

SOUTH AFRICA / JUDGMENT

S v J.M.J (Review) (CA&R 65/2024) [2024] ZANCHC 124 (29 November 2024)

[2024] ZANCHC 124

COURT

Northern Cape High Court, Kimberley

BEFORE

Mamosebo, Stanton

CASE / FILE NUMBER

CA&R65/2024

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IN THE HIGH COURT OF SOUTH AFRICA

NORTHERN CAPE DIVISION, KIMBERLEY

Case No: CA&R65/2024

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

and

J[...] M[...] J[...] ACCUSED

Heard on: In chambers

Delivered on: 29/11/2024

Summary:

Review: Section 302(1)(a) Criminal Procedure Act, 51 of 1977 (CPA). Sentences subject to review in the ordinary course. Charge: 'Child neglect': Contravention of Children's Act 38 of 2005. No specific section referred to. Sentence of 12 months Correctional Supervision s 276(1)(h). Sentence incompetent. Proceedings not in accordance with justice. Reviewed and set aside.

ORDER

In the result the following order is made in terms of s 304(2)(c)(iii) of the Criminal Procedure Act:

2. The Registrar of this Court is directed to furnish a copy of the judgment to the Department of Social Development to assess whether the General Regulations regarding children in need of care and

protection should be considered.

3. The Registrar is further directed to furnish a copy of the judgment

to the Chief Magistrate, Kimberley, the office of the Director Public Prosecutions, Northern Cape, and the Justice Centre, Kimberley.

Coram: Mamosebo ADJP et Stanton J

JUDGMENT ON AUTOMATIC REVIEW

MAMOSEBO ADJP

- [1] Upon a plea of guilty in terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA) the accused was convicted of 'child neglect' by Magistrate GS Plaatjie, the Magistrate for the District of Pixley ka Seme, Carnarvon, Northern Cape. The magistrate sentenced her to twelve (12) months correctional supervision in terms

of s 276(1)(h) of the CPA and to Community Service every Friday during that period at Carnarvon Police Station.

- [2] Section 276, which is headed 'Nature of punishments', reads in part:

'(1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of an offence, namely-

- (a) ...
- (b) imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);
- (c) periodical imprisonment;
- (d) declaration as an habitual criminal;
- (e) committal to any institution established by law;
- (f) a fine;

- (g) ...
- (h) correctional supervision;
- (i) imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.
- (2) Save as is otherwise expressly provided by this Act, no provision thereof shall be construed-
 - (a) as authorizing any court to impose any sentence other than or any sentence in excess of the sentence which that court may impose in respect of any offence; or
 - (b) as derogating from any authority specially conferred upon any court by any law to impose any other punishment or to impose any forfeiture in addition to any other punishment.
- (3) Notwithstanding anything to the contrary in any law contained, other than the Criminal Law Amendment Act, 1997 (Act 105 of 1997), the provisions of subsection (1) shall not be construed as prohibiting the court-
 - (a) from imposing imprisonment together with correctional supervision; or
 - (b) from imposing the punishment referred to in subsection (1) (h) or (i) in respect of any offence, whether under the common law or a statutory provision, irrespective of whether the law in question provides for such or any other punishment: Provided that any punishment contemplated in this paragraph may not be imposed in any case where the court is obliged to impose a sentence contemplated in section 51 (1) or (2), read with section 52, of the Criminal Law Amendment Act, 1997.’
- [3] Section 1 of the CPA defines ‘correctional supervision’ as a community based sentence to which a person is subject in accordance with Chapter V and VI of the Correctional Service Act, 1998, and the regulations made under that Act if –
 - (a) he [or she] has been placed under that section 6(1)(c);
 - (b) it has been imposed on him [or her] under section 276(1)(h) or (i) and he [or she], in the latter case, has been placed under that;
 - (c) his [or her] sentence has been converted into that under section 276A(3)(e)(ii), 286B(4)(b)(ii) or 287(4)(b) or he [or she] has been placed under that section 286B(5)(iii) or 287(4)(a);
 - (d) it is a condition on which the passing of his [or her] sentence has been postponed and he [or she] has been released under section 297(1)(a)(i)(ccA) or
 - (e) it is a condition on which the operation of –
 - (i) the whole or any part; or
 - (ii) any part, of his [or her] sentence has been suspended under section 297(1)(b) or (4) respectively.

