

SOUTH AFRICA / JUDGMENT

S v JEK (CA & R 26/2023) [2023] ZANCHC 45 (28 July 2023)

[2023] ZANCHC 45

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Lever

CASE / FILE NUMBER

CA & R 26/2023

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: Special Review CA & R 26/2023

Available on:

28/07/2023

Reportable:

YES / NO

Circulate to Judges:

YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES / NO

In the matter between:

THE STATE

APPLICANT

and

JEK

ACCUSED

Coram: Mamosebo J et Lever J

JUDGMENT ON SPECIAL REVIEW

MAMOSEBO J

[1] The 14-year old child[1] offender stood trial in the Child Justice Court on one count of theft. He was legally represented on 14 March 2023 when he tendered a plea of guilty before Acting Magistrate GS Plaatjie of Carnarvon Magistrates Court. He was convicted in terms of s 112(1)(a) of the Criminal Procedure Act, 51 of 1977 (the CPA). The public prosecutor submitted during argument regarding an appropriate sentence that the boy displayed uncontrollable behaviour. He only started attending school when he was admitted to a Child and Youth Care Centre. It is on this basis that the trial court directed that a probation officer's report be obtained. The report was admitted into the record on 26 April 2023. Pursuant to the address by the State and the defence on sentence, the child was sentenced to compulsory residence for a period of 8 months in a Child and Youth Care Centre in terms of s 76(1) of the Child Justice Act, 75 of 2008 (CJA).

[2] It is noteworthy that the magistrate, on the very same day, had the matter recalled and placed on record that she realized that she could not have sentenced the child offender in terms of s 112(1)(a)

of the CPA to a custodial sentence without an option of a fine and requests that the conviction and sentence be set aside and that the case be referred back to the District Court for the trial de novo (afresh). The magistrate referred the matter to the High Court in Kimberley and received by the office of the Registrar on 19 July 2023, purportedly on special review.

[3] I am indebted to Senior State Advocate JJD Rosenberg of the local office of the Director of Public Prosecutions for his legal opinion in this matter.

[4] Special review in terms of s304(4) of the CPA makes provision for cases that, though disposed of either at the district or regional court, are not subject to automatic review. In *S v De Wee & Others* 2006 (1) SACR 210 (NC) at 212d-e, magistrates referring their matters on special review in terms of s304(4) of the CPA to the High Court are encouraged to specify in their referral that the proceedings were not in accordance with justice.

[5] There is no mention of special review in the Child Justice Act. Sec 84 of the CJA deals with Appeals in Chapter 12 whereas s 85 deals with automatic review in certain cases. The covering letter addressed to the Registrar of the High Court by the Magistrate dated 10 July 2023 states that the matter is sent on review in terms of s 84 of Act 108 of 2010, an Act which is non-existent. It is crucial for Magistrates to double-check the source or reference relied on. Following *S v Ruiter* [2011] ZAWCHC 265; *S v Fortuin*

[2011] ZANCHC 28; and *S v LM* (Faculty of Law, University of the Western Cape: Children Rights Project of The Community Law Centre and Others as Amici Curiae) the case in casu is an automatic review in terms of s 85 of the CJA.

[6] Section 85 of the CJA provides:

“85 Automatic review in certain cases

- (1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children's Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of-
 - (a) the duration of the sentence;
 - (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;
 - (c) whether the child in question was represented by a legal representative; or
 - (d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.
- (2) The provisions of subsection (1) do not apply if an appeal has been noted in terms of section 84.”
- [7] The request for review is predicated solely on the basis that the custodial sentence was not coupled with a fine. But this is not the only concerning issue. Regard being had to the provisions of s 112(1)(a) it is necessary to determine whether the proceedings were in accordance with justice.
- [8] The provisions of s 112(1)(a) of the CPA read as follows:

“112 Plea of guilty

- (1) Where an accused at a summary trial in any court pleads guilty to the offence charged, or to an offence of which he may be convicted on the charge and the prosecutor accepts that plea –
 - (a) the presiding judge, regional magistrate or magistrate may, if he or she is of the opinion that the offence does not merit punishment of imprisonment or any other form of detention without the option of a fine or of a fine exceeding the amount^[2] determined by the Minister from time to time by notice in the Gazette, convict the accused in respect of the offence to which he or she has pleaded guilty on his or her plea of guilty only and –
 - (i) impose any competent sentence, other than imprisonment or any other form of detention without the option of a fine or a fine exceeding the amount determined by the Minister from time to time by notice in the Gazette; or
 - (ii) deal with the accused otherwise in accordance with law.”

[9] The allegation by the State is that on 08 December 2022 and at or near Bubbel and Krabbel Creche, Vosburg the child offender stole consumable items comprising: 12 X cans of fish @ R348.00; 12 X cans

of mix veggies @ R300.00; 6 X tray milk @ R98.00; 12 X cans tomato and onions @ R240.00; 12kg rice @ R148.00; 10kg flour @ R120.00; beef cubes @ R150.00 and 1kg instant porridge @ R30.00, property belonging to the creche or Nicoleen Tieties to the combined value of R1434.00.

[10] The record of proceedings is unhelpful. On 14 March 2023 where the accused's plea is entered, there is an inscription by the magistrate that the proceedings were not mechanically recorded because there was load shedding. The record is silent on whether the child offender was assisted by his parent or guardian as contemplated in s65 of the CJA. Seemingly, the child offender was convicted on the same day and the matter was remanded for the Probation Officer's

report to 20 April 2023 and he remained in custody at Molemampe Secure Centre. On 20 April 2023 despite the Probation Officer's

report being available the defence sought a postponement for sentencing. The case was postponed to 26 April 2023.

