

SOUTH AFRICA / JUDGMENT

**S v Ngobeni and Others (94/2019; 374/03/19;
252/02/19; 35/11/17; 10/04/2018; 31/10/18,
93/04/18; 141/03/17; 54/10/18; 150/09/18;
65/10/2017;10/01/17; 11/01/17; 58/11/17; 169/09/17;
195/07/17) [2020] ZALMPTHC 4 (3 February 2020)**
[2020] ZALMPTHC 4

COURT

Limpopo High Court, Thohoyandou

BEFORE

AML Phatudi, K Makhafola

CASE / FILE NUMBER

94/2019

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IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO LOCAL DIVISION, THOHOYANDOU

- (1) REPORTABLE: YES/NO.
- (2) OF INTEREST TO OTHER JUDGES: YES/NO.
- (3) REVISED.

CASE NUMBER: 94/2019

3/2/2020

THE STATE v MEEHLEKETO NGOBENI CAS NUMBER 374/03/19

THE STATE v PRAISE NHL MALULEKE CASE NUMBER 252/02/19

THE STATE v BOWENI ABRAM CHAUKE CAS NUMBER: 32/10/17

THE STATE v CAMPIRA OLINDA ZITA CAS NUMBER: 35/11/17

THE STATE v JOHN MASHABA CAS NUMBER: 10/04/2018

THE STATE v VANESSA MANGANYI CAS NUMBER: 31/10/18

THE STATE v TIYISELANI MAKHUBELE CAS NUMBER: 93/04/18

THE STATE v THANDI ARNOLD KHOZA CAS NUMBER: 141/03/17

THE STATE v TIRISANI MALULEKE CAS NUMBER: 54/10/18

THE STATE v KHANIMAMBO BALOYI CAS NUMBER: 150/09/18

THE STATE v CLEMENT CHABALALA CAS NUMBER: 65/10/2017

THE STATE v VUKOSI KHOSA CAS NUMBER: 10/01/17

THE STATE v FORGET AKANI MABASA: 11/01/17

THE STATE v MATIMBA MALULEKE CAS NUMBER: 58/11/17

THE STATE v MANDLA MKHWANAZI CAS NUMBER: 169/09/17

THE STATE v RENEWA MAKHALAE CAS NUMBER: 195/07/17

JUDGEMENT- SPECIAL REVIEW

AML PHATUDI J

Introduction

- [1] This is a special review brought before this court in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977. The senior magistrate (Acting Sub Cluster Head-Malamulele) sought from this court to review and set aside the convictions and sentences imposed by various magistrates in various matters since 2017. The senior magistrate sent all these records for this court to set the convictions and sentences aside because all these child offenders were dealt with contrary to the provisions of section 4 and 5 of the Child Justice Act 75 of 1980.
- [2] On perusal of the file, I referred the query to the office of the Director of Public Prosecutions-Thohoyandou for their comment or opinion and or opposition to the senior magistrate's request. The file never returned to me until I received a query from the Judge President who received a complaint from the senior magistrate. The file could not be located anywhere. I am using a copy sent by Judge President via email to finalise this review.
- [3] The offences that the magistrate seeks to review and set aside, were committed by persons under the age of 18. The offences committed were the following:

Factual

background

A. Contravention of section 154 (1) (D) read with the provisions of section 163 (1) of Act 27 of 1989.

- [4] On the 01 January 2017, VK, the child offender, was in his/her convivial celebration with other citizens over festivities of the New Year when arrested by the police. They served the child offender with a notice to appear in court (as envisaged in terms of section 56 of CPA 51 of 1977). The notice made provisions for “an admission of guilt fine”. VK opted to pay the admission of guilt fine that was set in an amount of R50, 00. The admission of guilty fine was as a result, recorded in terms of section 57 of Criminal Procedure Act 51 of 1977.
- [5] On the 12 January 2017, the prosecutor placed before the District Magistrate, the notice in terms of Section 56 together with the admission of guilt in terms of section 57, duly signed by the offender together with the receipt for the amount paid. The magistrate endorsed and handed down the conviction on the offence and confirmed the sentence.
- [6] Other child offenders who committed similar offence on various occasions are: F.A.M. Case No 11/01/2017; C.C. Case No 65/10/2017;

V.M Case No 31/10/2018; T.M. Case No 54/10/2018; P.N. Case No 252/02/2019 and M.N. Case No 374/03/2019. The offence proffered against M.M. Case No 169/09/2017 is further read with the contravention of the provision of section 163 (1) of Act 27 of 1989 in that he “was found being drunk in a public place at 19h00”. He paid a fine in an amount of R100, 00 as admission of guilt.

