CASE NO AR 359/2006
AR 360/206

IN THE HIGH COURT OF SOUTH AFRICA

NATAL PROVINCIAL DIVISION

In the matter between

THAMSANQUA NGCOBO **First Applicant**

BHEKI MCHUNU SHANGI **Second Applicant**

and

THE STATE **Respondent**

R E A S O N S F O R J U D G M E N T

LEVINSOHN DJP :

Both these cases were set down before this Court on 24th August 2006 as a matter of urgency. Each applicant sought the same relief, namely that the sentence that they be detained in a reform school be set aside. Precisely the same issue arises in each case and accordingly it was convenient that they be heard together. The Centre for Child Law, an

organisation committed to promote the best interests of children, particularly in regard to legal issues, applied for leave to join in the proceedings as an *amicus curiae*. This application was granted in the absence of objection from the applicants. The *amicus* was represented by Mr *Budlender* and the Court is indebted to him and to his client for the very helpful contribution they have made in these proceedings. The Director of Public Prosecutions of KwaZulu-Natal was represented by Ms *Blumrick*. We too are indebted to her for her input.

After hearing argument we ordered that they be released forthwith from custody. We indicated that reasons for this decision would be furnished later. These are the reasons.

The salient background facts in each case are the following.

[1] **Thamsanqua Ngcobo.** In October 2004 this applicant was arrested on a charge of contravening section 36 of Act 62 of 1955. He was found in possession of a jacket and a microphone which were suspected to have been

stolen. On 22nd February 2005 he was arraigned before a magistrate, pleaded guilty and was found guilty as charged. On 30th March 2005 he was sentenced to be detained in a reform school in terms of section 297(1)(d) of Act 51 of 1977. Pending transfer to a reform school he was to be detained in Westville Gaol. As at the date of the application he was still in detention there. In effect this applicant had spent approximately twenty-two months in gaol, part of this awaiting trial and the remaining period awaiting placement in a reform school.

[2] **Bheki Mchunu Shangi.** This applicant stated that he was 17 years of age. This is not possible since he gives his date of birth as 6th June 1987. He has been in custody at the Westville Prison since October 2004. On 21st January 2005 he was convicted of housebreaking with intent to steal and theft and sentenced to be detained in a reform school. As at the date of the application he had

not been placed in a reform school and has remained incarcerated in the Westville Prison.

The Criminal Procedure Act, No 51 of 1977, provides that a juvenile offender can be sentenced to be detained in a reform school. In given circumstances this is a most appropriate form of punishment. The *amicus* has pointed out that reform schools are administered by the respective provincial departments of education. They are not like prisons. Children have access to educational and recreational programmes in what the *amicus* describes as a "therapeutic environment". The *amicus* also points out and I quote from her affidavit : -

> "26.7 They are permitted to move freely within the parameters of the school, they are also allowed out with special permission, and can go home for school holidays. This is part of the process of reintegration, to ensure that they can return to the community after their sentences are completed. They have direct access to the assistance of social workers and psychological support services."

A further point that was emphasised by the *amicus* is that the Criminal Procedure Act provides that pending placement in a reform school the Court may order that the child in question be detained in a place of safety. It turns out that nowadays offenders are remanded to prisons to await placement. As is evident from the present cases they spend long periods there without being afforded any educational facilities whatsoever.

According to the *amicus*'s affidavit there is a major shortage of reform schools in the country. Manifestly this is a most unsatisfactory and undesirable state of affairs. It calls for drastic and urgent attention by the executive. Mr *Budlender* emphasised during the course of his argument that this type of sentence should not be turned into a dead letter. He drew attention to the constitutional duty of the executive to assist the judiciary in properly carrying out its functions. That means of course that resources must urgently be made available to establish new reform schools.

We were satisfied that both the failure to cause the applicants to be transferred to a reform school coupled with their prolonged incarceration in prison proclaimed that they should obtain relief. Counsel for the *amicus* referred us to the case of **State v Z and 23 Similar Cases** 2004 (1) SACR 400, a judgment of the Full Bench of the Eastern Cape Division. In that case the Court dealt with the problems which we have encountered *in casu*. The Court considered that it was entitled to deal with these matters on special review in terms of section 304. With great respect I agree entirely with the reasoning of Plasket J which is set forth at pages 414 to 416 of the report.

Accordingly we accept the principle that notwithstanding the fact that the lower court imposed a competent sentence if subsequent events occur which reveal that the sentence imposed is incapable of being carried into effect this Court can interfere on review.

It seemed to us that in the interests of justice it was inappropriate to set aside the sentence

imposed for manifestly that was a competent and appropriate one. The justice of the case however demands that both the applicants who have been detained for a grossly unreasonable period should be released. For these reasons we made the order indicated above.

To avoid a situation where juvenile offenders languish in gaol pending placement in a reform school, the Department of Justice and Constitutional Development is respectfully urged to cause magistrates to implement an administrative system whereby the progress made by the relevant authorities to place offenders in a reform school is constantly monitored. It seems to us that these cases can be diarised by the clerk of the court for a given period. When the date occurs the case can then be placed before the particular magistrate or another magistrate in order for such magistrate to consider submitting the case for special review. We do not think that the suggested monitoring system will be place an undue administrative burden on the magistracy. It is further envisaged that the

magistrate will call for reports from the authorities and in the light of those reports he/she may take steps to place the matter before a judge on special review in terms of section 304. The Registrar is directed to send a copy of this judgment to the Regional Office of the Department of Justice and Constitutional Development for its information.

JAPPIE J : I agree.

fo-Jappie J.

DATE OF REASONS FOR JUDGMENT :	14 SEPTEMBER 2006
DATE OF HEARING :	24 AUGUST 2006
COUNSEL FOR THE APPLICANTS :	MR D. M. ACHTZEHN
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COUNSEL FOR RESPONDENT :	MS R. BLUMRICK
INSTRUCTED BY :	DIRECTOR OF PUBLIC PROSECUTIONS, PIETERMARITZBURG