

# CASE NOTE

## The automatic review of child offenders' sentences

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*This case note considers the automatic review of child offenders' cases. Adult offenders' cases go on 'review in the ordinary course' in limited circumstances, but section 85 of the Child Justice Act aims to provide automatic review in a wider range of cases. The wording of section 85 and how it should be read with the Criminal Procedure Act has caused interpretational difficulties. Two cases have provided answers to certain questions: Do all cases regarding children under 16 years go on review? Do all cases regarding custodial sentences (that are not suspended) go on review, regardless of the experience of the magistrate, whether it was a regional court that issued the sentence, the length of the sentence and even if the child was legally represented? The courts have answered these in the affirmative. In reaching these conclusions, the courts have interpreted the law within the context of the Child Justice Act as a whole, and within the provisions of section 28 of the Constitution.*

The North Gauteng High Court, Pretoria, has described the Child Justice Act (CJA) as having introduced a comprehensive system for the treatment of children in conflict with the law; one that represents a decisive break with the traditional criminal justice system.<sup>1</sup> Under the CJA 'the traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law ... and reintegration of the child into the community'.<sup>2</sup> Whilst this is certainly true as an aspirational and operational departure point for the CJA, in reality the courts have experienced some difficulties in determining when the Criminal Procedure Act (CPA) is to be read together with certain provisions of the CJA, and when not. The issue of automatic review of sentences of children has proved to be a particularly thorny issue for interpretation by the courts.

This article begins by explaining how 'review in the ordinary course' works for offenders in the

mainstream criminal justice system, how the provision for 'automatic review' was conceptualised, and how it differs from 'review in the ordinary course'. The article then goes on to discuss the deliberations regarding automatic review, both by the South African Law Reform Commission and in parliament. This discussion is provided as a backdrop to inform the reader, but would not be of assistance to the courts in the exercise of statutory interpretation, because the Supreme Court of Appeal has found that 'little purpose is to be served by speculation as to the intention of parliament'.<sup>3</sup> The article explains Section 85 of the CJA, and identifies the problems regarding its interpretation, before discussing the cases. The judgments of two full benches of the High Court in the cases of *S v FM* and *S v LM* are then closely examined. The contextual approach followed by both courts in coming to their conclusions, as well as their attention to children's constitutional rights, is evaluated at the close of the article.

### IN THE ORDINARY COURSE

South African criminal procedure affords some offenders the right to have their cases 'reviewed in

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the ordinary course' under the Criminal Procedure Act 51 of 1977. This unique provision requires the records of the cases eligible for review to be typed up and sent to a judge of the High Court.<sup>4</sup> Lawyers describe this procedure as being 'sui generis', which means 'one of a kind', because although it is referred to as a review it is in fact closer in nature to an appeal, as the reviewing judge has powers that go beyond the usual review. The procedures are set out in sections 302-304 of the CPA. The judge reviews the record in chambers, and must determine whether the proceedings were in accordance with justice. If the judge is uncertain as to whether the required rules were complied with, s/he will seek information from the magistrate, who must respond to the inquiry. In some cases the opinion of the Director of Public Prosecutions may also be sought. If the judge finds that the proceedings were in accordance with justice s/he issues a certificate to this effect. If it appears to the judge that the proceedings were not in accordance with justice, or if doubt about this exists, s/he places the record before a court comprised of two judges, which sits as a court of appeal. In important cases, the deputy Judge President may convene a full bench of three judges.<sup>5</sup> This process has proved to be a protective measure, particularly for unrepresented accused persons, and has also promoted consistency in sentencing.<sup>6</sup>

Section 302 of the Criminal Procedure Act (CPA) is headed 'Sentences subject to review in the ordinary course' and it delineates the types of cases that are included within its ambit. Essentially there are three considerations – the type of sentence, the experience of the judicial officer who passed the sentence, and a requirement that the offender was not legally represented. The sentences to which the review procedure is applicable are imprisonment (including detention in a child and youth care centre) for a period exceeding three months if the judicial officer has been a magistrate for less than seven years, or exceeding six months if s/he has been a magistrate for longer than seven years.

