IN THE HIGH COURT OF LESOTHO

In the matter between

REX

vs

MALEFETSANE MOHLOMI	1st accused
KHENENE MPHUTLANE	2nd accused
TSEPO KETSELETSO	3rd accused
KHOTSANG HLAPANE	4th accused

Review case No. 06/2013 **CR. NO.10/2013**
Review Order No. 1/2013 **In the district of Quthing**

Order on Review

Delivered by the Honourable Mr. Acting Justice E.F.M. Makara

On the 14 March, 2013

Summary

The trial magistrate's referral of a case involving children allegedly in conflict with the law – The children tried jointly with the adults – The prosecutor apparently unaware about the **Children Protection and The Welfare Act (CPWA) of 2011** – The applicable procedures whenever a child is charged of an offence – The prosecutor inadvertently misleading the court – The violation of the children procedural rights in the trial – The magistrate's discovery of the procedural defects and hence the case referral for a review by the High Court – The dedication of the Act to the advancement of the best interests of the child; in rhythm with the International Convention on the Rights of Children, the African charter on the Rights and Welfare of the

Children and other international instruments – The domestication of International Law under Sec 2 (1) of the CPWA – the Procedural Orgarnogram under the Act – The finding that the accused children's procedural rights in the Act had been violated in the trial – The Reviewing Court setting aside of the proceedings in relations to the children involved – The order that these children be tried *de novo* before another magistrate.

CITED CASES

S v Nursing 1995 (2) SACR (CC) 331. S v FM (Centre for Child Law as *amicus curial*) 2012 4 AU SA 351 (GNP). South African Association of Personal Injury Lawyers v Heath, Willem Hendrik & 3 ors CCT/27/00

STATUTES AND SUBSIDIARY LEGISTLATION

Children's Welfare and Protection Act no 7 of 2011. Criminal Procedure and Evidence Act No.9 of 1981 (CP&E Act). The Sexual Offences Act 2011 the Child Justice Act 75 of 2008. The South African Constitution. The Criminal Procedure Act 51 of 1977. Laws of Lerotholi

INTERNATIONAL LAW CONVENTIONS.

The 1989 United Nations Convention on the Rights of the Child (CRC), The 1990 African Charter on the Rights & Welfare of the Child (ACRWC)

BOOKS

Unicef Innocent Research Centre International Criminal Justice and Children, Xpress s.r.l. Rome: Sept 2002**.** S. Poulter Family Law and Litigation in Basotho Society**,** Oxford University Press London 1967

[1] The genesis of this review judgment is a *mero mutu* referral of the criminal proceedings from the Magistrate Court of the district of Quthing for their review by this court.

[2] The basis of the referral is that it transpired to the Learned Magistrate Makhaketso of the first class jurisdiction who presided over the matter; that accused 3 and 4 were children at the time of the commission of the offence. Their child status is assigned in terms of **Sec 3 of the Children Protection and Welfare Act 7 of 2011**

[1](**CPWA**). The meaning is, in the background, foreshadowed in the United Nations Convention on the Rights of the Child (CRC), The African Charter on the Rights and Welfare of the Child (ACRWC) and other International instruments.[2]

[3] It would appear from the record of the proceedings that the Magistrate had, inadvertently, proceeded with the hearing unconscientiously of the guiding operational provisions where any one of the accused persons is a child in terms of the **CPWA.** He, resultantly, had his court sitting as an ordinary Subordinate Court and, thereby, simply administered justice through the instrumentality of the ordinary laws particularly the **Criminal Procedure and Evidence Act No.9 of 1981 (CP&E Act).**

[4] It would further appear that the Learned Magistrate subsequently discovered after he had convicted and sentenced all the accused persons that his court might not have been properly constituted and that the proceedings might have been irregularly conducted. The presumption is that his attention was drawn to the relevant operational provisions of the **CPWA** after he had sentenced the accused persons. This explains his resort to this court for its intervention by way of a review.

[5] The basic facts in the case before the court a *quo* are, in summarized terms, that the four accused persons had featured before the Quthing Magistrate Court against the charge of

[1] The sections define a child as a person under the age of Eighteen (18) years.
[2] The CRC defines a child as every human being below the age of 18 years old even if majority is reached earlier under domestic law. Article 24 (1) of the International Covenant on the Civil and Political Rights (ICCPR) bears the same meaning. Article 2 of the **ACRWC** maintains the same definition.

contravening **Sec.3 (2) of The Sexual Offences Act 2011.** The supportive allegation being that the four accused had at the material time and place within the jurisdiction of the trial court, individually and collectively committed a sexual offence in that they had a sexual intercourse with the complainant Nomasomi Qeza aged 53 **without her consent**.

[6] The view that the trial magistrate was, throughout the hearing up to its conclusion, unconscientiously of the applicable provisions in the **CPWA,** is reinforced by the fact that the charge sheet reflects that A1 and A2 were both aged 22 while A3 and A4 were recorded as being both aged 18. This not withstanding, the birth certificates of the latter two accused revealed that they were, at the material time, aged 16 and 17 respectively. The certificates formed part of the record of the proceedings.

[7] The prosecutor who is at Common Law a *Minister of Justice* appears to have also inadvertently been unaware of the **CPWA.** This was supposed to have been his key legislative instrument in providing guidance to the court. It is clear, therefore, that if the *Minister of Justice* was, innocently, unmindful of the appropriate tool of justice, the whole process was, from the onset destined towards injustice.

[8] The judgment should, from the beginning, highlight a basic fact that the **CPWA** is dedicated towards the attainment of **the best interests of the child through the protection and promotion of the boy or a girl child rights and welfare.** The dedication permeates

throughout all the procedures in the criminal litigation in particular. It should, therefore, be rendered its prevalence as the main instrument for guidance in the administration of justice whenever a child is alleged to have been in conflict with the law.[3]

[9] The four accused persons who all appeared in person, pleaded guilty to the charge. The prosecution accordingly accepted their individual pleas. The court, correspondingly, allowed the prosecution to operationalize **Sec. 240 (1) (b) of the CP&E Act.** The section directs the Crown to outline the evidence which it would have presented before the court had the accused pleaded otherwise.

[10] The outline was, in paraphrased terms, that the complainant Nomusomi Qeza who at the time of the incidence was 53 years old, was on the 31st December 2012, travelling from her home in Mphaki in the district of Quthing *en route* to Matatiele in the Eastern Cape Province of the Republic of South Africa (RSA). She was, in that journey in the company of one Mosito Lechaka, Mahlalele Lechaka and Nozabaleze Jankie. The complainant was even carrying her child Nondumizwa on her back.

[11] The complainant and her companions had out of desperation elected to cross the border between the two countries at an unofficial crossing point because they didn't have passports. Their final destination was in Pietmaritzburg in the

[3] This explains why some child rights advocates prefer to call the criminal process involving a child a simply child justice. This is intended to portray its autonomy within the criminal justice.

Kwazulu-Natal Province of the RSA. The plan was that they would get the bus to Pietmaritzburg at Matatiele. She works as a domestic worker and a street vendor in Pietmaritzburg.

[12] Along the way to Matatiele, they walked passed the accused persons cattle post where the accused emerged from the bushes and having inquired where they were proceeding to, started proposing love to the complainant and her female companions. The accused simultaneously expressed their desire to have sexual intercourse with the complainant.

