1:254 and further of the Dutch Civil Code.) The court may also order that the child be removed from the family environment (art 1:261 and further of the Dutch Civil Code) and be placed in an appropriate institution where, if necessary, treatment can be offered.

With the increase in juvenile delinquency in the early 1990s, the Dutch government established a committee to make recommendations pertaining to the prevention and combating of juvenile delinquency. The Van Montfrans Committee (the report *Met de Neus op de Feiten* of the Commission Van Montfrans (1994)) recommended that serious attention be given to children below the age of 12 who commit offences. It appeared that children commit offences at a younger age and that there is an increase in more serious offences by children younger than 12 years. Research has also shown that chronic and serious delinquency is considerably higher amongst children who commit their first offence before they turn 12.

7 “STOP-reactie”

The report resulted in the introduction of the so-called “STOP-reactie” for children younger than 12 years. It is not meant as a punitive order (there is no legal basis for the project in the Dutch criminal law and criminal procedure), but is a preventative and pedagogical measure. It is meant to assist the parent(s)/guardians to correct the child’s behaviour and to make the child aware that criminal behaviour is not tolerated. The “STOP-reactie” consists of a non-obligatory offer (the parents or guardian have/has to consent to the offer in writing) from the investigating officer to the parent(s) or guardian to take part in a “STOP-reactie” (project) when the child has admitted (due to the fact that “STOP-reactie” is focused on a pedagogical approach, meant as support to parents, such an offer can be made even where the suspect denies, but only on explicit request of the

parents/guardian and with consent of the public prosecutor) that he or she has committed a certain, less serious, offence (*eg*, use of force pertaining to property with limited damage, arson or hooliganism). The programme is based on outreach: family visits take place instead of office meetings, and the matter is dealt with shortly after the offence has been committed. An apology to the victim is also required. The maximum participation time is ten hours. In cases where there is a (serious) suspicion of family-related problems, no “STOP-reactie” offer will be made, but the case will be referred to the Child Care and Protection Board.

8 Diversion possibilities: 12-18 years

Not every youngster who has committed an offence and comes into contact with the police will appear before the children’s court. On the contrary, most suspected offenders between the ages of 12 and 18 years will not be summonsed to appear before the court. (Prosecution takes place in only about 17% or 18% of cases. Doek and Vlaardingerbroek *Jeugdrecht en Jeugd-hulpverleningsrecht* 4ed (2001) 395.) The Prosecuting Authority often makes use of alternatives in order to settle a matter out of court. The juvenile delinquent policy (*Richtlijn voor Strafvordering Kinderzaken (Misdrijven)* (1999), under (2)) of the Prosecuting Authority prescribes a community service order, unless there is good reason to seek an alternative sentence.

8 1 Police Diversion

Dutch juvenile criminal proceedings have a unique feature, namely that 40% to 45% of cases are settled by the police (in Dutch: “politie-sepot”) via:

- a warning by the police in the case of less serious offences, which consists of an oral warning which is registered, or;
- a referral to “Halt” (in Dutch: “Het ALternatief”; the legislative basis for Halt is found in art 77e of the Dutch Criminal Code), which means “The Alternative” to prosecution (hereinafter “Halt-project”), in more serious cases (*eg*, arson with a damage of max Euro 700, damage to property, *etc*).

This is a conditional decision not to prosecute, made by the police under the delegated authority of the Prosecuting Authority who may issue directives.

In dealing with a matter, preference is given to the Halt method unless a warning appears to be sufficient. The Prosecuting Authority issues policy rules and guidelines regarding the kind of offences for which a Halt-settlement could be applied. If a juvenile is eligible for a Halt-settlement, the investigating officer will make an offer in writing for participation in the project. In general only an offender who has confessed will be eligible for a Halt-settlement (in exceptional cases the public prosecutor can make an offer to a recidivist or to a suspect who has not made a confession and who has previously participated in a Halt-project). It will be made clear to the juvenile that participation is not compulsory, but at the same time the consequences of not partaking are outlined, namely that a report of the

offence will be sent to the public prosecutor, who then has to decide whether to prosecute or not.

Where a juvenile accepts the offer, a short report of the offence will be drawn up and registered at the report-system (HKS (in Dutch: *het geautomatiseerde Herkenningsdienstsysteem*)), which is important to establish recidivism. This report will also be sent to a Halt-bureau (usually a social worker) who will then propose a specific plan or project. The proposal could entail one of the following three options, or any combination of the three:

- the performance of tasks for a maximum of 20 hours (art 773(4) Dutch Criminal Law Code) without remuneration, which are somehow related to the offence committed;
- to compensate damage caused by the offence (this possibility is not applicable to juveniles of 12 and 13 years old, since according to article 164 of Book 6 of the Dutch Civil Code there is no civil liability for this age category; but nevertheless, the Halt-bureau could mediate between the parents of the juvenile and the victim, in order to come to an arrangement pertaining to compensation for damage caused by the juvenile); or
- other activities with a pedagogical approach.

Once the required duties have been fulfilled, the investigating officer will notify the juvenile and the public prosecutor in writing. As a consequence, the right to prosecute falls away. Interestingly enough, the right of a party with direct interest in the offence to lodge a complaint (art 12k Sv provides a period of three months to lodge a complaint) about non-prosecution with the court of appeal is not affected by the satisfactory fulfilment of the prescribed duties (see in this respect art 12a and further, Dutch Code of Sv), which means that prosecution (the *gerechtshof* can give an order to prosecute (in Dutch: *bevel tot vervolging*), based on art 12i Sv) may still follow anyway. In such a case the court will take into account the participation in the Halt-project when deliberating the sentence.

