

SOUTH AFRICA / JUDGMENT

S v Goliath (CA&R36/2014) [2014] ZAECHGC 4; 2014 (2) SACR 290 (ECG) (17 February 2014)

[2014] ZAECHGC 4

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J.D. Pickering, J.M. Roberson

CASE / FILE NUMBER

CA&R36/2014

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IN

THE HIGH COURT OF SOUTH AFRICA
(EASTERN
CAPE, GRAHAMSTOWN)

Review

case no: 2012000247

CA&R

no: CA&R36/2014

Date:

17 FEBRUARY 2014

In

the matter between

THE

STATE

vs

BRAMLEY

GOLIATH

REVIEW

JUDGMENT

PICKERING J:

- [1] The accused in this matter was convicted in the regional court, Somerset East, sitting as a Child Justice Court as defined in the Child Justice Act 75 of 2008 (“the Act”), on 2 counts of rape in contravention of the provisions of section 3 of Act 32 of
2007. At the time he was a mere 14 years of age. The regional magistrate, taking both counts as one for purposes of sentence, sentenced the accused in terms of section 76(1) of the Act to compulsory residence at the Bhisho Special Care Child and Youth Care Centre (“the Bhisho facility”). The accused was thereafter admitted to the Bhisho facility.
- [2] As required by s 85(1)(a) of the Act the matter was sent for automatic review in terms of s 304 of the Criminal Procedure Act 51 of 1977. It came before me on 20 September 2012 on which date I confirmed both the convictions and the sentence.
- [3] During July 2013 Mr. Goosen, the resident magistrate at Nerina One Stop Justice Centre in Port Elizabeth, became concerned as to what was happening at the Bhisho facility after reading a newspaper article in the Daily Dispatch. That article reported that staff members at the facility had been attacked, robbed and threatened with rape and that the children at the facility were a law unto themselves. He was also made aware of correspondence addressed by concerned persons to the relevant officials at the Department of Social Development in which the problems at the facility were pertinently brought to the Department’s attention.
- [4] Mr. Goosen then paid an unannounced visit to the facility on 25 July
2013. He discovered that children were roaming around freely, listening to music and not doing any schoolwork. His investigations revealed that the security guards were so afraid of the children that they would lock themselves into a room at night. He discovered further that many of the children absconded nightly from the facility and that the use of drugs was rampant. The buildings were being vandalised and he found broken windows, broken doors, damaged light fittings, vandalised swimming pool pumps, damaged and destroyed furniture and television sets, and broken security cameras. The main computer centre had been destroyed and attempts had been made to set the building alight. In short, the facility was wholly dysfunctional. A perusal of Mr. Goosen’s affidavit reluctantly brings to mind scenes from William Golding’s *Lord of the Flies*.
- [5] In consequence of his observations and his utmost concern at the appalling state of affairs at the facility, Mr. Goosen launched an urgent application on 2 August 2013 in the High Court, Bhisho, citing the MEC for Basic Education in the Eastern Cape and four others as respondents. *Cornelius Goosen N.O. v MEC Basic Education, Eastern Cape and 4 Others*, unreported case no 459/13. He pointed out in his affidavit in support of the application that “the lives of children not part of those causing havoc are in danger and the children causing

havoc are a danger to themselves, the staff and the community around the facility.” In his application he applied for an order calling upon the respondents to file a written report on or before 12 August 2013 as to “where each child sentenced to the Bhisho facility (and who should be at the Bhisho facility at the time of writing the report) is held and whether it would be safe for that child, the staff and the community at large should the child return to the Bhisho facility” as well as with respect to certain other issues relating to the functioning of the Bhisho facility.

