IN THE HIGH COURT OF SOUTH AFRICA

WESTERN CAPE DIVISION, CAPE TOWN

SPECIAL REVIEW 181000
SPECIAL REVIEW 181002
Date of judgment: 2 November 2018

In the matter between

THE STATE
V
B O

And

THE STATE
V
K P

CORAM: THULARE AJ; DOLAMO J

JUDGMENT ON REVIEW

THULARE AJ

[1] Both matters were sent by the respective trial magistrates for review after proceedings were conducted on the understanding that the accused were a major when the offence were committed, when in fact and in truth the accused were children.

[2] B O (O) elected to conduct his own defence and pleaded guilty to a charge of wrongful possession of two bankies of dagga weighing 5.3 grams at his first appearance on 26 September 2017. The State accepted the plea and the court in the district of Knysna found him guilty in terms of section 112(1)(a) of the Criminal Procedures Act, 1977 (Act No. 51 of 1977) (CPA). It was in his address in mitigation of sentence that he told the court that he was 17 years of age. Although the charge sheet indicated the age of the accused as 17, the Prosecutor had indicated to the magistrate that information at the State's disposal gave his age at 18.

[3] The matter was postponed for the determination of the correct age of the accused and he was released on warning. A copy of the accused's identity document was subsequently availed to the court a quo and it was determined that the accused was indeed 17 years of age. The accused was referred for assessment for purposes of diversion. The record reflects that a preliminary enquiry was held on 31 October 2017. He was placed under a programme following a supervision and guidance order made by the magistrate on 28 March 2018. The matter was then submitted for review.

[4] In the second matter, K P (P) was arraigned together with two others in the Regional Court in Parow and was found guilty of murder, three counts of attempted murder, one count of unlawful possession of firearms and one

count of unlawful possession of ammunition. He was sentenced to fifteen (15) years imprisonment on the count of murder, five (5) years imprisonment on each count of attempted murder, five (5) years imprisonment on the count of unlawful possession of ammunition and six (6) months imprisonment on the count of unlawful possession of ammunition. Count 5 and 7 were ordered t run concurrently with the sentence on count 4 and the sentences on count 8 and 9 were ordered to run concurrently with the sentence on count 1. The accused was also deemed unfit to possess a firearm.

[5] P' legal representative had requested a probation officer's report for purposes of sentencing. The following discussion between the court and Mr Smith on behalf of P appears on record in respect of the probation officer's report:

"MR SMITH: I have received the report, Your Worship. I've read through it, Your Worship, and there's certain aspects in the report that I'm not particularly happy with, Your Worship. I've consulted … (intervention).

COURT: What are you not happy with?

MR SMITH: They're saying the age of the accused, now I spoke to the family and the family says that the age does not reflect, the age on the report does not reflect the same age as his birth certificate, Your Worship.

COURT: I mean if he was 21 in 2016, what was he in 2016, how old was he?

MR SMITH: 18,19.

COURT: He's 23 now.

MR SMITH: So it's probably 20, 21, round about that age.

COURT: Ja, was 21. This is what the report is saying and this is what the docket is saying and the report was compiled from the information given by the accused as well as the family.

MR SMITH: (Indistinct) If I can just turn my back to you for one second, Your Worship.

COURT: Ja, he knows his age, he must tell you the correct age. He knows he was born … (Intervention).

MR SMITH: (Indistinct) clarify one issue with him, Your Worship.

COURT: … he was born in 1995 […] April.

MR SMITH: Court please, Your Worship.

COURT: Yes, he confirm the age?

MR SMITH: He confirms it, Your Worship.

COURT: […] April 1995, 23 years. It means he was 20 … (intervention).

MR SMITH: I will have to then accept the report's age which he is averring to, Your Worship."

[6] The statement of the magistrate to the review judge reads as follows at paragraphs 3 and 4:

"3. A week after the sentencing of the accused, it came to my attention that the age that the accused provided was incorrect and he was in fact born on the 26/04/1999. A copy of the accused's birth certificate was provided to me as proof.

4. It is now clear that when the offences were committed the accused was still under the age of 18 years and therefore a minor. Had this information been before court when it sat, it would have sat as a Child Justice Court as provided by the Child Justice Act 75 of 2008. I am also of the view that the accused would have been sentenced differently. The provisions of section 51(2) of the Criminal Law Amendment Act 105 of 1997 would not have been applicable to the accused had his correct age been brought to the attention of the court. The accused apparently also provided the wrong date of birth to the probation officer."

[7] The two cases, and a number of other reviews considered in this Division for the same reasons, in my view, clearly indicated that the terminology

employed in section 12, 13 and 14 in Part 3 of Chapter 2 of the Child Justice Act, 2008 (Act No. 75 of 2008) (CJA) were not being interpreted and applied in the best interests of children.

[8] The relevant provisions of section 12, 13 and 14 read as follows:

"12 Responsibility of police official where age of child is uncertain

If a police official is uncertain about the age of a person suspected of having committed an offence but has reason to believe that –

(a) The person may be a child under the age of 10 years, the official must act in accordance with the provisions of section 9; or

(b) The person may be a child who is 10 years or older but under the age of 14 years, or a child who is 14 years or older but under the age of 18 years, the police official must treat the person as a child with due regard to the provisions relating to-

(i) Arrest in terms of Chapter 3; or

(ii) Release or detention in terms of Chapter 4, and, in particular, section 27 relating to placement options before a child's first appearance at a preliminary inquiry, until a probation officer or medical practitioner has expressed an opinion on the age of the person or until the determination of that person's age at the preliminary inquiry or child justice court, after which the police official must treat the person in accordance with the opinion or determination.

