

SOUTH AFRICA / JUDGMENT

S v L.C (R12/2022;R13/2022) [2022] ZAMPMBHC 86; 2023 (1) SACR 578 (MM) (30 November 2022) [2022] ZAMPMBHC 86

COURT

Mbombela High Court, Mpumalanga

BEFORE

Ratshibvumo, Greyling-Coetzer

CASE / FILE NUMBER

R12/2022;R13/2022

Source: saflii.org · Research copy typeset by Esheria. Not court-issued or certified.

Source record

THE

HIGH COURT OF SOUTH AFRICA

MPUMALANGA

DIVISION, MBOMBELA MAIN SEAT

REPORTABLE:

NO
OF
INTEREST TO OTHER JUDGES: NO
OF
INTERESTS TO MAGISTRATES: YES
REVISED.
30
November 2022
HIGH
COURT REF NO: R12/2022
MAGISTRATE
CASE NO. N03/2022
MAGISTRATE
REFERENCE NO. 02/2022
In

the matter between: THE
STATE
And
LC
(THE
ACCUSED)
HIGH
COURT REF NO: R13/2022
MAGISTRATE
CASE NO. N04/2022
MAGISTRATE
REFERENCE NO. 01/2022
CM
(THE ACCUSED)
REVIEW

JUDGMENT

RATSHIBVUMO J

[1]. These two matters came before me by way of special review in terms of section 16(2) of the Child Justice Act, no. 75 of 2008 (the Child Justice Act) read with 304(4) of the Criminal Procedure Act, no. 51 of 1977. The two accused appeared in separate cases before the same Magistrate at Mbombela District Court on 19 January 2022. They were

charged with contravening section 49(1)(a) of the Immigration Act, no. 13 of 2002. They all pleaded guilty to the charge. Although they were all legally represented, their plea was dealt with summarily in terms of section 112(1)(a) of the Criminal Procedure Act, at the request by the Public Prosecutor. No statement was handed in by the legal representative as envisaged in section 112(2) of the Criminal Procedure Act. After hearing submissions from the State and the defence for purposes of sentence, the Magistrate proceeded to hand down a sentence of “cautioned and discharged” in both cases.

[2]. Although the accused’s ages were reflected on the charge sheets as adults, they were in actual sense children who should have been dealt with in terms of the Child Justice Act. In case no. N04/2022 involving CM, the Magistrate was alerted during the address in mitigation by the accused’s legal representative that she was not 22 as the charge sheet reflected, but 17. The Magistrate however proceeded to finalise the matter in terms of the Criminal Procedure Act and imposed the sentence referred to above.

[3]. As for matter no. N03/2022 involving LC, the charge sheet reflected that the accused was 18. It was only after the Magistrate had sentenced her that an Immigration Officer attending to both accused persons, raised her concerns with the Magistrate saying the two accused appeared to be children. The Magistrate then took the two charge sheets to the Senior Magistrate who sent the two cases on special review for reason that the Magistrate failed to act in terms of section 15 of the Child Justice Act when he became uncertain about the ages of the accused persons.

[4]. Discussion.

The fact that the Magistrate was informed in case N04/2022 of the accused's age which was different to the age reflected on the charge sheet, suggesting that the accused was a child, should have created uncertainty in his mind for simple reason that the accused could not have been aged both 22 and 17. The Magistrate should have attended to a determination of the age and decide which one of the two he was accepting as the accused's age. Making no determination is as if the two ages make no difference. However, for reason that one age

(22) demands that a trial be conducted under the Criminal Procedure Act while the other (17) demands that a trial to be conducted under the Child Justice Act the age difference therefore matters.

[5]. As for matter N03/2022, the uncertainty regarding the accused's age can be deduced from the conduct and words expressed by the Magistrate during and after the trial. After the court adjourned, the Magistrate went to see a Senior Magistrate with a view to start the review proceedings. In the words of Senior Magistrate Van der Merwe, the Magistrate "raised his concerns regarding the age of the accused persons and the fact that they appeared to be very young." The record of proceedings was sent without the comments by the Magistrate. The record was therefore sent back with a request that

the Magistrate should comment on what the Senior Magistrate wrote in the covering letter. The Magistrate then confirmed everything alluded to him in the covering letter.

[6]. Over and above what the Magistrate conveyed to his senior, the record of proceedings confirms his views and misgivings about the accused's age. On page 9 of the transcribed record, the following is recorded as part of the judgment on sentence,

"You informed this court that you are 18 years of age, that you still attend school, Grade 6. And I see at your face that you are still very, very young, you are actually a child. And it is difficult for the court to deal with this type of matters where you have to sentence children in court. But the court has to make this, has to sentence you today, that is the only thing that I can do now..."

