



**In the High Court of South Africa
(Western Cape Division, Cape Town)**

**Case No: High Court Ref No. 12/21
Magistrate's Serial No: 01/2020
Case No. B541/2020**

In the matter between:

THE STATE

and

KD

Accused

JUDGMENT

LEKHULENI AJ

INTRODUCTION

[1] This case comes before me by way of review in terms of section 85 of the Child Justice Act (*"the CJA"*) read with Chapter 30 of the Criminal Procedure Act 51 of 1977 (*"the CPA"*). The accused is a child offender who was 14 years old at the time of the commission of the offence and was 15 years at the time of sentencing. He was convicted on the 26 November 2020 by the District Court sitting at Strand on a charge of Possession of a Firearm in contravention of section 3 read with Schedule

4 and section 151 of the Firearms Control Act 60 of 2000 (*“the Firearm’s Control Act”*). He was subsequently sentenced to 12 months compulsory residence in a child and youth care center providing programs referred to in section 191(2)(j) of the CJA. This matter is subject to automatic review in terms of the provisions of section 85 of the CJA. Essentially, this court is enjoined to consider whether the proceedings before the trial magistrate appear to be in accordance with justice.

FACTUAL BACKGROUND

[2] The state alleged that upon or about 25 June 2019 and at or near 11th Street Strand the accused did unlawfully have in his possession a Gecado Revolver without holding a licence, permit or authorization issued in terms of the Firearms Control Act to possess that firearm. The accused was legally represented by an attorney and assisted by his mother throughout the proceedings. He pleaded guilty to the charge and made a statement in terms of section 112(2) of the CPA upon which his plea was based.

[3] The facts gleaned from his statement were that on the 25 June 2020 (sic) (should be 2019) he was walking on the Eleventh Street in Strand on his way to a shop. He knew that it was dangerous in the area and he had the Gecado Revolver with serial number 399725 in his possession. He kept the said firearm in his waist. He received the firearm from a friend and took it for safe keeping. Whilst walking to the shop, he saw a police van which was patrolling the area and he ran away and this raised suspicion. The Police caught him, searched him and found the firearm in his possession. He did not have a licence or permit to possess the firearm in question.

[4] The accused confirmed the contents of his statement. The accused was subsequently convicted as charged. The Probation Officer Mr E Smith compiled a pre-sentence report. In his report, the Probation Officer alluded to the fact that the accused was a first offender. His parents are not married. The accused's parents lived together until 2014 when they separated. The accused and his mother moved in to live with his maternal family. The accused however has a good relationship with his father. The accused was enrolled at Gordon Senior Secondary School and was in Grade 9 until May 2019 when he absconded from school out of his own free will. The accused consumes alcohol on social basis after being introduced to substance by his friends. The Probation Officer recommended that the court sentence the accused to compulsory residence in terms of section 76(1) of the CJA. The Probation Officer also recommended that if the court was inclined to impose such a sentence, the accused should among others, attend life orientation programs, academic and vocational programs.

[5] Following these recommendations, the court subsequently sentenced the accused in terms of section 76(1) of CJA to compulsory residence at Horrison child and youth care center for a period of 12 months. In terms of section 76(4)(b) of the CJA, the court further ordered that the order must be brought to the attention of all relevant functionaries in the prescribed manner. The Court also ordered that the head of the child and youth care center Morne Johnson, must on the child's completion of the sentence, submit a report to the Child Justice Court which imposed the sentence, containing his or her views on the extent to which the relevant objectives of sentencing referred to in section 69 have been achieved and the possibility of the child's reintegration into society without serving the additional terms

of imprisonment not later than six weeks before the child completes his or her sentence. In terms of section 103(2) of the Firearms Control Act, a consequential order was made to the effect that the accused is unfit to possess a firearm.

[6] The record of proceeding was transmitted and received by this court on 25 January 2021. After perusing the record, I was concerned with the sentence imposed by the learned magistrate as well as the ancillary order made. In particular, I was concerned whether the court in sentencing the accused complied with the provisions of Chapter 10 of the CJA, in particular, if there was compliance with section 69(1)(a-e) and section 69(3). I was also concerned whether the court considered other sentencing options enshrined in sections 72, 74 and 75 of the Child Justice Act. I was also deeply troubled with the ancillary order made by the magistrate in terms of section 103(2) of the Firearms Control Act.

ANALYSIS AND APPLICABLE LEGAL PRINCIPLES

[7] It has often been said that children are the souls of our society and if we fail them we have failed as society. Section 68 of the CJA provides that a Child Justice Court must after convicting a child, impose a sentence in accordance with this chapter (chapter 10). In *S v LM* 2013 (1) SACR 188 (WCC) at para 19, the court referred to Chapter 10 of the CJA and stated that 'it is clear from the above provisions that the CJA creates a separate and distinct system of criminal justice for children, the legal mechanisms and processes of which may indeed be different from those set out in the CPA.' Section 69 of the CJA sets out the objectives and factors that has to be considered by a court in sentencing a child offender. One of the prominent objectives in this section is the use of imprisonment only as a measure of

last resort and only for the shortest appropriate period of time. In terms of section 71(1) of the CJA a Child Justice Court must request a pre-sentence report prepared by a Probation Officer unless the child has been convicted of a Schedule 1 offence, or where the requiring of such a report would cause undue delay.

