

SOUTH AFRICA / JUDGMENT

J.A v S (20190063) [2019] ZAECHGC 64 (3 June 2019)

[2019] ZAECHGC 64

COURT

Eastern Cape High Court, Grahamstown

BEFORE

T Malusi, N G Beshe

CASE / FILE NUMBER

20190063

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THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION-GRAHAMSTOWN)

High

Court Ref No: 20190063

In

the matter between:

J[...]

A[...]

Applicant

Vs

THE

STATE

Respondent

REVIEW

JUDGMENT

MALUSI J:

- [1] This is an automatic review as provided in section 85(1) of the Child Justice Act 75 of 2008 (the Act). For convenience, the applicant will be referred to as the ‘accused’ in this judgment. After reading the review I directed that the accused be immediately released from prison. I indicated then that my reasons would follow and now these are provided below.
- [2] The accused was arrested on 14 April 2016 and charged with murder on 15 April 2016. It appears his guardian and a probation officer were informed of his arrest within 24 hours as provided in section 20 of the Act. He made his first appearance before a magistrate for a preliminary enquiry as envisaged in section 43 of the Act. The magistrate made an order that the matter be referred to a Child Justice Court as provided in section 49(2) of the Act.
- [3] On 21 April 2016 a preliminary enquiry was conducted by the Child Justice Court. It appears from the record that all the necessary steps envisaged in Chapter 7 of the Act were undertaken.[1] The accused was released to the custody of his guardian. Thereafter the matter was postponed on numerous occasions for various reasons.
- [4] On 14 February 2019 the accused appeared before the regional court for trial when he tendered a plea of guilty to the charge of murder. At the start of the proceedings the regional magistrate noted on record that the accused was 16 years old at the time of the trial. Section 1 of the Act defines a child as:

“Any person under the age of 18 years and, . . .”

Due to the fact that the accused was a child at the time he committed the offence and at the start of the trial it was peremptory that his trial be conducted in terms of the provisions of the Act.[2]

- [5] Any court before which a child appears as an accused must sit as a Child Justice Court and conduct the trial in accordance with Chapters 9 and 10 of the Act. Before the plea was tendered the regional magistrate was obliged to have informed the accused of the nature of the allegations against him, his rights and explain the procedures to be followed in his trial regardless of the fact that he was legally represented.[3] Every presiding officer in the Child Justice Court has to ‘ensure that the proceedings are not unduly hostile, appropriate to the age and understanding of the child’.[4] The regional magistrate did not follow any of these peremptory procedures.
- [6] Ex facie the record it does not appear that a guardian of the accused was present during his first day of trial on 14 February 2019. It is recorded that a guardian of the accused was present in court when the accused was sentenced on 28 March 2019. The guardian who had been warned by the enquiry magistrate to attend the proceedings in terms of section 49(2) of the Act was obliged to attend the entire trial proceedings unless he or she had been exempted. Section 65(1) of the Act provides that in a Child Justice Court a child must be

assisted by a parent, an appropriate adult or a guardian during proceedings in court. In my view, this provision envisaged help by the adult providing meaningful participation during the entire proceedings not just mere physical presence.

- [7] The proceedings involving a child in a Child Justice Court must be in camera unless the attendance of any other person is necessary.[5] There is no indication on record that the court was in camera on 14 February 2019. On 28 March 2019 it is stated on record by the prosecutor that the court was in camera.
- [8] The most egregious misdirection by the court a quo relates to the sentence proceedings. A Child Justice Court is obliged to sentence a child in accordance with the provisions of Chapter 10 of the Act. Before any sentence is imposed the court must request a probation officer to complete a pre-sentence

report.[6] The exception may occur when the court is dealing with an offence listed in Schedule 1 of the Criminal Procedure Act or obtaining the report would cause undue delay in the conclusion of the case.[7] In my view instances of undue delay will be rare as section 71(2) requires the probation officer to complete the report not later than six weeks at most from the date of request. A pre-sentence report was obtained after the regional magistrate prompted an application for such by the attorney for the accused though an application was unnecessary as it is the court's obligation to obtain the report.

- [9] The pre-sentence report compiled by the probation officer is at variance with the provisions of the Act. The probation officer recommended that the accused be incarcerated as 'time in prison will afford the accused person to reflect on his life and plan for a crime free life in future. . . . The accused person in prison will have access to variety of services.' (sic) The pre-sentence report is at odds with the aims and ethos of the Act. Section 76(1) of the Act provides that a child may be sentenced to compulsory residence in a child and youth care centre if necessary in the particular circumstances. It is only if substantial and compelling reasons exists that a child may in addition thereto be sentenced to a period of imprisonment which is to be served after completing the period of residence. Imprisonment is 'a measure of last resort and must be for the shortest appropriate period of time' according to section 77(1)(b) of the Act. The pre-sentence report also failed to provide current and reliable information on programmes that are available for the rehabilitation of the accused.
- [10] The regional magistrate accepted the recommendation of the probation officer for the accused to be imprisoned. The sentence imposed by the court a quo of 8 years imprisonment is shockingly inappropriate. It does not appear that the regional magistrate took into account any of the objectives and factors to be considered in sentencing children stipulated in section 69 of the Act. He simply considered the ordinary triad of factors normally examined by courts as if the accused was an adult.
- [11] According to section 76(2) the court a quo ought to have imposed a sentence of compulsory residence in a child and youth care centre for a period not exceeding 5 years or for a period which may not exceed the date on which the accused turns 21 years of age whichever date is

the earliest. A court has jurisdiction to impose an additional term of imprisonment if substantial and compelling reasons exist according to section 76(3)(a) of the Act. The magistrate did not provide any reasons to depart from the sentence provisions in the Act but simply ignored them and sentenced the accused to a term of imprisonment. In my view this was a gross irregularity.