[13] The complainant turned down the proposals. The accused then dragged the females away. Mosito who was in the journey with the women fought the accused with a stick and threw stones at them. They, however, overpowered him and he retreated. During that encounter, the women ran away and hid themselves in the bushes. The accused in the meanwhile, threw stones at their hiding sanctuary. In the process, the complainant was hit with a stone and she re-surfaced from the hiding.

[14] The accused reiterated their desire to indulge in sexual intercourse with the complainant and she refused. Mnyenezeni then undressed her and forcefully had sexual intercourse with her until he satisfied his beast like psycho-physiological lust. A2 followed likewise and so A1 followed by A3. A4 was the last to engage in the act up to his full satisfaction.

[15] The complainant returned home after being released by the accused. She reported the incidence to the Chief of Ha-Kelebone and to the police who arrested the accused. It is, however, unclear from the record as to why the said Mnyenezeni is not one of the accused in this case and yet he was the one who had pioneered the commission of the offence.

[16] The accused, individually, confirmed the outline as being true and correct. The Magistrate determined that it was embracive of all the essential elements for the sustenance of the charge and then pronounced each of the accused guilty as charged.

[17] The trial court, consequently, after considering the mitigating factors advanced by each accused, sentenced A1 and A2 respectively to ten (10) yrs without an option to pay fine; A3 and A4 were each sentenced to eight (8) years without an option of fine as well.

[18] The learned Magistrate has given a relatively jurisprudentially sound judgment and the reasons for sentence. He acknowledges in particularly that the accused are youths and that they readily confessed their sins before him. The understanding being that their pleas of guilty were indicative of their remorseful reflections.

[19] This court has, against the backdrop of the philosophical foundations of the **CPWA,** its untested pre-trial, trial and post trial

procedural regimes, found it imperative to rope in the assistance of counsel in the review. The Registrar was, thus, detailed to facilitate accordingly. The learned Director of Public Prosecutions (DPP) reciprocated to the call for assistance by entrusting Adv. Khoboko from his chambers with the assignment of presenting the Crown's perception of the issues to be addressed in the review. Advocate S. Sakoane who is one of the senior lawyers who had featured at the architecturing stage of the Act and in its sensitization campaigns, accepted the invitation to represent A3 and A4 *pro Deo.*

[20] The Presiding Judge and the counsel held a briefing session for the joint identification of the salient features of the **CPWA** for interrogation. The session culminated in the designing of a road map concerning the areas to be traversed before the court. These consisted of the philosophy behind the Act, its operational procedural provisions, the relevant parts of the constitution and the applicable international instruments which Lesotho has ratified and technically domesticated.

[21] The counsel assisted the court with systematic and comprehensive addresses along the identified areas of concern which needed elucidation. The understanding is that the approach would be instrumental for the analysis of the pertinent provisions in the Act. This would result in the ascertainment of the procedures, how they synchronize with each other and to lay down some foundation for future guidance in the administration of justice whenever a child is alleged to have been in conflict with

the law. This was found to be imperative given the fact that this court is the upper guardian of children and that the Act has not yet been tested.

[22] The content and the form of the **CPWA** should be perceived against the background of **The 1989 United Nations Convention on the Rights of the Child (CRC), [4] The 1990 African Charter on the Rights & Welfare of the Child (ACRWC),** other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory. This is sanctioned in **Sec 2 (1) of the CPWA** which provides that:

> The objects of this Act are to extend, promote and protect the rights of children as defined in the 1989 United Nations Convention on the Right of the Child, the 1990 African Charter on the Rights and Welfare of the Child and other international instruments, protocols, standards and rules on the protection and welfare of children to which Lesotho is a signatory.

23] The section is indicative of the legislature's contextual intention to domesticate the aforesaid international instruments in addressing the social welfare sphere of the child and in the administration of justice where a child is alleged to have been in conflict with the law or convicted for any offence.

[24] A further contextual indication by Parliament is that the international instruments referred to in the section, should provide a philosophical and an inspirational guidance in the background. This is to be so whenever the welfare or the justice of the child is to be considered.

---

[4] Article 40 (2) (a), (b) (i) to (vii) & 3 provide a special procedural regime for the rights & the protections to be accorded to a child who is suspected of being in conflict with the law. This transcends all the phases of the criminal Justice system.

[25] **Sec.79 of the CPWA** complements the meaning assigned to the word *child* under **Sec.3 of same**. It does so by introducing a categorization of children who may be in conflict with the law. Though in principle, the section classifies the children into two groups, there is a readable third one. The classification has roots in the **CRC**, the **ACRWC** and other international instruments. [5] The underlying consideration is an endeavor to facilitate for the ascertainment of the mental capacity of the child at the time of the commission of the offence and for justice to be administered in full recognition of that fact.

[26] The first classification of the children is that of those **below the age of ten (10)**. **Sec 79 (1) of the CPWA** directs that these children are not prosecutable. The understanding here is seemingly that a child below that age, cannot form a criminal intent. This represents the initial measure which protects children against the adverse effects of criminal justice.

[27] **Sec 79 (2) of same** refers to the second group of children. This constitutes of those aged **ten (10) to fourteen (14**). The group is in terms of **Sec 79 (4)** presumed to lack a capacity to appreciate the difference between right and wrong and cannot act **with full appreciation**.[6] The concerned children can only be prosecuted if the presumption is successfully rebutted.

---

[5] Research Centre of Unicef; **International Criminal Justice and Children** (A commentary on the CRC, the ACRWC and other Inter Instruments) pp53 -55.

[6] This is reminiscent of the Common Law presumption that children aged 7 – 14 are *dolus incapax* and, therefore, not prosecutable save where the contrary is proven.

[28] **Sec 79 (3) of the CPWA** introduces **an Inquiry Magistrate** into the children justice system. The section defines this magistrate as an officer presiding in **a preliminary inquiry**. This specially designated magistrate is entrusted with a *sui generis* status and responsibilities to discharge. A summarized version of the functions of this Magistrate is to preside over the pre-trial inquiry sitting where the socio-psycho environmental factors concerning a child who is alleged to be in conflict of the law are interrogated. It is in that inquiry conferencing where the **Inquiry Magistrate** would be evidentially assisted to make a determination on the question of whether or not a particular child aged between 10 and 14 could differentiate between right and wrong. It shall later emerge that the same magistrate commands the authority to determine a forum before which a child could stand trial.

[29] The legislature has demonstrated the strategic significance of the inquiry procedure by providing for a scientific approach to it. Thus, **Sec. 79 (6)** directs in mandatory terms that the evidence which addresses the mental capacity of the child to make a distinction between right and wrong, shall be supported by a report from an expert in **child development** or **child psychology**. The expert is also **mandatorily** expected to testify before the **Inquiry Magistrate** as to the content and the finding in the report.

[30] The machinery put in place under **Sec 79,** renders the ascertainment or the assessment of the age of the child imperative. The Probation Officer is assigned to make the

assessment which would be a major point of reference for the **Inquiry Magistrate** to make a pronouncement on the age of a child.

[31] The age of a child represents a key factor in the determination of the pre-trial avenues through which the child could be treated. The main idea is to facilitate for the exploration of the most appropriate diversionary alternatives [7] rather than to scheduling a child for a custodial detention pending trial and afterwards to the trial proceedings.

[32] The centrality of the **CPWA** & other International instruments is to provide for procedural machinery for the attainment of **the best interest of the child through a holistic approach**. The employment of a multi disciplinary approach in these instruments such as the involvement of professionals represents an attestation of that fact.

