

SOUTH AFRICA / JUDGMENT

S v H.L and Others (445/2023)

[2024] ZAWCHC 66 (4 March 2024)

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COURT

Western Cape High Court, Cape Town

BEFORE

Lekhuleni JD, Nziweni CN

CASE / FILE NUMBER

445/2023

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IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court reference number: 445/2023

Magistrate's serial number: R08/2023

Magistrate's case number: PRO30/2023

In the matter between:

THE STATE

and

HL

First Accused

DL

Second Accused

WB

Third Accused

REVIEW JUDGMENT – 04 March 2024

LEKHULENI et NZIWENI JJ

Introduction

- [1] This case is before us for review in terms of section 85 of the Child Justice Act ('the CJA'), read with Chapter 30 of the Criminal Procedure Act 51 of 1977 ('the CPA'). The three accused are child offenders who were 15, 14, and 17 years old, respectively, at the time of the commission of the offence. While we appreciate that they are child offenders and should be referred to as such, we will refer to them as accused 1, 2, and 3, for ease of reference. This is not meant to be disrespectful towards anyone involved in the case.
- [2] The accused appeared together at Paarl Regional Court. During the appearance, the charge preferred against accused 2 and 3 differed from that of accused 1. Accused 1 was charged with attempted murder and was found guilty on 3 July 2023 by the trial court pursuant to a plea and sentence agreement concluded in terms of section 105A of the CPA. The court subsequently sentenced the accused 1 to three years correctional supervision in terms of section 75 of the CJA read with section 276(1)(h) of the CPA.
- [3] Meanwhile, accused 2 and 3 were charged with assault with intent to do grievous bodily harm. They were convicted of the said charge on 03 July 2023, pursuant to a plea and sentence agreement in terms of section 105A of the CPA. The two accused (accused 2 and 3) were each sentenced to three years correctional supervision in terms of section 75 of the CJA read with 276(1)(h) of the CPA. As the accused were minors, this matter is subject to automatic review in terms of the

provisions of section 85 of the CJA. Essentially, this court is enjoined to consider whether the proceedings before the trial magistrate appear to be in accordance with justice. Upon perusing the record, we observed some irregularities that contaminated the proceedings at the court a quo. We will deal with those irregularities later in this judgment.

The Factual Background

- [4] As explained above, the State preferred a charge of attempted murder against accused
1. The State alleged that on or about 25 October 2021 and at or near Merchant Street, Klapmuts, in the Regional Division of the Western Cape, the accused unlawfully and intentionally attempted to kill M[...] V[...], a 14-year-old male, by hitting him with a pole on his head. Regarding accused 2 and 3, the State alleged that on 25 October 2021, at Merchant Klappmuts, the accused unlawfully and intentionally assaulted M[...] V[...], a 14-year-old male, by hitting him and kicking him with the intent of causing him grievous bodily harm.
- [5] The three accused were legally represented by an attorney throughout the proceedings. I pause to mention that when the matter was heard in the court below, accused 3 had already reached the age of majority. Accused 1 and 2 were still minors and were duly assisted by their legal guardians. As mentioned previously, all the accused pleaded guilty to the charges levelled against them and confirmed that they have entered into a plea and sentence agreement with the State.

- [6] The facts gleaned from their plea and sentence agreement are that they were at Klapmuts on 25 October 2021. The three of them were together and with other friends. They met the complainant with his friends, who threw stones at the accused. The stone struck accused 2 and 3 on the head and accused 3 was almost unconscious. The three accused asserted that they left and later returned, where they found the complainant and his friends smoking Oka pipe. They confronted the complainant and his friends about the earlier encounter.
- [7] Accused 2 and 3 kicked the complainant. Accused 1 took a pole and hit the complainant twice on the head therewith. Accused 1 admitted that the injury that the complainant sustained to his head was severe, and the complainant could have passed away had he not received medical treatment. Accused 2 and 3 were unaware that accused 1 would hit the complainant with a pole on his head. Pursuant to the assault, the complainant suffered injuries and was admitted at Stellenbosch

Provincial Hospital, where he was later transferred to Paarl Hospital.

