

SOUTH AFRICA / JUDGMENT

S v M (A536/17, SR256/2017) [2017] ZAGPPHC 698; 2018 (1) SACR 18 (GP) (17 October 2017) [2017] ZAGPPHC 698

COURT

North Gauteng High Court, Pretoria

BEFORE

NB Tuchten, D Nair

CASE / FILE NUMBER

A536/17, SR256/2017

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IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

DIVISION, PRETORIA

DATE:

17/10/2017

CASE

NO: SR 256/2017

A536/17

In

the matter between:

THE

STATE

and

M

M

Accused

JUDGMENT

Tuchten J:

1. This case came before me on special review. The accused was charged in a regional court with the offence of contravening s 3 of the Criminal Law Amendment Act, 105 of 1997 by inserting his fingers into the anus of a six year old complainant. The accused pleaded guilty, his legal representative handed in a statement in terms of s 112 of the Criminal Procedure Act, 51 of 1977 and the accused was convicted as charged. The case was then adjourned for sentence.
2. At the resumed hearing, it was established that the accused was under the age of 14 when he committed the offence on 4 February 2013. The statement contained nothing in relation to the criminal capacity of the accused. The presiding regional magistrate then stopped the proceedings on the ground that the accused was under the age of 14 at the relevant time and sent the case on review. In fact the accused was 12 years old when he committed the act for which he was charged.
3. The DPP was asked for his views on whether the conviction should stand and what the way forward in the case should be. Advocates in the office of the DPP have provided a helpful memorandum, for which we thank them. The two advocates who considered the case hold views which differ in one respect.
4. The advocates agree that where a child aged 12 is criminally charged, the state must prove criminal capacity on the part of the accused. Where such a child accused pleads guilty to a charge and hands in a statement under s 112, the state can be relieved of the duty to prove criminal capacity when an appropriate admission is made by the accused. In this case there was no such admission and, the advocates agree, the conviction ought not to stand.
5. The advocates however differ on the question of what should happen next. One view is that this court should set aside the conviction on review. The other view is that the matter should be remitted to the regional court with a direction to the regional magistrate to act in terms of s 113(1) of the Criminal Procedure Act. The section reads:

If the court at any stage of the proceedings under section 112 (1) (a) or (b) or 112 (2) and before sentence is passed is in doubt whether the accused is in law guilty of the offence to which he or she has pleaded guilty or if it is alleged or appears to the court that the accused does not admit an allegation in the charge or that the accused has incorrectly admitted any such allegation or that the accused has a valid defence to the charge or if the court is of the opinion for any other reason that the accused's plea of guilty should not stand, the court shall record a plea of not guilty and require

the prosecutor to proceed with the prosecution: Provided that any allegation, other than an allegation referred to above, admitted by the accused up to the stage at which the court records a plea of not guilty, shall stand as proof in any court of such allegation.

6. The powers of this court in reviews such as the present are listed in s 304(2)(c) of the Criminal Procedure Act read with s 304A(a). These include the power in s 304(2)(c)(v) to remit the matter to the court below with instructions to deal with the matter as this court may think fit.
7. In my view, this court ought to act in terms of s 304(2)(c)(v). As the regional magistrate is empowered under s 113(1) to correct the error which I have identified, there is no need for this court itself to make any such order.
8. I therefore make the following order:

The case of the State v M M, with case no. RC48/2017 in the regional division of Gauteng held at Tsakane is remitted to that court with instructions to the regional magistrate under s 113(1) of the Criminal Procedure Act, 51 of 1977 to record a plea of not guilty and require the prosecutor to proceed with the prosecution.

NB Tuchten

Judge of the High Court

13 October 2017

I agree.

D Nair

Acting judge of the High Court

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