

SOUTH AFRICA / JUDGMENT

C.D.S v S (A505/15) [2016] ZAWCHC 24; 2016 (1) SACR 584 (WCC) (9 March 2016)

[2016] ZAWCHC 24

COURT

Western Cape High Court, Cape Town

BEFORE

Meer, Henney, Klopper

CASE / FILE NUMBER

A505/15

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case

No: A505/15

DATE:

09 MARCH 2016

In

the matter between:

[C.....]

[D.....]

[S.....].....First

Appellant

And

THE

STATE.....Respo
ndent

Coram:

Meer J, Henney J et Klopper AJ

JUDGMENT

DELIVERED ON 9 MARCH 2016

HENNEY J

- [1] The appellant is a child offender who was 15 years old at the time of the commission of the offences with which this appeal is concerned. He was convicted on 29 June 2015 by the Regional Court sitting at Parow on the following charges: murder; possession of a firearm in contravention of section 3 of the Firearms Control Act 60 of 2000, in that he possessed a 9mm semi-automatic firearm; and of contravening section 90 of the Firearms Control Act 60 of 2000, in that he was in possession of 9 rounds of 9mm ammunition.
- [2] On 30 July 2015, he was sentenced to 10 years' imprisonment on the murder charge, 3 years' imprisonment for possession of a firearm and 1 year imprisonment on the possession of ammunition charge. The court ordered the sentences imposed on counts 2 and 3 to run concurrently with the sentence imposed on count 1.
- [3] This matter was subject to an automatic review in terms of the provisions of section 85 of the Child Justice Act 75 of 2008 ("CJA") read with Chapter 30 of the Criminal Procedure Act 51 of 1977 ("CPA"). The matter was transmitted for review on 17 August 2015 and served before Maartens AJ.
- [4] The appellant also had an automatic right to appeal in terms of section 84 (1)(a) of the CJA due to the fact that he was under the age of 16 years at the time of the commission of the offence and could note an appeal without having to apply for leave in terms of Section 309B of the CPA. This appeal was lodged with the Clerk of the Court on 14 August 2015.
- [5] In terms of section 85(2) of the CJA, the matter should therefore not have been transmitted for review by the Regional Magistrate or Clerk of the Court because according to this provision, if an appeal has been noted in terms of section 84 the matter should not be sent on review.
- [6] On 7 September 2015, Maartens AJ in any event made a determination that the proceedings were in accordance with justice. This court is now seized with the appeal.
- [7] In the light of the determination made by Maartens AJ, the Judge President of this division constituted a full bench to hear this appeal. Counsel appearing for the appellant conceded that the Regional Magistrate correctly convicted the accused. The appeal is therefore solely directed at sentence. The presiding Judge requested the parties to address the court during the hearing of the appeal on the following issues:

"1. Whether the court in sentencing the appellant had complied with the provisions of Chapter 10 of the Child Justice Act, and in particular, if there was compliance with s69(1)(a-e) and s69(4);

150% ">2. Whether the court a quo considered the sentencing options as set out in s72, 73, 74 and 76 of the CJA;

3. Whether the provisions of s77(5) of the CJA. are peremptory and if so, whether the court a quo complied therewith."

The Facts on which the conviction is based

- [8] On the morning of 6 June 2014 at approximately 8h00, Jean Hokim who is the sister of the appellant's grandmother was walking down Rachel Street in Elsie's River. A person driving a motor bike ("the deceased") drove towards and past her. She heard someone say, "he must be shot". She turned around, and saw the appellant and accused no.2 in the Court a quo, standing in front of the driver who was seated on the motor bike. She was about 8 metres away from them at the time. Next, she saw the appellant draw a gun and shoot the deceased. She could not say how many shots he fired at the deceased. The deceased fell to the ground. Ms Holkim ran home. There she heard that the person on the motor bike who was known as "Chessie" had died.

Grounds of appeal against sentence

- [9] The ground of appeal is that the sentence of 10 years' direct imprisonment was harsh, given the fact that the appellant was 15 years old when he committed the offence and 17 years old when he was sentenced.

Discussion

- [10] The provisions of the Child Justice Act are clearly applicable to the appellant. In terms of section 4 of the CJA, the appellant is a person in the Republic who committed an offence when he was 10 years or older, but under the age of 18 years when he was arrested and brought before court for this offence.
- [11] Any court that imposes a sentence upon a child offender must sentence such child offender in terms of the provisions of Chapter 10 of the CJA. Section 68 states: "A child justice court must after, convicting a child, impose a sentence in accordance with this Chapter".

