Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Review Number: 13456
Magistrate's Court Case Number: OSH168/12

In the matter between:

THE STATE

and

NIKLAASWITBOOI

REVIEW JUDGMENT DATED 6 AUGUST 2013
IN TERMS OF S 85(1) OF THE CHILD JUSTICE ACT 75 OF 2008

CLOETEJ:

[1] This matter came before me in chambers on automatic review in terms of s 85(1) of the Child Justice Act 75 of 2008 (*'the CJA'*). After perusing the record of the proceedings in the court *a quo* I directed certain queries to the presiding magistrate. I will refer to these later in this judgment.

[2] Theaccused (who was legally represented at the trial) was convicted in the Oudtshoorn Magistrates Court on 26 February 2013 after pleading guilty to one

count of housebreaking and robbery. Hehad also been charged with a separate count of theft for which the trial court had entered a plea of not guilty on his behalf but for which he was also subsequently convicted. The sentence imposed on the count of theft was a warning and discharge. The court *a quo* reasoned as follows when sentencing the accused on the count of theft:

> *'Gedagtig aan die feit dat hy tans besig is om 'n vonnis uit te dien van 18 maande gevangenisstraf en gedagtig aan die meer ernstige vonnis wat hy by klagte 2 gaan kry, wat 'n uiters ernstige oortreding was, gaan die hof hom* ***WAARSKU EN ONTSLAAN****. Dit is net om die kumulatiewe effek korrek te kry ten opsigte van klagte 1… Ten opsigte van klagte 2 kom ons by 'n perd van 'n heel ander kleur.'*

[3] The court *a quo* sentenced the accused on count 2 (namely that of housebreaking and robbery) to 5 years direct imprisonment and remarked *'…wat taamlik lig is gedagtig aan die persoonlike omstandighede'.*

[4] At the time of being sentenced the accused was serving a separate sentence in respect of a conviction for housebreaking with intent to steal and theft for which he had been sentenced on 15 August 2012 to 18 months imprisonment in terms of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 i.e. (*'the CPA'*). In argument on sentence the accused's legal representative informed the presiding magistrate that the sentence that the accused was serving at the time arose out of a later offence committed;and thus correctly submitted that, for purposes of sentence, the accused was a first offender (he has no other previous convictions).

[5] The record reflects that the accused was born on 17 July 1995 and that the offence for which he was sentenced to 5 years direct imprisonment was committed on 2 May 2012. He was accordingly 16 years old at the time of commission of the offence, and thus fell squarely within the statutory sentencing requirements contained in Chapter 10 of the CJA.

[6] In *S v L* 2012 (2) SACR 399 (WCC) a full bench of this division referred to these requirements at paras [15] – [17] as follows:

> *'[15] Chapter 10 of the Act deals comprehensively with the sentencing of children. Section 68 provides that a court must, after convicting a child, impose a sentence in accordance with that chapter. Section 69 details the objectives of sentencing and the factors to be considered. In addition to any other considerations relating to sentencing, the objectives are to:* (a) *encourage the child to understand the implications of and be accountable for the harm caused;* (b) *promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;* (c) *promote the reintegration of the child into the family and community;* (d) *ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and* (e) *use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.*
>
> *[16] The last objective is also to be found in s 28(1)*(*g*) *of the Constitution which provides that every child has the right not to be detained except as a measure of last resort and then only for the shortest appropriate period of time… Section 77(6) provides that, in compliance with South Africa's international obligations, no law or sentence of imprisonment imposed on a child may directly or indirectly deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment.*
>
> *[17] Section 69(4) of the Act stipulates that when considering the imposition of a sentence involving imprisonment in terms of s 77, the court must take the*

following factors into account, namely: (a) *the seriousness of the offence;* (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. Section 71 makes it obligatory (save in certain limited circumstances which do not apply here) for the furnishing of a pre-sentence report by a probation officer. Section 71(4) provides that a court may impose a sentence other than that recommended in the pre-sentence report but must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.'*

[7] Section 77(2) of the CJA provides that:

'Notwithstanding any provision in this or any other law, a child who was 16 years or older at the time of the commission of an offence referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997) must, if convicted, be dealt with in accordance with the provisions of section 51 of that Act.'

[8] Robbery is an offence specified in Part IV of Schedule 2 to the Criminal Law Amendment Act 105 of 1997 (*'the 1997 Act'*). S 51(2)(c)(i) thereof prescribes a minimum sentence for a Part IV first offender of imprisonment for a period of not less than 5 years unless the court, in terms of s 51(3)(a), is satisfied that substantial and compelling circumstances exist which justify the imposition of a lesser sentence.

