

CHAPTER 10

CONVERSION OF SENTENCES

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CONTENTS

	<i>Page</i>
1. Introduction	542
2. Correctional Supervision	544
3. The Marimuthu Matter	548
3.1 Background	548
3.2 Commission's Investigations	549
3.3 Conduct of Members of the Department	550
• Mr I.S. Zulu	550
• Mr Mervyn Govender	551
• Mr B.E. Mbatha	552
• Other Members	552
3.4 Findings	554
4. The Magubane Matter	555
4.1 Background	555
4.2 Findings	557
5. Victims of Crime	558
6. Recommendations	560
6.1 Correctional Supervision	560
6.2 Mr Marimuthu	560
6.3 Mr Magubane	560
6.4 Victims of Crime	561

CHAPTER 10

CONVERSION OF SENTENCE

1. INTRODUCTION

The conversion of sentences from imprisonment to correctional supervision is an issue that has caused a great deal of dissatisfaction amongst inmates. Many prisoners have complained to the Commission about irregular conversions of sentence, the failure of members of the Department to convert their sentences when prisoners are of the opinion that they are entitled to such conversion and the lack of consistency in the way members apply the rules and regulations relating to conversion of sentences.

The main concern of the Commission is that there is a strong belief amongst the aggrieved prisoners that members convert sentences in accordance with some favour or advantage and not on the basis of fairness and in accordance with the provisions of the regulations that govern such conversions. Although this Commission has not found any convincing evidence to substantiate this claim of payment for the conversion of sentences, it has found sufficient evidence to support the fact that numerous problems exist in the manner in which Departmental officials apply the provisions relating to the conversion of sentences.

As the granting of conversion of sentence or parole profoundly affects prisoners and can mean the difference between continued incarceration and freedom, it is not surprising that these were some of the major issues that occupied the Commission's investigations. The abuses of the conversion procedures highlighted later in this Chapter relate only to one particular Management Area. However, the Commission received numerous complaints with regard to conversion of sentences in almost all of the Management Areas

it investigated as well as from many Management Areas that fell outside the Commission's mandate.¹ As the potential liberty of prisoners was at stake in these matters, the Commission, within the constraints of its resources, attempted to listen to and deal with all complaints received, irrespective of the Management Area from which the complaints emanated. The Commission referred all complaints that were outside the prisons it investigated, which the Office of the Inspecting Judge could deal with, to the Office of the Inspecting Judge.

In this Chapter, the Commission intends examining the concept of correctional supervision as it relates to sentenced prisoners and will motivate for the Department to utilise correctional supervision as a means of addressing the issue of overcrowding in our prisons. The Commission is of the opinion that a proactive Departmental policy that uses the procedures the Legislature provides to convert sentences to ones of correctional supervision will steadily reduce the prison population in our country.

The Commission will also examine abuses of the system uncovered during its investigations and will highlight two such cases.² The first case is that of Mr Marimuthu, which involved allegations of corrupt behaviour by senior members of the Department of Correctional Services and the Department of Justice as well as a Deputy Mayor. The second case deals with the conduct and rulings of Mr Magubane, the Chairperson of the Parole Board, who completely abused his discretionary power and position by motivating in his report that a sentence be converted in circumstances where conversion was clearly not justified. As Chairperson, he also made an unnecessary and irresponsible statement that a sexual offence was not a "serious offence", causing outrage in the community. It will also be clearly shown that Mr Mugubane lacked the skills and expertise to hold the position of Chairperson and in this regard the Commission will recommend that the Department

¹ See St Albans Management Area.

² Both these cases arose from the Durban-Westville Management Area.

ensures that all officials holding such positions have the necessary expertise and integrity.

Despite the Commission's view that the Department needs to be motivated to apply the conversion of sentences more rigorously, the Commission is sensitive to the pain and trauma suffered by victims of crime and will also motivate for the recognition of the rights of the victim and the victim's family when applications for correctional supervision are brought before the Court.

2. CORRECTIONAL SUPERVISION

Correctional supervision is described in Section 1 of the Criminal Procedure Act³ as a community based form of punishment. This means that it is a form of punishment that is executed within the community where the offender would normally work and learn. The term "Correctional Supervision" is therefore a collective term for describing various measures that may be included in such punishment.

