

ARE WE FAILING TO DELIVER THE BEST INTEREST OF THE CHILD?

Prof Herman Conradie
Department of Criminology
University of South Africa

1 Introduction

Children constitute the most vulnerable group in contemporary democratic South African society. On 22nd September 2002 Keppler (2002:5) reported that there were about 173 000 cases relating to child abuse on the roles of South African courts. One week later, on 29th September 2002, Smith (2002:11) reported findings of the Ciet study, indicating that from a group of 9000 children one in four reported that they believe condoms cannot prevent AIDS/HIV-infection. About 14 percent of these young people believed that sex with a virgin is a cure for HIV/AIDS – and one-third of them were convinced that they have had AIDS already during the time of the research. Asked about the prevalence of sexual abuse in Gauteng during the Ciet Africa study (South African Human Rights Commission 2002:8-9) 77 percent of the respondents said sexual violence is common or very common. Twenty percent of the female and 13 percent of the male respondents under 18 years of age reported suffering from some form of sexual violence. Sexual relationships are arguably the most complicated humans can engage one another. Adults fail in these relationships – even under normal circumstances. How much more will the negative impact be on children when their first experiences with their sexuality are negative ones.

Eight years into the new dispensation, children seem to be the forgotten South Africans. More than half of the population is under 18 years of age. Crimes against them are increasing and becoming more heinous. The Minister of Social Development, S. Skweyiya (2002) stated at an international conference on child well-being, that we are not living up to the standards set by the constitution concerning women and children. The seriousness of this situation was also verbalized by the Premier of Polokwane Province, Adv. N. Ramatlodi (2002) when he stated at a provincial conference on crimes against children: The species that eats its own children is doomed to extinction. He encouraged the participants in the summit to blow the whistle – even when they spot parenting to fail. Any society should do anything and everything to protect its children. Therefore they deserve more protection than any other segment of society. To ensure this, NGO's, CBO's, academic institutions, government departments and even business organizations are cooperating to achieve this goal. To aid this end, the National Crime Prevention Strategy calls for a multi disciplinary approach. However, we still seem to fail to ensure the best interest of the child.

In this article the emphasis is on the ways in which we are policing and adjudicating crimes against children in South Africa. To set the scene for achieving this goal, brief expositions of the state of the nation and the state of the children will be analyzed first.

2 The state of the nation

There are in excess of 42 million people in South Africa (Statistics South Africa 1996, p. xx), speaking 11 different languages. Our nine year democracy was built on promises of housing, jobs, education and a better life for all. However, the government inherited a bankrupt and devastated society and could not deliver. Their problem was exacerbated by the coming of HIV/AIDS. The coming of HIV/AIDS coincided with the transformation to democracy. The vast majority of the HIV/AIDS-victims are in their economically productive years. The fact that the promises could not be delivered and their own hopes of contributing to the new society, because they are on 'death row', leave them, closing to 20 percent of the population, in despair.

We have 1126 police stations, 747 courts and 273 prisons in South Africa. We have a seven percent conviction rate. This means that 93 percent of all those who are accused in a court of law, walk out free. Notwithstanding this fact, our daily average of incarcerated persons were 181 000 during September 2002. This figure represents 80 percent overpopulation. Another startling statistic is that 65 000 of the 181 000 are awaiting trial prisoners. It cost the tax payers R124,00 per day to keep one inmate incarcerated. Eighty percent of those who are released, fall back into crime. 3500 Incarcerated persons have been sentenced to life imprisonment.

Regarding the children: we have 42 Family-, Child- and Sexual Offences Units and Child Protection Units of the South African Police Services looking out for our children. They receive in excess of 35 000 reports per annum. About 50 percent of the reported incidents go to court – and the conviction rate fluctuates between 50 percent and 60 percent (Kruger 2002). Furthermore, we have 176 courts especially prepared for child victim cases. 18 Million Children in South Africa are under 7 years of age. Sixty to seventy percent of all children of South Africa live in extreme poverty. One in five children suffers from malnutrition. In 2002 we had 420 000 orphans – with an adoption rate of 0,1 percent. In 2005 we will have at least 800 000 children orphaned by HIV/AIDS alone. Because of the devastating effects of HIV/AIDS, more and more of our children will be taken care of by grannies and/or chronically ill parents. The net effect of this will be more and more child-headed families (Simkins 2002). Meanwhile, more and more crimes against the children are being reported – despite the vigorously propagated human rights culture. Sadly, the children themselves are becoming more and more involved in crime themselves – we have 3345 children incarcerated and awaiting trial for rape.