## DELIBERATIONS ABOUT THE CHILD JUSTICE BILL AND AUTOMATIC REVIEW

When drafting the Bill that would culminate in the Child Justice Act (CJA), the South Africa Law Reform Commission (SALRC) considered the 'review in the ordinary course' provided by section 302 of the CPA to be insufficiently protective of the rights of child offenders to be detained as a measure of last resort and for the shortest appropriate period of time.<sup>7</sup> This was based on reports by monitors and social workers who had found numerous cases of children serving prison sentences because they could not pay paltry fines. Such sentences escaped High Court scrutiny because they were short sentences, were imposed by longer serving magistrates, or because the child had been legally represented.<sup>8</sup> The SALRC's proposed Bill therefore extended automatic review to any residential sentence, regardless of the length of the sentence, the experience of the magistrate or whether the accused was represented.<sup>9</sup>

Although the Child Justice Bill (CJB) was first introduced into Parliament in 2002 it was not until 2008 that the final deliberations occurred.<sup>10</sup> The relevant clause of the CJB looked similar to the final version of section 85. The minutes of the Justice and Constitutional Development parliamentary portfolio committee (the portfolio committee), as recorded by the Parliamentary Monitoring Group (PMG), indicate that the intention was that there would be automatic review of 'decisions from the lower courts.'<sup>11</sup> By this stage, the clause had been altered to provide different rules for two age categories – below 16 years and between 16 and 18 years – to bring it in line with an amendment that had been made to the Criminal Procedure Act regarding the rules for appeal.<sup>12</sup>

It is clear from the PMG minutes that the portfolio committee intended that *all* sentences imposed on children below the age of 16 years should go on automatic review, whilst 'any custodial sentence' imposed on a child in the category 16 to 18 years should be so treated. The

PMG minutes also confirm that the portfolio committee considered the automatic review to operate regardless of whether the child was legally represented, and in any case, as was pointed out at the portfolio committee hearings, all children dealt with in terms of the CJA would be legally represented.<sup>13</sup> It appears, though it was not crisply stated by the portfolio committee, that the clause that would eventually become section 85 of the CJA would render the operation of section 302 'review in the ordinary course' redundant. The lack of clarity about whether section 302 of the CPA continued to have any relevance to child offenders drifted into the wording of section 85, and has subsequently caused difficulties in interpretation for courts working under the operation of the new law.

The above deliberations have been included in this article so that the reader might understand what the aim behind the provision was, but the parliamentary debates cannot be used to guide interpretation of the CJA. The Supreme Court of Appeal, in *Natal Joint Municipal Pension Fund v Endumeni Municipality*<sup>14</sup> has made it clear that the courts will restrict their inquiry about the meaning of a particular section in an Act to the words actually used in the provision under scrutiny. Although lawyers often attempt to adduce evidence of what was intended by the legislature, or the drafter of the laws, the court deemed this to be unhelpful. This approach was more recently affirmed in *Director of Public Prosecutions, Western Cape v Prins and Others*.<sup>14</sup> In that case the court was called upon to interpret the Criminal Law (Sexual Offences and Related Matters) Amendment Act, insofar as it failed to provide penalties for sexual offences. The court rejected the various explanations as to what the legislature had intended, and instead relied on the fact that the legislation evidently anticipated that if offenders were convicted of sexual offences, they would be sentenced. However, while the inevitable starting point is the language of the provision, the context and the purpose of the law are also important, as will be demonstrated in the approach adopted by the courts in the two cases discussed below.

## AUTOMATIC REVIEW UNDER THE CHILD JUSTICE ACT 75 OF 2008

Section 85 of the CJA reads as follows:

Automatic review in certain cases

- (1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence-
  - (a) Under the age of 16 years; or
  - (b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre, providing a programme provided for in section 191(2)(j) of the Children's Act,

The sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.

The first apparent problem with section 85 is its reliance on chapter 30 of the CPA and the specific reference to section 304. Chapter 30 is entitled 'Reviews and appeals in criminal proceedings in lower courts' and it deals with the procedure on reviews and appeals. If this new automatic review rule envisaged in section 85 of the CJA was supposed to replace the old rule in the CPA, why did section 85 make chapter 30 apply? The answer to this lies in the fact that although the CJA introduced a new child justice system, it lies on the bedrock of the criminal procedure laid out for all criminal matters in the CPA. Thus, not every detail of procedure appears in the CJA. For example, plea procedures are not spelt out in the CJA, but a child pleading to a charge would do so according to the procedures set out in the CPA.