The following are various forms of correctional supervision that a court can impose:

- 2.1 A fine or term of imprisonment can be imposed in terms of Section 276 (1)(h) of the Criminal Procedure Act. This may not be done without a report by a probation or correctional officer and it may not exceed three years.⁴ This form is usually referred as the standard form for correctional supervision.
- 2.2 Correctional supervision can be imposed as a condition to a suspended sentence for the postponement of sentencing.
- 2.3 Imprisonment may be linked to a correctional supervision.

³ Act No. 51 of 1977.

⁴ See Section 276A(1) of the Criminal Procedure Act.

2.4 When the Commissioner of Correctional Services is of the opinion that a prisoner is a suitable candidate for correctional supervision,⁵ he may apply to the Court, which initially imposed the imprisonment, to reconsider that sentence and to consider imposing correctional supervision in lieu of the remaining term of imprisonment.⁶

As stated earlier, the area of correctional supervision being dealt with in this Chapter is its application to sentenced prisoners. Accordingly, it is Section 276A(3) of the Criminal Procedure Act referred to above, which is aimed at those prisoners who have rehabilitated themselves, that will be the focus of the Commission's attention in its motivation for the Department to resort to the provisions more frequently.

Our Constitution affirms the democratic values of human dignity, equality and freedom. Of all these values, freedom remains the most cherished by all citizens. Many South Africans lost their lives in the fight for freedom and many will not hesitate to pay the ultimate price in the defence of that freedom. Prisoners on the other hand, by their own actions, have been compelled to surrender most facets of this fundamental right. Many, to their credit, having realised the error of their ways, strive tirelessly to rehabilitate themselves to escape the confines of prison in order once again to become part of our free South African society. Such rehabilitated prisoners who qualify to have their sentences converted to correctional supervision should not languish in prison for longer than is necessary. The Department's arbitrary and unreasonable refusal to apply for the conversion of these prisoners' sentences is a serious violation of the prisoners' human rights.

It has been repeatedly stated that overcrowding is the most important and difficult challenge facing the Department of Correctional Services.⁷ Despite this, and considering the rising number of prisoners over the years, coupled

⁵ *Leeb* 1993 (1) SACR (T) 315.

⁶ See section 276A(3).

⁷ See Chapter on Overcrowding for more details

with the fact that our prisons are ill equipped and under resourced to deal with such volumes, the Department remains reluctant to attempt to address the problem of overcrowding by aggressively applying for the sentences of prisoners who qualify to be converted to correctional supervision, a reluctance the Commission finds difficult to understand.

The Legislature has had the foresight of enacting a section that gives the Commissioner or his delegate the discretion, in appropriate cases that justify such action, to apply to the sentencing court to convert a sentence into correctional supervision. One would therefore have expected the Department to be pro-active and to start aggressively using section 276A(3) of the Criminal Procedure Act to reduce the prison population by allowing such prisoners to serve the rest of their sentences in the community.

Our courts in the *De Lange* case,⁸ have decided that the discretion to apply for the conversion of a sentence to correctional supervision lies solely with the Commissioner and accordingly a sentenced prisoner has no right to force the Commissioner to make the application for such prisoner in terms of section 276A(3) of the Criminal Procedure Act. This case highlights one of the shortcomings of the Act, namely, that a prisoner, who has fulfilled his duties inside prison and is of the opinion that he is rehabilitated, is left with no recourse or remedy but to lodge an application for his release all by himself in terms of section 276A(3), if the Commissioner does support such an application and recommend that correctional supervision be granted.

⁸ *De Lange v Provincial Commissioner of Correctional Services*, Eastern Cape 1 2002 (2) SACR 185 (SE). In this matter, the court held that proceedings in terms of section 276A(3) of the Criminal Procedure Act (allowing the Commissioner of Correctional Services to approach a court to convert sanction of imprisonment into correctional supervision) is *sui generis* and not “an application” as envisaged by the Uniform Rules of the courts. Therefore the Commissioner was not bound in this particular matter by Rule 41(1) of the Uniform Rules in withdrawing the matter once it was instituted in terms of section 276A(3).