- [8] The complainant spent approximately 18 days hospitalised. From the Probation officer's report, the mother of the complainant reported that the complainant kept on experiencing seizures, and this led to him being hospitalised for an extended period. According to the complainant's mother, scans were done on the complainant, and it was confirmed that there were no permanent severe injuries. However, she stated that after the ordeal and recovery, the complainant tends to forget easily. The complainant also, at times, complains about headaches and sleeps more often than before.
- [9] All three accused expressed remorse for their unlawful conduct. The Correctional Officer reported that all accused were suitable candidates for correctional supervision. The Probation Officers who prepared the pre-sentence reports also recommended that all three accused be given a sentence of correctional supervision according to section 75 of the CJA. After considering the matter, the trial court was satisfied with the plea and sentence agreements and found that the various sentences were just. He accordingly informed the prosecutor and the defence as envisaged in section 105A (8) of the CPA. Consequently, the court convicted the accused of the offence charged and imposed a sentence of correctional supervision expressed

in the plea agreement as recommended by the Correctional and the Probation Officers.

Incompetent sentence

- [10] As previously stated, the parties entered into a plea and sentence agreement. Upon perusal of the record, we observed that the sentence that the parties agreed on is problematic and offends the provisions of the CJA. Furthermore, the sentence does not align with the established principles of correctional supervision. For the sake of completeness, we reproduce verbatim the sentence incorporated in the plea agreement, which was subsequently imposed by the court.

“The accused is sentence to:

In terms of section 75 of the Child Justice Act 75 of 2008:

36 Months correctional Supervision in terms of section 276(1)(h) of the Criminal Procedure Act 51 of 1977.”

[11] It hardly needs citation of authorities to see that the sentence imposed by the court a quo in respect of all three accused is incompetent. Accordingly, it is void and unenforceable. The sentence is incompetent because it does not comply with the requirements of a sentence imposed in terms of section 75 of the CJA read with section 276(1)(h) of the CPA. Plainly, the foregoing sentence does not contain any expressed conditions. The trial court, inter alia, failed

to order the accused to adhere to conditions as envisaged in section 75 read with section 53 of the CJA. Section 75 of the CJA provides that a child justice court that convicts a child of an offence may impose a sentence of correctional supervision envisaged in section 276 (1)(h) of the Criminal Procedure Act. Notably, apart from the difficulty in the wording of this sentence, it did not attach or refer to the proposed programs of life skills, anger management, alcohol and substance abuse recommended in the pre-sentence reports. In our view, the sentence imposed by the trial court defeats the intended objectives of correctional supervision.

[12] It is important to note that correctional supervision as a sentence is served by offenders in the community under the control and supervision of correctional officials or a probation officer and is subject to conditions set by the court or the commissioner of correctional services. These conditions are designed to protect the community and prevent the offender from reoffending.

[13] In other words, a sentence of correctional supervision endeavours to ensure that offenders abide by the conditions imposed upon them to protect the community from offences which such persons may commit. In *S v M* [2007] ZACC 18; 2007 (2) SACR 539 (CC) at para 60, the Constitutional court referred to section 50(2) of the Correctional Services Act 111 of 1998 (‘the Correctional Services Act’) and stated that a requirement for the imposition of a sentence of correctional supervision is that the offender agrees not only to such sentence, but also to the stipulated conditions ordered and undertakes to co-operate in meeting them.

[14] Section 50(1)(a) of the Correctional Services Act sets out the objectives of community corrections. Among others, the Act states that the objectives of community corrections are to afford sentenced offenders an opportunity to serve their sentences in a non-custodial manner to enable persons subject to community corrections to lead a socially responsible and crime-free life during the period of their sentence and in the future. The sentence is of a flexible character to promote the best achievement of its objectives. *S v Dikqacwi and Others* (unreported case number SS49/2012) (15 April 2013) para 24.