Similarly, although section 85 indicates what triggers automatic review, and sets out the special rules, the procedure of how such reviews are to be undertaken are detailed in chapter 30 of the CPA

and are not repeated in the CJA. That is the reason why section 85 refers to chapter 30, and to section 304, which deals with the procedure of review. Section 4 of the CJA explains that the CPA applies except insofar as the CJA provides for amended, additional or different provisions or procedures. Schedule 5 to the CJA sets out in tabular form how the CJA is to be read together with the CPA, and how all the sections relating to review procedures are to be read with sections of the CJA. The schedule should be clearer that section 302 (the procedure for 'review in the ordinary course') is superseded by the new section 85.

Other interpretational difficulties arise from the wording of section 85. These include whether legal representation of the child has any relevance (as the section is silent on this issue), and whether the words 'criminal proceedings in the lower courts' include regional courts within its ambit. A further problem is the fact that section 85 includes only a term of imprisonment that 'was not wholly suspended'. The old section 302 of the CPA did not include this limitation, giving rise to the question whether the CJA has in fact reduced the rights of review of cases involving children in the 16 to 18 year old category.

The CJA came into operation on 1 April 2010 and it was not long before the courts began to experience difficulties in interpreting section 85. In a judgment of the Northern Cape High Court, Kimberley, *S v Fortuin* [2011] ZANCHC 28,<sup>17</sup> Judge Olivier grappled with the question whether section 85 of the CJA could be read alone, without reference to section 302 of the CPA. The judge found that the requirement in section 302 that offenders who are legally represented are excluded from review could not logically be expanded to apply to section 85 of the CJA, because under sections 82 and 83 of the latter Act, the child is always assisted by a legal representative. This approach was endorsed by other High Courts in the Western Cape, Eastern Cape and Free State.<sup>18</sup>

## The case of *S v FM*: A constitutional reading of automatic review arising from regional courts

The question of whether section 85 applies in relation to cases from the regional court as well as the district level of the magistrate's court came up in the course of a special review of a case that was referred to the North Gauteng High Court, Pretoria. The regional court magistrate was uncertain as to whether regional court cases should be sent on automatic review. Due to the importance of deciding the proper interpretation of the clause, the Deputy Judge President convened a full court to hear the matter. The case is reported as *S v FM* 2013 (1) SACR 57 (GNP). The crime was a serious one and therefore had been heard in a regional court. The accused, who was 14 years old at the time of the offence, had pleaded guilty to 'an act of sexual penetration' of an 11 year old girl who was unable to consent to sexual intercourse due both to her age and the fact that she was mentally disabled. A crime of this nature would attract a sentence of life imprisonment for an adult under the minimum sentences legislation, but that legislation has never applied to child offenders below 16 years of age, and since the case of *Centre for Child Law v Minister of Justice* [2009] (2) SACR 477 SACR 477 (CC) no longer applies to persons who were 16 or 17 years of age at the time of the commission of the offence. The regional court had heard from the probation officer's report that the boy's home circumstances were impoverished, he had dropped out of school and started using drugs, including nyaope (a mixture of dagga and heroin). The court had set a sentence of ten years effective imprisonment, plus a further five years suspended on certain conditions.

The Centre for Child Law was admitted as *amicus curiae* (a friend of the court). The legal representative of the accused, as well as counsel for the *amicus curiae*, argued that section 85 applies to cases decided by the regional court, because the words 'lower courts' in that section includes both the district and regional courts, and that section 85 of the CJA should be read alone, without reference to section 302 of the CPA. The state argued, on the contrary, that on their reading of the law only the

cases involving sentences of detention longer than three months or six months (depending on the length of the experience of the magistrate concerned) would go on automatic review. As a general rule, regional courts are presided over by more experienced magistrates. Furthermore, the state pointed out that a child accused sentenced to a term of detention would also have the right to appeal without first applying for leave, and that automatic review was therefore unnecessary for this category of offenders.

Judge Tuchten, writing for the full court,<sup>20</sup> explained that interpretation must be conducted in a contextual manner in the light of the document as a whole.<sup>21</sup> The apparent purpose of the document is important. A sensible meaning is to be preferred over one that leads to insensible results or undermines the apparent purpose of the document, though a court should not be tempted to stretch the meaning of the actual words of the text too far in the attempt to reach a sensible outcome.<sup>22</sup> When a statute is capable of different meanings, a court should prefer the interpretation that better promotes the spirit, purport and objects of the Bill of Rights.<sup>23</sup> Having laid this groundwork, Judge Tuchten then examined the legal framework in a contextual manner. He concluded that 'current legal policy favours a high degree of scrutiny over sentences imposed on child offenders.'<sup>24</sup>

The judge went on to undertake an analysis of the provision against the constitutional rights guaranteed to children. He considered that section 28(1)(g) of the Constitution gives every child the right not to be detained, except as a measure of last resort, in which case the child may be detained only for the shortest appropriate time. He noted that the preamble to the CJA refers to the Constitution, the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (ACRWC). In particular, he observed that article 37, regarding detention as a measure of last resort and shortest appropriate period of time, is framed in similar terms to section 28(1)(g) of the Constitution, and he drew attention to the fact that the ACRWC provides that the essential aim of the treatment of every child found guilty of infringing the penal law

shall be his or her reformation and reintegration into his or her family, and social rehabilitation.

