

SOUTH AFRICA / JUDGMENT

S v Sekoere (141/2012) [2012] ZAFSHC 114; 2013 (1) SACR 92 (FB) (14 June 2012)

[2012] ZAFSHC 114

COURT

Free State High Court, Bloemfontein

BEFORE

L J Lekale, M B Molemela

CASE / FILE NUMBER

141/2012

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FREE STATE HIGH COURT, BLOEMFONTEIN

REPUBLIC OF SOUTH AFRICA

Case No.: 141/2012

In the review between:

THE STATEApplicant

and

THABO ESIA SEKOERERespondent

CORAM: MOLEMELA, J et LEKALE, J

JUDGMENT:

LEKALE, J

DELIVERED ON: 14 JUNE 2012

- [1] On the 14th March 2012 the accused, a 16-year old boy, appeared before the magistrate's court at Dewetsdorp and pleaded guilty to housebreaking with intention to steal and theft. He was, thereupon, sentenced in terms of section 76(1) of the Child Justice Act 75 of 2008 (CJA) to 3 years' compulsory residence at a child and youth care centre providing a programme designed for the reception, development and secure care of children as contemplated in section 191(2)(j) of the Children's Act, 38 of 2005 (CA).

[2] The matter now serves before this court on automatic review in terms of section 85 of CJA read with the provisions of section 302(1) of the Criminal Procedure Act of 1977 as amended (CPA).

[3] In referring the matter for review, the trial magistrate cites conflicting decisions on whether or not matters of the present nature, where the accused was legally represented when the sentence was imposed, are reviewable in the ordinary course and concludes that:

“As far as I am aware there is no specific judgment of the Free State High Court on the subject matter and I would request the honourable Reviewing Judge to provide some guidance with regard to the interpretation to be followed in the Free State province.”

[4] The automatic review regime, which our criminal justice system provides, is limited, in its application, to cases in which the accused was not legally represented at the proceedings which resulted in the sentences envisaged in section 302(1) of CPA. (See section 302(3)(a) of CPA).

[5] At the forefront of decisions that hold that the envisaged sentences imposed on minor children in terms of the CJA are automatically reviewable notwithstanding the fact that such children were assisted by legal advisers at the relevant trials is the Western Cape judgement in *S v RUITER* [2011] ZAWCHC 265 in which Dlodlo J pronounced that:

“The High Court is the upper guardian of all minors within its jurisdictional area. For that reason, and that one alone I am of the view that cases provided for or referred to in section 85 of the Act under consideration should always be the subject of automatic review in the ordinary cause regardless of whether or not the said minor child was legally represented...”

[6] In endorsing the foregoing Olivier J, sitting as the reviewing judge in the Northern Cape High Court, referred to sections 82 and 83 of CJA and held as follows in *S v WILDENE FORTUIN* [2011] ZANCHC 28:

“[49] When regard is had to these provisions it is clear that ... a child appearing before a child justice court will in effect never be without legal representation. The duties and rights of a legal representative appointed to assist the court will, for all practical purposes, be the same as in the case of an own legal representative.”

“[50] ... To interpret section 85(1) of the CJA as excluding cases where the child was legally assisted would indeed render the provisions of the proviso to section 85(1) meaningless to a large extent, and defeat the clear intention to afford children additional protection by means of automatic review.

...

[52] When the peremptory language used in section 85(1), and more specifically the use of the word “is”, is viewed against this background, the only interpretation that would give effect to the expressed intention (in the preamble to the CJA) to afford children in conflict with the law “special protection” and “specific safeguards”, is that cases envisaged in section 85(1) of the CJA will be automatically reviewable, regardless of whether or not the child was legally

represented or the court legally assisted, and that the effect of the proviso, as a whole and read in context, is to qualify the general applicability of chapter 30 of the CPA by excluding the operation of section 302 (3) (a) of the CPA in cases like this.”

- [7] Taking the opposite view and finding that the cases envisaged in section 85(1)(a) and (b) of CJA are not automatically reviewable when the accused minor child was legally assisted at the relevant trial, the North West High Court found as follows, among others, in *S v JAN NAKEDI* [2012] ZANWHC 5:

“[12] This problem is solved by a reference to Item (p) of Schedule 4 read with Section 99(1) of the CJA, which in essence substitutes Section 302(1)(a)(i) of the CPA. The amendment is indicative of the fact that the remaining provisions of Section 302 are applicable, which includes referral for automatic review where the accused is not assisted by a legal adviser.

- [16] The referral of all matters wherein the minor child is legally represented for automatic review is not consistent with the CPA and

CJA, ... but also does not call for the situation where the High Court as upper guardian needs to intervene to protect the interests of the minor child.”

- [8] In my view the best place to start at, in this matter, is to appreciate the literal effect of the provisions of section 85 of the CJA. As observed in *S v FORTUIN* (supra) the proviso to the section in question qualifies the applicability of the provisions of Chapter 30 of the CPA by prescribing, in addition to those sentences specified in section 302(1) of the CPA, sentences which are automatically reviewable.