[8] As explained above, this has been complied with. A Probation Officer's report was filed and marked as an exhibit in the record of proceedings. The Probation Officer noted in her pre-sentence report that the accused is a first offender, still young and vulnerable. He also noted that the accused takes responsibility for the offence committed. He noted that the offence is of a serious nature and that the court needs to strike a balance between the circumstances of the accused, the nature of the offence and the interest of the community, but also show mercy. In her report the Probation Officer only considered two sentencing options, namely a suspended sentence and a sentence of committal to a child and youth care center. In his view, a suspended sentence was not a suitable sentence for the accused. He did not consider other sentencing options. I must say with respect that the report of the Probation Officer in this regard is very perfunctory and desultory. The report is not well-considered or motivated on the question of sentence.

[9] Unfortunately, the learned magistrate went along with the insufficient recommendations of the Probation Officer without conducting an inquiry in terms of section 69(1)(a) to (e) and 69(3) of the CJA. It seems to me the court was overwhelmed by the submissions of the prosecutor that a longer period of incarceration will be to the benefit of the accused's mother as she will not have to struggle with disciplining the accused and that this will give the accused an opportunity to attend to programs at the child and youth care centre.

[10] In *S v S* 2016 (1) SACR 584 (WCC), the court emphasised the importance of sections 69 of the CJA and stated that in applying the CJA a court must adhere to ordinary considerations relating to sentencing, such as the triad and the aims of punishment (deterrence, rehabilitation, prevention and retribution). The court stressed the fact that a Child Justice Court should consider the objectives of sentencing in terms of section 69(1) of the CJA namely, it should firstly encourage the child to understand the implications of, and be accountable for the harm caused. Secondly, it should promote an individualized response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society. Thirdly, it should promote the reintegration of the child into the family and community. Fourthly, it should ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration. Lastly, the Court should use imprisonment only as a measure of last resort and only for the shortest appropriate period of time. The court went on to say that a court should during the sentencing stage consider and address each of these objectives, as set out in s 69(1) of the Act.

[11] It is regrettable that the court *a quo* did not conduct an inquiry as required by these provisions. The court did not even consider the provisions of section 69(3)¹ when it imposed the sentence. The court was persuaded by the report of the Probation Officer and overlooked the peremptory provision of section 69. It must be

¹ Section 69(3), of the CJA enjoins courts when considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment, consider the following into account:

(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.

stressed that the court was not bound by the deficient recommendations of the Probation Officer in his pre-sentence report. Imposing a sentence is a judicial function, which cannot be abdicated to another authority. It is also trite that the essence of the judicial function is the determination of a sentence. The process requires this to be done by a Judge. *Sibiya v Director of Public Prosecutions, Johannesburg* 2006 1 SACR 220 (CC) para 41. In *Centre for Child Law v Minister of Justice and Constitutional Development* 2009 2 SACR 477 (CC) para 85 the Constitutional Court observed that 'our Constitution, envisages that sentencing is a judicial function and that this function will be performed by the courts and only the courts'. The CJA is alive to this judicial injunction. Section 71(4) of the CJA provides:

'A child justice court may impose a sentence other than that recommended in the pre-sentence report and must, in that event, enter the reasons for the imposition of a different sentence on the record of the proceedings.'

[12] The court *a quo* did not at all consider alternative sentencing options but only had the committal of the accused to a child and youth care centre as the only available option at its disposal. It is not clear why the accused is not a suitable candidate for community based sentence or for correctional supervision in terms of sections 72 and 75 respectively of the CJA. It is also not clear why a fine or an alternative to a fine was not a suitable sentence. These sentencing options could have been clarified if the court conducted the necessary inquiry in terms of section 69. More importantly, from the record, it appears the recommendations of the Probation Officer were unclear and imprecise to the court and the court had to ask the prosecutor to come to his assistance. In my view, the court could and should have called the Probation Officer to present oral evidence and to engage him on the suitability of the accused in respect of other sentencing options.

[13] It is my considered view that the committal of the accused to 12 months compulsory residence in a child and youth care centre under these circumstance is startlingly inappropriate and evokes a sense of shock. As noted by the Probation Officer, the accused is still young and vulnerable and deserved individualised protection. He was a first offender. He was found in possession of a firearm. He did not use the firearm to commit an offence. Gleaned from the record, it seems to me that the only reason the court below sentence the accused to 12 months compulsory residence at the child and youth care centre was to keep him away from his family in particular his mother as she struggles to discipline him. In my opinion, the provision of section 28 of our Constitution underscores the paramountcy of minor children and courts must take cognisance of this provision when dealing with children in conflict with the law. Section 28(1)(g) of the Constitution provides that:

‘Every child has the right – not to be detained *except as a measure of last resort*, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for *the shortest appropriate period of time ...*’.(*Emphasis added*)

[14] In *S v B* 2006 (1) SACR 311 (SCA) at para 20, the Supreme Court of appeal noted that ‘In sentencing a young offender, the presiding officer must be guided in the decision-making process by certain principles, including: the principle of proportionality; the best interests of the child; and the least possible restrictive deprivation of the child's liberty, which should be a measure of last resort and restricted to the shortest possible period of time.’