[33] It must be highlighted that the Convention and the Charter create a distinction between the descriptions of an adult offender a child offender. The former is classified as an accused person while the latter is referred to as being that of a person in conflict with the law. The classification denotes the expected differences in the approaches and in the applicable jurisprudence.

[7] This generally refers to an alternative justice system in which the parties resort to other lawful means of resolving their dispute and thereby avoid, the conventional justice system and its logical consequences. These, could include subjecting a wrong doer to the adverse realities of the criminal justice system which would include custodial detention pending trial, imprisonment, inflicting a permanent harm on the harmed relations between the parties and beyond etc.

[34] The third category of children who are suspected of being in conflict with the law would be those **between the age of fourteen (14) and below eighteen (18) years**. In contrast to the 2nd classification, the **CPWA,** does not provide that these children should be presumed to have lacked the intelligence to have differentiated between right and wrong at the material moment and, therefore, without the requisite appreciation.

[35] Parliament has, given the background presented, deemed it wise to create a substantively and operationally specialized court which is dedicated for the administration of justice concerning children in conflict with the law. It is in that spirit that **Sec. 133 (1) of the enactment,** has specifically established a Children's Court by providing that every Subordinate Court shall be a Children's Court within its jurisdiction. The section *inter-alia* (for the purpose of this review) assigns the latter court a jurisdiction to hear charges which are listed under **schedules I and II in the Act.** These being a list of the offences involving children against whom the prosecution has preferred a charge on the allegation that they have individually or collectively acted in conflict with the law upon some stated grounds.

[36] Sec 133 (2) anchors the specialty of the Children's Court in contradistinction to the ordinary Subordinate Court or any other Court of the Land. It, from the onset, **mandates the Chief Justice to designate a Presiding Officer who shall preside over the proceedings in that court.** The sub section endeavors

further to maintain the uniqueness of the court by requiring that it should be staffed by **specially** trained personnel.

[37] The legislature appears to have throughout the text of the **CPWA**, been mindful of the commitment to promote and protect the best interest of the child in social welfare and justice concerns. It is in tandem with this, that the Act provides for the location and the configuration of the court to be conducive to the dignity and the protection of the children. This is reinforced with a direction that the proceedings in court should be informal, child friendly and accommodative of active participation of all the people who need to be involved.

[38] It would also be readable that the spirit of the Act would be that a child who is alleged to be in conflict with the law should not have his full names appearing in the proceedings. Such a reference is to be circumvented through the substitution of the real name by another. The idea is to protect the dignity of the child and to protect him from future stigmatization. The court in this perception, registers its exeption to the reference of A3 and A4 by their full names.

[39] A mere fact that the children's court is a transformed and a reconfigured Subordinate Court which is assigned a special jurisdiction and applies special procedures; should not be comprehended to mean that a magistrate concerned should compromise his presiding authority in the proceedings. It has to be over-emphasized that he would be holding court proceedings

and not a meeting with him as its appointed chairman. The magistrate would have to give a direction, rulings on issues of relevancy and materiality of evidence, admissibility of evidence hearsay etc. Otherwise, the system would be destined to uncertainties, inconsistencies, probabilities, injustices and ultimately produce the results which are counter to the objects of the Act itself.

[40] **Section 134** presents a different scenario which applies where a **court**[8] other than a Children's Court has a jurisdiction to hear a case of a child in conflict with the law. This would be so, where the child is charged with murder, treason, sedition or is charged of any offence which may attract a sentence beyond the jurisdiction of the Children's Court [9]or is facing multiple charges in which one of them falls within the jurisdiction of another court or where the child is co accused with an adult and a decision made in terms of **Sec 140 (1) – (6) of the Act** that such child be tried jointly with the adult. This would certainly be at any court of competent jurisdiction other than the Children's Court.

[41] There is, however, no express or implied impression from **Sec 134** or any other section in the Act, that the procedures applicable to the children in conflict with the law; should be dispensed with where a child is being tried before another court

[8] This would refer to a court of competent jurisdiction depending on the charge preferred and the surrounding circumstances. Treason, sedition and murder would for instance, be tried in the High Court.

[9] The court observes that the architects of the Act appear not to have been mindful that the Subordinate Court proceedings are presided over by the magistrates of different classes and that they exercise different punishment powers. It could, perhaps have been elegant and precise to have talked about the jurisdiction of a magistrate. Their sentencing powers ranges from 10-20 years.

other than the Children's Court. The technical differentiation that children are described as being in conflict with law while the adults are being suspected of having committed a criminal offence, automatically subject the children to a different procedural regime in the administration of justice as opposed to the adults. The pursuit of the best interest of a child would still remain a predominant consideration irrespective of the court where a child is being tried. In the adult's case, the orthodox procedures would, in principle, be adhered to throughout.

[42] The pre-trial procedure under **sec. 79 (3)** which is presided over by **the Inquiry Magistrate** would, in the view of the court, apply to any child irrespective of whether he is facing a **Schedule I or II offence or any offence** which would render him prosecutable in any ordinary court of competent jurisdiction. It is, therefore, self explanatory that all the children would, consequently, be illegible to any of the pre-trial diversionary interventions. These would include the exploration of prospects for victim-offender restitutive settlement through Restorative Justice. A cardinal need for a search for the best interest of the child would still guide the process.

[43] The **CPWA** has recognizably in its endeavor to facilitate for the protection and promotion of the rights of children, 'revolutionarised' the characteristics of the conventional court and its logistics. The substantive and procedural configurations are all calculated for the achievement of the best interest of the child. **Sec 133 (3)** is a testimony of a substitution of the

conventional adversarial litigation system with the informally administered proceedings which are child friendly and favourable to the maintenance of the dignity of the child. This is complemented by the inclusivity of all qualifying persons to participate in the proceedings.

[44] **Sec 106** renders it imperative that the preliminary inquiry should be held within 24 hrs or 72 hours (as the case may be) whenever a child has been arrested.

[45] It would be on the basis of the representations and the evidential revelations that the Inquiry Magistrate would, in accordance with **Sec. 110 (4) (b),** decide to refer the matter to the prosecutor for charges to be instituted in the Children's Court or in other courts. The same Magistrate could at the end of the session, order for the closure of the matter for want of sufficient evidence.

[46] It, however, deserves a special mention that one of the terms of reference for the Inquiry Magistrate is in terms of **Sec. 111** *inter alia* to satisfy himself that there is sufficient evidence to sustain the prosecution and that he may, request the prosecutor, the investigating officer or any relevant, person to provide an oral report concerning the sufficiency of such evidence. It must be clear here that the Inquiry Magistrate is substantively a Judicial Office Bearer like any other magistrate or a judge.

[47] Sections 149 to 157 of the Act, are dedicated to the prescription of a diversity of sentencing options which the court may impose upon a child who has been proven to have acted in conflict with the law**. Secs 129, 158 to 162** have a contributory dimension to the sentencing regimes.

[48] It is clear from the whole sentencing text that the various modes of punishment contemplated therein, are intended for application over all the children within the purview of the meaning of a **child** in **Sec 3 of the Act.**[10] This is indicative of the legal fact that any court of competent jurisdiction which may hold a child to have acted in conflict with the law, may, competently, sentence a child to any one of the provided sentences.

[49] The legislature has, in principle, preferred the diversionary oriented types of sentencing. The sentence involving detention in any residential facility or at the worst imprisonment appear to feature as the undesirable last options which should be resorted to in serious offences and under strict conditions. This is clear from **Sec. 150 (3)** which provides that for a child to be sentenced to a detention in any residential facility, there must be a pre-sentence report executed by a probation officer. **Sec. 159 (5)** makes it a criminal offence for anyone to admit a child in the detention facility without evidence that the report had been made.