- [15] Meanwhile, section 75 of the CJA provides that a child justice court that convicts a child of an offence may impose a sentence of correctional supervision envisaged in section 276 (1) (h) of the Criminal Procedure Act. Correctional supervision is described in section 1 of the CPA as a community-based sentence to which a person is subject in accordance with Chapters V and VI of the Correctional Services Act 111 of 1998. Section 52 of the Correctional Services Act lists a range of conditions that could form part of the sentence, for example, house arrest, refraining from using alcohol or drugs or refraining from threatening a particular person or persons by word or action, etc.
- [16] In addition to the conditions set out in section 52, section 69 of the Correctional Services Act lists two additional conditions in respect of children, namely: the child may be compelled to attend an educational programme if not subject to compulsory education, and the Department of Correctional Services must provide access to such social work services, religious care, recreational programmes and psychological services as the child may require.
- [17] In the present matter, the court a quo imposed sentence in terms of section 75 of the CJA read with section 276(1)(h) of the CPA. It must be stressed that section 75 of the CJA must not be read in isolation. It must be read together with other provisions of the CJA, particularly sections 53, 72 and 79. For convenience, these sections are discussed hereunder.
- [18] Section 72(1) defines a community-based sentence as a sentence allowing a child to remain in the community. It includes any options referred to in section 53, as sentencing options, or any combination thereof and a sentence involving correctional supervision referred to in section 75. Section 72(2) stipulates that a child justice court that has imposed a community-based sentence (in this case, correctional supervision) in terms of subsection (1) must request the probation officer concerned to monitor the child's compliance with the relevant order and to provide the court with progress reports, in the prescribed manner, indicating compliance; and (b) warn the child that any failure to comply with the sentence will result in him or her being brought back before the child justice court for an inquiry to be held in terms of section 79.
- [19] Meanwhile, section 53 sets out the sentencing options for community-based sentences and provides as follows:
53. Diversion options. — (1) For the purposes of this section—
- (a) “a compulsory school attendance order” means an order issued in the prescribed manner, requiring a child to attend school every day for a specified period of time, which must be monitored by a specified person;
- (b) “a family time order” means an order issued in the prescribed manner, requiring a child to spend a specified number of hours with his or her family;

- (c) “a good behaviour order” means an order issued in the prescribed manner, requiring a child to abide by an agreement made between the child and his or her family to comply with certain standards of behaviour;
- (d) “a peer association order” means an order issued in the prescribed manner, requiring a child to associate with persons or peers who can contribute to the child’s positive behaviour or to refrain from associating with certain specified persons or peers;
- (e) “a reporting order” means an order issued in the prescribed manner, requiring a child to report to a specified person

at a time or at times specified in the order so as to enable that person to monitor the child’s behaviour; and

- (f) “a supervision and guidance order” means an order issued in the prescribed manner, placing a child under the supervision and guidance of a mentor or peer in order to monitor and guide the child’s behaviour.

[20] Section 53(a)-(q) sets out possible orders that a court may make when imposing a community-based sentence. They include a written apology, a compulsory school attendance order, a good behaviour order, a referral to counselling or therapy, etc. Section 79 of the CJA envisages situations where the child fails to comply with certain sentences, including community-based sentences. It provides as follows:

“Failure to comply with certain sentences—

- (1) If a probation officer reports to a child justice court that a

child has failed to comply with a community-based sentence imposed in terms of section 72, or a restorative justice sentence imposed in terms of section 73, or has failed to pay a fine, restitution or compensation provided for in section 74, the child may, in the prescribed manner, be brought before the child justice court which imposed the original sentence for the holding of an inquiry into the failure of the child to comply.

- (2) If, upon the conclusion of the inquiry, it is found that the child has failed to comply with the sentence

provided for in subsection (1), the child justice court may confirm, amend or substitute the sentence.”

[21] The intended objectives of these sections are to ensure that a child offender is monitored pursuant to a community-based sentence that a court imposed. The child justice court has a wide discretion to impose conditions that would serve the best interest of the child offender when it imposes a community-based sentence. This ensures that the child concerned is fully integrated into society upon completion of the sentence. Sadly, the court a quo imposed a sentence that did not serve the interest of the three child offenders.

[22] The community-based sentence imposed by the court a quo did not attach life skills conditions or development and support programmes that the child offenders had to do to mould their behaviour as envisaged in the above sections. In *S v Govender* 1995 (1) SACR 492 (N) quoted with approval by the Constitutional Court in *S v M* (supra), the full court held that in imposing a sentence of correctional supervision, it was for the court to indicate clearly the duration and extent of house arrest, community service or other duties and restrictions so as to permit of no doubt of what was imposed on the accused.

Duty of the court during section 105A proceedings

[23] We accept that the sentence was pursuant to an agreement between the State and the defence. However, we deem it proper to emphasise that a trial court should not take a plea and sentence agreement at face value. The courts are not there to act as a mere rubber stamp to what the State and the defence have agreed upon. Section 105A (7) of the CPA enjoins a court if it is satisfied that the accused admits the allegations in the charge and that he is guilty of the offence in respect of which the agreement was entered into to proceed to consider the sentence agreement. In addition to the requirements set out in section 105A (7), a court must also satisfy itself whether the proposed sentence is legally competent or not. A just sentence must conform to the Constitution and the relevant applicable law. We hold the firm view that the sentence that the court a quo imposed offends the provisions of the CJA and is not in the best interest of the three child offenders.