The Commission is also of the view that non-governmental organisations can play a vital role in ensuring that prison numbers are kept to the minimum in assisting prisoners to approach the Commissioner to apply for conversion of sentence in terms of section 276A(3). In this regard, it is appropriate to refer to the matter of *Ex Parte-Department of Correctional Services in re S v Katisi*⁹ in which a successful application was done through the endeavours of a non-governmental organisation. An interesting aspect of this case that the Department should highlight and take note of is that Satchwell J is of the view that the legislation that charged the court with the duty to reconsider sentence required the court to go back to the drawing board and to start from scratch in dealing with the matter of sentence. The case of *S v Cloete*¹⁰ also has some relevance on this point, where Levy AJ (as he then was) stated that the circumstances of the crime are of far less importance at the time of application for conversion of sentence than they were at the trial.¹¹

The Commission remains firmly of the view that properly managed and applied the applications for the conversion of sentences to correctional supervision will result in a steady reduction of the prison population in our country. Rehabilitated prisoners who qualify for correctional supervision should not continue to be incarcerated at enormous expense to the South African taxpayer and the Commission sees no reason why the Commissioner should not apply his discretion with greater resolve and vigour by applying for the conversion of sentences across the board for all qualifying prisoners.

The abuses of the conversion procedures, dealt with hereafter, should not detract from all the positive aspects of correctional supervision. The Marimuthu case, in particular, was clearly unusual and distinguishable on the basis that not only was the normal procedure not followed but also because Mr Marimuthu was given preferential treatment in that he was never re-admitted to prison after his unsuccessful appeal.

⁹ 2002 (1) SACR 497 (T).

¹⁰ 1995 (1) SACR 367 (W) at 369.

¹¹ However, also see *Elliott* 1996 (2) SACR 531 (E) where Melunsky J propounded a different opinion.

3. THE MARIMUTHU MATTER

3.1 Background

The background facts of this matter, which can be gleaned from the answer the Minister of Correctional Services at the time, Mr Ben Skosana, gave in response to a question in Parliament¹² and from the opening address of the Commission's evidence leader, can be briefly summed up as follows:

- 3.1.1 In 1992, Mr Marimuthu was sentenced to four (4) years imprisonment, one (1) year of which was suspended, for the crime of dealing in 3 390 mandrax tablets;
- 3.1.2 Mr Marimuthu appealed on some technical point, the details of which are not of relevance, and he was released on bail;
- 3.1.3. Mr Marimuthu's matter was later re-enrolled for hearing before the Magistrate for a further hearing and he was again sentenced to the same term of imprisonment;
- 3.1.4. He appealed once more and that appeal was dismissed on 7 October 1997 with an order that, if his Application for Leave to Appeal to the Appellate Division was denied, then he would have to hand himself over to the prison authorities as soon as that decision was made known.
- 3.1.5. On 10 November 1997 his Application for Leave to Appeal was refused but instead of then being behind bars from 11 November onwards, he appeared in court on 2 December 1997 before Magistrate Maharaj at

¹² See Exhibit 'YYYY9' for the detailed answer of Parliamentary question 479.

the Durban Magistrate's Court, who then granted him bail on the basis that he could make a petition to the State President.¹³

3.1.6 On 22 January an application was brought before Magistrate Smit in terms of which Mr Marimuthu was then granted correctional supervision.

3.2 Commission's Investigations

When the Commission investigated the matter it soon became clear that all was not what it seemed and that sinister and extraordinary manoeuvrings had taken place behind the scenes by some of those implicated to ensure that Mr Marimuthu escaped incarceration.

From documents and the evidence of witnesses before the Commission,¹⁴ it appeared that on 4 December 1997 a meeting was held at the Offices of the then Deputy Mayor of Durban, Mr Ngwenya, where the members of the community as well as the Area Manager of the Durban-Westville Management Area, Mr I.S. Zulu, were present to discuss Mr Marimuthu's situation. Who initiated the meeting and why it had to be held in the office of the Deputy Mayor is not clear but it was apparently at this meeting that a decision was taken that some mechanism should be activated to ensure that Mr Marimuthu was granted correctional supervision.

After this meeting, some Correctional Services members sprang into action and in a surprisingly short space of time ensured that Mr Marimuthu was brought to court before Magistrate Smit on 22 January 1998, even though his

¹³ Although not mentioned in the answer of the Minister to Parliament, it is clear from documents that surfaced during the Commission's investigation that Magistrate Maharaj remanded the matter to 30 January 1998. A copy of the proceedings of 2 December 1997 was handed in to the Commission and from that record it appears that the matter was remanded by Mr Maharaj to 30 January 1998 in order to give Mr Marimuthu the opportunity to seek legal advice concerning the dismissal of the Appeal or a possible pardon by the State President. Mr Marimuthu was then warned to appear in Court on 30 January 1998.

