

SOUTH AFRICA / JUDGMENT

Stander v S (CA&R 426/2012)
[2013] ZAECHGC 62; 2013 (2)
SACR 323 (ECG) (24 May 2013)
[2013] ZAECHGC 62

COURT

Eastern Cape High Court, Grahamstown

BEFORE

J M Roberson, E Revelas

CASE / FILE NUMBER

CA&R 426/2012

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IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION – GRAHAMSTOWN)

CASE NO: CA&R426/2012

DATE HEARD: 24/04/2013

DATE DELIVERED: 24/04/2013

In the matter between

CHRISTOPHER STANDERAPPELLANT

and

THE STATERESPONDENT

Nature of matter: Contravention of s 66 (2) of the National Road Traffic Act 93 of 1996 & and housebreaking with intent to steal and theft Reasons for the Order - The appellant was convicted in the Magistrate's Court, Port Elizabeth, after pleading guilty, of two offences: using a motor vehicle without the owner's consent in contravention of s 66

- (2) of the National Road Traffic Act 93 of 1996, and housebreaking with intent to steal and theft. The counts were treated as one for the purpose of sentence and on 28 February 2012 the appellant, who was 17 years old, was sentenced to compulsory residence in a child and youth care centre for a minimum period of two years, in terms of s 76 (1) of the Child Justice Act 75 of 2008 (the CJA). The appellant appealed against this sentence.

Order: The sentence was set aside and replaced with a caution and discharge.

REASONS FOR ORDER

ROBERSON J:-

BACKGROUND

[1] The appellant was convicted in the Magistrate's Court, Port Elizabeth, after pleading guilty, of two offences: using a motor vehicle without the owner's consent in contravention of s 66 (2) of the National Road Traffic Act 93 of 1996, and housebreaking with intent to steal and theft. The counts were treated as one for the purpose of sentence and on 28 February

2012 the appellant, who was 17 years old, was sentenced to compulsory residence in a child and youth care centre for a minimum period of two years, in terms of s 76 (1) of the Child Justice Act 75 of 2008 (the CJA). The appellant appealed against this sentence. On 24 April 2013 this court upheld the appeal and made the following order:

"1 The sentence of compulsory residence in a Child and Youth Care Centre is set aside and replaced with a caution and discharge.

2 The Registrar is ordered to forward a copy of this order to the Provincial Head of the Department of Social Development, Eastern

Cape."

Reasons for the order were to follow, which they now do.

[2] The appellant was represented at his trial by an attorney apparently from Legal Aid South Africa. After he was sentenced, the magistrate sent the matter on review to the Eastern Cape High Court, Port Elizabeth. In his memorandum accompanying the record, the magistrate requested the High Court to consider whether or not the matter was reviewable in terms of s 85 of the CJA, in view of the fact that the appellant had been legally represented at his trial. Tshiki J, with whom Beshe J concurred, found that the proceedings were reviewable and confirmed that the proceedings were in accordance with justice.¹

JURISDICTION

[3] In the appeal, the appellant was represented by the Centre for Child Law. In view of the fact that the proceedings had already been confirmed by two judges as being in accordance with justice, we requested submissions on whether this court had jurisdiction to hear the appeal. Mr. Courtenay for the appellant and Ms Hendricks for the respondent submitted, with reference to various authorities, that this court did have such jurisdiction.

[4] In *S v Sawman* 2001 (1) SACR 649 (ECD), the appellant was sentenced in the Regional Court for culpable homicide. The magistrate granted leave to appeal against the sentence, but thereafter sent the matter on special review because he had imposed an incompetent sentence. On review, two judges of this court set aside the sentence and substituted it with

another sentence which they considered “appropriate”. The appeal against sentence at a later stage came before two judges of this court. Jansen J with whom Jones J concurred, was of the view that, because the court which substituted the judgment sat as a court of appeal as provided for in s 304 (2) (a) of the Criminal Procedure Act 51 of 1977 (the CPA)², the court had no jurisdiction to hear the appeal in terms of s 20 (4) of the Supreme Court Act 59 of 1959, and that an appeal would lie in these circumstances to the Supreme Court of Appeal. However, Jansen J was of the view that in spite of the fact that the court had no appeal jurisdiction, the court’s own process and the common law ought to be developed in terms of s 173 of the Constitution³ in order to avoid an injustice. Jansen J took into account that the magistrate had been negligent in not bringing to the attention of the reviewing judges that an appeal was pending, that an appeal to the Supreme Court of Appeal would involve a delay and further costs, and that certainty about his situation was important to the appellant. These considerations led Jansen J to conclude that there was *iustus causa* to entertain the appeal.