[10] These being children below 18 years. Save that those below 10 years cannot be prosecutable.

[50] A child could be sentenced to imprisonment not exceeding three years. This is in terms of **sec. 156 (1).** The sentence is, however, limited to children between the age of fourteen (14) years and under eighteen (18) years. **Sec. 156 (2)** demonstrates the undesirability of the sentence by providing that it could be suspended on condition that a child concerned performs community service or attends a specified centre.[11]

[51] Sec. 154 (1) introduces an interesting interventionist provision to any sentence imposed. This affects imprisonment as well. It sanctions for a postponement or suspension of a sentence on any of the specified conditions. These could be summarized as restitutive, compensatory, indication of remorsefulness, availability to the restorative justice relational therapy, victim – offender mediation, school attendance, show of prospects for rehabilitation and demonstration of readiness for reintegration into society.[12]

[52] To this end, the message is, in few words, clear that any court before which a child stands accused, must in its endeavor to promote the best interest of the child, explore all possible prospects for a diversionary sentencing and only resort to a detention in a residential facility or imprisonment where the circumstances strongly militates otherwise.

---

[11] This would, contextually, be a rehabilitative centre.

[12] Interestingly, the effectively similar provisions exists under **sec.134 of the CP&E Act** and are hardly ever operationalized by lawyers, magistrates ad judges. Hopefully it would this time be practically recognized.

[53] The legislature's emphasis on diversionary avenues as it relates to the child justice, is evidenced by the incorporation of Restorative Justice (RJ)[13]into its system by **Sections 120** and **171**. This is primarily intended for the reconciliation of the child offender with the victim and, therefore, to facilitate for a restorative settlement. The process is kick started by the child offender's preparedness to admit the wrong as an indication of expressing remorse and a plea for a pardon. In RJ, an offence is regarded as an offensive act or omission against the victim, his relatives, the community and ultimately against God the Almighty. Thus, all the victims would have a *locus standi* to participate at the RJ forum where the relational disturbance would be discussed towards the restoration of the original relationship between the offender, the victim and all those adversely affected by the offence.

[54] The Act has provided machinery for the practical management of this paradigm. This has been done through the creation of the Restorative Justice Forums, the Open Village Healing Forums (OUHF) and the Victim-Offender structures to operate at different levels of the communities.

[55] There is a philosophical expression that war is, so a serious national challenge which cannot be left in the hands of the

[13] This refers to the alternative justice dispensation which is devoted to the healing of the relational harm caused by the offence committed by the offender against its victim. The harm could be spiritual and or physically. The restoration of the original relationship between the two, could be done physically or metaphysically as the case may be. RJ is, resultantly *inter alia* called a Relational Justice or a Hearing Justice. Its other meaningful names are grass roots justice, (in Rwandese the word Grass is gacaca and, therefore, they call it the Gacaca RJ , Traditional Justice (since it is considered as more of a justice which is inscribed in the hearts and minds of men) Transformational Justice (since it transfers people) Popular Justice, People's Justice and Justices of the people of the covenant.

generals alone.[14] The legislature has analogously in the **CPWA**, wisely recognized the fact that a correction of a child is a serious national challenge which cannot be left in the hands of the prosecutors, the lawyers, the magistrates and the judges alone. This is demonstrated by the indentified in built inclusive procedural systems which are designed to correct the child with emphasis on the achievement of what would be in his best interest. The inclusivity favours a holistic approach in which there are multidisciplinary interactions towards one common objective.

[56] S v Nursing 1995 (2) SACR (CC) 331 is one of South African leading case which is indicative of the indispensability of a collaboration between the lawyers and the experts in Human Behavioral Sciences in criminal cases concerning children. Their co-operation helped the court to discover with appreciation, the mental dynamics of a child who has for a long time been abused. The court as a result, had a clear perception of justice to be followed.

[57] A young boy was, in the above case, facing three counts of murder for having fatally shot his mother and his maternal grand parents. The mother was a well known high class doctor and there was, resultantly, a wide spread condemnation of the act and expressions of its indignation. It was regarded as the highest act of rebellion since a child had killed someone who has given

[14] N Qhubu: Restorative Justice& The Child Justice Challenges Presented by the CRC, paper presented at the Lesotho Justice workshop conference held in Maseru Lesotho on the 23rd May 2002.

birth to him. There were even calls for the boy to be severely punished.

[58] The child psychologist and the psychiatrist having conducted their respective social inquiries came to a conclusion that the shooting was a manifestation of a long domestic conflict which culminated in what the psychologist termed an *acute cathemic crisis***.** The psychiatrist testified that at the time the boy shot the trio, his psychic equilibrium was not functioning logically such that his level of intelligence was no better to that of a dog responding to provocation. As for his maternal grand parents, it was found that found that he had shot them because they couldn't protect him from his mother's domineering power over him and upon themselves.

[59] The experts attributed the boy's fatal shooting to the long history of having been sexually abused by his mother and punishing him for having any relationship with girls. The mother had allegedly even driven away her husband. One Mrs Essack had confirmed that the mother had for years ill-treated the boy physically and psychologically. An independent doctor testified that he had for several times treated the boy for abdominal pains and headache. He described that as being some of the symptoms of a victim of abuse.

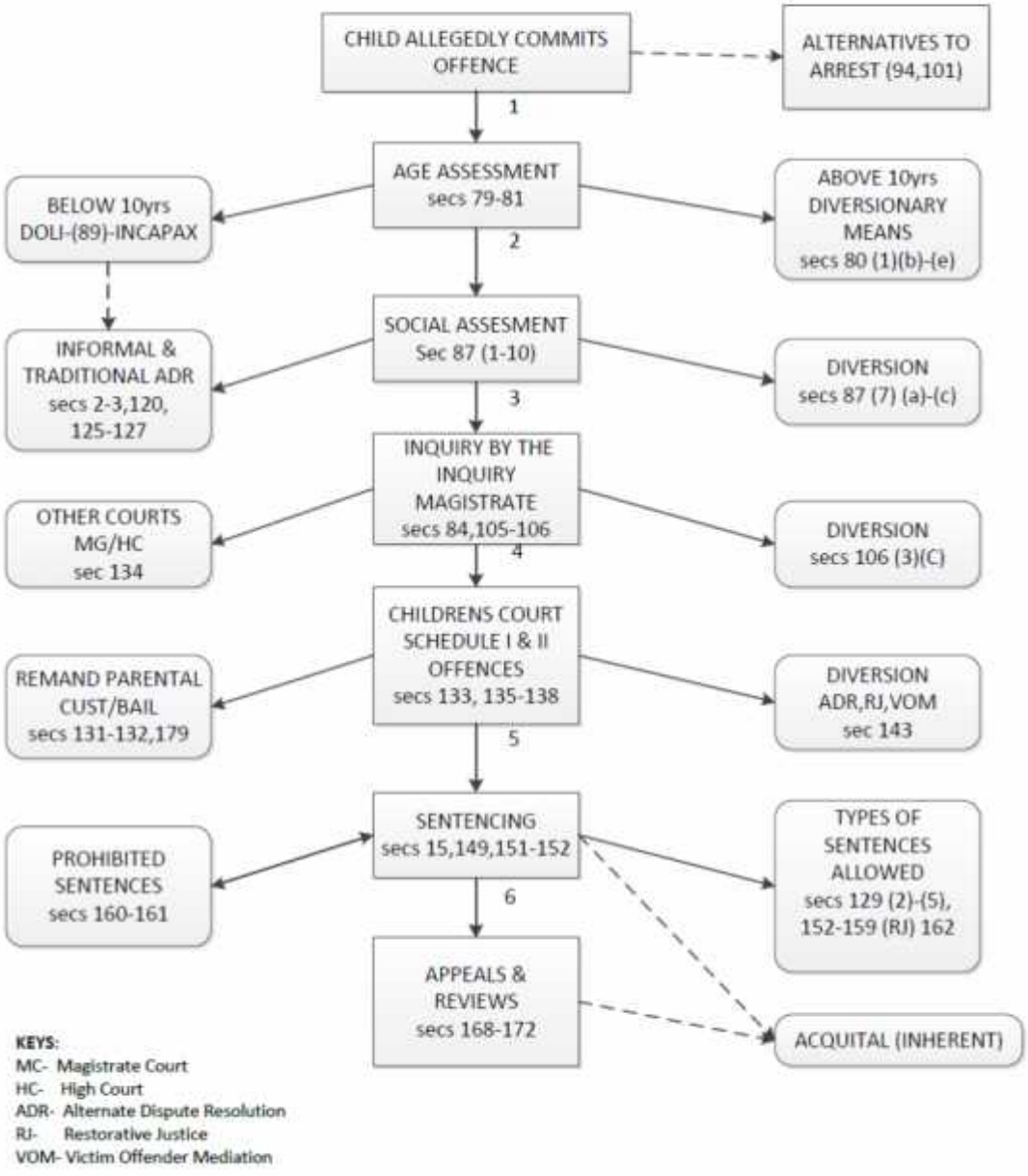
[60] The court relying primarily upon the assistance of the stated experts, found that the accused was at the time of the incidence suffering from extreme psychological storm. This had