It was also the spreading of HIV/AIDS that led to the sexualizing of children by adults. Adults started giving them 'sexual education' and taught them how to use condoms – while adults themselves notoriously struggle to behave according to the sexual mores of society, they expect children to do so. The condomizing message regarding sex made sexual behavior overt. By propagating this message, adults have been making children sexually active – not preventing HIV/AIDS. The Abstain-Be Faithful-Comdomize-campaign in South Africa are supposing that all our children are sexually active. This might encourage those who have not been sexually active to think they should be sexually active. This campaign can only be successful in encouraging the use of condoms during sexual encounters and not in preventing

anything. The wide-spread occurrence of HIV/AIDS in our society encourages people also to look for ever-younger sexual partners – based on the premises that the chances of infection are less the younger the partner is.

Regarding the child abusers it should be noted that they come from all walks of life. Usually it is the coerced or willing participation of at least one violent and one silent partner that makes a crime against a child possible. These culprits are known by social scientists for their low frustration tolerance. They focus their attention on the child who ‘behaves’ by not ‘back chatting’ them. The abusers are caught in dysfunctional communication patterns and they lack the ability to solve interpersonal conflict. This is the reason why they tend to react with punishment as a first mode of conduct. This trait is linked to their inability to control their impulses. They change work more often and use more alcohol than the non-abusers. They live socially isolated lives and were deprived of basic mothering. They are very difficult to spot because in public they manifest model behavior – especially towards children. They can be helped – it we can get them to speak out. Poverty, overpopulation of certain areas, patriarchy, cultural convictions, ideologies sexualizing girls, and certain child care givers, have been positively linked to the causes of crimes against children in South Africa.

All these factors call for long term governmental prevention strategies against these factors – and they should include all government departments and not only focus on the more glamorous, short term and public-pleasing policing practices only.

3 Policing practice

The South African Police Services is the first line of reporting of crimes against children. Therefore they have to respond with empathy, patience, and professional sensitivity to a complaint. They receive the complaints, arrest the alleged perpetrator, oppose bail, investigate the criminal complaint, gather evidence, forward the case to the prosecution, and keep the victim apprised of the progress in the case. Once a case is lodged with the police, it becomes the State’s case (South African Law Commission 2002:18-20).

The South African Law Commission (2002:57-60) found that police investigation procedures are insensitive to the state in which the child was when he/she made the statement of the police or when he/she testified in court. The police’s understanding of the child’s cognitive development as a complainant and a witness, is limited. They also registered the following findings regarding the policing of crimes (especially sexual offences) against children: they fail to comply with the National Police Guidelines and the Multi-Disciplinary Protocol – and they have only limited knowledge of the Protocols. They unduly exercise discretion with cases involving children below age 16. The SALC also found that the location of the Child Protection Units make their accessibility limited to children who are sexually abused. Statements from children are taken by inexperienced, ordinary police officials instead of the well-trained, specialized Child Protection Unit members. This has a negative impact on the judicial outcome of cases. Poor investigation of cases by police officials are due to work overload. The child victim and his/her parents/care givers receive poor feedback from the investigating officers after lodging a

complaint. Often evidence gets lost between the examining doctor's office and the police station. This happens because the J88-forms are sometimes handed to the children and their parents/care givers to take to the doctor and back to the police station after the medical examination has been conducted.

Where a relationship exists between the perpetrator and the victim, the police tend not to investigate and prosecute the case, irrespective of the age of the girl. They are viewed as a false charge of rape.

Owing to the location of informal settlements, the police find it difficult to trace complainants and perpetrators alike. This impact negatively on arrest and investigation. The poor statements from police also hamper effective assessment of cases by prosecutors when exercising discretion to prosecute or not.

To enhance the best interest of the child regarding policing, these services need to be upgraded and expanded. It is untenable that there are not enough resources for these overworked and stressed out police officials to conduct their work in a manner suitable to the needs of the children. One way of upgrading and expanding is to include in the policing team also a lawyer, as social worker counselor and a pastor. The lawyer would have the task of even from the reporting stage, to look out for the best interest of the alleged child victim. The social worker's task would be to make a professional assessment of the family situation even at the time of the reporting. The task of the pastor would be to offer religious counsel to the victimized child. The presence of the counselor could alleviate the immediate and long-term impact of the victimization of the crime on the child victim. This would be a one-stop service looking out for the best interest of the child. This team is experts are needed because in 90,4 percent of the incidents, the victims are being violated by persons whom they know (De Kock 2002:13).