In S v LM 2013

- (1) SACR 188 (WCC), this court at paras 18 – 19 held the following:

"[18] An important deviation from the provisions of the CPA is contained in ch 10, which deals with the sentencing of a child in terms of the CJA, s 68. A child justice court is obliged to impose a sentence in accordance with ch 10. Only where the CJA expressly empowers a court to do so, may a child be sentenced in accordance with the provisions of the CPA.

- [19] It is clear from the above provisions that the CJA creates a separate and distinct system of criminal justice for children, the legal mechanisms and processes of which may indeed be different from those set out in the CPA. [...]"

- [12] When a court sentences a child, the objectives of sentencing and factors that it must consider are set out at section 69 of the CJA.
- [13] A child justice court must also in terms of section 71(1) request a pre-sentence report prepared by a probation officer unless the child has been convicted of a Schedule 1 offence, or where the requiring of such a report would cause undue delay. This has been complied with. The court a quo did request and was furnished with a pre-sentence report as well as a Victim Impact statement.
- [14] The sentencing options available to a child justice court are set out in Part 2 of Chapter 10, sections 72 – 79, which include a sentence of imprisonment which may be imposed in terms of the provisions of s 77.
- [15] It goes without saying that Judicial Officers must apply the provisions of the CJA relating to sentencing. They cannot

proceed as if the Act does not exist. One of the purposes of the Act as set out in the preamble, is to establish a criminal

justice system for children, who are in conflict with the law, in accordance with the values underpinning the constitution. In *S v RS and Others* 2012 (2) SACR 160 (WCC) at para 30 Moses AJ held the following:

“[30] The legislature has therefore in unequivocal terms incorporated those principles, guidelines and considerations, as developed by our highest courts in the case law referred to above, in this Act, and has elevated those, in the context of our juvenile justice system, to having legal force and effect. Non-compliance therewith will henceforth not only be irregular, but also unlawful, in violation of the principle of legality.”

- [16] The Act also has as one of its objects, to create incrementally where appropriate, special mechanism processes or procedures for children in conflict with the law that in broad terms takes into account inter alia:

- The past and sometimes unduly harsh measures taken against some of those children;
- The long term benefits of a less rigid criminal justice process that suits these needs of children in conflict with the law, in

appropriate cases and wide range of appropriate sentencing options specifically suited to children.

- [17] In applying to the CJA a court must also adhere to ordinary considerations relating to sentencing, such as the triad[1] and the aims of punishment (deterrence, rehabilitation, prevention and retribution). A Child Justice Court should also

consider the objectives[2] namely, it should firstly encourage the child to understand the implications of, and be accountable for the harm caused. Secondly, it should promote an individualized response which strikes a balance between the circumstances of the child, the

nature of the offence and the interests of society. Thirdly, it should promote the reintegration of the child into the family and community. Fourthly, it should ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration. Lastly, the Court should use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.

[18] A court should during the sentencing stage consider and address each of these objectives, as set out in s 69(1).

[19] In terms of the provisions of s 69 (4), a Child Justice Court, when imposing a sentence involving imprisonment, must take the following factors into account:

- 1) The seriousness of the offence with due regard to - the harm done or risked through the offence, and the culpability of the child in causing or risking the harm;
- 2) The protection of the community;
- 3) The severity of the impact of the offence on the victim;
- 4) The previous failure of the child to respond to non-residential alternatives, if applicable; and
- 5) The desirability of keeping the child out of prison.

Section 77 of the CJA states:

“(1) A child justice court—

- (a) may not impose a sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and
 - (b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.
- (2) ...
- (3) A child who is 14 years or older at the time of being sentenced for the offence, and in respect of whom subsection (2) does not apply, may only be sentenced to imprisonment, if the child is convicted of an offence referred to in—
 - (a) Schedule 3[3];
 - (b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment; or
 - (c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.
 - (4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment

- (a) for a period not exceeding 25 years; or
 - (b) envisaged in section 276(1)(i) of the Criminal Procedure Act.
- [1] See *S v Zinn* 1969
- [2] SA 537 (A) at 540 G where the court held that the triad consists of “the crime, the offender and the interests of society”.
- [2] Section 69 (1) of the CJA.
- [3] Murder is a Schedule 3 offence in terms of item 3 of the Schedule. Possession of firearms and ammunitions is also a Schedule 3 offence in terms of item 17 of the Schedule.
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