

SOUTH AFRICA / JUDGMENT

S v S.S (CA&R 42/2020) [2020] ZAECHGC 97 (31 August 2020)

[2020] ZAECHGC 97

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Rugunanan, Bloem

CASE / FILE NUMBER

CA&R 42/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(EASTERN

CAPE DIVISION, GRAHAMSTOWN)

CASE

NO. CA&R 42/2020

Date

delivered: 31 August 2020

In

the matter between:

THE
STATE
and
S[...]
S[...]
(A.K.A
S[....] S[...])
(accused
a
quo)

JUDGMENT

RUGUNANAN, J

- [1] This is an automatic review in terms of section 85(1) of the Child Justice Act[1] (“the Act”). The record of the proceedings in the Magistrates’ Court at Kenton-on-sea was placed before me on 24 August 2020. Having read it on 25 August 2020, I formed the opinion that there were numerous irregularities that vitiated the proceedings such that the proceedings were not in accordance with justice. I directed that the accused be immediately released from the John X Merriman Child and Youth Care Centre (“Merriman”). What follows are my reasons.
- [2] On 25 November 2019, the accused, who was born on 02 April 2003, was convicted of theft and assault with intent to do grievous bodily harm (“assault GBH”). The respective offences were alleged to have been committed during September and July 2019. At the time of the commission of the offences the accused was aged 16. He was legally represented[2] in the court a quo and his convictions followed a plea in the form of a written statement under section 112(2) of the Criminal Procedure Act.[3] For the purpose of sentencing, the offences on both counts were taken together and the accused was sentenced to undergo 2 years’

compulsory residence in a child and youth care centre.

- [3] Section 1 of the Act defines a child as:

“Any person under the age of 18 years ...”

Since the accused was a child at the time of the commission of the offences and at the commencement of the trial proceedings, it was peremptory that his trial be conducted strictly in accordance with the provisions of the Act.[4]

THE PLEA PROCEEDINGS

- [4] Before the plea was tendered the magistrate was obliged under section 63(3) of the Act to have informed the accused of the nature of the allegations against him, to have explained the accused his rights and the procedures to be followed in his trial regardless of the fact that he was legally represented. In this context section 63(4) assumes significant relevance. It prescribes that every presiding officer:

“may elicit additional information from any person involved in the proceedings; and must, during all stages of the trial ... ensure that the proceedings are fair and ... are appropriate to the age and understanding of the child.”

[my own emphasis in bold]

- [5] The plea proceedings of 25 November 2019 were not mechanically or digitally recorded. The record reflects a typewritten note that

reads: [5]

“NO POWER AT COURT – PROCEEDINGS RECORDED BY HAND.”

The magistrate’s handwritten note reads as follows:[6]

“Miss Baloyi for accused hands up statement in terms of section 112(2) for count 1 and 2 after reading it into the record.

Accused confirms the contents as being true.

State accepts the pleas as affirmed.”

[6] Nowhere does it appear in the magistrate’s handwritten note (or anywhere in the record) that he complied with the obligations imposed by section 63(3). Moreover, it does not appear that the magistrate questioned the accused on the content of his written statement as required by section 112(1)(b) of the Criminal Procedure Act if it is considered that the magistrate might have (preliminarily) formed the opinion that the offences merited imprisonment without the option of a fine.

[7] Relevant to the count of theft, the charge specifically alleges that the accused stole items with a total value of R310.00. These included: a 6-pack of Coca-Cola (R120.00), 5 packets Topper biscuits (R30.00), 2 packs of chicken portions (R60.00), 4 packets of lemon creams biscuits (R20.00), and a 10 kilogram pack of cake flour (R80.00).

[8] In his written statement, the accused proffers the following explanation for the commission of the offence:

“5.2 On the day of the incident I was standing outside the shop smoking a cigarette which I had bought at the shop. While I was standing there a group of guys went into the shop and they put the shop owner on the ground.

5.3 The guys in the shop then told me to take whatever I want. I went into the shop and took a pack of White Star maize meal and rice.”

[9] The items to which the accused admitted having stolen are not among those listed in the charge, nor was their value disclosed or ascertained. This discrepancy, in my view, necessitated that the magistrate ought to have sought clarification from both the prosecutor and the accused’s legal representative, and that he ought to have purposefully questioned the accused with reference to the alleged facts of the case to ascertain whether the accused properly understood the charge and admitted the allegations to which he pleaded guilty. My view is supported by the provisions of section 63(4) the Act.