[4] The Chief Magistrate, Northern Cape, Mr OM Krieling, sent this matter on review in terms of s 302(1)(a) of the CPA with a request to determine whether the proceedings and the sentence imposed were in

accordance with justice.

[5] Sec 302(1)(a) of the CPA deals with sentences subject to review in the ordinary course and provides that:

‘(1)(a) Any sentence imposed by a magistrate's court-

(i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191 (2) (j) of the Children's Act, 2005 (Act 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

(ii) which, in the case of a fine, exceeds the amount determined by the Minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i),

(iii) ...

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.’

The Magistrate occupies an acting position and therefore the referral accords with the provisions of s 302(1)(a)(i).

The plea

[6] The accused was legally represented at the trial by Mr Pretorius of the Legal Aid Board. She tendered a plea of guilty in terms of s 112(2) of the CPA. The written statement reads:

‘I, M[...] J[...], known as J[...], 36-year-old female, confirm I am the accused in this matter. I confirm that I understand the charge of child neglect against me. I further confirm that I tender a plea of guilty voluntarily and without undue influence. And make the following admissions.

That I was in Carnarvon, in the District of Pixley ka Seme on 12 December

2021. That I wrongfully failed to provide shelter and food for my child, R[...] J[...]. That at the time of the incident I was the parent and primary caregiver of R[...] J[...]. That I had no legal right to act in this manner. On the day in question, I left my child at home without food while I went drinking with my boyfriend. R[...] was later observed roaming the streets looking for me. As a result thereof the police and social welfare were contacted. R[...] has since been removed and placed in foster care with his grandmother. I am very sorry for what I have done and ask the Court to have mercy on me. I also apologise herewith to my son for the suffering he encountered as a result of the incident. I am really, really sorry for neglecting

him in this matter. I have tried to change my behaviour and be a better parent for him.’

[7] This is what transpired after Mr Pretorius read the plea:

‘Court: Ma’am, are these the instructions that you have given to your attorney that are written or stated in this plea of guilty?’

Accused: Yes

Court: And this is your signature on the plea?

Accused: Yes.

Court: Ms Boks, any objection to the plea being handed in?

Prosecutor: No objection, Your worship.

Court: Plea handed in and marked as Exhibit A.

Prosecutor: As the Court pleases.

Interpreter: Pleit word geaanvaar soos Bewystuk A.

[8] Du Toit et al[1] succinctly summarised this significant aspect in S v Ngubane[2] in this fashion:

‘The Appellate Division has confirmed that the prosecutor’s acceptance of a plea should not be viewed as either a withdrawal

under s 6(a) or a stopping of the prosecution under s 6(b): the prosecutor’s acceptance of plea of guilty on an alternative or lesser charge is a sui generis act which limits the ambit of the lis between the State and the accused.’

The Supreme Court of Appeal (SCA) in S v Kekana[3] unanimously confirmed the principle espoused in Ngubane and added that the Court is bound by such an acceptance. It is clear from the record that the prosecutor was not afforded the opportunity to make the election to accept or dispute the facts and the proceedings continued as if she had accepted the averments and facts as set out in the accused’s plea. Thereafter the prosecution indicated that it would prove no previous convictions. This is a misdirection on the part of the trial court. More significantly, the defence and the State should have been more astute.

The charge

[9] This is the charge as appearing on Annexure 1 of the record that was put by the prosecutor, Ms Boks, to the accused:

‘The State v J[...] M[...] J[...] hereinafter referred to as the accused – Child Neglect-

That the accused is/are guilty of the offence of contravening the provisions of the Children’s Act, 38 of 2005

In that on or about 10/12/2021 and at or near Carnarvon in the District/Regional Division of Pixley ka Seme, the accused being the

parent and the primary caregiver of the child, R J, 8 years old did wrongfully failed to provide for the child's basic needs, to wit, failed to provide shelter and food.'