overwhelmed his thinking faculties to the extent that he couldn't at the material time make a distinction between right and wrong. He was, ultimately held not guilty on the reasoning that he couldn't have formed the requisite intention to kill the three.

[61] The fateful shooting of the three, had been triggered by the mother's sudden reversal of her earlier permission for the accused to attend a cinema show on the night of the incidence. This was immediately after she had heard the boy confirming it through a telephone conversation that he would meet a girl at the place. The boy had throughout the day worked hard to please the mother so that she could up to the last minute sustain her attitude allowing him to attend the show. He had throughout the day been anxious to meet the girl.

[62] The court has utilized the technical expertise of the learned Magistrate Amandus Tapole of the 1st class powers in Maseru, to design a *procedural organogram* which indicates a road map in the administration of the child justice. This is presented here below:

A Procedural Organogram in The Children's Protection and Welfare Act No. 7 of 2011



KEYS:
MC- Magistrate Court
HC- High Court
ADR- Alternate Dispute Resolution
RJ- Restorative Justice
VOM- Victim Offender Mediation

GUIDING PHILOSOPHY : THE BEST INTEREST OF THE CHILD SECTION 4

A Commentary on the Child Justice Procedural Organogram

[63] The six stages hereunder outlined, are based on **Part X1 of the CPWA.** They are designed on the premise that a child like any other criminal suspect is presumed innocent until proven otherwise. The emphasis is on diversionary alternatives. The pre-arrest alternatives are informal caution, home detention, placing of a child under the supervision of a probation officer for caution. These are provided for under **Secs 94,101.**

Stage 1: Age Assessment Secs 79, 80 and 81

[64] The purpose of the provisions is to establish the age of a child. The Probation Officer plays a central role in this process. She is the "engine" of the entire process in that she ascertains the prosecutability of the child concerned. This being the children who are aged 10 to 18.

Alternative A: This applies to the children below 10 years. They are regarded as being *doli-incapax* since they are deemed to be incapable of forming the requisite intention to commit an offence. A provided therapeutic intervention is the child or his family counseling. This is sanctioned under **Sec 89 (1).**

Alternative B: The other diversionary route would be to apply her discretion in favour of other correctional measures permissible by law. The avenue is provided for under **Sec 80 (1) (e).**

Stage 2: Social Assessment Sec 87 (1)-(7)

[65] The purpose here is to establish the 'roots' of the child and his social environment. It is for this reason necessary to locate a parent or guardian or any one in *loco-parentis* so that this process can start. However, if such 'roots' remain untraceable, the process may be concluded in their *absentia.*

Alternative A: The exploration of the informal and traditional methods of dispute resolutions. These are listed under **Secs 2 (3) 120, 125-127.** These are highly encouraged to the extend that they advance the rights of the child. Traditional practices such as where the offender is, after inflicting a wound upon the victim, simply instructed to spit on the injury to provide for its healing effect without the injured person being send for a medical treatment, would not be in the best interest of the child.

Alternative B: The probation officer may reinforce the diversionary alternatives in the **Alternative A** immediately above, by intervening at the pre-charge stage. Here, the probation officer is enjoined to make a social enquiry about the social background of the child, upraise the child about his right to legal representation by a legal practitioner at the child's own cost, recommend appropriate divisionary route and recommend a place where the child could temporarily be placed pending the holding of the inquiry by the

Inquiry Magistrate. The alternative is provided for under **Sec 87 (1)-(10).**

Stage 3: Preliminary Inquiry Secs 105 and 106.

[66] The two main purposes of this stage are:-

To establish that all preliminary procedures preceding a formal charge has been followed;

To assess whether there is sufficient evidence to warrant referral of a case to the Children's Court.

Alternative A: Other Courts Sec 134.

Referral of some cases to the Magistrate or High Court is envisaged in deserving circumstances. This would apply w here for instance, a child has committed an offence beyond the jurisdiction of the Children's Court or the DPP may request joinder of trials involving children and adults. This is in terms of **Secs 84 and 140-141.**

Alternative B: Diversion – Sec 106 (3) (c)

The Inquiry Magistrate is here enjoined to assess whether prospects for diversion still exists. This would be before the charges may be drawn.

Stage 4 The Children's Court – Secs 133, 135, 136, 137, 138 and 148.

[67] The Court must be child friendly and staffed by specially trained personnel capable of handling children issues. The

proceedings have to be informal, child friendly and allow active participation of all persons who need to be involved. The child has to be informed about the **5 basic rights** – *right to silence, cross-examination, need for the presence of a guardian or parent, the importance of legal representation of own choice and cost, to have the proceedings conducted in a language which the child understands and for a copy of the charge sheet to be made available to the guardian or parent.*

Alternative A: Remand, refer to parental custody or grant bail – **Secs 151, 132 and 179.**

If the trial cannot proceed soonest, and there is no serious danger to the child, the Children's Court shall release the child on bail.

If a child is remanded into custody, it must be to:

A remand home or place of safety for the shortest time possible, not exceeding three (3) months, ensure that the custody is not shared with an adult and facilitate for a close supervision of a child or for his placement with a fit and proper person. **Sec. 132 (8).**

Alternative B: Diversion Sec143

Where a child accepts responsibility, before or after conviction, the court has discretion to order diversion in terms of **Sec. 129**, and the finding of guilt so entered against the child, shall be deemed not to have been made.

The Court may stop the proceedings at any stage before sentencing if it is apparent that other forms of Alternative Dispute Resolution (ADR) may resolve the dispute. Thus, the case may be referred to the Victim Offender Mediation (V.O.M.) or to the Restorative Justice Forum.

Stage 5: Sentencing –Secs 149,150,151,152.

