

SOUTH AFRICA / JUDGMENT

N.S v S (DR42/2023) [2023] ZAKZDHC 83 (26 October 2023)

[2023] ZAKZDHC 83

COURT

Kwazulu-Natal High Court, Durban

BEFORE

Hlatshwayo, ZP Nkosi

CASE / FILE NUMBER

DR42/2023

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IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

Case no: DR42/2023

In the matter between:

N[...] S[...]

APPELLANT

and

THE STATE RESPONDENT

REVIEW JUDGMENT

Delivered on: 26 October 2023

Hlatshwayo AJ (ZP Nkosi J concurring):

Introduction

- [1] It has been said that children are the soul of our society, if we fail them then we would have failed the society.[1] This matter involves a child who is in conflict with the law and it came before me as a review in terms s 85(1) of the Child Justice Act 75 of 2008 (“the CJA”). The child was convicted by the Regional Court of an attempt to commit a sexual offence in contravention of s 55 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 following a plea of guilty in terms of s 112(2) of the Criminal

Procedure Act 51 of 1977 (“the CPA”).

- [2] The child was then sentenced to five years’ imprisonment on 21st June 2023 and it is this sentence that triggers the automatic review to this court. It must be mentioned that the child was 13 years old at the time when the offence was committed.

Background

- [3] A brief history of the matter reveals that on 9th May 2023, the child pleaded guilty to the charge in a written statement in terms of s 112(2) of the CPA. In this plea he detailed how on the night of 6th September 2022, he had broken into the premises of the complainant and pointed a knife at her forcing her to have sexual intercourse with him. The complainant alerted her mother by screaming and the child ran away.
- [4] The social worker Ms. Ngwane then compiled a pre-sentence report regarding her investigation and interviews with the necessary role players including the child and the complainant. She also testified and presented her report and recommendations regarding the appropriate sentence.
- [5] This court is therefore called upon to determine if the proceedings in the magistrate’s court were in accordance with justice and followed the prescripts of the CJA. I must point out that the child was legally represented during the proceedings and was also assisted by his guardian.

The applicable legal principles

- [6] There is no hesitation that our Law is filled with legal instruments aimed at protecting the rights of children. Our common law demands that the best interest of the child be at the centre of any decision made by our courts regarding children. The Constitution provides extensive protection of rights of children. Section 28(2) underscores the importance of a child’s best interest in any matter concerning a child.
- [7] Our country’s commitment to children’s rights as guaranteed in the Constitution and our commitments to the international

instruments[2] culminated into the CJA giving effect to the protection of rights of children in conflict with the law. This Act regulates proceedings whenever a child is in conflict with the law. It must always be followed by our courts and its stated objectives must be apparent in the outcome regarding the decision affecting the child. S v LJ,[3] quoting from various cases, stressed the need to apply the CJA. It remarked:

‘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.’ Courts are thus required to adhere to the provisions of the Act scrupulously. Moreover, the courts are required to scrupulously

comply with 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.’

Proceedings in the magistrate’s court

[8] Section 63(3) of the CJA provides that before the plea is tendered, the presiding officer must explain the nature of the allegations against the child, his rights and the procedure to be followed. Again, s 63(4) places a duty on the presiding officer to ensure the child’s best interest is observed and may elicit any information from those present. This does not appear from the record of the proceedings and it has been held that this duty exists regardless of whether the child is legally represented. See *S v Speelman*.^[4]

[9] It must be stated though that upon perusal of the record and the subsequent report of the probation officer which detailed the interview with the child in a far more relaxed environment than a court and the complainant’s interview, I have no qualms regarding the child’s conviction despite the shortcomings pointed out above.

[10] When it comes to the sentencing it must be pointed out that an appeal or review court is slow to interfere with the sentencing discretion of the trial court which is ordinarily steeped in the atmosphere of the case, unless there are material irregularities in the proceedings. In *Mnisi v S*,^[5] in dealing with an appeal, the Supreme Court of Appeal cautioned that:

‘...an appeal court cannot, in the absence of a material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at simply because it prefers to do so. To do so, so the Court held, would be to usurp the sentencing discretion of the trial court.’

[11] When the court a quo imposed a sentence on the child in this matter, it committed material irregularities warranting this court to interfere with the sentence imposed. The sentencing court completely failed to take into account the CJA and its stated objectives when it arrived at its sentence. Nowhere in the record of proceedings is the applicability of the CJA considered or the very least, mentioned nor

its aims taken into account. It bears repeating that the CJA creates a separate and distinct system of criminal justice for children. It is no longer business as usual when dealing with children in conflict with the law. The record in this matter disturbingly demonstrates

that the foundation of our child justice system was not considered when sentencing a child. If the sentencing court had done so the child would have been treated differently and an emphasis would be placed on effective rehabilitation and the integration into society to minimise chances of reoffending.