[10] 'Charge' is defined in s 1 of the CPA as including an indictment and a summons. Du Toit Et Al[4] provides these insightful comments:

'In a charge the relevant offence is set out in such a manner and with such particulars as to the time and place at which such offence is said to have been committed and the person, if any, against whom and the property, if any, in respect of which the offence is alleged to have been committed, as may be reasonably sufficient to inform the accused of the nature of the crime (s 84). In the superior court the charge will be laid in an indictment (s 144) and in the inferior courts in a summons or a charge sheet.'

[11] A charge sheet must contain all the essential elements necessary to sustain a plea of guilty.

In S v Legoa[5] the Supreme Court of Appeal made these instructive remarks:

'[20] Under the common law it was therefore 'desirable' that the charge-sheet should set out the facts the State intended to prove in order to bring the accused within an enhanced sentencing jurisdiction. It was not, however, essential. The Constitutional Court has emphasised that under the new constitutional dispensation, the criterion for a just criminal trial is 'a concept of substantive fairness which is not to be equated with what might have passed muster in our criminal courts before the Constitution of the Republic of South Africa Act 108 of 1996 came into force'. The Bill of Rights specifies that every accused has a right to a fair trial. This right, the Constitutional Court has said, is broader than the specific rights set out in the sub-sections of the Bill of Rights' criminal trial provision. One of those specific rights is 'to be informed of the charge with sufficient detail to answer it'. What the ability to 'answer' a charge encompasses this case does not require us to determine. But under the constitutional dispensation it can certainly be no less desirable than under the common law that the facts the State intends to prove to increase sentencing jurisdiction under the 1997 statute should be clearly set out in the charge-sheet.'

[12] The charge sheet alleges that the accused is 27 years old whereas in her written plea she stated her age as 36 years. The Magistrate, when considering her personal circumstances, referred to her age as a 34-year-old. This discrepancy is immaterial because what matters is that the accused is an adult and not a minor or of an advanced age. It is as if there were three different accused persons of different ages.

[13] The charge sheet alleges that the accused is charged with 'child neglect' in contravention of the Children's Act 38 of

2005. The description is vague and embarrassing, in that there is no mention of the relevant section of the Act, which omission is crucial for purposes of preparing a defence. The Bill of Rights specifies

that every accused has a right to a fair trial. Assuming that the State intended to follow s 305(3)(a) of the Children's Act[6], instead of the blanket and open-ended allegation of neglect it ought to have specified the period of neglect. The written plea limited the alleged neglect to one day, 12 December 2021. The record is silent on whether the State accepted that admission. It certainly acquiesced.

[14] There seems to be a difference regarding the date on which the offence was committed. In the charge sheet the alleged date is given as 10 December 2021. However, in the written plea, the accused pleaded guilty to an offence that was committed on 12 December 2021. This discrepancy escaped the Court, the State and the defence. As it stands, the date of the commission of the alleged offence is unclear. It follows, therefore, that the charge levelled against the accused

is defective and cannot stand.

[15] The trial court's sentencing of the accused in terms of s 276(1)(h) of the CPA to 12 months correctional supervision without specificity is incompetent. All that the accused can deduce from this sentence is that she must be under correctional supervision at Carnarvon Police Station for a period of 12 months. There were no conditions attached to this sentence save for the trial court to remark that 'so, you would be doing community service once a week on a Friday at the police station. You will be informed by the correctional officer as to when and how the correctional service will be carried out.'

[16] The suitability report to determine whether the accused was a suitable candidate for correctional supervision is attached to the record and marked Exhibit B. At para 1.4 (a) of the report it is recommended that the accused be referred to a social worker for the individual oriented treatment. Para 1.4 (d) under 'other' reads: 'If the Honourable Court can consider Correctional Supervision s 276(1)(h) direct to community corrections. Any reasonable instructions given by the Court the accused is to abide and comply with those instructions.' A plain reading of para (d) is requesting the trial court in the event of ordering correctional supervision to direct the matter to community corrections or service. This means that the trial court's order should have directed that the Department of Correctional Service be placed in possession of its order with specified conditions.

[17] It is inexplicable why the trial court did not incorporate the recommended conditions it deemed meet in its order. With the order in its current form, the accused would not have known who to report to, at what time and the hours of her community service are unspecified and the type of community services to be performed are also not specified. Neither the responsible police officer at the police station nor the corrections officer's names are made known to the accused. She was not even told which programmes she will have to undergo as part of her correction and the consequences that would follow should she not abide by the order. The effect of this type of order is overbroad and vague.