B. Possession or usage of dependence producing substances

- [7] The following child offenders were found in possession or usage of dependence producing substance-Dagga. B.A.C Case No 32/10/2017, M.M. Case No 58/60/11/217 and T.M. Case No 93/04/2018 contravened “regulation 4(b) possession or usage of dependence producing substance-Dagga. BAC was a scholar when found in possession of dagga. It is, however, not clear, as to where he was when arrested. Cas No relating to M.M is not clear on record. The original charge bears Case No 58/11/2017 and a copy attached thereto Case No 60/11/2017. In any event, the child offender was unemployed and at Xikundu village around 11h45 when found being in possession of dagga. The last child offender, T.M. was a scholar at Shingwedzi High school when found in possession of dagga.
- [8] All above named child offenders paid R200, 00 admission of guilt fines. The magistrates confirmed convictions and sentences but for T.M Case No 93/04/2018.

C. Contravention of Road Traffic Act, Act 93 of 1996.

- [9] Only two child offenders (Case No 141/03/2017; and Case No 150/09/2018) were found to have contravened the provisions of section 12(A) of Road Traffic Act 93 of 1996. The charges stipulated indicate that they were driving motor vehicles without driver’s licences and the offender under Case No 35/11/2017 was found driving a motor vehicle without a disk.

D. Other offences.

[10] The child offender, M.R., under Case No 195/07/2017, contravened the provisions of section 21 of Act 19 of 1974. According to the notice, the child offender was found 'committing an indecent behaviour inside Toyota quantum in public'. J.M. (Cas no 10/04/2018) was charged with Contravention of section 77 (1) (d) of Act 4 of 1996 – 'playing gambling using money and cards'. The child offenders were fined R100, 00 and R50, 00 respectively.

Issue

[10] The senior magistrate acting as Sub Cluster Head at Malamulele and the Provincial Child Justice Forum conducted an audit in ensuring that Child Justice Act is implemented when dealing with children in conflict with the law. The audit found that all convictions and sentences imposed on child offenders referred to above were dealt with contrary to the provisions of section 4 and 5 of the Child Justice Act 75 of 1980. The senior magistrate referred these matters for review in order for the convictions and sentences to be set aside.

[11] It is common practice that Reviews sent to High Court in terms of sections 302 and 304 are presumed to be urgent in their nature. The urgency is dictated by the merits. Each case is treated on its own merits. On perusal of the records, I referred the query to the Director of Public Prosecution-Thohoyandou for their comment. It is common practice, if not highly recommended, that the opinion of the DPP be sought in every case referred to high court for review in terms of the said sections. Their response, if any, did not find its way to this court. This special review is thus being attended to without their input. Nevertheless, these matters cannot be tagged with urgency because the injustices were only detected two years after the child offenders were dealt with. The Child Justice Act has been enacted to specifically deal with child offenders.

Law

[12] Section 4(1) of the Child Justice Act provides

Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and

- (a) was under the age of 10 years at the time of the commission of the alleged offence; or
- (b) was 10 years or older but under the age of 18 years when he or she was-
 - (i) Handed a written notice in terms of section 18 or 22;
 - (ii) Served with a summons in terms of section 19; or
 - (iii) Arrested in terms of section 20, for that offence.
- (2) The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97 (4) (a) (i) (aa), in the case of a person who-
 - (a) is alleged to have committed an offence when he or she was under the age of 18 years; and

- (b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1) (b), direct that the matter be dealt with in terms of section 5 (2) to (4).