¹⁴ This can also be seen from the earlier answer of the Minister to Parliament.

actual case had at that time been postponed until 30 January 1998. At the hearing of 22 January 1998, two (2) members of the Department, one, Mr M. Govender, being the investigation official and the other, Mr Bongani Mbatha, of Community Corrections, handed in documentation and gave evidence that culminated in Magistrate Smit's decision that Mr Marimuthu's sentence of imprisonment should be converted to one of correctional supervision.

It was common cause throughout the hearings that Mr Marimuthu was at no stage, after the finalisation of his appeal, ever admitted to prison.¹⁵

It was argued by the evidence leader that the order was improperly granted, as Mr Marimuthu had not served the minimum term of imprisonment before such an order could be made. He pointed out that Mr Marimuthu was supposed to serve at least one sixth of his sentence, which would have been six (6) months of imprisonment. Accordingly, the question of correctional supervision could only have been effectively considered after that period of imprisonment had elapsed.¹⁶

3.3 Conduct of Members of the Department

- **Mr I.S. Zulu**

Mr I.S. Zulu, the Area Manager, inexplicably played a pivotal role in the entire process of keeping Mr Marimuthu out of prison.

His zealotness was clearly evident when he requested the Chairperson of the Parole Board, Mr Magubane, on 10 December 1997 to advise him on the case. A letter of Attorneys Selvam Nadar and Associates, which was handed

¹⁵ Although it had initially been alleged that Mr Marimuthu had never served a single day in prison, it appears, as far as could be established, that he had served three (3) days during his initial sentence.

¹⁶ The evidence leader had further stated that the Anti-Corruption Unit of the Department was distressed about the developments in this matter and persisted in their recommendation that Mr Marimuthu should return to prison.

in and which is filed in the records of the Department, supported this instruction.¹⁷ A note in Mr Zulu's handwriting reveals the following:

"Chairperson/Parole Board Mr Magubane, please advise me regarding this matter".

Another note in the file, again in Mr Zulu's handwriting, states:

"Mr M. Govender please investigate the validity of the allegations, consult with the Parole Board and Mrs Khan at Community Corrections, make further reports to my office".

At the bottom of the same letter is a note to the Transport Controller, once more in Mr Zulu's handwriting, which reads:

"Transport to utilise objective; you can confirm with me or Mr Shezi".

It appears that Mr Zulu was taking a daily interest in the matter as he signed these last two notes on 11 December 1997 with the earlier instruction to the Chairperson of the Parole Board on 10 December 1997.

- **Mr Mervyn Govender**

The role of Mr Govender, the investigator who conducted the investigation that formed the basis of the application to Court to convert the sentence of Mr Marimuthu into correctional supervision, also needs to be commented on, as his investigation was inadequate in many respects. Although he seems to have responded with alacrity to the instruction Mr Zulu gave him and completed his investigation and submitted the different reports to Magistrate Smit, he never at any stage seriously dealt with the policy of the Department of Correctional Services pertaining to the referral of offenders to a Court for an

¹⁷ Department File 1/13/1., Exhibit "YYYY6".

application for conversion of sentence. Furthermore, without having the direct comments of either the Chairperson of the Parole Board or of the institutional committee, Mr Govender recommended on 14 January 1998 that the case of Mr Marimuthu be referred back to the court *a quo* for a correctional supervision application.

Mr Govender's investigation was clearly not a thorough one.

- **Mr B. E. Mbatha**

Mr B.E. Mbatha of Community Corrections also appears not to have applied his mind to the policies of the Department. He made the following comments:

*“Taking into consideration Mr Marimuthu’s social standings contribution to society it will serve no purpose to send him to prison except increase the number in the over populated prison. If Mr Marimuthu were to be imprisoned +/- 47 families will be left destitute, and an alternative sentence is recommended”.*¹⁸

Although these two officials appear to have been merely following the orders of Mr Zulu, they did not conduct themselves in the manner one would have expected from correctional services members dealing with such an important matter.

- **Other Members**

Despite the views of the members mentioned, it appears from other documentation presented to the Commission¹⁹ that at least some of the members involved remained focused and remembered that the situation of Mr Marimuthu had to be considered in terms of the policies of the Department.

¹⁸ See Exhibit “YYYY6”.

¹⁹ Exhibit “YYYY27” which contains Mr Magubane’s affidavit.