The Halt-project appears to be effective in the early prevention of so-called "criminal careers" of first-time juvenile offenders. Apart from the coordination and execution of Halt-settlements, the Halt-bureaux also perform general preventative duties, for example the providing of information at schools (it remains to be seen to what extent the so-called "school drop-outs" are reached, which is of similar concern in South Africa) and community centres.

9 Family group conferencing

Research in the Netherlands (Eigen Kracht *Family Group Conference in Nederland, van Model naar Invoering* 2003) has shown that in many cases offenders re-commit offences. It appears that, especially with juveniles, alternatives that foster reparation to the victim may be better than incarceration. Various forms of restorative justice focus on resolving disputes in such a way that it satisfies both the victim and the offender. One example is the so-called "family group conference", which aims to restore the harm

created by the offence and in which it is central that the offender takes responsibility for his or her actions.

The concept of family group conferencing is inspired by the approach of the Maori culture in New Zealand, where family-related problems are discussed and solutions sought within the family. Various countries have developed the model to suit their needs. In essence, family group conferencing brings together the family and the social structure to seek solutions for problems with the help of an independent coordinator. (In the Netherlands there is an independent organisation which provides for independent coordinators. See Eigen Kracht 33.) The process is connected to the participants instead of being imposed *on* them.

In the criminal law context, the purpose of family group conferencing is to:

- resolve the problem which results from the delinquent behaviour; and,
- heal the relationships affected by such behaviour.

In traditional criminal justice procedures, attention is often paid to the guilty person who needs to be punished, without any role to play for the victim, which may ultimately negatively impact on the quality of life of the victim. The delinquent is often exposed to stigmatisation. Punishment does not normally focus on reintegration into the social network and therefore the learning effect is minimal. This is particularly disastrous for juveniles. It increases the desire belonging to negative subcultures. Therefore, the focus on restorative justice and healing should receive high priority, especially pertaining to juveniles.

In the Netherlands these criminal case conferences are called “Echt Recht” conferences. Victim(s) and delinquent(s) are brought together with their families and social network. The conference is chaired by a trained coordinator. All participants are encouraged to reflect on what has happened and the aim is to come to an agreement about how to restore the damage caused. If an agreement is reached it needs to be signed by all participants. In this way criminal proceedings can be avoided, or where prosecution cannot be avoided, the outcome of the process can be taken into account by the court, when deliberating on the sentence. The *Echt-Recht* approach can also be useful as prevention (to avoid repetition of the offence or aggravation) or as a reintegration process after serving a sentence.

The Dutch prosecuting authority has developed policy guidelines pertaining to this kind of conference (early 2002). They applaud the initiative but have set certain conditions, amongst others:

- both victim and delinquent must participate voluntarily;
- the process must be transparent; and
- no promises may be made on how the prosecutor would weigh the outcome.

The “Echt-Recht” conferences confirm the positive outcomes of research done in other countries. In 80% of the researched cases the participants came up with a so-called “healing plan” containing the agreement reached. The exact content of the plan will differ from case to case and is largely left to the participants to agree upon (this may include the writing of an essay,

compensation for damage, an apology to the victim, repair of damaged property, participating in programs, *etc*).

The South African Child Justice Bill also provides for family group conferencing (FGC) as an alternative to prosecution (art 48 of the Child Justice Bill [B49 – 2002]), as well as a possible sentence option upon conviction (art 65 of the Child Justice Bill [B49 – 2002]). Where FGC is utilised as an alternative to prosecution, the magistrate who presides at the assessment hearing may refer the matter to a family group conference with the consent of the prosecutor (see Skelton and Franks “Conferencing in South Africa: Returning to Our Future” in Morris and Maxwell *Restorative Justice for Juveniles: Conferencing, Mediation and Circles* (2001) 103 for a discussion of family group conferences for juvenile offenders and the detailed provisions in the Bill). This is in line with the objects (art 2 of the Child Justice Bill [B49 – 2002]) of the Act, which are amongst others:

- to promote “ubuntu” in the child justice system,
- to support reconciliation by means of a restorative justice response, and
- to involve parents, families, victims and communities in child justice processes in order to encourage the reintegration of children.

10 Recommendations

As Chief Justice Chaskalson stated in his address to the Third University of the North Law Week (3-7 May 2004 *Ten Years of Constitutionalism and Constitutional Adjudication in South Africa*), there is a breakdown of moral and ethical standards that, apart from poverty, increases the risks of getting involved in crime. The question is: how can this be addressed? The following are some measure that could be followed:

- Life-skills programmes, dealing with issues like self-respect, authority and peer pressure, need to be offered at schools and in community centres, the latter specifically to reach out to the so-called “early school leavers” and “school drop-outs”, who might be at a higher risk (resorting to crime).
- Crime should never be ignored, even if it is of a petty nature or the offender is a child. No response to an offence is a form of neglect and sends out the message that it is tolerated. Parents, guardians, schools, community centres and community members should set clear limits on what is acceptable or not.

It might be useful to consider and learn from initiatives in other countries, for example “STOP-reactie”, Halt-system and family group conferencing. With the necessary adjustments, these can be tailor-made for South Africa.

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