4 Court hearing practice

Between January 1996 and June 1997 a total of 4046 dockets pertaining to children had been finalized by in the courts of Gauteng Province. In only 1324 (32,7%) of these cases the courts handed down convictions. The majority of the courts handed down imprisonment as the preferred sentence (De Kock 2002:1 and 12).

According to Act 32 of 1998 the prosecution function vests in the National Prosecution Authority (NPA). The role of the NPA is to ensure justice where the law has been transgressed. In considering prosecuting, the NPA is required to consider the possibility of successfully diverting the perpetrator for the criminal process, the seriousness or lack of it, and even discretionary grounds like compassion. The offender's presumed innocence should also be considered during the evaluation to prosecute or not. It is also the responsibility of the prosecutor to prepare the child for the court hearing *inter alia* by going through the statement with the victim and clear any possible inconsistencies or statements that are not clear. The court procedure needs to be explained to the victim and familiarize the child with the court room environment. The prosecutor also has to ensure that – if needed – the

translator and intermediary are prepared and that all the necessary documentation and exhibits are present during the court hearing. The role of the complainant and his/her parents or care givers are limited to that of a State witness. Once the accused has been arraigned and has pleaded to charges, a case may not be withdrawn (South African Law Commission 2002:20-24).

Based on the Bill of Rights (1994) the courts in South Africa have to ensure that the following rights of the child are secured:

Every child (that is a person under the age of 18 years) has the right to a name and a nationality from birth, to family care or parental care or alternative care, to basic nutrition, shelter, health care and social services. They also have the right to be protected against maltreatment, neglect, abuse or degradation. Under the Bill of Rights all children have the right to be protected against exploitative labor practices. They have the right not to be detained except as a last resort. They are entitled to insist that their best interests are of paramount importance in every matter.

The successful prosecution of an alleged perpetrator is based on the facts of the case established by the court according to the rules of the court. The guilt must be proved beyond reasonable doubt – even if the accused lies. This is why much is based on the evidence of the victim of what transpired. Once the court is satisfied that guilt has been proven by the evidence of the victim only, no medical evidence or expert witnesses are needed. However, the court should always remember that the victim is not on trial. Indeed, this is in the best interest of the child.

In the present system the accused perpetrator has the right to be confronted face-to-face by the alleged child victim. This is why many courts have adopted the practice of using intermediaries as well as closed circuit television to try to avert the fear of the child for the perpetrator. The first of these specialized court who are more child-friendly, came to be in 1993 in Wynberg, Cape Town. The objectives of these courts are to improve inappropriate and insensitive treatment of the victims of especially sexually abuse children (South African Law Commission 2002:25). In-camera proceedings, prohibition of publishing a child's identity, use of intermediaries, close circuit television and one-way mirrors, have been instituted in these special courts (South African Law Commission 2002:27-28). With the utilization of these technologies, the direct and scaring confrontation by the alleged perpetrator of the child victim, are being minimized.

However, this is not enough. Even the South African Law Commission (2002:57) found that the system as it stands, does not work for children – it is hostile towards them and traumatize them further. Furthermore, not all courts have these facilities available. This is why this confrontational style should be changed – in the best interest of the child – to the inquisitorial system. In such a system only the (well-trained) presiding officer of the court asks questions. The child is not even present and is not expected to be present. The well-known lie detection by means of voice stress analysis can be used to interview the child and the perpetrator prior to the court hearing. This can also replace cross-examination questions in these cases.

The South African Law Commission (2002:57-58) found that the capacity of the prosecutors, defense attorneys and magistrates to understand the cognitive development of the child as a complainant and a witness. The SALC also concluded that this limited understanding of the court officials result in insensitive treatment of the child and secondary victimization – and are not in accord with the best interest of the child.