Judge Tuchten then considered the arguments of counsel in the light of this constitutional and international law framework. He pointed out that the state's argument was criticised by counsel for the accused and the amicus curiae on the ground that it would exclude from the ambit of automatic review the cases of children found guilty of more serious cases, which are usually heard in the regional courts, and carry the heavier sentences. This would be contrary to the constitutional injunction of, at the very least, ensuring that the child accused is sentenced to the shortest appropriate period of time in detention. The court found that there was merit in these criticisms. One of the objects of the CJA is 'to provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults.'<sup>25</sup>

The court also dealt with an ancillary argument of the state that the broad interpretation of section 85 being sought would add unreasonably to the workload of 'an already overburdened and under-resourced justice system.'<sup>26</sup> The court accepted that this might be so, despite a lack of evidence before it, but was of the view that this should not carry weight. The court found that the solution to this problem, consistent with the Constitution, is that the resources must be provided if the legislature requires the task to be done.

The court ultimately found that, at a linguistic level, there was merit in the state's arguments, but that a contextual and constitutional interpretation favoured the arguments of the defence and the amicus curiae. Over and above section 28(1)(g), Judge Tuchten also made it clear that the best interests principle included in section 28(2) of the Constitution applies to children who have collided with the law, and while it does not necessarily override other considerations, the paramountcy principle 'does call for appropriate weight to be given to the best interest of the child.'<sup>27</sup> The court accordingly came to the conclusion that section 85

of the CJA should be interpreted to provide for automatic review in respect of all children who are sentenced to a period of imprisonment or detention in a child and youth care centre, including children who are sentenced in a regional court.

The court then considered the facts of the case and determined, taking all factors into consideration, that the sentence was too severe, and reduced it by removing the suspended sentence that had been added to the ten years of imprisonment.

### **S v LM: A constitutional interpretation of several aspects pertaining to automatic review**

The Western Cape High Court also set up a full bench to consider the interpretation of section 85 of the CJA. The full bench issued directions inviting interested parties to join as *amici curiae*. The Community Law Centre at the University of the Western Cape and the Centre for Child Law at the University of Pretoria both responded to the invitation, and filed separate submissions. The Director of Public Prosecutions in the Western Cape and the representative of the accused also filed submissions, and all parties presented oral argument.<sup>28</sup>

In contrast to the offence committed by the child FM, the offence which the child LM had committed was very minor. He was 15 years old and was convicted in the child justice court held at the magistrates court in Cape Town, of possession of one 'stop' of dagga.<sup>29</sup> He was legally represented and pleaded guilty to the offence. The court postponed the passing of sentence for one year on the conditions that the accused had to submit to the supervision of a probation officer and had to appear before the court if called upon to do so.<sup>30</sup> In practice, the sentence works like a conditional caution; if the offender does not breach the conditions and commits no further crimes during the postponement period, no sentence will be put into effect.

The magistrate had been uncertain whether, despite the accused being below the age of 16

years, such a sentence should be referred to automatic review. He accordingly sent it on special review for consideration by the High Court. The full bench issued directions, setting out a range of questions that counsel should respond to in their arguments. These included the following:

- (a) Are all matters in which children under the age of 16 years at the time of the offence are sentenced, subject to review, notwithstanding that the accused was legally represented?
- (b) Are cases where children were 16 years or older, but under the age of 18 years at the time of the commission of the offence, and sentenced to imprisonment or detention in a child and youth care centre, subject to review, notwithstanding the length of the sentence or that the accused was legally represented?
- (c) Are the provisions of s 85 of the CJA applicable to children sentenced by a regional court?
- (d) What is the effect of s 85 on a suspended sentence where such a sentence would otherwise be reviewable in terms of s 302 of the CPA?