[11] There is nothing preventing the presiding officer to summarily convict the accused on a plea of guilty. This, however, will depend on whether or not the offence committed is trivial in nature as s 112(1)(a) is meant for minor offences. It would have been much safer and preferable to rather follow the s 112(1)(b) plea of the CPA affording the trial court an opportunity to pose questions to the child offender to ascertain whether all the elements of the offence would be met. There is also the option of a plea in terms of s 112(2) of the CPA to ensure a proper conviction. It is not clear from the record whether the magistrate had formed an opinion that the matter falls within the purview of s 112(1)(a). The record is further unclear whether s 112(1)(a) was applied at the request of either party or mero motu by the trial court. The prosecutor and the defence had insight into the docket and should have played a more active role in assisting the magistrate to formulate an opinion on whether the jurisdictional fact to apply s 112(1)(a) exist or not.

[12] On 26 April 2023 the trial court considered the Probation Officer's report, and referred to S v Zinn in taking the following personal circumstances into account: that the child offender is 14 years old; has dropped out of school in Grade 7; he is a first offender. The following were the considered aggravating circumstances: theft is a prevalent offence in that jurisdiction; the stolen goods were from a creche and the entire month's supply is worth more than R1000; the goods were not returned to the owner. Having taken the recommendation of the Probation Officer into consideration, the trial court sentenced the boy to compulsory residence for a period of 8 months in a Child and Youth Care Centre in terms of s 76(1) of the Child Justice Act, 75 of 2008 (CJA).

- [13] Ms Lesinda Grootboom compiled the Probation Officer's report that served before the Magistrate. She possesses a BA Degree in Social Work from the University of Stellenbosch. She was a Generic Social Worker for 8 years. She has been in the employ of the Department of Social Development for the past 13 years as a Probation Officer. It is unclear whether she testified in court or her report was handed up by consent between the parties. Her recommendation is that the child offender be diverted in terms of s 76(1) of the Child Justice Act to De Aar -Child and Youth Care [Centre].
- [14] Grootboom's recommendation is unclear. According to s1 of the CJA "diversion" means diversion of a matter involving a child away from the formal court procedures in a criminal matter by means of the procedures established by Chapter 6 and Chapter 8. You cannot on one hand divert a child from the formal system while in the same breath invoke the provisions of s 76 (1) to sentence him or her to compulsory residence. The two are irreconcilable.
- [15] Assuming that the trial court has considered the sentencing options as appearing in the Probation Officer's report and found that the only suitable option would be a sentence in terms of s 76 (1), the record is silent as far as the programmes that the child offender must undergo as contemplated in s 191(2)(j) of the Children's Act is concerned. More importantly, s 112(1)(a) has historically been pleaded in summary trials involving minor offences where imprisonment or detention was not a consideration.
- [16] Section 77 of the CJA finds application since it deals with the imprisonment sentence. It stipulates:
- "(1) A child justice court –*
- (a)...
- (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)...
- (2) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in –
- (a) Schedule 3;
- (b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;
- (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)...

- (5) A child justice court imposing a sentence of imprisonment must take into account the number of days that the child has spent in prison or a child and youth care centre prior to the sentencing being imposed.”

The total amount of the alleged stolen goods according to the charge sheet is R1434.00 which therefore exonerates the child offender from facing an imprisonment term of any form. Notwithstanding that theft is an offence in both Schedule 1 and 2, the amount in casu does not exceed R2500.00 which is the threshold in both Schedules.

[17] A Presiding Officer has a duty to keep a full record of court proceedings. See Sec 76(3) of the Criminal Procedure Act, which stipulates:

“(3)

- (a) The court shall keep a record of the proceedings, whether in writing or mechanical, or shall cause such record to be kept, and the charge-sheet, summons or indictment shall form part thereof.
- (c) Such record may be proved in a court by the mere production thereof or of a copy thereof in terms of section 235.
- (d) Where the correctness of any such record is challenged, the court in which the record is challenged may, in order to satisfy itself whether any matter was correctly recorded or not, either orally or on affidavit hear such evidence as it may deem necessary.”

The presiding officer in this matter has, undoubtedly, not kept a proper record.

[18] It is crucial for presiding officers in the child justice court to be mindful of the objects of the Act as outlined in s 2 and of the guiding principles as provided in s 3 of the CJA.

Notwithstanding that the child offender is in conflict with the law, the provisions of s 28 of the Constitution still find application.

[19] The proceedings in this matter were not in accordance with justice both as regards the conviction and the incompetent sentence.

[20] I make the following order.

1. Both the conviction and the sentence of compulsory residence for a period of 8 months in a Child and Youth Care Centre in terms of s 76(1) of the Child Justice Act, 75 of 2008 are hereby reviewed and set aside.
2. It is left to the Director of Public Prosecutions for the Northern Cape to determine whether the accused would be prosecuted again or pursue any appropriate action in terms of the relevant prescripts.
3. The office of the Registrar is directed to make a copy of this Judgment available to the office of the Director Public Prosecution and the lawyers involved.

MC MAMOSEBO

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION

I concur

L LEVER

[1] 'Child' as defined in s 1 of the CJA means any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of s 4(2).

[2] R5 000.00 (GN R62 in GG 36111 of 30 January 2013, effective from 1 February 2013 and reproduced in the Regulations section of

Commentary. Previously the amount was R1500.00 in terms of the now repealed GN R239 in GG 24393 of 14 February 2003.

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