Section 5 stipulates Manner of dealing with children who are alleged to have committed offences:

(1) Every child who is alleged to have committed an offence and is under the age of 10 years must be referred to a probation officer to be dealt with in terms of section 9.

- (2) Every child who is 10 years or older, who is alleged to have committed an offence and who is required to appear at a preliminary

inquiry in respect of that offence must, before his or her first appearance at the preliminary inquiry, be assessed by a probation

officer, unless assessment is dispensed with in terms of section 41

- (3) or 47 (5).

- (3) A preliminary inquiry must be held in respect of every child referred to in subsection (2) after he or she has been assessed, except where the matter- (a) has been diverted in accordance with Chapter 6; (b) involves a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved, as provided for in section 10 (2) (b); or (c) has been withdrawn.

(4)

- (a) A matter in respect of a child referred to in subsection (2) may be considered for diversion-

- (i) by a prosecutor in accordance with Chapter 6

- (ii) at a preliminary inquiry in accordance with Chapter 7.

- (b) A matter which is for any reason not diverted in terms of paragraph

- (a) must, unless the matter has been withdrawn or referred to a children's court, be referred to a child justice court for plea and trial in terms of Chapter 9.

- (c) A matter in respect of a child referred to in paragraph (b) may, before the conclusion of the case for the prosecution, be considered

for diversion by a child justice court in terms of Chapter 9.

Evaluation

[13] It is clear from the reading of the Act and specifically the provisions of sections 4(1) (b), is peremptory. The section provides

that 'any person who is alleged to have committed an offence and was 10 years or older but under the age of 18 years when he or she was served with a written notice in terms of section 18 or 22 for that offence, the Director of Public Prosecutions having jurisdiction may direct that the matter be dealt with in terms of section 5 (2) to (4)...

[14] It is common cause that all the child offenders referred to herein fall within the category provided for in section 4(1) (b).

[15] The child offenders were issued with a notice in terms of section 56

(1) (c) of the Criminal Procedure Act 51 of 1977. The notice contains an endorsement in terms section 57 of Criminal Procedure Act. All child offenders complied by paying the admissions of guilt fines, which were confirmed by various magistrates safe for TM Case

93/04/2018.

[16] The notices served on the child offenders did not comply with the provisions of sections 18 or 22 of the Child Justice Act. For ease of reference, section 18(2) provided that “the provisions of sections 56 (1) (c) of the Criminal Procedure Act relating to an admission of guilt and paying of fine. do not apply to the written notice in terms of this Act”. Any notice issued to a child offender which is non-compliant with the Act, is void ab initio.

[17] It is common cause that all child offenders were issued with notices in terms of section 56 of the Criminal Procedure Act 51 of 1977. The arresting officers were clearly wrong when they caused issue of notices to child offenders. The notices were not issued in terms of section 18 or 22 of the Child Justice Act. The Act clearly provides that a notice issued in terms of section 56 (1) (c) of Act 51 of 1977 to a child offender is invalid.

[18] Having considered the facts presented and the applicable law, I find all notices issued to all child offenders in terms of section 56 (1)

(c) to be void and of no force or effect. On this leg alone, I am of the view that all notices issued to the child offenders fall to be set aside.

[19] The procedure dealing with child offenders were not followed to the letter. The arrests, issues of notices in terms of section 56 of the Criminal Procedure Act 51 of 1977 and the endorsements thereof by the magistrates were flawed. Not all such proceedings were in accordance with this Act, thus the proceedings were not in accordance with justice. All convictions and sentences imposed on child offenders fall to be set aside.

[20] In the result, I make the following order:

ORDER

20.1 All the convictions and sentences emanating from those Magistrates’ Courts in contravention of the relevant provisions of the Child Justice Act 75 of 1980 are reviewed and set aside.

20.2 The Registrar is ordered to circulate this judgment to all Magistrates’ Courts falling under the jurisdiction of this

Court.

AML PHATUDI

JUDGE OF THE HIGH COURT

I agree

K MAKHAFOLA

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Prepared on 12 October 2026 · Esheria