- [6] Following upon the institution of these proceedings the Bhisho facility was closed down, purportedly on a temporary basis and the children at the facility were transferred in the meantime to other facilities.
- [7] On 3 October 2013 the matter came before Hartle J who granted an order postponing it to 17 October 2013. She further ordered, inter alia, that those children (including the present accused) listed in a particular schedule to the Notice of Motion should remain in protective custody at Kirkwood Correctional Centre – Youth section until 17 October 2013. A certain Mr. Meyer was appointed curator ad litem to represent the interests of the forty affected children listed in the schedule.
- [8] On 17 October 2013 the matter came again before Hartle J on which date it was postponed to 31 October 2013 to enable the respondents to take certain instructions. It was further ordered, by consent, that:

“2. Regard being had to the temporary closure of the Bhisho Child and Youth Care Centre, the Courts that sentenced all the children on Annexure X hereto are to consider the imposition of alternative sentences.

3. That the children currently held at Kirkwood Correctional Centre in protective care as per the list applied by the curator ad litem, and any other child as per Annexure X that might be apprehended in the interim, will remain at the Kirkwood Correctional Centre in protective care until each child is requisitioned by the Court that sentenced him, alternatively until 31 October 2013.
4.
5. That the curator ad litem deliver a progress report by 31 October 2013 in respect of each child.”
- [9] It is immediately apparent from paragraph 2 of the Order that Hartle J (as a prerequisite to the consideration of alternative sentences by the respective courts) did not review and set aside the sentences which had previously been imposed upon the affected children.
- [10] On 31 October 2013 Hartle J was again presiding when the following order was made with the agreement of counsel for both applicants and respondents as well as the curator ad litem:

“1. That the detention of the children still at the Kirkwood Correctional Centre on 31 October 2013 is extended to 11 November 2013 for requisition by the Courts that originally imposed sentences on them.

2. That the curator ad litem report at every extension until all the affected children have been requisitioned by the Courts that

sentenced them.”

- [11] Certain other orders were made in respect of an Implementation Plan dealing with the transfer of the Bhisho facility from the Eastern Cape Department of Education to the Department of Social Development and with the appointment of relevant personnel in order to ensure that the Bhisho facility again become fully functional. These orders are not relevant to the present matter. In consequence of this order a number of the detained children were requisitioned to appear before the courts that sentenced them. According to the report of the curator ad litem thirteen of the requisitioned children have been re-sentenced whilst sentencing procedures in respect of a further eight children have yet to be finalised. There are, according to the report, a further five affected children, including the present accused, who are still currently housed at the Kirkwood Correctional Centre. The report states that the matter involving the present accused was “sent on special review, citing the closure of the Bhisho reform school.” In each of the other four matters those children were not requisitioned to appear in the court a quo “due

to the fact that the magistrate from the court a quo indicated that he is functus officio.”

- [12] That then is the background leading up to the regional magistrate, Mr. Potgieter, sending the present matter on special review. In so doing he stated as follows:

“1. I convicted and sentenced the accused. In terms of section 76(1) of Act 75 of 2008 he was sentenced to compulsory residence at Bhisho Special Youth Care Centre.

2. After accused had been there for a period of time the centre was temporarily closed. The accused was then kept at Kirkwood prison.
3. I include herewith documentation which explains the situation. In paragraph 2 (of the court order) it is suggested that the court should impose an alternative sentence.
4. In my view I cannot do this because the sentence was not set aside by the High Court. I am functus officio. Section 76(4)(e) of the Act is also not applicable. I send this case on review again for a consideration to set the original sentence aside. Once that is done I can impose another sentence.”

- [13] When the present matter came before me on review on 2 December 2013 I sought the views of the Director of Public Prosecutions. I was furnished on 6 December 2013 with an opinion by the Deputy Director of Public Prosecutions, Mr. Bezuidenhout. I am indebted to him for his very prompt and comprehensive opinion. Because Mr. Bezuidenhout was of the view that the regional magistrate was incorrect in believing that he was functus officio I considered that I should afford the regional magistrate an opportunity to comment thereon.

That opinion was forwarded to the regional magistrate on 11 December

2013. For some unknown reason this document only reached the clerk of the court, Somerset East, on 21 January 2014. It is regrettable that such a delay should have occurred especially in a case where the interests of a minor child are involved. Be that as it may, the regional magistrate replied on 27 January 2014 stating that he remained of the opinion that he was *functus officio* and that the accused's sentence accordingly had first to be set aside before he could be re-sentenced.