[24] It is perhaps necessary to remind ourselves that the aim of the CJA as expressed in the Preamble is, among others, ‘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. Thus, the CJA is child-centric and intends to apply to children in the criminal justice system. *S v L.J* 2023

(1) SACR 396 (WCC) at para 21.

[25] Crucially, the CJA recognises the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children to minimise the potential for reoffending. Sections 53, 72, 75, and 79 are giving effect to these objectives. Thus, in a broader context, the CJA is giving effect to section 28 of the Constitution.

Delay in finalising the matter

[26] Lastly, we have observed some irregularities on the record that, in our view, contaminated the entire proceedings and must be strongly condemned. A series of lengthy delays occurred in this matter. The Constitution guarantees the right to be tried within a reasonable time. Hence, it is well established that delay of proceedings affects fair trial rights. In this matter, the accused had a right to have the criminal proceedings against them finalised without undue delay. The computation of the delay does not start when the trial

proceedings start. The clock begins to run on the date of the first (initial) appearance before a judicial officer and continues until the accused person is finally sentenced or acquitted.

- [27] The accused were arrested on 03 November 2021. A preliminary investigation was conducted on 04 November 2021, and the inquiry magistrate made an order that the case be referred to a child justice court (Paarl District Court – D) in terms of section 47(9)(c) to be dealt with in accordance with Chapter 9 of the CJA. The inquiry magistrate further warned the accused and their guardians to appear in that court on the same day and remain in attendance until excused. Indeed, the accused appeared in that court under case number D860/21. On 11 March 2022, the case against the accused was transferred to the Regional Court for trial on 22 March 2022.
- [28] Thus, in this matter, the speedy-trial clock started to run on 04 November 2021. The accused were duly assisted by their parents throughout the proceedings. A legal Aid attorney also represented them. The matter was postponed several times in the Regional Court for over a year and four months before it could be finalised. Accused 1's father lost his employment because of attending court several times due to the postponement of the matter. We accept that this matter was postponed once due to load shedding. However, there were instances when the case could have been heard, and it was postponed based on insubstantial or no reasons at all.
- [29] From the minutes of proceedings, on 24 August 2022, the matter was postponed to 25 August 2022 for plea negotiations. On 25 August 2022, the court postponed the case for pre-sentence reports to 19 September
2022. Pursuant to the plea negotiations, it is apparent that as of 19 September 2022, the accused declared their intentions to plead guilty, albeit the case was postponed for a pre-sentence report. Accordingly, this matter should have been finalised swiftly.
- [30] Nevertheless, gleaning from the record, it is evident that the matter was postponed three times for the pre-sentence report, and on 19 September 2022, the case was postponed for a plea to 17 October 2022. In one instance, the guardian of accused 1 was absent, and a warrant of arrest was authorised against him, but the issue thereof was stayed until 25 October 2022. On 25 October 2022, all the parties were present, including the guardians of all the accused. Notwithstanding, the matter was by agreement postponed for plea to 09 November 2022. It is not clear from the record of proceedings why the case was not heard and finalised on that date as all the parties were in attendance. It must be stressed that courts must be very slow to
- grant postponements that might lead to substantial injustice even if it is by agreement.
- [31] It bears commenting that, from the circumstances of this case, it can never be said that the accused had forgone their right to speedy trial by contributing to the undue delay of this matter. They attended court regularly and remained in attendance until their case was called.