[10] The accused’s statement relating to his plea on the count of assault GBH sets out the detail and circumstances regarding the commission of the offence. His statement, in relevant part, reads thus:

“6.1 ... I did intentionally, wrongfully and unlawfully stab N[...] S[...] with a knife on her back with the intent to do grievous bodily harm.

6.2 On the day of the incident my sister was drunk and she was swearing at me and saying that my father doesn't care about me and that he only cares about her because he gives her money but he doesn't give me money.

6.3 I got really upset so I took out a knife and stabbed her on the back.

7 I admit that my actions were wrongful and unlawful at all material times during the commission of this offence."

[11] On the face of it the allegations in the charge appear to be admitted but it is doubtful if the statement contains sufficient factual

content to have supported a conviction. Grievous bodily harm is regarded as "harm which in itself is such as seriously to interfere with health".[7] Proof of the commission of the offence requires "an intent to do more than inflict the casual and comparatively insignificant and superficial injuries which ordinarily follow upon

an assault. There must be proof of an intent to injure and to injure in a serious respect."

[8] When considering whether grievous bodily harm has been inflicted a general proposition is that the whole complex of objective factors involved in the assault are to be considered, including the results which flowed from the wounds inflicted.[9] There is no indication in the statement of whether the complainant sustained an injury as a result of the accused's conduct and, if so, the nature and extent thereof. There is accordingly a lack of detail in the charge and indeed in the accused's written statement to support this proposition.

[12] The magistrate's ostensible failure to have heeded the provisions of section 63(4) of the Act renders it doubtful if the proceedings were brought within the range of understanding of the accused. My sense is that the magistrate's failure to have complied with his statutory duty on the count of theft similarly tainted the plea on the remaining count of assault GBH. On the latter count, and regard being had to what is stated in the preceding paragraph, I am reluctant to assume or infer that the accused understood the allegations against him.

[13] The approach adopted by this court in its assessment of the plea proceedings leans in favour of accentuating one that is consistent with the preamble to the Act and which fundamentally emphasises "the best interests of children and singles them out for special protection" as a measure for giving effect to their constitutional rights. Accordingly, on both counts it cannot be assumed that statutory

compliance by the magistrate did occur notwithstanding indications that the proceedings were held in camera, that the accused's

mother was present, as also a court interpreter, and that the accused was legally represented.

THE PROCEEDINGS ON SENTENCE

[14] The most egregious misdirections by the court a quo relates to the sentence proceedings. On 23 January 2020, the magistrate handed down a sentence in the following terms:

“... in terms of section 76 of the Child Justice Act ... you are sentenced to compulsory residence in John X Merriman Child and Youth Care Centre for a period of two years, pending your removal you will remain in custody.”

[15] The order on sentence reflects that the accused be detained until his admission to Merriman. Section 76(4)(b)(iii) of the Act reads:

“(b) When making an order referred to in subsection 1 the child justice court must-

(iii) give directions where the child is to be placed for any period before being admitted to the centre specified in the order, preferably in another child and youth care centre referred to in ... the Children’s Act, but not in a police cell or lock-up.”

[16] Clearly, the magistrate’s order does not specify where the accused should have been placed pending his admission to Merriman. It cannot be casually assumed that the accused was immediately placed in Merriman consequent to the magistrate’s order. For this reason, the provisions in section 76(4)(b)(iv) of the Act assume relevance. They read as follows:

“(b) When making an order referred to in subsection (1), the child justice court must-

(iv) direct a probation officer to monitor the movement of the child to the centre specified in the order, in compliance with the order, and to report to the court in writing once the child has been admitted to the centre.”

[17] The record offers no indication of a directive in the nature contemplated by the above section.

[18] In addition, section 76(4)(d) of the Act states:

“Where a presiding officer has sentenced a child in terms of this section, he or she must cause the matter to be retained on the court roll for one month, and must, at the re-appearance of the matter, inquire whether the child has been admitted to the child and youth care centre.”

[19] After sentencing the accused, the magistrate immediately directed that the matter be sent for review by a higher court but failed to retain the matter on the roll of the court a quo for a month as required by the above section. The magistrate did so without stating reasons for departing from this peremptory requirement.