[68] A Pre-Sentence report remains a prerequisite for proper sentencing of a child, except in the case of **the Schedule I offences** where the court may dispensed with the procedure. The evidence relating to previous diversions may not be adduced for the aggravation of the sentence but only for the assessment of its suitability.

Alternative A: Prohibited sentences- Secs 160 and 161.

Notwithstanding section 235, of the Act, no court may sentence a child to:

A monetary penalty (fine) payable to the state;

Life or death;

Corporal punishment;

A detention while awaiting approved school.

Alternative B: The listed diversionary options -Secs (129, (2)(3)(4)(5) 152,153,162.

Re-integration of a child-offender into the society is the central consideration in the sentencing of a child. Thus, all sentences must be reflective of this philosophy. The supervisory and

guidance orders, Restorative Justice approach, postponement or suspension of the sentences etc, must be geared towards this goal.

Stage 6: Appeals and Reviews – Secs 168, 169, 170, 172.

[69] A sentence which involves a residential element shall be subjected to an automatic review.

[70] The above procedural road map demonstrates a comprehensive and systematic collaboration between the conventional and the alternative justice dispute resolution mechanisms in such a way that they respectively complement each other. It should, however, be perceived that the general design of the scheme is that the two regimes interface with each other in a **dual track** relationship.[15]

[71] The emphasis is on the alternative justice dispute resolution systems particularly on restorative, restitutive and compensatory solutions. This represents the parliament's commitment to aggressively resuscitate the traditional systems of addressing disputes by incorporating them in the Act and by attaching more significance to their application in the administration of the children's justice. The 'revolution' effectively marks a clear epoch

[15] This means that the Conventional justice systems collaborate with the Alternative justice systems(including the traditional methods) in such a manner that a child offender could subject to the circumstances in place, be referred from one system to the other. The collaboration is intended to find the system which would, more appropriately, address the best interests of the child. It is a practical acknowledgement of a need for the two systems which have, hitherto , operated in a parallel manner, to complement each other.

of transition form the colonial legacy to the beginning of new era of a renaissance of the appreciation of the values enshrined in the indigenous justice systems. It further signals a milestone towards a meaningful and practical reclamation of the indigenous jurisprudential heritage.

[72] The Judgment at this juncture turns to apply the already explored and analyzed laws[16] to the already narrated facts of the case, the judgment of the Learned Magistrate and to the sentence imposed upon the accused with emphasis on A3 and A4. In that endeavor, logical reasoning dictates that the case of A3 and A4 should primarily be comprehended with reference to **Sec. 133 (1)** read in conjunction with **Sec. 134 (1) to (5).**

[73] **Sec 133 (1)** provides that every Subordinate Court shall be a Children's Court and simultaneously for the purpose of the present case, circumscribes the jurisdiction of the latter court to the charges which appear under **schedules I and II in the Act**. This notwithstanding, **Sec 134 (1)** introduces a dual jurisdictional scheme by providing for different scenarios where any court of competent jurisdiction other than the Children's Court could try an accused child. This would obtain where a child is facing a charge beyond the parameters of **schedules I and II such as murder, treason, sedition, armed robbery, sexual offences etc.** It could also be so where one of the multiple charges preferred against a child in beyond the jurisdiction of the Children's Court; or where a child has in terms of **Sec. 140** been

[16] These refers to the stated international instruments in the background, the Customary Law and to the CPW ACT in particular.

scheduled to be tried jointly with the adults; or where the DPP having considered the charge and the sentence likely to be imposed, has referred the case to any appropriate court.

[74] **Sec. 134 (4)** is, unequivocally, instructive that any court hearing the matter under it, must conduct the proceedings in accordance with the provisions of the Act and with due regard to the best interest of a child.

[75] The **Sec. 134 (4)** posture has been foreshadowed by **Sec. 4 (1) and (2)** which has prescribed that all actions concerning a child, shall take full account of his best interest and that this shall be the primary consideration for all the courts and others dealing with a child. It doesn't make any distinction between the courts.

[76] It should to this end, be clear that the sexual offence charge which A3 and A4 were confronted with before the Magistrate Court, is abroad **schedules I and II;** it could attract a sentence beyond the punishment powers of the Children's Court and that the District Prosecutor acting under the D.P.P.'s general authority had, albeit the procedural legal controversies, referred the case before the Subordinate Court sitting in its ordinary jurisdiction. A3 and A4 should, whatever the case, have been throughout treated in consonance with the substantive and the procedural provisions in the Act.

[77] The manner in which justice was administered during the trial is clearly reflective of the fact that A3 and A4 had their

procedural rights in the Act violated throughout the proceedings. The primary author of this is that the prosecutor and the presiding magistrate had never from the onset and throughout the hearing, been conscientious of the substantive and the materially operative provisions of the **CPWA.** The prosecution as a result misdirected the court and the trial court innocently followed the wrong direction. It, however, commendably realized the misdirection after it had already convicted all the accused and sentenced them according. It was then that it sought for the correction of the proceedings through the review process.

[78] The initial procedural defect in the proceedings is that the prosecution and the presiding magistrate didn't attach *an iota* of significance to the ages of A3 and A4. The prosecutor had simply and without any suspicion assumed that the information from seemingly the police, that they were both 18 yrs old, as correct. The irony as it has already been stated in passing, is that their birth certificates which are attached to the record of the proceedings stand as documentary testimonies that A3 was born on the 15th October, 1995 while A4's birth date is the 4th January 1996. A simple arithmetic would reveal that the former was aged 17 at the time he featured before the court and that the latter was 16.

[79] The mere indication from the charge sheet that A3 and A4 were aged 18 years; should have signaled a need for the ascertainment of that since 18 years would represent a border line case. This is because in terms of **Sec 3** a *child* is a person

below the age of 18. It should have rendered the court skeptical about the accuracy of the years recorded in the charge sheet especially given the accused persons seemingly humble station in life. A mere fact that they are cattle post shepherds, lacked the orthodox technique of proposing love to women, showed lowest moral decadence not befitting a Mosotho child and had failed to realize the consequences of their actions; should have explained their simplistic minds towards life and, therefore, created a reasonable doubt about the accuracy of their recorded ages and, perhaps, even about their levels of sanity. The Inquiry Magistrate created under **Sec 79 (3)** and his sitting terms reference, are specifically intended to provide a machinery for the inquiry into such intricate matters for the ascertainment of relative truth.

[80] The trial court should have received guidance from the provided birth certificates for A3 ad A4. A reference to those documents would have ascertained their ages. In any event, it had already become part of the record of the proceedings. It is assumed that it was made so for the purpose of **Sec 242 (1) of the CP&E Act.** A disregard of the certificates and the failure by the court to have adopted whatever robust measures to ascertain the ages of A3 and A4, seems to have been the source of the subsequent procedural transgressions against these child accused.

[81] The provisions of **Sec 240 (1) (6) of the CP&E Act**[17] were prematurely followed in the case. Thus, the verdict returned against A3 and A4 and the sentences of 8 years imprisonment imposed upon them, were both a product of the proceedings which had from their origins, been irregularity conducted and innocently not been administered in accordance with the procedural imperatives of **CPWA. Sec. 4 (1)** presents a preliminary instruction that all actions [18]concerning a child shall take full account of his best interest and **Sec 4 (2)** specifically *inter alia* details the courts to primarily consider the best interest of the child when seized with a matter concerning a child.