[15] In *casu*, the presiding magistrate considered the aims of punishment and briefly referred to the triad in his judgment on sentence. However, he did not, as required, state whether he considered other sentencing options as set out in 69 of the CJA. In my view, the presiding magistrate failed to heed this judicial injunction and therefore committed a material misdirection which demands interference by this court. It cannot be said in the circumstances that a period of 12 months at a child and youth care centre was a measure of last resort and that it is the shortest possible period of time for the incarceration of the accused. In my view, the court *a quo* should have conducted an inquiry in terms of section 69 and considered the sentencing options provided for in chapter 10 of the CJA. In my judgment, the sentence imposed by the magistrate is not in accordance with justice and should be set aside.

[16] The final issue that requires consideration before I conclude is the ancillary order made by the trial court. The court *a quo* made an order to the effect that in terms of section 103(2) of the Firearms Control Act, the accused is unfit to possess a firearm. In my view, this order is legally incompetent. The relevant section of the Firearms Control Act applicable in this matter is section 103(1) and not 103(2). In terms of section 103(1), unless the court determines otherwise, a person convicted of an offence set out in section 103(1)(a) - (o) becomes unfit to possess a firearm. The default position of this section is that of unfitness to possess a firearm unless the court, having regard to relevant facts and circumstances, determines otherwise. The accused in this case was convicted for unlawful possession of a firearm listed in section 103(1)(a). The unfitness to possess a firearm operated *ex lege* upon conviction.

[17] Notwithstanding, section 103(2) of the Firearm Control Act provides as follows:

‘(a) A court which convicts a person of a crime or offence referred to in Schedule 2 and which is not a crime or offence contemplated in subsection (1), must enquire and determine whether that person is unfit to possess a firearm.

(b) If a court, acting in terms of paragraph (a), determines that a person is unfit to possess a firearm, it must make a declaration to that effect.’

[18] In terms of this section, a court must enquire and determine whether a person convicted of a crime listed in schedule 2 is unfit to possess a firearm. Section 103(2)(a) of the Firearms Control Act makes it mandatory for the court seized of the matter to conduct such an enquiry and based on such enquiry, to determine whether a declaration of unfitness is appropriate. *S v Smith* 2006 (1) SACR 307 (W) at para 8. An enquiry in terms of section 103(2)(a) is peremptory where an accused has been convicted of a crime or an offence detailed in paragraph 7(c) of Schedule 2, in respect of which the accused has not been sentenced to a term of imprisonment without the option of a fine. *S v AR & Others* 2020 (1) SACR 580 (WCC).

[19] During the inquiry the presiding officer is expected to ask relevant questions to establish whether the conduct of the accused and/or the circumstances surrounding the commission of the offence merits taking away the accused's right to possess a firearm. In this case, the learned magistrate was informed that the accused may want to be a police officer when he is old. The court subsequently made an order in terms of section 103(2). The inquiry if any, in this matter was cursory and carried out without real interest.

[20] More importantly, the CJA distinguishes imprisonment from a sentence of compulsory residence at a child and youth care centre. Sections 76(1) and 76(3)(a)(i) and (ii) set out a clear distinction between the two sentencing options. Section 76(1) provides for a sentence to be served at a child and youth care centre and not for a sentence of imprisonment to be served at such a centre. *A v S* [2016] ZANCH 5 at para 11. To this end, I agree with the views expressed in *S v AR & Others*, where the court stated that having regard to the provisions of section 76(3)(a) of the CJA the sentence of compulsory residence at a child and youth care centre does not constitute a sentence of imprisonment for the purposes of section 103(1) or section 103(2) since the CJA clearly differentiates between imprisonment and compulsory residence and that this is apparent from the fact that the Act empowers a court to impose, in addition to a sentence of compulsory residence, a sentence of imprisonment to be served after completion of the period of compulsory residence.

[21] From the above, it is abundantly clear that the trial magistrate was incorrect when he made an order in terms of section 103(2) of the Firearms Control Act. This finding does not accord with the provisions of section 103(2)(b) of the Firearms Control Act and the interests of justice demand that this order should be set aside. In any event, I am of the view that the accused was still young and vulnerable when he committed the offence and that it was not in the interest of justice in these circumstances to make such order in terms of section 103(1) or 103(2).

ORDER

[22] In the result, the following orders is granted:

1. The conviction of the accused is in accordance with justice.

2. The sentence imposed by the magistrate is hereby set aside.
3. The accused is sentenced to six months imprisonment which is wholly suspended for a period of three years on condition the accused is not found guilty of possession of a firearm committed during the period of suspension.
4. The order in terms of section 103(2) of the Firearms Control Act is hereby set aside.
5. No order is made in terms of section 103(1) of the Firearms Control Act.

LEKHULENI AJ
ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered:

HENNEY J
JUDGE OF THE HIGH COURT

Date of Judgment: 2 February 2021