[20] Evident from the aforementioned statutory provisions is that they are purposely intended to provide as much protection as reasonably

possible for children who have violated the law by ensuring that they are not treated on the same footing as adult detainees, that their movement to a specified centre is monitored and documented, and that a court has confirmation of their admission to a specified child and youth centre. Courts are thus required to scrupulously adhere to the provisions of the Act. As Malusi J appositely pointed out in *J A v The State* [10]:

“The promulgation of the Child Justice Act ushered in a new era in the criminal justice system for children. It was, to borrow a phrase, ‘no longer business as usual’ when dealing with a child from the moment of arrest until after the child is sentenced. The courts are required to scrupulously adhere to the provisions of the Act unless reasons exist to depart therefrom. A wholesale departure or lackadaisical application of the provisions of the Act will not pass muster.”

[21] On both plea and sentencing, the proceedings in the court a quo amounted to a gross departure from the provisions of the Act. It was imperative for the magistrate to have ensured that the plea proceedings were brought within the understanding of the accused; and that on sentence, any need for the departure from the express provisions of the Act rendered it imperative for the magistrate to have provided reasons for such departure. In all the circumstances, the material departures from the Act did not render the proceedings a quo in accordance with justice.

DELAY

[22] The importance of timeous despatch of the record cannot be overemphasised. The automatic review procedure envisaged by section 85(1) of the Act as read with the provisions of section 304 of the Criminal Procedure Act[11] is an integral part of the constitutional right to a fair trial and demands that the process unfolds expeditiously otherwise serious

injustice may result.[12]

[23] The record on review was received by the registrar of this court on 21 August 2020. In terms of section 303 of the Criminal Procedure Act the clerk of the court should have forwarded the record to the registrar within one week after the case was determined on 23 January

2020. The expansive delay is attributed to various factors,[13] such as the retirement of the presiding magistrate at the end of January 2020 and the inadequacy of the record. Amongst other factors

are those considered systemic and others considered fortuitous in the light of the national lockdown brought on by the Covid-19 pandemic which saw closure of the magistrates’ offices during April and July 2020. Understandably, while these events undoubtedly occasioned difficulty and inconvenience for officials and support staff to discharge their duties, the administration of justice should not be compromised and personnel should not lose sight of the importance of fulfilling their roles in the administration and in rendering an efficient service.

[24] In the circumstances the following order issues:

- (a) The convictions for theft and assault with intent to do grievous bodily harm and the combined sentence of 2 years' compulsory residence in the John X Merriman Child and Youth Care Centre are hereby set aside, and in view of the fact that the accused S[...] (a.k.a. S[...]) S[...] has served approximately 7 months' of the sentence, it is further ordered that:
- (i) The matter is referred to the Director of Public Prosecutions, Eastern Cape, to decide whether the accused is to be re-arraigned.
- (ii) In the event that he is re-arraigned, the trial must commence before another magistrate.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree. It is so ordered.

G. H. BLOEM

[1] Act No. 75 of 2008, as amended

[2] See *S v Sekoere* 2013

(2) SACR 426 (FB) which laid down that all matters falling within the provisions of s 85(1) of the CJA must be referred to the High Court for automatic review in accordance with that section read with the provisions of chapter 30 of the CPA whether or not the child concerned was legally represented.

[3] Act No. 51 of 1977, as amended

[4] See *J A v The State*, Unreported, Review Case No 20190063 (ECD) for an exposition on the peremptory provisions of the Child Justice Act

[5] page 7

[6] Handwritten notes, page 8

[7] Burchell, *Principles of Criminal Law*, 3rd ed at page 689

[8] Burchell *op cit* at page 689

[9] *S v Maselani and Another* 2013

(2) SACR 172 (SCA) at paragraph [12]

[10] fn 4, see paragraph [15] of the judgment

[11] *S v Sekoere supra* at paragraph [28]

- [12] See *The State v S[...] B[...] P[...]* at paragraph [12] <http://www.saflii.org.za/za/cases/ZAFSHC/2014/89.pdf> (accessed 25 August 2020)
- [13] Explained in a covering letter dated 18 August 2020 (Ref 1/4/13) under which the record was despatched to the registrar of this court
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