The Chairperson of the Parole Board, Mr Magubane, unlike in his handling of the matter to be dealt with hereinafter, was clearly not willing to make a recommendation for the referral of Mr Marimuthu to the Court *a quo* in terms of Section 276A(3) of the Criminal Procedure Act No. 51 of 1977, due to the fact that Mr Marimuthu had not served a period of imprisonment in the prison. The Secretary of the Parole Board, Mr J.N. Botha, also shared his opinion²⁰.

Mrs Khan, the social worker at Community Corrections, also submitted a report to the area manager in which she strongly advised against Mr Marimuthu being referred to court for the conversion of his sentence. Correctly, she pointed out that such referral would set a precedent.

It is disconcerting to note that not only did Mr Zulu ignore these dissenting opinions and approve Mr Marimuthu's referral to the Court for a conversion of sentence but he went as far as to instruct the investigating officer, Mr Govender, and the Head Community Corrections, Mr B.E. Mbatha, to consult with the Magistrate in order to finalise the matter.

The implicated parties argued that the standing B-Orders provide for cases like that of Mr Marimuthu, where the sentence can be converted to correctional supervision if there are unusual circumstances that require the matter to be referred to the court *a quo* for a reconsideration of the sentence. Looking at the B-Orders, the Commission agrees with the view of Mr Wilkin²¹ that only the following instances should be considered as unusual:

- Advanced state of pregnancy.
- Diseases diagnosed as terminal.
- Advanced age with related poor physical conditions.

The argument of unusual circumstances existing in Mr Marimuthu's case has no merit.

²⁰ Also Exhibit "YYYY27".

²¹ Exhibit "YYYY27".

3.4 Findings

The Commission has no intention of judging or questioning the proceedings before Magistrate Smit on 22 January 1998²² but it is clear that very little regard was paid in those proceedings to the question of whether Mr Marimuthu had been rehabilitated through the previous sentence.

The Commission also sees very little purpose in dealing any further with the minimal role the junior members of the Department played. Even though some of his actions might appear to be suspect, Mr Govender clearly acted under the orders of his superior, Mr I.S. Zulu. The same applies to Mr Mbatha.

The driving force behind the whole initiative was Mr I.S. Zulu, the Area Manager, who actively assisted in getting the matter to court and getting Mr Marimuthu released under correctional supervision. It is not clear why Mr Zulu decided to ignore the view of the Parole Board and the Institutional Committee and why these bodies were not requested to provide reports, as one would expect them to do in terms of their directives. Mr Zulu's attitude throughout the proceedings was that he deemed it fit to appoint an official other than the Parole Board/Institutional Committee to approach the court *a quo* with a verbal application for the imposition of an alternative sentence on Mr Marimuthu. The Department's officials are guided by the B-Orders. Mr Zulu could not show the Commission any regulation that empowered him to act in the manner in which he did.

It is clear that unacceptable efforts were made to ensure that Mr Marimuthu did not spend a day behind bars and the suspicion remains that there is a strong likelihood that money changed hands somewhere in this matter. This version seems very probable if one looks at the speed with which this matter was handled, where even the Parole Board's recommendations against

²² The Chief Magistrate of Durban previously investigated these proceedings and accordingly the Commission will rather confine its inquiries to the circumstances under which the Department of Correctional Services dealt with Mr Marimuthu.

correctional supervision were ignored. The Commission, however, cannot come to a conclusive finding that any corrupt activity took place to successfully ensure that Mr Marimuthu did not re-enter the prison. It is clear, however, that members of the Department, in particular Mr I.S. Zulu, ignored policy directives.

Why Mr Zulu, as a senior manager of the Department, should have been so involved in this matter remains a mystery. He seems to have displayed an interest in the matter that went far beyond the call of his duties as the Area Manager.

Although no evidence emerged of this, his unhealthy interest in the matter at best seems to indicate poor judgement on his part but at worst raises suspicions of corrupt conduct. No responsible senior member of the Department should so actively pursue activities that are contrary to clear Departmental policies.

His actions in assisting a prisoner of means only added to the negative perception that rich and influential people, unlike the ordinary person on the street, receive special treatment and privileges from the Department. It also reinforces the perception amongst prisoners that the conversion of sentences is only granted in payment of some favour or advantage and not on the basis of fairness and in terms of the regulations that govern such conversions.

