

SOUTH AFRICA / JUDGMENT

S v White (CA&R 08/2021) [2021] ZAECHGC 4 (20 January 2021)

[2021] ZAECHGC 4

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Bloem, Rugunanan

CASE / FILE NUMBER

CA&R 08/2021

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IN THE HIGH COURT OF
SOUTH AFRICA
EASTERN
CAPE DIVISION, GRAHAMSTOWN
CASE
NO. CA&R 08/2021

Date

delivered: 20 January 2021

In

the matter between:

THE
STATE
and
MELVINO
WHITE
(accused
a quo)

Coram:

Bloem J et
Rugunanan J

JUDGMENT

ON REVIEW

RUGUNANAN J

- [1] On special review at the instance of the regional magistrate (“the magistrate”) in East London, this court must consider whether the accused’s conviction for contravening the Criminal Law (Sexual and Related Matters) Amendment Act[1] against a 5 year old victim on 3 June 2016 is to be reviewed and set aside.
- [2] Before writing this judgment the record of proceedings in the court a quo was forwarded to the Director of Public Prosecutions (“DPP”) for comment. A note of appreciation is conveyed to the DPP for providing an opinion that included additional detail on the conduct of the matter as well as her recommendations on which I have placed significant store in arriving at my conclusion.[2] Only those portions considered relevant for purposes of this judgment are mentioned as succinctly as possible.
- [3] What follows are the circumstances that prompted this application.
- [4] The accused first appeared in the regional court on 21 November 2019. After several postponements occasioned by the Covid-19 pandemic and the unavailability of forensic DNA results, the matter proceeded to trial a year later on 23 November 2020. The accused was legally represented and following a plea of guilty it became known during argument on sentence that his date of birth is 9 December
1999. No birth certificate was produced to the court. At the time of his conviction on the aforesaid date the accused was 20 years
- old and about two weeks away from turning 21.
- [5] The facts in the guilty plea disclose that the accused did not sexually penetrate the victim and that there was indirect contact between his penis and the victim’s vagina. He did not remove her underwear but ejaculated thereon at or near the front of her vagina.[3] Although the facts indicate that the accused was the donor of the genetic material on the victim’s underwear, the DNA report was not produced in court - nor was the report of the victim’s medical examination produced as confirmation of that examination
- despite the fact that she had not suffered any physical injury.[4]
- [6] When the accused first appeared in the regional court on 21 November 2019 his legal representative informed the court that the accused intended to plead not guilty, that no plea explanation would be tendered and no formal admissions would be made.[5] Had the accused immediately admitted what is now contained in his guilty plea there would have been no reason for the State to have waited for the DNA results. The accused’s own conduct appears to be a contributory factor in the substantial delay in finalising his trial.

[7] I digress to deal briefly with the charge against the accused and the offence to which he pleaded guilty. He was charged with attempted

rape in contravention of section 55(a) read with section 3 of the Criminal Law (Sexual and Related Matters) Amendment Act. On facts

accepted by the State, he pleaded guilty to a lesser charge of sexual assault in contravention of section 5(1) of the latter Act. Despite the fact that a contravention of section 5(1) is not a competent verdict for a contravention of section 55(a) the magistrate found, and correctly in my view, that the conviction on the lesser charge is sustainable under section 270 of the Criminal Procedure Act.[6]

[8] The accused was 16 years of age at the time of the commission of the offence and aged 19 when he was initially served with a summons to appear in the district court on 12 August 2019. As will be seen from what follows herein the Child Justice Act[7] (“the Act”) places the accused in a specified category of persons in respect of whom the DPP may exercise a discretion as to whether they ought to be dealt with in accordance with the Act.

[9] Considering that the accused was under the age of 18 when the offence was committed the magistrate raised the issue about whether he ought to have been dealt with in accordance with the provisions of the Act. In doing so the magistrate was prompted by the findings in the matter of *The State v Eugene Dominic Polman*[8]. Having established that no preliminary enquiry for the accused was held in terms of the Act, the magistrate refrained from sentencing the accused and referred the matter to this court for review under section 304(A) of the Criminal Procedure Act[9]. According to the prosecutor the accused was “too old for child justice procedures”. [10]

[10] To begin with, a “child” is defined in section 1 of the Act as “any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4(2).”

[11] The age ambit in respect of persons to whom the Act is applicable is set out in section 4(1) which reads:

“4 Application of Act

(1) 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.”

[12] A juxtaposing position is indicated in section 4(2) which provides that:

“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).

(the emphasis in bold is mine)

[13] Section 5(2) to (4)[11] deals with preliminary inquiries. In summary, it is stipulated that every child who is 10 years or older (but under the age of

- 18) who is alleged to have committed an offence, must be assessed by a probation officer, must appear before a preliminary enquiry and may be diverted either by the prosecutor (i.e. in terms of section 41 for minor offences detailed in Schedule 1), or at the preliminary enquiry.

[14] Section 4(2) expressly confers upon the DPP a discretionary power to invoke the provisions of section 5(2) to (4) of the Act. This power is not conferred on a magistrate’s court nor on a regional court. It is a power that may only be exercised by the DPP in respect of a person who committed an offence while under the age of 18 years but who was handed a written notice, or served with a summons,[12] or arrested while s/he is 18 years or older but under the age of 21. The DPP exercises this power in accordance with national directives

issued by the National Director of Public Prosecutions in terms of section 97(4)(a)(i)(aa) of the Act.