[12] After sentencing the accused, the regional magistrate directed that the matter be sent for review. He failed to retain the matter on the roll of the court a quo for a month as required by section 76(4)(d) of the Act. He did not state the reasons for departing from this peremptory requirement in the Act.

[13] The purpose of the Child Justice Act is to provide as much protection for children who have violated the law as reasonably possible. This is clear from its preamble which states in part:

“the Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right-

- not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;”

[14] In light of the ignorance on display in the court a quo it is necessary to refer more fully to the preamble where it states:

THIS ACT THEREFORE AIMS TO-

- establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning our Constitution and our international obligations, by, among others, creating, as a central feature of this new criminal

justice system for children, the possibility of diverting matters involving children who have committed offences away from the criminal justice system, in appropriate circumstances, while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts;

- expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed;
- recognise the present realities of crime in the country and the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending;
- balance the interests of children and those of society, with due regard to the rights of victims;

- create incrementally, where appropriate, special mechanisms, processes or procedures for children in conflict with the law-
- that in broad terms take into account-
- the past and sometimes unduly harsh measures taken against some of these children;
- the long-term benefits of a less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases; and
- South Africa's obligations as party to international and

regional instruments relating to children, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;

- in specific terms, by-
- raising the minimum age of criminal capacity for children;
- ensuring that the individual needs and circumstances of children

in conflict with the law are assessed;

- providing for special processes or procedures for securing attendance at court of, the release or detention and placement of, children;
- creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases;
- providing for the adjudication of matters involving children which are not diverted in child justice courts; and
- providing for a wide range of appropriate sentencing options specifically suited to the needs of children,”

[15] The promulgation of the Child Justice Act ushered in a new era in the criminal justice system for children. It was, to borrow a phrase, ‘no longer to be business as usual’ when dealing with a child from the moment of arrest until after the child is sentenced.[8] The courts are required to scrupulously adhere to the provisions of the Act unless reasons exist to depart therefrom. A wholesale departure or lackadaisical application of the provisions of the Act will not pass muster.

[16] The proceedings in the court a quo were a wholesale departure from both the procedural and substantive provisions of the Act. The magistrate ignored the requirement

to treat child offenders differently from adults. The accused was treated as if he were an adult. If there was any need to depart from the provisions of the Act at any stage before, during or after the trial, it was imperative that the magistrate provide reasons for departing from the provisions of the Act. It is trite that giving reasons to substantiate conclusions by our courts is not only salutary but indeed is obligatory.[9]

[17] Any court sitting as a Child Justice Court is obliged to adhere to the procedural and substantive provisions of the Act from the first appearance of the child until after the matter is disposed by that court. In my view the regional magistrate departed so materially from the provisions of the Act that the proceedings in the court a quo were not in accordance with justice. The numerous irregularities vitiate the proceedings. In light thereof it is necessary that both the conviction and the sentence be set aside.

[18] It is imperative for me to comment on the unsatisfactory conduct of both the attorney and the public prosecutor. It appears from the record that when the magistrate materially departed from the provisions of the Act, neither the attorney nor the prosecutor assisted the court in pointing out the correct procedure that ought to have been followed. Both the attorney and the public prosecutor failed in their duty as officers of the court to facilitate a just verdict and an appropriate sentence. In specific terms the attorney failed to comply with the requirements to protect the rights of the child as set out in section 80 of the Act. The prosecutor failed to act in accordance with section 32(1)(a) of the National Prosecuting Authority Act 32 of 1988 and clause C(i) of the prosecutors' code of conduct.

[19] It is for these reasons that the following order is issued:

19.1 The conviction and sentence of J[...] A[...] is set aside;

19.2 The matter is remitted to the court a quo for the trial to start de novo before another magistrate.

T MALUSI

JUDGE OF THE HIGH COURT

I agree and it is so ordered:

N G BESHE

[1] Chapter 7 deals with the nature and objectives, the special mechanisms and procedures of a preliminary enquiry.

- [2] See section 4(1) of the Act which provides: “subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and – (a) was under the age of 10 years at the time of the commission of the alleged offence; or (b) was 10 years or older but under the age of 18 years when he or she was – (i) handed a written notice in terms of section 18 or 22; (ii) served with a summons in terms of section 19; or (iii) arrested in terms of section 20, for that offence.”
- [2] See section 4(1) of the Act which provides:
- “subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and –*
- (a) was under the age of 10 years at the time of the commission of the alleged offence; or
- (b) was 10 years or older but under the age of 18 years when he or she was –
- (i) handed a written notice in terms of section 18 or 22;
- (ii) served with a summons in terms of section 19; or
- (iii) arrested in terms of section 20,
- for that offence.”
- [3] See section 63(3) of the Act.
- [4] See section 63(4)(b).
- [5] Section 63(5) of the Act.
- [6] See section 71(1)(a) of the Act.
- [7] See section 71(1)(b) of the Act.
- [8] Phrase coined by Marias JA in *S v Malgas* 2001 (1) SACR 469 (SCA) para 7.
- [9] *S v Martin* 1996(2) SACR 378 (W) at 381i-j; *S v Maake* 2011 (1) (SACR) 263 SCA at paras 19-22.

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