[5] In the present matter, there was no interference with the sentence of the magistrate. The judgment of Tshiki J merely dealt with the issue of the reviewability of the proceedings. The record was not laid before the reviewing judges on the basis that there was doubt whether the proceedings were in accordance with justice. That being the case, in my view the reviewing court did not sit as a court of appeal as contemplated in s 304 (2) (a) of the CPA.

[6] Further authorities support the submission that this court had jurisdiction to hear the appeal. In *R v D and Another* 1953 (4) SA 384 (AD) at 390H – 391A Centlivres JA said:

“It is true that a convicted person has a right to appeal against both a conviction and a sentence, although a Judge or a Court may in terms of sec. 98 already have confirmed the conviction and sentence but the reason for this is that the convicted person is given by sec. 103 an unfettered right of appeal.”

In *S v Madihlaba* 1990 (1) SA 76 (TPD) at 79A-E, Le Roux AJ said:

“No limitation is placed on an accused’s right to appeal. This was also accepted in S v Muniohambo 1983 (4) SA 791 (SWA), where it was held that it is unnecessary to obtain withdrawal of the Judge’s certificate confirming on review the proceedings in the lower court before leave to appeal in terms of s 305 of Act 51 of 1977 can be granted.

Even though the Court’s powers in terms of s 304 of the Act are very wide and the Court can deal with any matter as if it were an appeal, the question of *res judicata* does not arise because the tests in the end are different.”

(Emphasis added)

See too *S v M* 2001 (2) SACR 316 (TPD) at 317b-d where Grobbelaar J said:

“Dit is egter bekende geldende reg dat, na bekragting op hersiening deur twee Hersieningregters, ‘n Hof van appèl vir ‘n Provinsiale Afdeling nie functus officio is om ‘n appèl in dieseflde verrigtinge te hanteer nie waar die appèl handel oor aspekte wat nie reeds in die hersiening ter sprake was nie. Sien S v Maduna en ‘n Ander 1997 (1) SASV 646 (T).”

I was therefore satisfied that this court had jurisdiction to hear the appeal.

THE OFFENCES

[7] The circumstances of the offences were set out in the appellant’s statement in terms of s 112 (2) of the CPA. On 14 October 2011 he went to his mother’s place of work and asked his mother for her car keys in order to get something out of her car. Without his mother’s permission he drove the car to a shop and returned to her place of work half an hour later. The police were waiting for him and he was arrested.

On 16 January 2012 he broke into a house in the complex in which he and his mother lived. He stole various items with a total value of R9 360.00. He and a friend sold the items for R800.00. He was arrested the same day and led the police to the place where he had sold the items. They were all recovered and returned to the owner.

[8] The appellant’s personal circumstances were set out in a detailed pre-sentence report. He has a relatively stable socio-economic background. He was born on 9 December 1994 and was the only child born of the relationship between his mother, Margaret Stander, and one Ross. The relationship ended when the appellant was ten months old. Mrs Stander brought up the appellant with the support of family. During 1998 Mrs. Stander met and married the appellant’s stepfather. The marriage was stable until 2006, when the stepfather began to abuse alcohol and to abuse Mrs. Stander verbally and emotionally. He also abused the appellant physically and verbally. Mrs. Stander and her husband separated in 2011.

[9] The appellant attended school until Grade 10 and achieved academically and in sport. No behavioural problems were encountered during his school days but during 2010 he started to use drugs (specifically Tik) and became friendly with drug lords and gangsters, who were older than him. As a result of his addiction to drugs he left school. He also started stealing from home and would spend nights away from home. During 2010 and 2011 referrals for psychological counselling or substance abuse treatment were not successful, owing to the appellant’s lack of co-operation.

[10] The probation officer reported that the appellant took responsibility for the offences and showed remorse. He accepted that he had ended up in this situation as a result of his poor choice of friends. He acknowledged that failing to finish school would have an adverse effect on future employment and wanted the opportunity to complete his schooling.

[11] Mrs. Stander informed the probation officer that she was unable to control the appellant’s behaviour and wanted him to be placed in a structured environment so that he could be rehabilitated. If the appellant had been returned to her care, she would have had to find alternative accommodation because the Body Corporate of the complex in which she lived

told her she would have to leave if the appellant returned home. In addition, she was planning to leave Port Elizabeth within the year. She expressed fear of harassment by the appellant's undesirable friends if he returned to her care. It appeared from the trial record that after the appellant's first appearance in court he was kept in custody because his mother was not prepared to take responsibility for him.