- [32] On 19 January 2023, all the parties were in attendance, and the presiding officer indicated on the record that his contract (presumably his acting contract) expires at the end of January 2023. He also stated that he has two other part heard matters to attend to. The case was postponed to 16 February 2023 for plea. While we accept that part heard cases take preference, we find it concerning that the presiding magistrate postponed this matter under those circumstances. It was known to him that it was going to be a plea. The case before him involved minor children. More so, the guardians of the accused had appeared before the same presiding magistrate several times. He should have known that the matter had been postponed multiple times before that day.
- [33] Significantly, the fact that his acting appointment was coming to an end was not a reasonable ground to postpone the case, which had already been on the roll for almost a year. In any event, he could still do his part heard cases even after the expiration of his contract in terms of section 9(7)(a) of the Magistrates Court Act 32 of 1944. Simply put, the reasons advanced by the magistrate were insubstantial, and he should have dealt with the matter. It is apposite to stress that courts must function in a manner which at all times shows due respect for children's rights. *S v M* [2007] ZACC 18; 2007
- (2) SACR 539 (CC) at para 15. A child's best interests are of paramount importance in every matter concerning the child.
- [34] The prejudice the accused suffered at the court a quo did not end there. On 16 February 2023, accused 1's father could not attend court, and the matter was postponed to 08 March 2023. On 08 March 2023, all the parties were in attendance, and the case was postponed to 30 March 2023 for a plea. On this day, accused 1's father informed the court that he lost his job due to this case. However, he indicated that he found another employment; hence, he could not appear on 16 February 2023. The accused's legal representative submitted that his clients still wanted to tender a plea and asked the court to prioritise the matter. Notwithstanding, the case was postponed to 30 March 2023. It is not clear from the record why the matter could not be heard then, primarily because it was known that the accused wanted to plead guilty, their legal representative was in attendance, and their guardians were also present in court.
- [35] The delay between the initial appearance in this case and the child offenders' eventual guilty pleas is lengthy enough to be presumptively prejudicial. The delay in the finalisation of this matter before the court a quo is unacceptable and must be strongly condemned. It should be borne in mind that one of the guiding principles set out in section 3(f) of the CJA enjoins courts to ensure that all procedures in terms of the CJA are conducted and completed without unreasonable. We have also observed that this matter was finalised in July 2023 and was only submitted to the High Court four months later. The delay has not been explained.

[36] Given the high premium placed on the need to expeditiously finalise cases involving minor children and particularly the provisions of section 35(3)(d) and (o) of the Constitution, it must be impressed on those who preside in these matters to attend them with diligence and conscientiousness to avoid a miscarriage or a perversion of justice. We hold the view that the courts must always pay sufficient attention to the constitutional provision that in all matters concerning children, the children's

interests shall be paramount.

[37] In *S v L*, J 2023

(1) SACR 396 (WCC) para 53, we said that cases involving children in conflict with the law should be conducted and completed without unreasonable delay. In addition, we stated that section 66(1) of the CJA, echoes similar sentiments and provides that a Child Justice Court must conclude all trials of children as speedily as possible and must ensure that postponements in terms of this Act are limited in number and duration.

Conclusion

[38] We are mindful that the crimes that were committed by the accused had severe consequences. Particularly the one that was committed by accused 1, which resulted in the hospitalisation of the complainant. It is not beyond belief that the complainant and his family suffered immensely because of the accuseds' actions. We are also mindful that in terms of section 105A of the CPA, the victim should be consulted regarding the sentence on which the State intends to reach an agreement.

[39] In the present matter, the prosecutor informed the court at the commencement of the trial that the mother of the complainant was consulted and that she had also filed an unsworn statement wherein she indicated that she was satisfied with the agreed sentence in terms of section 276(1)(h). It can be reasonably inferred that the victim's family was not seeking retribution. More so, the Probation Officers who compiled the pre-sentence reports recommended a non-custodial sentence.

[40] Perhaps if there was ever a matter where some drastic measure is required to resolve an apparent injustice, this is the one. Failure to observe the fundamental rights of children in conflict with the law might lead to a situation that requires their sentences and convictions to be set aside. In fact, even if they are convicted of serious crimes. On that basis alone, it is always expected from a court handling cases involving children in conflict with the law to always be on high alert. It is regrettable that, in this instant case, the proceedings did not measure up to constitutional standards.

[41] Given all these considerations, we believe that the proceedings were not in accordance with justice. We hold the view that the irregularities observed in this matter contaminated the entire proceedings. Moreover, the inordinate delay in finalising the plea proceedings, resulted in actual prejudice to the accused. Hence, we firmly believe that the conviction of all the accused and the resultant sentences must be set aside. In the circumstances of this case, it would not be in the interests of justice to retry the case against the accused.

Order

[42] In the result, the following order is granted.

42.1 The conviction and the resultant sentences imposed against the three accused are hereby set aside.

LEKHULENI JD

JUDGE OF THE HIGH COURT

NZIWENI CN

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Prepared on 10 October 2026 · Esheria