With regard to the question of legal representation Judge Henney, writing for the full bench,<sup>31</sup> found that the section should be interpreted within the context of a proper interpretation of the CJA, taking into account the principle enshrined in section 28(2) of the Constitution that the child's best interests are of paramount importance in all matters concerning a child. The court went on to undertake a constitutionally compliant reading, making reference to Constitutional Court judgments that require judicial officers to read legislation, where possible, in conformity with the Constitution.<sup>32</sup> Courts must prefer interpretations of legislation that fall within constitutional bounds, provided that such an interpretation is reasonable.<sup>33</sup> Judge Henney found that where it is unclear whether the CJA or the CPA is applicable, the CJA must prevail. This is consistent with the idea that the CJA seeks to establish a separate criminal justice system for children. Following this general approach, the court worked its way through the

arguments, and set out its conclusions in summary form at the end of the judgment<sup>34</sup> as follows:

All cases are subject to automatic review in terms of the provisions of section 85 of the CJA where a child was

- (a) below the age of 16 years, or
- (b) 16 years or older and under the age of 18 years, if the sentence to imprisonment was not wholly suspended, or to detention in a child and youth care centre, or
- (c) if sentenced to a period of imprisonment after a suspended sentence was put into operation.

This would be irrespective of:

- (i) the duration of the sentence or the length of time the judicial officer had held the rank of magistrate; or
- (ii) whether the child was legally represented; or
- (iii) whether the child was sentenced by a regional court.

The judgment also made it clear that section 302 of the CPA does not apply to child offenders. As in the *FM* case, the state had argued that the interpretation proposed by the defence and the amici would cause the High Court to 'be flooded with reviews, resulting in unmanageable workloads for judges and other court staff'.<sup>35</sup> In this instance, the Minister of Justice and Constitutional Development put up some statistics in support of this claim. The court was unconvinced by the figures, and found that the fear raised by the Minister was unwarranted. Justice Henney went on to find that even if the workload is increased, 'this fact alone cannot serve as a legally and constitutionally permissible reason not to have these matters considered on review'.<sup>36</sup> The proceedings in relation to the child *FM* were found to be in accordance with justice.

## CONCLUSION

The conclusions reached in both *S v FM* and *S v LM* are, in the author's view, correct. However, it

is notable that not only did the courts reach the correct conclusion, but they also both applied an approach to statutory interpretation that relies on a contextual and constitutional analysis of the provisions. Using this expansive approach, both courts looked beyond section 85 to the broader aims of the CJA, and undertook their interpretation with those objectives in mind. Furthermore, both courts were aware of the Bill of Rights, and the importance of its application to their endeavours. Judge Tuchten, in particular, went to great lengths to consider that although there were different arguments before him that had merit from a textual point of view, the court was enjoined to prefer a reading which was in keeping with the constitutional injunction that detention must be a measure of last resort and for the shortest appropriate period of time. He also made the important point that the wording of section 28(1)(g), dealing with the last resort principle, was closely based on the wording of the Convention on the CRC, and that the ACRWC aims to reintegrate child offenders. Judge Henney relied on the best interests principle, perhaps because the sentence on review in the *LM* matter did not involve detention, thus section 28(1)(g) was less on point.

The courts in both of the judgments discussed in this case note were very much alive to the new philosophy regarding the Child Justice Act. They understood the importance of what Judge Tuchten referred to as 'the enhanced scrutiny of the case of the child accused contemplated by the CJA'. The judges saw the advantages of the operational thrust of section 85 – the automatic review of children's criminal cases in as wide a range of cases possible.

The decisions of the full bench are binding in their respective provinces, namely Gauteng and the Western Cape. These judgments are also persuasive in the other provinces. Furthermore, the legislature plans to write the courts' interpretations into the law, as evidenced by clause 44 of the Judicial Matters Amendment Bill [B7-2013], which was tabled before Parliament on 8 April 2013.<sup>37</sup>

The reviewing judges of the future will be the important ‘upper guardians’ of an effective child system. Their vigilance can indeed ensure that children’s best interests are protected in the child justice system, that detention truly is a measure of last resort, and, where unavoidable, that it is for the shortest period of time so that ‘every day a child spends in prison should be because there is no alternative.’<sup>38</sup>