- [12] The appellant was concerned that if he returned home his friends would make it difficult for him to change and might be a danger to him and his family. He was willing to be sent to a "reformatory" and said that if he was placed in a structured environment he could finish his schooling and make use of support services in order to overcome past traumatic experiences.
- [13] The probation officer considered three sentencing options: a suspended sentence, direct imprisonment, and detention in a "reformatory school". He was of the view that neither of the first two options was suitable. He was of the view that detention in a reform school was appropriate because it would enable the appellant to complete his schooling, he would have the benefit of life skills and rehabilitative programmes and social work services, and he would have the opportunity to develop insight into the impact of his behaviour on the victim.
- [14] The prosecutor and the appellant's attorney supported this recommendation, the attorney placing on record that the appellant and his mother were in agreement with the recommendation.

DISCUSSION

- [15] What was formerly a reform school is now referred to as a child and youth care centre. Compulsory residence in such a centre is the second to last sentencing option contained in the CJA, the last being imprisonment. It is a custodial sentence⁴ and is one of the sentences which is subject to automatic review in terms of s 302 of the CPA (depending on the length of the sentence and the length of service of the magistrate). Detention in a reform school has long been authoritatively recognised as a severe sentence. See generally SS Terblanche Guide to Sentencing in South Africa Chapter 12 paragraph 5.2.6 and the authorities referred to. In particular at paragraph 5.2.6.4, the author states:

"Owing to the severity of committal to a reform school, such punishment should be imposed only after particularly careful consideration. As a general principle it should be limited to young offenders who have committed a serious crime or who have repeatedly committed fairly serious crimes. In other words, it is generally inappropriate for a first offender or a very young offender."

- [16] In the present case, I am of the view that the offences did not warrant such a severe sentence. The appellant used his mother's car without her permission for a very short time and she in all probability called the police because she could no longer cope with his behaviour. The appellant co-operated with the police with regard to the housebreaking charge and the stolen goods were recovered. The appellant pleaded guilty, was remorseful

and showed insight into his behaviour. He was a first offender. Although psychological and substance abuse treatment had not been successful, the appellant had not previously been in the criminal justice system where court ordered intervention could have occurred. I do not think he should be regarded in the same light as a person who was given opportunities to rehabilitate through previous sentences, but failed to take advantage of such opportunities. In all

these circumstances, the sentence imposed was disturbingly inappropriate.

[17] The severity of the sentence is highlighted by the provisions of s 69 of the CJA, which deals with the objectives of sentencing and the factors to be considered. S 69

(3) deals specifically with the factors to be taken into account when considering compulsory residence in a child and youth care centre, and incorporates the factors to be taken into account when considering the imposition of a sentence involving imprisonment.

Ss 69 (3) and (4) provide as follows:

(3) When considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, which provides a programme referred to in section 191 (2) (j) of the Children's Act, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment,

consider the following:

- (a) Whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;
 - (b) whether the harm caused by the offence indicates that a residential sentence is appropriate;
 - (c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and
 - (d) whether the child is in need of a particular service provided at a child and youth care centre.
- (4) When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:
- (a) The seriousness of the offence, with due regard to-
 - (i) the amount of harm done or risked through the offence; and
 - (ii) the culpability of the child in causing or risking the harm;
 - (b) the protection of the community;
 - (c) the severity of the impact of the offence on the victim;
 - (d) the previous failure of the child to respond to non-residential alternatives, if applicable; and
 - (e) the desirability of keeping the child out of prison.

A mere reading of these factors illustrates that compulsory residence in a child and youth care centre is reserved for the more serious offences and for repeat offenders, and accords with the quoted extract from Terblanche above. A proper consideration of these factors in the present case would lead to the conclusion that compulsory residence in a child and youth care centre is not a suitable sentence.

- [18] In any event the period of residence described as a minimum of two years was incompetent, as was properly conceded by Ms Hendricks. S 76 (1) of the CJA provides for compulsory residence in a child and youth care centre not exceeding five years. The sentence should therefore contain a definite period of residence.
- [19] Chapter 10 of the CJA contains a range of sentencing options including community-based sentences, restorative justice sentences, fines with alternatives such as symbolic restitution or services, correctional supervision, compulsory residence in a child and youth care centre, imprisonment, and postponement or suspension of passing of sentence. These sentencing options reflect the spirit of s 28 (g) of the Constitution⁵ and the purpose and spirit of the CJA itself, which was described by Bertelsman J in *S v CKM and Others*, Gauteng North Division, Pretoria, reference numbers 20/1, 21/1 and 112, judgment dated 19 January 2012, as follows:

“It commenced on the 1st April 2010. It introduced a comprehensive system of dealing with child offenders and children coming into conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care and correcting errant actions as far as possible by diversion, community based programs, the application of restorative justice processes and reintegration of the child into the community.”