[14] It is clear that this Court has the power to review the sentence imposed by the regional magistrate. In *S v Z* and 23 similar cases 2004 (1) SACR 400 (ECD) Plasket J, with whom Leach and Froneman JJ concurred, had occasion to deal with a situation where juvenile offenders who had been sentenced to reform school had, by reason of administrative difficulties, been detained elsewhere for unreasonably long periods before their sentences were carried into effect. The Court held that in such cases, where the fundamental rights of the

children were being infringed, the Court had the jurisdiction to review the sentences, despite the fact that they were competent and regular when imposed.

[15] The headnote of the case, which correctly reflects what was stated in the judgment, reads as follows at 401 e-f:

“Section 304 of the Criminal Procedure Act 51 of 1977, when interpreted in accordance with the spirit, purport and objects of the Bill of Rights (as enjoined by s 39(2) of the Constitution of the Republic of South Africa Act 108 of 1996), and bolstered by the inherent jurisdiction of the superior Courts to regulate their process and develop the common law in the interests of justice (as enshrined in s 173 of the Constitution), envisages that those Courts will have the power to review competent, regularly imposed sentences, where subsequent events, if no interference occurs, would create or lead to a miscarriage of justice.”

[16] In *S v Katu* 2001 (1) SACR 528 (E) the trial court had ordered that a 15 year old youth, convicted of housebreaking, be sent to a reform school. The magistrate discovered, 15 months later, that the youth was still being detained at Grahamstown Prison pending his removal to a reform school. Although the proceedings had been duly confirmed on review shortly after sentence had been passed the Court, per Smuts AJ, held that justice demanded that the accused be detained no longer. He accordingly withdrew the previous certificate issued by the reviewing judge, set aside the previously imposed sentence and remitted the matter to the magistrate's court for the imposition of sentence afresh.

[17] Mr. Bezuidenhout in his opinion submitted, however, that it was not necessary in the present matter to resort to the s 304 review procedure. He submitted that the order issued in the Goosen case to the effect that each of the children currently being held at Kirkwood Correctional Centre in protective care be requisitioned by the court that sentenced him in order for those courts to consider the imposition of alternative sentences, was justifiable in terms of s 76(4)(e) of the Act inasmuch as those children were “never admitted to a Child and

Youth Care Centre as defined in the Act and the Children's Act." Mr. Bezuidenhout drew attention to the definition of a "Child and Youth Care Centre" in the Act as being "a child and youth care centre defined in section 191 of the Children's Act". Section 191 itself states that such a centre "is a facility for the provision of residential care to more than six children ... in accordance with a residential care programme suited for the children in the facility ..."

. It specifies, inter alia, the "therapeutic programme" which must be offered at such a centre. Mr. Bezuidenhout submitted

that "a careful reading" of Mr. Goosen's affidavit in the Goosen case supra, showed clearly that the Bhisho facility was no longer providing the requisite programmes as specified in section 191 of the Children's Act. Accordingly, so he submitted, the Bhisho facility, although described as a Child and Youth Care Centre, was not in fact such a centre and the children sentenced to compulsory residence therein had as a result never actually been "admitted" to a Child and Youth Care Centre even though they had taken up residence therein.

[18] In my view these submissions cannot be sustained. It is not in dispute that the Bhisho facility was built at a cost of R300 million as a high security facility in terms of the applicable legislation in order to cater for children in conflict with the law and that it commenced functioning as such in terms of that legislation. The fact that it thereafter became dysfunctional, lamentable as that may be, cannot alter the facility's statutory status as a Child and Youth Care Centre. Mr. Goosen's averments may constitute evidence of the dysfunctional state of the facility but they do not constitute evidence that the facility ceased to be a Child and Youth Care Centre. In any event, there is no evidence whatsoever to the effect that at the time the present accused was admitted to the facility it was already dysfunctional and that therefore he had never been admitted to a Child and Youth Care Centre.