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## NOTES

1. The Child Justice Act is the first piece of legislation in South Africa that provides a comprehensive system for dealing with children in conflict with the law. Prior to this, the ‘system’ for child offenders had to be gleaned from a piecemeal reading of fragments of different laws, read together with case law. The fact that children were to be dealt with differently from adults, particularly in relation to sentencing, has been recognised by the courts over many decades; see S Terblanche *Guide to Sentencing* Butterworths, Durban, 375, 384-394 (1999).
2. Bertelsmann J in *S v CKM and Others* NGHC (12 January 2012), at para 7.
3. *Director of Public Prosecutions, Western Cape v Prins and Others* 2012 (2) SACR 183 (SCA) para 36, citing *Natal Joint Municipal Pension Fund v Edumeni Municipality*, 2011, 2, All SA 262 (SCA) para 20.
4. E du Toit, F de Jager, A Paizes, A Skeen and S van der Merwe, *Commentary on the Criminal Procedure Act*, Cape Town: Juta, 2009, 30-8.
5. *Ibid*, 30-11.
6. The history of the protection, and its importance in the protection of the partially illiterate and undefended accused, is included in an article entitled *On the system of automatic review and the punishment of crime*, which the editors describe as ‘the contents of a memorandum to the Hon. Mr Q de Wet (Judge President of the Transvaal) by two members of the Transvaal bench’, 79, 1962, *South African Law Journal* 267. The memorandum also stresses the need for consistency in sentencing.
7. This principle is enshrined in s 28(1)(g) the South African Constitution, and is derived from article 37 of the Convention on the Rights of the Child, 1989, which was ratified by South Africa in 1995.
8. SALRC *Report on Juvenile Justice*, Pretoria, July 2000, 197.
9. *Ibid*, 299.
10. For a discussion about the delays in the passing of the Child Justice Bill see A Skelton and J Gallinetti, A long and winding road: The Child Justice Bill and civil society advocacy, *South African Crime Quarterly*, 15, 3-10 (2008).
11. Mr Bassett, senior state law advisor, PMG minutes of a Justice and Constitutional Development portfolio committee meeting, ‘Child Justice Bill: deliberations on clauses 81 to 98’, 24 April 2008.
12. In terms of section 309B(1)(a) children were permitted to appeal their cases if they were below the age of 14 years old at the time of the commission of the offence, and this was later changed to 16 years old.
13. Ms Gallinetti (Child Justice Alliance) pointed out that ‘no child could waive his or her right to legal representation’. Mr Jeffery (ANC member and co-chair of the committee) ‘wondered if the reference to legal representative should not be taken out altogether’ (PMG minutes, 24 April 2008).
14. See note ii PMG minutes, 24 April 2008.
15. *Ibid*.
16. Act 32 of 2007.
17. This case was handed down by the Northern Cape High Court, Kimberley on 11 Nov 2011. It is unreported but is available on [www.saflii.org](http://www.saflii.org).
18. Namely *S v Ruiter* [2012] ZAWCHC 265, *S v CS* 2012 (1) SACR 595 (ECP) and *S v TS* 2013 (1) SACR 92 (FB). In *S v Nakedi* (2012) ZANWHC 5 the court found that section 85 should apply only to children not legally represented but this decision is, with respect, incorrect.
19. Criminal Law Amendment Act 105 of 1997.
20. J Molopa concurred in the judgment of J Tuchten.
21. *S v FM*, para 19.
22. These interpretational guidelines were developed by the Supreme Court of Appeal in *Natal Joint Municipal Pension Fund v Edumeni Municipality*, note ii, PMG minutes, 24 April 2008, para 18.
23. This principle was enunciated by the Constitutional Court in *Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd and Another* 2009 (1) SA 337 CC, paras 46, 84 and 107.
24. *S v FM* para 21.
25. Section 2(c) of the CJA.
26. *S v FM* para 34.
27. *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC).
28. The judgment was reported as *S v LM*, Faculty of Law, University of the Western Cape: Children Rights Project of the Community Law Centre and Others as Amici Curiae, (1) SACR 188 (WCC) 2013.
29. Dagga is the colloquial term for marijuana and one ‘stop’ is a very small quantity for personal use.
30. Section 78(1) of the CJA read with s 297(1)(a)(i) of the CPA.
31. The other two judges were Desai J and Gamble. They concurred with Henney J.
32. *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors and Others v Smit NO and Others* 2000 (2) SACR 349 (CC), paras 22-23.
33. *De Lange v Smuts NO and Others* 1998 (3) SA 785 (CC).
34. *S v LM* para 64.
35. *S v LM* para 63.
36. *S v LM* para 62.
37. An explanatory summary of the Bill was published in Government Gazette No 36347 of 8 April 2013.
38. Cameron JA (as he then was), in *S v N* 2008 (2) SACR 135 (SCA), para 7.