- [20] In his reasons for sentence, the magistrate said that he was extensively guided by the submissions made on behalf of the State and the appellant, as well as the contents of the pre-sentence report. He was also of the view that the appellant needed to be in a structured environment, given his need to finish his schooling, his choice of associates, his drug abuse and the previous unsuccessful interventions. I do not doubt that the magistrate sincerely intended to impose a sentence which would be beneficial to the appellant. However, his reasons do not disclose that he had regard to the provisions of s 69 (3) and (4) of the CJA, nor is it apparent that he considered other sentence options as provided for in the CJA. While it was in the appellant’s interests to finish his schooling and to receive services in order to rehabilitate him and to help him overcome his drug addiction, detention in a centre was not the only way to achieve these results. This was not an easy case. The possibility of further influence or harassment by undesirable associates and the appellant’s mother’s unwillingness to take responsibility for him, left the appellant in need of a protective environment other than a family home. In my view, in these circumstances, it would have been appropriate to refer the appellant to a children’s court in terms of s 64 of the CJA.

S 64 provides:

“If it appears to the presiding officer during the course of proceedings at a child justice court that a child is a child in need of care and protection referred to in section 50, the court must act in accordance with that section.”

S 50 of the CJA provides:

“If it appears to the inquiry magistrate during the course of a preliminary inquiry that-

- (a) a child is in need of care and protection referred to in section 150
- (1) or (2) of the Children's Act, and it is desirable to deal with the child in terms of sections 155 and 156 of that Act; or
- (b) the child does not live at his or her family home or in appropriate alternative care; or
- (c) the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth,

the inquiry magistrate may stop the proceedings and order that the child be brought before a children's court referred to in section 42 of that Act and that the child be dealt with under the said sections 155 and 156.”

[21] In his reasons the magistrate was of the view that s 64 read with s 50 could not be applied because the appellant had not committed minor offences, and because his basic needs were met. This view was a misinterpretation of s 50. The grounds for referral to a children's court are not restricted to cases involving minor offences. The evidence showed that the appellant met the requirements contained in s 50 (a) and (b). He appeared to be in need of care and protection as provided for in s 150 (1) of the Children's Act 38 of 2005. S 150 (1) sets out various grounds on which a child may be identified as a child in need of care and protection. S 150 (1) (b)) provides for a child who displays behaviour which cannot be controlled by the parent or care-giver. S 150 (1) (d) provides for a child who is addicted to a dependence-producing substance and is without any support to obtain treatment for such dependency. The appellant also did not live at his family home or in appropriate alternative care. At the time he was sentenced, he had no home to go to. That is why he was kept in custody for the duration of his trial.

[22] In considering an alternative sentence, I took into account that the appellant had spent six months in the centre. According to the affidavit of Mr. Courtenay in support of the application for condonation for the late application for leave to appeal, the appellant absconded from the centre during August

2012. After an absconder's enquiry was held in the Children's Court, Port Elizabeth, he was not sent back to the centre but was instead kept in a place of safety pending an administrative decision

by the Department of Social Development on where to place him. In these circumstances, little purpose would have been served in

imposing any other kind of sentence. The appellant is now 18 years old and referral to the Children's Court cannot take place.

Fortunately, so we were informed from the bar, he now has relatives who are prepared to take care of him and provide a supportive environment.

[23] For the above reasons, the sentence was set aside and replaced with a caution and discharge.

J M ROBERSON

JUDGE OF THE HIGH COURT

REVELAS J:-

I agree

E REVELAS

1Eastern Cape, Port Elizabeth case no. CA&R 100/2012 judgment delivered 30 March 2012

2This subsection provides: "If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal:"

3S 173 of the Constitution provides: "The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice."

4In terms of s 76 (1) of the CJA the youth care centre must be one which provides a programme referred to in s 191 (2) (j) of the Children's Act 38 of 2005, which is a programme designed for the reception, development and secure care of children. "Secure care" is defined in the Children's Act as the physical containment in a safe and healthy environment of children with behavioural and emotional difficulties and children in conflict with the law.

5S 28 (g) provides, inter alia, that a child has the right not to be detained except as a measure of last resort and may be detained only for the shortest appropriate

period of time

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