[82] It is clear from the record of the proceedings that A3 and A4 were preliminarily recognized as adults and, therefore, subjected to the normal criminal justice procedure which is, principally, based on the **CP&E Act.** The approach, understandably, deprived them the right to be perceived in the light of the consideration encapsulated in the above stated **Sec 4 (1) and (2).** This foundational defect resulted in a total disregard of their antecedent procedural rights before any court.

[83] An attempt would be made to identify the violations of the two accused's procedural rights in their roughly logical order.

---

[17] This is the proviso which authorizes the prosecutor to simply make an outline of what would be the evidence before the court had the accused before it pleaded not guilty. It applies strictly where the accused tenders an unequivocal plea of guilty.

[18] This includes court actions involving a child. This obtains regardless of whether the action relates to the question of the welfare of the child in a civil suit or in criminal proceedings.

[84] They two were in the first place unprocedurally and simultaneously unlawfully charged before a preliminary inquiry established under **Sec 106 (1)** was held and concluded. The process should in terms of **Sec 106 (2)** have been presided over by an Inquiry Magistrate. This preliminary process should have been administered within 48 hrs or 72 hrs subject to the basis and the circumstances of the arrest.

[85] The preliminary inquiry itself is designed to advance the best interest of the child by facilitating for the ascertainment as to whether a probation officer has assessed the child's age, exploration of the possible diversionary avenues to safe the child from being detained or from going through the conventional justice system and the determination of the appropriate court for trial. The paramount consideration would be to divert the children from the criminal justice system. The preferred alternative would be to have them tried before a Children's Court. The procedure prescribed for the inquiry is that it must be child friendly and accommodative of the participation of the people and the professionals who could assist in placing the circumstances of the child under some clear perspective. It is clear, therefore, that A3 and A4 were denied the rights which are sequel to **Sec 106.** This in turn, deprived them the opportunity to have benefited from the exercise of the general powers bestowed upon the Inquiry Magistrate under the **provisions of Sec. 109.** These could be summarized as his power to call on his own volition any relevant form of evidence which would assist him in his final determination of the direction to be followed.

[86] The trial court had conducted the proceedings in which A3 and A4 were the co accused with A1 and A2 who were adults without the requisite direction from the Director of Public Prosecutions (DPP). This was done contrary to **Sec. 108 (1)** which provides that the DPP may direct that the case of the adult be separated from that of the child. The idea being that the adult would be tried through the normal criminal justice procedures while the child would be tried through the *sui generis* procedures in the Act.

[87] The trial court's dispensation with the preliminary inquiry phase of the proceedings automatically disadvantaged the two accused from the consequential benefits under **Sec 111.** In terms of this triple one provisions, the Inquiry Magistrate would, in exercising the powers entrusted upon him therein, have solicited for oral information from the investigating officer, the prosecutor or any other person to determine if there was sufficient evidence for the sustenance of the charge. At the end of the inquiry, he would have been enjoined to consider releasing them with an order for appropriate intervention by the probation officer. At the worst, regard being had to the fact that the offence in question was outside the parameters of **schedules I and II,** the child accused would, ultimately, be referred for prosecution in a court of competent jurisdiction other than the Children's Court. There would, however, be endeavors to cause them to genuinely reflect on their offence, accept a responsibility for it and, perhaps, even be amenable to a payment for some reparation to the victim.

[88] Sentencing wise, the procedural irregularities which bested the proceedings, have prejudiced the procedural rights of A3 and A4 in that the court had disregarded their **Sec 154** procedural rights. The section presents a catalogue of conditions which should have been considered before the punishment could be imposed upon a child offender. A reference to those conditions would be instrumental to the court in making a further consideration about the appropriateness of postponing or suspending the sentence upon a directive that one or both or several of the specified conditions be fulfilled in a prescribed manner. The centrality of the provided alternatives is to maintain a pursuit for the advancement of the best interest of the child primarily through the exploration of the alternative justice interventions.

[89] In synopsis terms, the conditions listed under **Sec 154** which could be the basis for the postponement or suspension of the sentence are reparation through restoration, restitution, compensation, rehabilitation, correction etc. The child offender – victim reconciliation and the former reintegration into the community at large, featuring as the ultimate objective.

The trial court had not considered the wisdom in **Sec. 155.** Here it is specifically enjoined to consider the imposition of a sentence with a restorative justice element. To that end, the section contemplates victim – offender mediation, family group

conferencing or other restorative justice processes.[19]A settlement concluded through those interventions could be referred to the court for its consideration, variation and endorsement for its enforceability. This in a word, stands as a testimony of the legislature's scheme for the correspondences between the conventional and the alternative justice systems. The collaborations are, as it has already been explained, of *a dual track relationship.* In the Sesotho language *this inter dependency relationship,* is referred to as, "*Lehlahahlela le llang ka le leng''.*

[90] The eight (8) year imprisonment sentence imposed upon the A3 and A4 respectively, without an option for them to pay fine or any other diversionary dispensation, would have to be tested against the provisions of **Sec.156 and Sec. 235.** In the view of the court, these provisions share a reciprocal and a complementary correspondence on the sentencing powers of the court and their parameters whenever a child offender is involved.

[91] **Sec.156** authorizes a court to sentence a child offender aged fourteen (14) and above, to imprisonment for a maximum period of three (3) years. It simultaneously qualifies that by providing a dispensation for the same sentence to be wholly or partially suspended with or without the conditions referred to under **Sec 154 (2)** on condition that a child performs **Community Service or avails himself to a specified center for a rehabilitative program.**

[19] These would embrace the traditional metaphisical means of resolving the disputes such as the offender agreeing to spit on the wound of the the victim of his assault, submitting his stick a young lady to walk across it as away of aborting its metaphysical might which makes it dangerous. The assumption being that it is fortified with traditional medicinal power which may even render the stick to be lethal.

[92] **Sec. 235** impacts directly upon **Sec. 156** by introducing a general proviso that notwithstanding any penalty imposed under the Act, a court may, where circumstances warrant, impose any penalty higher than that provided for in the Act. Thus, on the strength of this provision and regard being had to the severity of the offence, the Eight (8) years imprisonment sentence imposed upon A3 and A4 can not *per se* be said to be *ultra vires* the Act. A counter fact, however, is that the proceedings have, in so far as they concern the two child offenders, been fatally undermined by the multiplicities of the identified procedural improprieties.

[93] The court holds a view that the **Sec. 156** provided 3 yrs maximum imprisonment for a child offender is intended for children who have committed any of the offences under **schedules I and II** or who despite the commission of an offence abroad these schedules, could be rehabilitated. The more punitive **Sec. 235** appears to be reserved for the child offenders who have committed serious offences or who have become habitual offenders with no visible prospects for their rehabilitation within the three (3) year period. The section appears to be further intended for the court to have an avenue for its imposition of a substantially meaningful custodial sentence in reaction to a serious offence committed by a child offender perhaps, without any mitigating factors. This could be for the court to register the social indignation to the offence and to provide a basis for the general deterrence to the rest of the children. It would otherwise, render sentencing meaningless and land the administration of justice into disrepute if every child

regardless of the merits of a case and the gravity of the offence, would be sentenced to a maximum term of 3 years in jail.

[94] Whilst the court appreciates the technical significance of **Sec. 235** to sentencing; it, nevertheless, adopts a view that it must be interpreted against the background of the Act as a whole. In that approach, it would transpire that the paramouncy of the idea that it is primarily dedicated to the advancement and protection of the best interest of the child, should ever remain the central guide for reference. This is designed to be achieved through a diversity of diversionary mechanisms including rehabilitation and other correctional means.