[7]. From the above, it is apparent that the Magistrate was uncertain about the age of the accused and that he found it difficult to have to sentence a child. He however believed that he had no other choice but to proceed and hand down the sentence. Clearly, he was unaware of the options availed by section 15 of the Child Justice Act. I am of a view that it would have been prudent of him to have approached his senior right at that stage as opposed to finalising the cases and seek help later. It is however pleasing to note that he received guidance from his senior regarding how

to handle such cases going to the future. The two cases must have been a learning curve for him too.

[8]. The law.

Section 15 of the Child Justice Act provides,

“15. Age determination by any other court.

Where there is any uncertainty as to whether a person appearing before any other court was over or under the age of 18 years at the time of the commission of the alleged offence, the court must-

- (a) determine the age of that person in accordance with section 14; and
- (b) where necessary, alter the record to reflect the correct age of that person, in accordance with the provisions of section 16, which apply with the changes required by the context.”

[9]. Section 14 of the Child Justice Act provides as follows,

“14. Age determination by inquiry magistrate or child justice court.

- (1) If, during a preliminary inquiry or during proceedings before a child justice court, the age of a child at the time of the commission of the alleged offence is uncertain, the presiding officer must determine the age of the child.
- (2) In order to determine the age of a child, a presiding officer may-
 - (a) consider the form and any documentation submitted by the probation officer in terms of section 13(3);
 - (b) require any relevant documentation, information or statement from any person;
 - (c) subpoena any person to produce the documentation, information or statements referred to in paragraph (b); or
 - (d) if necessary, refer the child to a medical practitioner, in the prescribed manner, for an estimation of age.
- (3)
 - (a) The presiding officer must enter the age determined in terms of subsection (1) into the record of the proceedings as the age of the child.
 - (b) Should evidence to the contrary emerge, the presiding officer must alter the record to reflect the correct age.”

[10].

Submissions

by the DPP.

I have sought and received an opinion from the Office of the Director of Public Prosecutions (DPP), Mpumalanga. I am grateful to Adv Mpolweni, the Deputy Director of Public Prosecutions and Adv Phungula who carefully crafted an opinion based on facts and the law. It is those capitulations that finally gave silhouette to this judgment.

[11]. The DPP, laments that in failing to have the correct age determined, the children in conflict with the law missed the opportunities that are available to them in terms of the Child Justice Act. It was submitted that the Magistrate erred in not applying the provisions relating to age determination which in the long run would have exposed the children to diversion programs as provided in section 51 of the Child Justice Act.

[13]. In *S v Gxaleka*,^[3] the High Court set aside unterminated proceedings after the trial court referred the matter on review while the trial was underway.

This was after it came to the attention of the Magistrate during the cross examination of a witness that the accused was under the age of

18. The High Court held that the failure to deal with the accused as a child in terms of the Child Justice Act was a serious irregularity that had the potential to lead to a miscarriage of justice. It remarked that it was inexplicable how the

question of the age of the accused had escaped the notice of the members of the police and public prosecutor, and that the accused's

only legal representative had failed to disclose this fact to the court.

[14]. It has now come to the court's attention that the two children involved here were deported back to their country of origin with the help of the Immigration Officer who was present in court the day they were sentenced. I had implored the Magistrate to seek their participation in these proceedings in line with the *audi alteram partem* rule, but for this reason, this was not possible. This was confirmed by the DPP. This will also be a hindrance for the court to remit the proceedings to start *de novo* with adherence to the provisions of the Child Justice Act referred to above. It was for this reason that the DPP requested that the convictions and the sentence imposed in the two cases should be set aside.

[15]. For the aforesaid reasons, the following order is proposed.

[15.1] The convictions and sentences imposed in cases N03/2022 and N04/2022 are hereby set aside.

TV RATSHIBVUMO

JUDGE OF THE HIGH COURT

I agree

D GREYLING-COETZER

ACTING JUDGE OF THE HIGH COURT

30 NOVEMBER 2022

[1] ZAGPJHC 154; 2012

(2) SACR 468 (GSJ).

[2] (A92/2015)

[2015] ZAGPPHC 114 (26 February 2015).

[3] 2013 (2) SACR 399 (ECB).

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.saflii.org/za/cases/ZAMPMBHC/2022/86.html>

CASE PAGE <https://chat.esheria.ai/case-law/south-africa/s-v-lc-unknown-topic-ampmbhc-2022>

Prepared on 10 October 2026 · Esheria