The lack of proper prosecutorial services to look after the best interest of the child often leave them feeling marginalized by the criminal justice system. If the National Policy Guidelines are implemented properly, the secondary victimization of children would be averted. It is absurd that the prosecutors do not comply, especially when they are enforceable by the police. The high turnover within the prosecuting profession impacts negatively on the standard of prosecution in courts. The fact that there is a lack of experience in the prosecution of child abuse cases, increases the child's trauma during the case. Private waiting rooms are not available where the child and his/her parents/care givers can wait until their case is called. They have to wait in the corridor – with the perpetrator and his/her family. Postponements discourage the child and his/her family to continue with the case. Where courts are not equipped with closed circuit television cameras, the child is still forced to testify in the presence of the accused. Where these facilities are available, the use is at the discretion of the magistrate and not compulsory. The lack of the necessary preparation for the court, still results in it being a harrowing experience to the child. The acquittal of the accused is often not explained to the child and his/her family. Intermediaries are not always available. It hampers the treatment of the child in accordance with his/her age during testifying. Inordinate delays in the finalization of the cases hampers the child's healing and adds to his/her traumatization. The movement of cases through the criminal justice system negatively impacts on the public's confidence in it and may account for the low reporting rates, Victims cannot afford traveling costs to distant courts for trial. There are no post-trial programmes to deal with children who have been abused and traumatized by the criminal justice system.

5 Incarceration practice

To put it bluntly, the present system of incarcerating child abusers, boils down to the fact that the tax payers are footing the bill for the crime of the criminal. It cost the tax payer R124,00 per day to keep the perpetrator in prison. He pays nothing. Agreed, he loses his freedom of movement. This is not enough. It is in the best interest of the child victim – and society – that the perpetrator is allowed to pay his own way through prison. De Kock (2002:9) found that as much as 50 percent of the perpetrators of crimes against children claimed to have been employed prior to their incarceration. The only reason why we do not want him outside, is because society has deemed him too dangerous to walk amongst us. Therefore he needs to stay inside. However, once he has been found guilty, he does not lose his skills, knowledge and ability to work. He can continue with his work activities inside prison – and get paid for it market prices. If he needs more space than his one cell, he can hire more – and pay for it.

6 Conclusion

Criminologically speaking it is in the best interest of the child that the policing of these crimes be expanded and enhanced by adding to the investigating team the state funded services of a lawyer, a social worker, counselor and a pastor. It is also in their best interest that the inquisitorial system be implemented during the court hearing. Furthermore, it is in their – and societies – best interest that the criminals pay their own way and not rely on tax payers to support them. To these ends, the needed budget changes should be done as speedily as possible. Yes, the laws also need to be changed. Then we need to change them. All state departments should change their laws to be child-friendly. Only then can we claim convincingly to look out for the best interest of the child.

Research should be conducted to determine why men do not commit crimes against children. The findings should be utilized to enhance prevention strategies. Research should also focus on analyzing the court transcripts of the successful and unsuccessful outcomes of the court cases, one could determine who got away – and why. This research should be conducted as a matter of urgency.

There is nothing missing in children. Adults are the problem. There is no price too high to pay to ensure that our children reach adulthood without being violated physically, psychologically, emotionally, sexually – or otherwise. Any society should do anything and everything to protect its children. No piecemeal solutions will be effective. True long-term commitment is needed to curb crimes against children in South Africa. Better sooner than later. If we do not do it, we will be failing to serve the best interest of the child.

References

Bill of Rights. 1994.

De Kock, C. Docket analysis: crimes against children. Unpublished document.

Keppler, V. 2002. Kindersake veel vinniger verhoor. Rapport. Gauteng-nuus. Rapport, 22 September 2002, p. 5.

Kruger, S. 2002. Policing crimes against children. Leading a helping hand in fighting crimes against children. Summit organized by Limpopo Provincial Government, Department of Safety and Security and Liaison, The Ranch Hotel, Polokwane, 18-19 October 2002.

Ramatholodi, N. 2002. Keynote address. Leading a helping hand in fighting crimes against children. Summit organized by Limpopo Provincial Government, Department of Safety and Security and Liaison, The Ranch Hotel, Polokwane, 18-19 October 2002.

Simkins, C. 2002. The impact of HIV/AIDS on budget priorities in Gauteng Province. Gauteng Provincial Government. Unpublished presentation.

Smith, E. 2002. Seuns jonger as 16 grootste sekslagoffers, wys studie. Rapport, 29 September 2002, p. 11.

Skweyiya, Z. 2002. Keynote address. Children's well-being indicators; an international consultative conference. Eskom Convention Centre, Midrand, Johannesburg, 21-23 October 2002.

Statistics South Africa. 1996. Population census.

South African Human Rights Commission. 2002. Report on sexual offences against children: Does the criminal justice system protect children? April 2002.