- [9] The proviso, in my judgment, strikes at the sentences set out in

section 302(1)(a)(i) of CPA insofar as it provides that the sentences imposed on minor children specified in section 85 of CJA are “subject to review in terms of section 304 of the Criminal Act, ... irrespective of the duration of the sentence.” In this regard, it is worth noting that section 302(1) of the CPA identifies the sentences envisaged with reference to their duration and the rank of the judicial officer who imposed them. The proviso adds to the list of automatically reviewable sentences in as far as minor accused children are concerned and expressly removes sentence duration as a determining factor in their case. The rank or experience of the presiding magistrate who imposed the relevant custodial sentence is, thus, not a factor in the relevant children’s case.

- [10] The import of the proviso in issue, in my opinion, can be better appreciated when one considers that it is to the effect that:

10.1 all sentences of imprisonment, including compulsory residence in a child and youth care centre contemplated in section 191(2)(j) of CA, imposed in respect of offences committed when the minor accused child was under the age of 16 are automatically reviewable;

10.2 sentences of any form of imprisonment which are not suspended in whole and which are imposed in respect of offences committed when the minor accused child was 16 years or older but under 18 years of age are automatically reviewable;

10.3 all sentences of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the CA imposed on a child who was 16 years or older but under the age of 18 at the time of the commission of the relevant offence is reviewable in the ordinary course.

[11] As correctly found in *S v NAKEDI* (supra) the CJA amends section 302 of CPA only as far as section 302(1)(a)(i) is concerned and does not impact on other provisions of section 302 of the CPA. (See item p of schedule 4 read with section 99(1) of CJA which identifies the extent to which 302 of the CPA is amended).

[12] In my view, any argument to the effect that an interpretation which excludes a child who was legally assisted at the relevant trial from the purview of section 302(1) of the CPA as read with section 85(1) of CJA defeats the clear intention of the legislature to afford children additional protection, with respect, loses sight of the fact that not all children in conflict with the law are afforded additional protection in the form of automatic review.

[13] Even a liberal interpretation, which accommodates minor children who were legally represented at relevant trials, allows some minor children to fall into the cracks as far as automatic review goes. In this regard, it is worth noting that wholly suspended custodial sentences of durations below the threshold specified in section 302(1) of the CPA imposed on a child who was 16 or older but under 18 years of age at the time of the commission of the relevant offence are not automatically reviewable. The same applies to fines which are below the amounts determined by the Minister of Justice and Constitutional Development for respective judicial officers referred to in section 302(1)(a)(i) of CPA.

[14] The heading to section 85 of the CJA also suggests, as an aid to juridical interpretation, that not all sentences imposed on minor offenders are intended to be automatically reviewable insofar as it proclaims as follows:

“Automatic review in certain cases.”

(See *President of the Republic of South Africa and another v Hugo* 1997 (4) SA 1 at para [12].

[15] It is correct, as found in *S v NAKEDI* (supra), that a construction which excludes legally assisted minor offenders from the automatic review provisions of CPA neither offends the Constitution of the Republic of South Africa nor is it inconsistent with the CPA and the CJA.

[16] In my view the clear intention of the legislature was to amend the provisions of section 302 of CPA to the extent set out in the CJA. A contention that the effect of sections 82 and 83 of CJA is that no child appearing before the Child Justice Court will ever be without legal representation, with respect, ignores the fact that a legal representative appointed to assist the court in terms of section 83(2) of CJA gets appointed simply because the relevant minor

child does not wish to have legal representation or declines to give instructions to an appointed legal representative. Such a legal representative is, in the very nature of the reason for his appointment, deprived of the accused's co-operation and vital instructions. The duties and rights of such a

representative in terms of Regulation 48 of the "Regulations Relating to Child Justice, 2010" do not, in my view, cure such a defect because in order to represent the accused minor child effectively the legal representative needs to get instructions from the child in question as a port of first call.

[17] Had the legislature intended to exclude minor offenders from the purview of section 302(3) (a) of CPA it would, in my opinion, have done so explicitly regard being had to the fact that the provisions of this section concern an established practice which has been in existence for a very long time. (See generally *S v MBONYANY EN ANDER* 1978 (2) SA 927 (T) and *S v MAFIKOKOANE*; *S v MOKHUOANE* 1991 (1) SACR 597 (O).

[18] In conclusion it is my judgment that cases involving minor children sentenced in terms of CJA, like all other cases envisaged in section 302 of CPA, are not automatically reviewable where the accused minor child was legally represented.

[19] The present matter, further, does not call for the exercise of the court's inherent powers of review.

ORDER

[20] In consequence the matter is not reviewable in the ordinary course and the court, therefore, has no jurisdiction over it.

L. J. LEKALE, J

I concur.

M. B. MOLEMELA, J

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