4. THE MAGUBANE MATTER

4.1 Background

To show the inconsistencies in the handling of conversion matters, the Commission finds it necessary to focus also on the matter of Mr Bongani Magubane, the former Chairperson of the Parole Board of the Durban/Westville Management Area. This matter indicates the Chairperson of

the Parole Board's abuse of discretion in dealing with the conversion of sentences.

During February 2002, Mr Magubane, in his capacity as the Chairman of the Parole Board in charge of the Westville Management Area and other nearby Management Areas, had recommended the conversion of a six (6) year sentence of a prisoner who had been convicted of a sexual offence on his minor daughter to correctional supervision. This prisoner was sentenced in 1999 for having sexually assaulted his five (5) year-old daughter over a four (4) year period. Whilst in prison, the prisoner had applied for his sentence to be converted from direct imprisonment to one of correctional supervision.

Mr Magubane, without obtaining the vital information necessary for purposes of processing the application, inter alia, a psychologist's report regarding the mental state of the prisoner, had recommended that the sentence be converted. He furthermore abused his power by making false declarations in his report regarding how long he had known the prisoner and the prisoner's appearance before the Parole Board. He also ignored both a Magistrate's directive regarding the necessity for the offender to attend a sexual offender's course and a Prosecutor's advice regarding the outcome of the inmate's appeal. He expressed his own views as if they were those of the Board in circumstances where he had never consulted the Board.

Mr Magubane, however, went further and made the astounding comment that the prisoner, who was charged with sexual molestation, had not committed a "serious offence". This irresponsible statement caused an outcry and, as was to be expected, members of the public in the province were up in arms at the Chairperson of the Parole Board's sheer disregard for the victims of sexual violence.

As in the Marimuthu case, it appears that the opinions and reports of the officials of the Department were ignored. In giving evidence before the Commission, Mrs Khadija Bhamjee, a psychologist at Westville Prison, had

testified about the fact that the prisoner had failed to honour three (3) therapy sessions she had arranged for him to attend. The only report attached to the application was that of a social worker and not that of the psychologist. The same social worker was not a credible witness before the Commission.

How Mr Magubane could have arrived at a decision to recommend the conversion of the sentence is inexplicable and, like in the case of Mr I.S. Zulu in the Marimuthu matter, only raises all kinds of suspicions of improper conduct. It was therefore not surprising that after the Magubane matter was heard before the Commission that the National Commissioner acted against Mr Magubane and removed him from his position because he had brought the Department of Correctional Services into disrepute.

4.2 Findings

The Magubane matter illustrates how the discretionary power, which is given to the Chairman of the Parole Boards, can be abused. Given this, care must be exercised in the selection of individuals being appointed as Chairpersons of the Parole Board. They must, at all times, possess the necessary expertise and integrity. It is clearly apparent to the Commission that Mr Magubane had neither the necessary experience, nor the skills and expertise, to chair Parole Boards and consequently to exercise a discretion that has such important consequences on the life of any inmate applying for a conversion of sentence. His experience, educational qualifications and skills, all necessary components for the job, are very limited.²³

The Commission's findings with regard to the Magubane matter are that Mr Magubane failed in the performance of his duties for the following reasons:

²³ He was appointed as a warder and on 1 October 1980, subsequently promoted to senior correctional officer and assistant director. He was appointed Chairperson of the Parole Board in August 1997. He had never undergone any training for such a position.

- 4.2.1 He made a false declaration regarding the prisoner's appearance at the Parole Board.
- 4.2.2 He also made a false declaration regarding the number of years he had known the prisoner.
- 4.2.3 He made irresponsible and unnecessary statements regarding the seriousness of the sexual offences that were committed by the prisoner.
- 4.2.4 He failed to ensure that the prisoner and/or Department of Correctional Services had complied with the Magistrate's order/directives that the prisoner should attend a sexual offender's course before recommending the conversion of the prisoner's sentence to correctional supervision.
- 4.2.5 He pressed ahead with the application for conversion of the prisoner's sentence into correctional supervision notwithstanding the information he had received from the Prosecutor regarding the outcome of the appeal to the High Court and the refusal of the application for leave to appeal to the Supreme Court of Appeal Division.
- 4.2.6 He contravened the provisions of the Correctional Services Act in a number of respects.
- 4.2.7 He expressed his personal views in the report as the views of the members of the Board, who had not been consulted regarding the application for conversion.