[15] The current policy directives provides that a DPP may issue a direction under section 4(2) of the Act in the following prescribed

circumstances: [13]

“(a) in the event of a Schedule 1 offence;

- (b) if the co-accused is a child;
- (c) if the person was used by an adult to commit the crime;
- (d) where there is doubt regards (sic) the age of the person;
- (e) where the person appears to be intellectually or developmentally challenged; or
- (f) where other pertinent and relevant circumstances so demand ...

.”

[16] Quoting directly from the opinion provided by the DPP, the following is stated:[14]

“The accused in this matter was charged with a serious offence (Schedule 3), he having taken advantage of a sleeping 5 year old child, thereby abusing a position of trust, and committed, on his plea, a sexual assault in contravention of section 5(1) of Act 32 of

2007. None of the circumstances that may persuade a Director of Public Prosecutions to issue a direction in terms of section 4(2) ... were present and the prosecutor was accordingly not required to refer the matter to the Director of Public Prosecutions for a direction.”

[17] Attempted rape in contravention of section 55(a) of the Act for which the accused has been charged is an offence in Schedule 3 of the Act whereas sexual assault in contravention of section 5(1) to which he pleaded guilty is a Schedule 2 offence. Attempted rape is not an offence under Schedule 1 to which the directives specifically refer, nor do any of the other circumstances specified in the directives find favour for the accused. In terms of section 52(3)(a) of the Act, where an offence is listed in Schedule 3, a matter may only be considered for diversion if exceptional circumstances exist and the DPP having jurisdiction has indicated in writing that the matter may be diverted. In the present matter such circumstances are not extant.

[18] In summing up, section 4(2) read in conjunction with the directives is clear regarding the specific category of persons and offences (i.e. Schedule 1) in respect of whom the DPP may direct that such persons be dealt with in accordance with the Act. Although the accused was under the age of 18 when he committed the offence, he is not a person in respect of whom the DPP has invoked the discretionary power that he be dealt with in terms of section 5(2) to (4) of the Act.

[19] I readily acknowledge that the magistrate’s standpoint on the Polman judgment signified caution in referring this matter to this court. Respectfully, the Polman case does not apply to the present accused and is factually distinguishable. In that matter the accused was two days short of his

18th birthday when he allegedly committed murder. He was arrested and appeared in court before turning 18. Since he was unaffected by the provisions of section 4(2), the high court found that the provisions of the Act were peremptory and a preliminary inquiry should have been held.

[20] In all the circumstances, I am of the view that the proceedings in this matter have thus far been in accordance with justice. This is despite the delay occasioned by circumstances or events subsequent to the accused’s first appearance in the regional court.

[21] The accused is yet to be sentenced. I am in agreement with the DPP that his age when the offence was committed is a relevant factor and that, despite his present age, he is entitled to receive the benefit of the sentencing procedure in Chapter 10 of the Act. Moreover, the magistrate must, prior to the imposition of sentence, have the benefit of a pre-sentencing report concerning the accused’s personal circumstances.[15] Information relating to the impact of the commission of the offence on the child victim and her family should also be placed before the magistrate together with the accused’s birth certificate, the victim’s

medical report and the DNA report. This will enable the magistrate to have regard to information for fully evaluating all the factors relevant to the imposition of a just sentence. [16]

[22] Wherefore the following order is made:

- (i) The proceedings before the regional magistrate in the court a quo are declared to be in accordance with justice.
- (ii) The accused's conviction is confirmed.
- (iii) The matter is remitted to the court a quo for continuation of the proceedings on sentence.
- (iv) At the conclusion of the evidence the regional magistrate must impose a sentence which she deems to be just.

M. S. RUGUNANAN

JUDGE OF THE HIGH COURT

I agree. It is so ordered.

G. H. BLOEM

[1] Criminal Law (Sexual and Related Matters) Amendment Act, 2007 (Act 32 of 2007)

[2] The opinion incorporating recommendations is dated 11 January 2021

[3] Record 8:20

[4] Record 14:6

[5] This additional information is contained in the opinion rendered by the DPP

[6] Criminal Procedure Act, 1977 (Act 51 of 1977). Section 270 reads: "Offences not specified in this Chapter - If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved."

[6] Criminal Procedure Act, 1977 (Act 51 of 1977).

Section 270 reads:

“Offences not specified in this Chapter - If the evidence on a charge for any offence not referred to in the preceding sections of this Chapter does not prove the commission of the offence so charged but proves the commission of an offence which by reason of the essential elements of that offence is included in the offence so charged, the accused may be found guilty of the offence so proved.”

- [7] Child Justice Act, 2008 (Act 75 of 2008)
- [8] Unreported NCPD Case No CA&R 06/2014, delivered 11 September 2014
- [9] Criminal Procedure Act, 1977 (Act 51 of 1977)
- [10] Magistrate's covering letter of referral for special review dated 23 November 2020
- [11] Section 5(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). Section 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. Section 5(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; or (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.
- [11] Section 5(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).
- Section 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.

Section 5(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; or
- (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.

[12] As was the accused in this case

[13] See Part 48M of the “Directives in respect of persons who were children at the time of the commission of a crime but are 18 years and older, but under 21 years” dated 1 June 2015

[14] Paragraph [9]

[15] See generally *S v B* 2006 (1) SACR 311 (SCA) at paragraph [15]; *S v IO* 2010 (1) SACR 342 (CPD) at paragraph [17]; *S v BF* 2012 (1) SACR 298 (SCA) at paragraph [11]

[16] As per recommendations by the DPP

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Prepared on 9 October 2026 · Esheria