[12] Moreover the child was sentenced to five years' imprisonment. Nowhere in the sentence does the presiding officer grapple with any of the different sentencing options that the CJA pointedly sets out in chapter 10, part 2, ss 72 to 79. The probation officers report, though scant, contained some of the sentencing options however no interrogations of these options was undertaken.

[13] It is important to restate the position in our law when a sentence of imprisonment of a child is considered. Section 77 of the CJA reads:

'(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 period of time.'

The child in question was 13 years old when the offence was committed and had turned 14 when the sentence was passed. The ordinary meaning of words 'as a last resort' in subsection 1(b) above means a sentence of imprisonment against a child must be considered only when no other option but the imposition of that sentence. As stated above, various sentencing options were not entertained for the court to arrive at the conclusion that the imprisonment was a last resort. The sentencing court failed to comply with the CJA by imposing imprisonment as a measure of last resort.

[14] The presiding Magistrate also did not consider the second leg of subsection 1(b) which obliges him, when imposing imprisonment, to do so for the shortest period of time. This is clearly to avoid exposing children to the adverse effects of the criminal justice system and long periods of imprisonment. From the record, there is no indication how the sentence of five years' imprisonment was aimed at effective rehabilitation and reintegration as envisaged in the CJA.

[15] In addition it appears that the probation officer recommended that the child be sentenced in terms of s 76(2) of the CJA which is a compulsory residence at a child and youth care center providing a programme. It is indeed correct that the recommendation in the pre-sentence reports do not bind the court[6]. In *S v LJ* supra it was held:

"However, it was compelling for the recommendations of the probation officer to be seriously considered. Importantly, where recommendations are not followed, the court must explain why the sentence differs from what was suggested in the pre-sentence report. The court must enter the reasons for the imposition of a different sentence on the record of proceedings."

[16] The presiding Magistrate did not follow the recommendation of the Probation Officer and imposed a sentence of imprisonment on the child without providing reasons why he is not accepting this recommendation. This is the serious irregularity which offends the core values and objectives of the CJA, in particular, to provide an effective rehabilitation of

children in conflict with the law. Clearly section 76(2) is aimed at empowering the children concerned by providing them with programs designed for their needs and at the same time ensuring they take accountability for their actions.

- [17] In this matter the probation officer referred to a school of industries as a possible school where the child may receive this program. This was in light of her view that the child was doing well at Valley View where he participated in certain programs and showed signs that he is likely to be rehabilitated. The only downside is that the space was not immediately available but in December. This however is not a good reason to move away from a suitable sentence and to a sentence of imprisonment which has far reaching consequences for the child and the community at large.
- [18] It must be mentioned that the child in question faced a serious offence of attempting to commit a sexual offence. The scourge of violence against woman and children in our country is at alarming levels. Our courts are constantly grappling with the consequences of this heinous crime, the need to eradicate this scourge and where possible, the need to utilize interventions aimed at changing behavior must be encouraged. In this matter the child in question did not succeed in committing rape as a result of the brave actions of the complainant. It is however clear that considering his age and prospects of rehabilitation, the most suitable sentence is the one envisaged by the probation officer in terms s 76(2) of the CJA.
- [19] In light of the material irregularities in the sentencing of the child, the sentence of imprisonment must be set aside. The conviction of the child must however be confirmed.
- [20] In the result the following order is made:
1. The conviction is hereby confirmed.
 2. The sentence of five years' imprisonment is hereby set aside and substituted with the following sentence:
 - (a) The child is sentenced in terms of s 76(2) of the CJA to three years' compulsory residence at Newcastle School of Industries.
 - (b) Pending the transportation of the child, he shall be kept at Westville Youth Centre.
 - (c) The Regional court, Ngwelezane must keep the matter on the roll pending the transportation of the child in accordance with this order.
 - (d) This order must be brought to the attention of the South African Police Service and the Investigating Officer of this matter.
 - (e) The Probation Officer is ordered to undertake placement of the child at the said institution and monitor the movement of the child.

HLATSHWAYO AJ

I agree.

ZP NKOSI J

[1] See *SS v Presiding Officer, Children's Court, Krugersdorp and Others* 2012

(6) SA 45 (GSJ) para 1.

[2] United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.

[3] *S v LJ* 2023

(1) SACR 396 (WCC).

[4] *S v Speelman* 2020 JDR 1840 (ECG) para 4.

[5] *Mnisi v S*

[2014] JOL [31298] (SCA) para 18.

[6] *Centre for Child Law v Minister for Justice and Constitutional Development and Others*

[2009] (2) SACR 477 (CC)

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