[95] The emphasis on the diversionary alternatives is further in explicit terms provided for under **Sec 4 (2).** Here, the courts, persons, parents, institutions or other bodies concerned with the child are enjoined to explore prospects for the correctional options. Incidentally, the Central and Local Courts (The Basotho Courts) have developed the custom by taking into account the best interests of the children whenever they award custodianship of children after divorce.[20] This indicates that the task is extended to prisons which may have a custodianship of a child. The legislation doesn't contemplate a notion of any child offender beyond redemption. This is clearly attested to under **Sec 161(1)**

[20] The Central and Local Courts have been established by the Central and Local Courts Proclamation No 62 of 1938. These courts are primarily dedicated for the administration of justice in accordance with the Basotho Customary Laws. The Laws of Lerotholi is a compilation of the customary laws albeit not exhaustively. Sec 34 of these laws gives the local courts a jurisdiction to make divorce orders where parties are customarily married. The traditional practice was that the custodianship of the children was awarded to the father since the children are regarded to belong to his family. Nowadays the custodianship is determined on the basis of the best interest of the children.

which prohibits the imposition of a life or death sentence upon any person who was below 18 yrs at the time of the commission of the offence.

[96] The resultant practical implication would be that even if a child is, in accordance with **sec 235,** sentenced to a term of imprisonment exceeding the three (3) years, the prison authorities would still continue with his rehabilitation program until the mission is accomplished. It would thereafter, be logical for the authorities to facilitate for the earlier release of the child offender for his reunion with the family and integration into the society. Otherwise, there would be no justification for the child's continued detention and that would be inconsistent with the letter, the spirit and the purport of the Act.

[97] The decision to have a child released earlier than the custodial duration prescribed in the judgment would remain a prerogative of the Commissioner of the Correctional Service. This would be attributable to the fact that he would be the one entrusted with a responsibility of correcting the child and therefore, to determine when that has been achieved, and resultantly, to initiate through the Ministry, the logistics for the early release.

[98] Adv. Sakoane had, in one in his representations intimated that the procedural rights of A3 and A4 could have been compromised by the absence of a legal representative to have advised them accordingly and presented their case before the

court. He maintained that the degree of the awareness which an accused child should, in terms of **Sec 147** have, in order to have a reasonable command of the basics for presenting his defense, would indispensably require the assistance of a lawyer. He sought to somehow persuade the court to rule that child offenders should be represented to guard against possibilities of a miscarriage of justice to the detriment of the best interests of the child.

[99] There is merit in the proposition of law advanced by the counsel regarding a need for a legal representative in cases of the accused child. The court, however, thinks that his learned view on the subject has been largely inspired by the decision in the South African case of **S v FM (Centre for Child Law as *amicus curial*) 2012 4 AU SA 351 (GNP).** He had referred the court to it. The essence of the assignment before the court in that case, was to interpret **sec 276 (1) (b) of the Criminal Procedure Act 51 of 1977, sec 85 of the Child Justice Act 75 of 2008 and Sec 28 (2) of the South African Constitution[21];** to determine if the imprisonment imposed pursuant to the said **Sec 276 (1) (b)** was subject to automatic review even if the child was legally represented at the trial. The court arrived at a conclusion that in recognition of **Sec 28 (2) of the Constitution,** the case was subject to automatic review for the ascertainment of the compliance with the notion of giving effect to the best interest of the child.

[21] The section provides for the paramouncy of the child best interest in every matter concerning the child not least his or her collisions with the criminal justice.

[100] The court whilst sympathetic to the idea that a representation by counsel could in the circumstances of **Sec 147** be indispensable, refrains from pronouncing itself on that question. The reason for the decision is influenced by **Sec 148 (1)** which provides that a child **may** have a legal representation of his choice and at his own costs at any proceedings under the Act. Moreover, the Act seems to introduce a greater semblance of inquisitorial proceedings in the litigation in which a child is accused of having been in collision with the law. This could be indicative that the Inquiry Magistrate and the Trial Magistrate are entrusted to appraise the unrepresented child about the basic essentials and his rights in the conduct of his defence. In any event, the understanding is that the Act prescribes for emphasis on substantial justice in any case involving a child rather, than on legal technicalities.

[101] On an extra note, the court recognizes the **Children Protection and Welfare Act No.7 of 2011,** as a recent landmark legislative enactment which originates from the local initiative. It is, characteristically, comprehensive and very methodical in seeking to address the socio-legal concerns of a child through the process of interfacing the traditional and the international systems for the sake of the best interests of the child. In this celebrative spirit, however, there are some provisions in the Act which should as a matter of urgency be revisited for a consideration of their amendment.

[102] To mention a few, the multiplicity of vital roles assigned to the probation officer and a disregard of the easily and permanently available sources of the evidence required, is destined towards a logistical nightmare. History stands as a testimony of this fact.

[103] **There** shall always be a scarcity of resources such that it is not conceivable that this would change in the nearest future. One can only wish that the legacy in the subordinate courts and the police to attend work with little or no reliance on the Government vehicle and orders for the hotel accommodation, food and beverages could be bequeathed to their support agencies and accepted as such. It is already a frustrating experience for the magistrates to wait for social inquiries and the pre sentence reports; at times for years, due to the well known phenomenon of the absence of the vehicles and the other stated facilities.

[104] The **sec 111 (1)** power of the Inquiry Magistrate to collaborate with the police, the witnesses and the prosecutor to determine the sufficiency of evidence against a child offender appears to foundationally undermine the constitutional impartiality of a judicial officer. This could in the near future land the administration of justice into disrepute. There must be a clear separation of roles between the Judiciary and the law enforcement agencies. Otherwise, the constitutional standing of the Judiciary under **sec 118** and its role in the administration of the fair trial rights under **sec 12 of the Constitution** could be

seriously compromised. The case of **South African Association of Personal Injury Lawyers v Heath, Willem Hendrik & 3 ors CCT/27/00** illustrates the constitutional imperatives to have the judicial officer's functions separated from those of other agencies.

[105] The Court finds that the procedural rights of A3 and A4 which are provided for in the Act have been violated and it is accordingly ordered that:

1. The proceedings are set aside in so far as they relate to A3 and A4;

2. New proceedings should be started *de novo* against A3 and A4 before another Magistrate duly designated by the Chief Justice to preside in the Children's Court as provided for under **sec 133 (2);**

3. The Inquiry Magistrate based procedure should be followed in the future sitting over the case;

4. A3 and A4 should as a result, be released from custody on the appropriate conditions which will ascertain their attendance to their future trial;

5. The proceedings are as they relate to A1 and A2, held to have been in compliance with real and substantive justice and, therefore, confirmed including the verdicts and the sentences imposed upon each of them;

6. The Chief Magistrate should advance to the Chief Justice the names of the magistrates who would preside in the Children's Court;

7. The Chief Magistrate should further collaborate with the Ministries of Justice, Social Development, Finance and the relevant organizations for working out the logistical and the fiscal implications on the required increase in the establishment list and other operational facilities towards a countrywide meaningful implementation of the Act;

8. The order is to be served upon the Officer Commanding Correctional Services in the district of Quthing.

E.F.M. MAKARA
ACTING JUDGE

For Crown : Adv. Khoboko
For A3 and A4 : Adv. S Sakoane

Copy: The Director of Public Prosecutions
The Chief Magistrates
The Magistrate – Quthing
All Magistrates
All Public Prosecutors
The Director of Prisons
O/C Police –Quthing