- [18] Section 28(2) of the Constitution[7] provides that ‘A child’s best interests are of paramount importance in every matter concerning the child.’ The trial court should have conducted these proceedings mindful of the fact that as the upper guardian it needs to ensure that the child’s best interests are protected. It is mentioned in the record that the child was removed and placed under foster care of the accused’s grandmother. Regrettably, the rest of the information emanates from the prosecutor. However, it can be deduced therefrom, because the defence did not challenge the submission, that the child was never removed from the accused.
- [19] Section 304 (2)(c) empowers this court, whether it has heard evidence or not, subject to the provisions of s 312, to –
- (i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative charges, convict the accused on the other alternative charge or on one or other of the alternative charges;
 - (ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;
 - (iii) set aside or correct the proceedings of the magistrate's court;
 - (iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or
 - (v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and
 - (vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice.’
- [20] Section 312, under the head ‘Review or appeal and failure to comply with subsection (1)(b) or (2) of section 112’, stipulates that:
- (1) Where a conviction and sentence under section 112 are set aside on review or appeal on the ground that any provision of subsection (1)(b) or subsection (2) of that section was not complied with, or on the ground that the provisions of section 113 should have been applied, the court in question shall remit the case to the court by which the sentence was imposed and direct that court to comply with the provision in question or to act in terms of section 113, as the case may be.
 - (2) When the provision referred to in subsection (1) is complied with and the judicial officer is after such compliance not satisfied as is required by section 112 (1)(b) or 112(2), he shall enter a plea of not guilty whereupon the provisions of section 113 shall apply with reference to the matter.’

[21] The SCA has, in *S v Mshengu*[8] made these illuminating remarks:

‘[18] The course prescribed by the section must, however, be followed unless the court on review or appeal is of the view that it would lead to an injustice or would be a futile exercise. The court retains the discretion not to order a remittal if the circumstances of the case are such that the remittal will be inappropriate.’

[22] Regard being had to the referral letter, record of proceedings, the relevant authorities of a binding nature not only on this court but also on the trial court, I am satisfied that the proceedings were not in accordance with justice. With the flaws indicated in this judgment of both procedural and substantive nature, it would be an exercise in futility and an injustice to remit the matter to the trial court. See also *S v Shiburi* 2018 (2) SACR 485 (SCA) para 22.

[23] In the result the following order is made in terms of s 304(2)(c)(iii) of the Criminal Procedure Act:

2. The Registrar of this Court is directed to furnish a copy of the judgment to the Department of Social Development to assess if the General Regulations regarding children in need of care and protection

should be considered.

MC MAMOSEBO

ACTING DEPUTY JUDGE-PRESIDENT

OF THE HIGH COURT

I concur

A STANTON

JUDGE OF THE HIGH COURT

NORTHERN CAPE DIVISION, KIMBERLEY

[1] *Du Toit Et Al*. Juta Vol 1. [Service 68, 2022] 17 - 7

[2] *S v Ngubane* 1985

(3) SA 677 (A) at 683

[3] *S v Kekana* 2019 (1) SACR 1 (SCA) paras 16 and 17

[4] *Du Toit Et Al*, Juta Vol 1, Def 8, [Service 63, 2019]

[5] *S v Legoa* 2003 (1) SACR 13 (SCA) para 20

[6] Section 305 (3)(a) under the heading ‘offences, stipulates: (3)A parent, guardian, other person who has parental responsibilities and rights in respect of a child, care-giver or person who has no parental responsibilities and rights in respect of a child but who voluntarily cares for the child either indefinitely, temporarily or partially, is guilty of an offence if that parent or care-giver or other person-

(a) abuses or deliberately neglects the child.

[6] Section 305 (3)(a) under the heading ‘offences, stipulates:

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(a) abuses or deliberately neglects the child.

[7] The Constitution of the Republic of South Africa, Act 108 of 1996. Section 28 of the Constitution is the provision in the Bill of Rights that provides for the rights of children.

[8] S v Mshengu 2009 (2) SACR 316 (SCA) para 18

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