13 Age estimation by probation officer

(1) If, during an assessment of a child in terms of Chapter 5, the age of a child, at the time of the commission of the alleged offence, is uncertain, the probation officer must make an estimation of the child's age and must complete the prescribed form.

14. Age determination by inquiry magistrate or child justice court

(1) If, during a preliminary inquiry or during proceedings before a child justice court, the age of a child at the time of the commission of the alleged offence is uncertain, the presiding officer must determine the age of the child."

[9] Section 12 envisages that a police official should have information on which such official is able to firmly rely on in respect of what was the correct age of the youngster. It envisages an investigation by the police official which produced evidence upon which the police official would be completely convinced of the right age of the youngster. It envisages the police official entering the age of the youngster on record as a true fact.

[10] In my view, the section envisaged that where a police officer arrested a youngster, the police officer should treat such youngster as a child unless the police officer is satisfied that some factual or medical basis existed for him or her to be certain that the person is not a child. In the absence of the state of being certain of the age, the youngster should be treated as a child by the police official. The arresting officers and the investigating officers in both matters clearly failed the two children. Contrary to the provisions of the section, where there was no certainty as to the age of the youngsters, they were treated as adults.

[11] I understand the obligation imposed by section 14 of the CJA on the inquiry magistrate or child justice court to be that where the age of the youngster is unknown, is based on unreliable evidence or cannot be precisely determined, the presiding officer should hold an enquiry and determine the age of the youngster. The age determined after such enquiry is deemed to be the age of the youngster. The age so determined can only be substituted by evidence of the age of the youngster to the contrary. Clearly, the presiding officers before whom the youngsters made their first appearance, did not

enquire as to the age of the children, and therefore failed to protect the children.

[12] Unless magistrates are deliberate in their approach to child justice, children will enjoy special protection on paper only and not in practice, fact and in deed. Our laws will remain paper tigers with no teeth to bite away children's vulnerability in a criminal justice system meant for adults. The criminal justice system would not pave a way for children to move to the child justice courts and they would remain within the mainstream of the criminal justice system and continue to be dealt with like adults.

[13] Section 14 of the CJA calls for a paradigm shift. It envisages a change of mindset and alertness to the judicial officer as regards the distinction between an adult and a child. At entry level, at the first appearance of every youngster, the presiding officer has a duty to determine whether the accused before him or her is a child or not. In my view, section 14 (2) of the CJA envisages an enquiry into the age of every youngster who appears, for the presiding officer to determine the age of the person so appearing, for it is at this point that the trajectory of the forum for trial is determined.

[14] As regards O, the central feature of the inquisitorial nature of a preliminary enquiry, and the facility of that feature to dispose of such minor misdemeanours by allowing for diversion of such matters out of criminal proceedings and the risk of a criminal record during childhood, was denied him at the inception of the proceedings. I am satisfied that the magistrate was correct in her view that the error regarding the age of the child caused prejudice to the child during the proceedings in question and correctly caused

the matter to be transmitted for review –[section 16(2) of CJA]. In my view, the conviction of the child, under the circumstances, should not be allowed to stand. On the face of it, had the accused been dealt with in accordance with the CJA, he would in all probability have been diverted. Furthermore, in terms of section 83 of the CJA, he would have had legal representation, and would have been advised on the appropriate way to deal with the charges against him.

[15] As regards P, there was a departure from the formalities, rules and principles of procedure which the law requires that the trial of a child should be initiated and conducted under as envisaged in the CJA. An irregularity occurred in the trial of the child. Having considered the record of proceedings, I am unable to come to a conclusion that P was tried unfairly. I am unable to conclude that a failure of justice has in fact resulted from such irregularity leading to his conviction. In my view, the case against him was proved beyond reasonable doubt and there was no resultant failure of justice – [*S v Felthun* 1999 (1) SACR 481 (SCA) at p. 485g -486a].

[16] The position is different as regards sentence. A child must be sentenced in accordance with Chapter 10 of the CJA. P was not sentenced in accordance with the Chapter. Furthermore, he would have benefited from the provisions as regards minimum sentences as regards children as envisaged in the Criminal Law Amendment Act, 1997 (Act No. 105 of 1997). In my view, the irregularity of a departure from the formalities, rules and principles applicable to sentencing children resulted in a failure of justice leading to the inappropriate sentences imposed.

[17] In my view, probation officers are not helping much in the process of individualisation, which is calculated to ensure a comprehensive image of the social, personal and psychological background of accused persons, especially children. An interview with the child and a few minutes with its mother alone can never amount to a thorough research with regard to the person, character and environment of the child sufficient to gain a deeper understanding of the child. In the case of P, the probation officer was unable to investigate and truthfully report on something as elementary as the correct age of the child, in circumstances where a birth certificate of the child was available.

[18] For these reasons, I would make the following order:

(a) The conviction of B O is set aside.
(b) The sentences imposed on K P are set aside.
(c) The matter of K P is remitted back to the magistrate for consideration of sentence as envisaged in Chapter 10 of the Child Justice Act, 2008.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered

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MJ DOLAMO
JUDGE OF THE HIGH COURT