[9] The question which arises is whether s 77(2) of the CJA relieves a sentencing court of the obligations imposed upon it in terms of s 69(4) thereof as well as s 28(1)(g) of the Constitution.

[10] The Constitution is the supreme law of South Africa. Law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled (s 2).TheConstitution provides that a child's best interests are of paramount importance in every matter concerning the child (s 28(2)).The right of a child not to be detained except as a measure of last resort and then only for the shortest appropriate period of time may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors including: (a) the nature of the right; (b) the importance of the purpose of the limitation; (c) the nature and extent of the limitation; (d) the relation between the limitation and its purpose; and (e) less restrictive means to achieve the purpose (s 36(1)).

[11] Given that a child's best interests are of paramount importance in every matter concerning the child; and given the stated purpose of the CJA as contained in the preamble thereto, namely *'to establish a criminal justice system for children… in accordance with the values underpinning the Constitution and the international obligations of the Republic* [and] *… to extend the sentencing options available in respect of children who have been convicted…'* it must surely have been the intention of the legislature, when enacting the CJA, to nonetheless impose an obligation on a court sentencing an accused child under s 77(2) of the CJA to have regard to the express provisions contained in s 69(4) thereof.

[12] Support for this view is to be found in the wording of s 69(4) itself which

imposes a positive obligation, without qualification, on a sentencing court to take into account the factors set forth therein when considering the imposition of a sentence involving imprisonment in terms of s 77.It was open to the legislature to have made the provisions of s 69(4) specifically subject to those contained in s 77(2) of the CJA; but it did not. Thewordsin s 77(2) that *'notwithstanding any provision in this or any other law'* a child who was 16 years or older at the time of the commission of a Schedule 2 offence must, if convicted, be dealt with in accordance with the provisions of s 51 of the 1997 Act cannot reasonably be interpreted to mean that courts must disregard s 69(4) of the CJA when sentencing children under s 77(2) thereof.

[13] It is accordingly my view that the proper interpretation to be placed on s 69(4) as read with s 77(2) of the CJA is that, despite the applicability of the minimum sentencing legislation, the sentencing court is nonetheless obliged to comply with s 69(4) in arriving at what it considers to be an appropriate sentence.

[14] Returning now to the queries that I raised with the presiding magistrate. The pre-sentence report of the probation officer reflected that: (a) the accused is learning disabled; (b) he was involved in a motorvehicle accident in January 2010 and suffered head injuries. He thereafter began exhibiting behavioural problems and ultimately left school in June 2011; (c) the accused's family unit is stable and there do not appear to be any signs of criminal or anti-social behaviour on the part of family members other than the accused; (d) he qualified for correctional supervision, both in respect of the offence for which he was sentenced on 15 August 2012 to 18 months imprisonment in terms of

s 276(1)(i) of the CPA, as well as the present offence, and indeed this was the probation officer's recommendation; and (e) the accused had not displayed any behavioural problems since his incarceration at Mossel Bay Youth Centre.

[15] I informed the learned magistrate that it was not apparent from the record what steps he had taken to satisfy himself that the sentence of 5 years direct imprisonment was: (a) a measure of last resort; and (b) the shortest appropriate period of time. It was also not apparent that he had considered and taken into account s 68, s 69 and s 77(6) of the CJA or s 28(1)(g) of the Constitution. There was furthermore no reference to s 71(4) of the CJA which, as I have said, stipulates that a court may impose a sentence other than that recommended in the pre-sentence report but must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.

[16] It is also apparent from further perusal of the record that at no stage prior to his conviction on the count of robbery was the accused's attention drawn to the applicable minimum sentencing legislation. It is not reflected in the charge sheet, was not referred to by either the prosecutor or the accused's legal representative in argument, and was not referred to by the learned magistrate when imposing sentence. The record is furthermore silent as to the applicable provisions of the CJA. Neither the prosecutor nor the accused's legal representative addressed these in argument, nor did the learned magistrate make even passing reference to them in his judgment on sentence.