[19] I am further of the view that Mr. Bezuidenhout's reliance upon the provisions of s 76(4)(e) of the Act is misplaced. That subsection must be read in conjunction with s 76(4)(d). The two subsections read as follows:

"(d) Where a presiding officer has sentenced a child in terms of this section, he or she must cause the matter to be retained on the court roll for one month, and must, at the re-appearance of the matter, inquire whether the child has been admitted to the child and youth care centre.

(e) If the child has not been admitted to a child and youth care centre, the presiding officer must hold an inquiry and take appropriate

action, which may, after consideration of the evidence recorded, include the imposition of an alternative sentence, unless the child has been sentenced in terms of subsection (3)."

[20] It is clear in my view that section 76(4)(d) was enacted in order to cater for the type of situation that arose in *S v Katu* and *S v Z* supra and to prevent a child languishing in a prison or other place of detention for longer than a month whilst awaiting transfer to a Child and Youth Care Centre. If it appears in the course of the presiding officer's enquiry in terms of s

76 (4)(d) that the child has not been admitted to the centre within the preceding month then the presiding officer is enjoined, in terms of s 76(4)(e), to hold an enquiry and to take appropriate action which may include the imposition of an alternative sentence.

[21] The presiding officer's jurisdiction to impose an alternative sentence without that sentence having been set aside on review or appeal is confined to the circumstances specified in s 76(4)(d) and

(e) and to none other.

[22] In my view therefore, once a child sentenced to compulsory residence in a Child and Youth Care Centre has been admitted thereto, the Child Justice Court which sentenced that child becomes functus officio, its jurisdiction having been fully and finally exercised. As was stated in *R v Mthembu* 1959 (4) SA 129 (NPD) at 131 E – F:

“(T)he Court, having delivered its judgment and pronounced its verdict, was functus officio, in accordance with the principles stated in Estate Garlick v Commissioner for Inland Revenue, 1934 AD 499 at page 502”.

See too *West Rand Estates, Ltd v New Zealand Insurance Co. Ltd* 1926 AD 173 where Kotze JA stated as follows at 187:

“The reason given for the rule that a judge cannot alter or add to a definitive sentence pronounced by him is that, after the pronouncing

of the sentence, his function as judge has come to an end, and the matter has passed in rem judicatam.”

[23] The only basis therefore upon which that child's sentence could be interfered with would be by way of review or appeal. Absent that, the presiding officer has no jurisdiction to impose an alternative sentence upon the child in question.

[24] As I have said above the orders which were made by Hartle J were granted by consent. The parties were represented by experienced

counsel, including senior counsel. It would appear that the minds of all concerned were directed towards a solution to the dire problem such as would best serve the interests of the minor children. In so doing it seems to me, with the greatest respect, that sight was lost of the procedural prerequisites applicable to the matter. Once the matter had been brought to the attention of the High Court by Mr. Goosen then, in my view, that part of the order dealing with the resentencing of the affected children, should have provided that the case of each such child be urgently sent on special review to be dealt with accordingly. It is useful to compare in this regard the matter of *S v Z and 23 Others* supra where Mr. Goosen himself was responsible for referring the matters at issue therein to the reviewing court. I would like to record at this juncture that Mr. Goosen's continuing commitment to the safeguarding of the interests of juvenile offenders in the Eastern Cape Province is deeply appreciated.

[25] In all the circumstances I am of the view that the regional magistrate in the present matter is indeed functus officio.

[26] In the light of the closure of the Bhishe facility the sentence imposed upon the accused must be set aside and the case remitted to the regional magistrate for sentencing afresh.

[27] The following order is made:

1. The certificate dated 20 September 2012 by Pickering J in terms of s 304(1) of the Criminal Procedure Act 51 of 1977 is withdrawn.
2. The sentence imposed on the accused is set aside.
3. The matter is remitted to the regional magistrate, Somerset East, for sentencing afresh.

J.D. PICKERING

JUDGE OF THE HIGH COURT

I agree,

J.M. ROBERSON

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