5. VICTIMS OF CRIME

Before making recommendations on the matters dealt with in this Chapter, it should again be stressed that the Commission's advocating of the aggressive application of correctional supervision should not be interpreted to mean that the Commission is not sensitive to the pain and trauma of the victims of crimes, who are likely to have many old wounds reopened with the early release of the perpetrators.

In this regard, the Commission has taken note of, and agrees with, the opinion of Kgomo J, in *S v van Rooyen*²⁴ wherein he referred to the void in the provisions of section 276A(3) of the Criminal Procedure Act dealing with correctional supervision. Kgomo J advocates that it should be compulsory for whoever initiates an application for conversion of sentence to serve a copy of such application with the Office of the Registrar of the High Court and on the victim or the victim's family. In doing so, the applicant should provide them with the option to oppose the application

Although the impact of correctional supervision on victims of crime is not strictly within its Terms of Reference, the Commission is of the view that the amendment proposed by Kgomo J is well founded and would certainly address the concerns of victims who have received very little recognition, particularly at the sentencing stage of the proceedings of a criminal trial.²⁵ The amendment of the Correctional Services Act to provide for the rights of victims could be similar to the consultations relating to plea bargaining found in terms of Section 105A of the Criminal Procedure Act²⁶. Such amendment will, at least, ensure that the victim, or the family of the victim, has the opportunity to oppose any release on correctional supervision.

The Commission is mindful of the fact that, on a more practical level, should this section be amended, a duty will have to be placed on The Registrar of the

²⁴ 2000 (1) SACR 372 (NC).

²⁵ The victim does not have a special status or any pecuniary right at the sentencing phase but has to rely on the prosecution service to put all aggravating circumstances before the court.

²⁶ Section 105A of the Criminal Procedure Act, provides that:

“The Prosecutor may enter into agreement contemplated in paragraph A-iii after affording the complainant or his or her representative, where it is reasonable to do so and taking into account the nature of and circumstances relating to the offence and the interests of the complainant, the opportunity to make representations to the Prosecutor regarding –

- aa. The contents of the agreement; and*
- bb. The inclusion in the agreement relating to compensation or the rendering to the complainant of some specific benefit or service in lieu of compensation for damage or pecuniary loss.”*

Court, the South African Police Service as well as the Director of Public Prosecutions to make a note on the date of sentence of the whereabouts of the victim or the victim's family in order to be in a position to serve such notification in the future.

6. RECOMMENDATIONS

6.1 Correctional Supervision

To address the challenge facing the Department of prison overcrowding, the Commission recommends that the Department should, as soon as possible:

6.1.1 Conduct a survey of all its Management Areas countrywide to establish how many prisoners currently qualify for their sentences to be converted to correctional supervision.

6.1.2 Inform such qualifying prisoners about the provisions of the Criminal Procedure Act that entitle them to approach the Commissioner to request that he consider converting their sentences to one of correctional supervision.

6.1.3 Make application to the relevant courts for the release of all such prisoners on correctional supervision.

6.2 Mr Marimuthu

As Mr I.S. Zulu, as a senior member of the Department, should have been aware of the policies of the Department, the Commission recommends that the Department should charge him in terms of the Disciplinary Code for his actions in flagrantly pursuing the application for Mr Marimuthu's release and flagrant disregard for the Department's clear policy directives.

6.3 Mr Magubane

It is recommended that Mr Magubane not be considered for any placement as a Chairperson of a Parole Board until such time as he has undergone appropriate training, which will make him fit to sit in a position on a Parole Board or Institutional Committee.

6.4 Victims of Crime

To address the sensitivities and give due recognition to the victims of crime, the Commission motivates that serious consideration be given to the amendment of Section 276A(3) of the Criminal Procedure Act to read as follows:

“Sub-sectionA(3) – Where a person has been sentenced by a court of imprisonment for a period –

- (i) not exceeding five (5) years; or*
- (ii) exceeding five (5) years but the date of release in terms of the provisions of the Correctional Services Act, and the Regulations made thereunder is not more than five (5) years in the future.*

The Commissioner may, if he is of the opinion that such a person is fit to be subjected to correctional supervision, apply to the Clerk or Registrar of the Court, as the case may be, to have that person appear before the court a quo in order to reconsider the sentence, provided that the Commissioner has given notice to the complainant of the application that will be lodged, which notice must be advertised in the Government Gazette and in a local newspaper where the crime was committed and which notice must notify the complainant of their right to oppose such an application.”