[17] Even more disturbing is the submission made by the prosecutor during argument that *'Die staat is van mening agbare, dat die enigste gepasde vonnis sal wees direkte gevangenisstraf, dit is die enigste vonnis wat die regte boodskap aan die gemeenskap sal uitstuur dat hierdie tipe van optrede gaan nie geduld word nie. Dit maak nie saak of jy 17 jaar oud is nie, jy sal tronk toe gaan'.*

[18] In his response to my queries the learned magistrate acknowledged that he had not during the trial mentioned the Constitution, the CJA, our obligations under international conventionsor why he had departed from the sentence recommended in the pre-sentence report. He also acknowledged that it was not possible for him to correct the record at this stage. He informed me however that the question was simply whether or not the accused was to be given a chance to return to society. As a first offender and a child he would have wished to impose a non-custodial sentence on the accused *'if at all possible. The Court intended imposing a suspended sentence, but found this not to be in the interest of society… I would simply like to point out the following at the risk of saying the obvious'* and he then set out the reasons why he considered that a sentence of 5 years direct imprisonment was appropriate in the circumstances.

[19] In his judgment on sentence the learned magistrate had reasoned as follows. First, an aggravating factor was that subsequent to the commission of the current offence the accused had committed another offence for which he had been sentenced to 18 months imprisonment (a factor which should have had no bearing on the sentence to be imposed on the accused given that at the time of

commission of the current offence he was a first offender). Second, the offence was serious. In this regard, the essential facts were that the accused unlocked a security door with a piece of wire and while brandishing it scared the domestic worker in charge of the premises at the time into unlocking a safe. He then removed expensive items as well as a firearm. Third, the offence had been planned and could have had far more serious consequences. Fourth, similar offences were committed by other children of the same age because they assumed that they would not be punished appropriately *'want hulle kry heelwat ligter strawwe as meer volwasse mense vir verstaanbare redes'.*Fifth, the imposition of a suspended sentence would have resulted in a *'drastiese en skokkende'* overemphasis of the accused's personal circumstances. In proceeding to impose the sentence of five years direct imprisonment the learned magistrate, as previouslymentioned, remarked that it *'taamlik lig is gedagtig aan die persoonlike omstandighede'.*

[20] In his written response to my queries the learned magistrate essentially repeated his reasoning relating to the seriousness of the offence and the frequency, in his view, with which offences of this kind occur among the accused's age group. He alsothen set out in some detail why he considered that the character of the accused and his behaviour did not favour his release into society. Finally, he emphasised the interests of the community and the rights of the victim as well as the accused's own family. He concluded as follows:

> *'Crime unfashionable as the idea may be requires punishment. I believe in the circumstances accused was given the lightest possible sentence and although not specifically mentioned, all the requirements of the Child Justice Act and Constitution were met.'*

[21] The learned magistrate's written response to my queries in which he motivates why he rejected the recommendations in the pre-sentence report, do not form part of the record of the proceedings in the court *a quo.*

[22] This constitutes a fatal irregularity due to the court a quo's failure to comply with the peremptory provisions of s 71(4) of the CJA. Further – and this is acknowledged by the learned magistrate – there is simply no indication in the record that he took into account the factors to which he was obliged to have regard in terms of s 69(4) of the CJA or s 28(1)(g) of the Constitution nor how he applied them to the facts of the case. It is inappropriate to consider the learned magistrate's motivation for imposing the sentence that he did given that his reasons have been provided *ex post facto* and the absence of these considerations in the record constitute another irregularity.

[23] A further irregularity is that the court *a quo* imposed the minimum sentence stipulated in s 51(2)(c)(i) of the 1997 Act without the accused apparently having been given any notice whatsoever that the minimum sentencing provisions were applicable.Although I have not previously raised this with the learned magistrate it is unnecessary to do so at this stage in light of the other irregularities which vitiate the sentencing proceedings in the court *a quo.*

[24] My conclusion is thus that the sentencing proceedings in the court *a quo* were not in accordance with justice. It follows that the sentence imposed on the accused in respect of count 2, namely 5 years direct imprisonment, must be set aside.

[25] **I accordingly make the following order:**

1. The sentence of the accused is set aside.

2. The matter is remitted to the court a quo to be heard by another presiding officer who is directed to consider the pre-sentence report and to deal further with the matter in accordance with justice.

3. In the event that the accused has completed serving the sentence imposed upon him in respect of the unrelated, later offence for which he was sentenced to 18 months imprisonment in terms of s 276(1)(i) of Act 51 of 1977, it is ordered that he be released on bail in an amount of R250 on the following conditions:

(a) That the accused report at the office of the district court control prosecutor, magistrate's court, Oudtshoorn, within 7 (seven) days of his release on bail to be apprised of the date of his court appearance.

(b) To attend court on all such days to which the matter will be postponed until the matter shall finally be dealt with as contemplated in paragraph 3 of this order.

_____

J I CLOETE

HENNEY J: I agree and it is so ordered.

_____

R C A HENNEY