



IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: R431/2017

In the matter between:

THE STATE

and

B. N.& S. T.

CORAM: MHLAMBI, J et CHESIWE, AJ

JUDGMENT BY: CHESIWE, AJ

DELIVERED ON: 26 OCTOBER 2017

REVIEW JUDGMENT

- [1] This is a special review in terms of section 304A (1)(a) of Criminal Procedure Act 51 of 1977 (CPA). Accused 4 and 5 are charged with possession of house breaking implements and the failure to give satisfactory account of these implements or objects.

- [2] The additional Magistrate Janse van Rensburg stationed at Virginia is particularly concerned about the fact that at the time of the offence: accused 4 and 5 were minors and that the Director of Public Prosecution (OPP) did not comply with the requirements of the Child Justice Act 75 of 2008 (Child Justice Act). Both accused where 17 years at the time of the commission of the offence.

- [3] The accused where charged with contravening the provisions of section 82 of the Third General Amendment Act 129 of 1993 in that they were near the taxi rank in the district of Virginia, where they were unlawfully found in the possession of implements or objects including: balaclavas, gloves, a bag and bolt cutter in respect of which there was reasonable suspicion that it had been used or intended to be used to commit housebreaking, or to break open a motor vehicle or gain unlawful entry into a motor vehicle of which the accused were unable to give a satisfactory account of the possession of these items.

- [4] The accused where convicted on 23 June 2017.

- [5] During the trial it transpired that accused 4 and 5 where never assessed after their arrest and no preliminary enquiry was

conducted in terms of section 43(3)(a) and (b) of the Child Justice Act.

- [6] The issue that the court must determine is whether the non-compliance with the provisions of the Child Justice Act amounted to an irregularity which could result in a failure of justice for accused 4 and 5.

- [7] Accused 4 and 5 where both legally represented throughout the trial, as well as their guardians being present. Both accused raised a defence that they were not in possession of any house breaking implements as they were merely found in the shack by the police while they were "smoking dagga".

- [8] The record shows that the learned Magistrate on discovering that accused 4 and accused 5 were never dealt with in terms of the Child Justice Act, addressed this issue at length in the judgment. However it does appear on the record that accused 4 and 5 were given notices to appear at a preliminary enquiry on 25 April 2013 in terms of section 18 of the Child Justice Act. These notices were attached as Exhibit "8" and "C" of the record. For reason unknown to the trial court, it appears that the preliminary enquiry was not done. Criminal proceedings against the accused were instituted four years later when accused 4 and 5 were summoned to appear in court in terms of section 54 of the CPA, when they were over the age of 18.

[9] The Child Justice Act was enacted and promulgated on 1st April 2010 with a view to establish among other objectives "...a criminal justice system for children, who are in conflict with the law and are accused of committing offences, in accordance with the values underpinning the Constitution and the international obligations of the Republic". The Act further aims to provide for the "holding of a preliminary inquiry and... , the possibility of diverting matters away from the formal criminal justice system..." The Child Justice Act¹ clearly states that the prosecutor should take into consideration the following factors.

- a) The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child;
- b) The nature and seriousness of the alleged offence;
- c) The impact of the alleged offence on any victim;
- d) The interests of the community;
- e) A probation officer's assessment report in terms of Chapter 5;
- f) The prospects of establishing criminal capacity in terms of section 11 if the matter were to be referred to a preliminary inquiry in terms of Chapter 7;
- g) The appropriateness of diversion; and
- h) Any other relevant factor.

"

[10] Chapter 8 of the Child Justice Act and particularly sections 51-52; provides for objectives and consideration to be followed for diversion.

Section 52 (1) provides:

- (1) A matter may, after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether

¹ Section 10(1) of the Child Justice Act 75 of 2008

the child has a record of previous diversions, be considered for diversion if-

- (a) The child acknowledges responsibility for the offence;
- (b) The child has not been unduly influenced to acknowledge responsibility;
- (c) There is a prima facie case against the child;
- (d) The child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion; and
- (e) the prosecutor indicates that the matter may be diverted in accordance with subsection (2) or the Director of Public Prosecutions indicates that the matter may be diverted in accordance with subsection (3).

[11] Section 4(2)(a) of the Child Justice Act states that:

"(2) 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

direct that the matter be dealt with in terms of sections (2) to **(4)**"

[12] Section 5(2) states:

"(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)"

While section 5(3) states:

"(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"

[13] It was established by the DPP that accused 4 and 5 were minors at the time of the offence and both were 17 years at that stage.

Exhibit B and C of the record showed that accused 4 and 5 were given notices to appear at a preliminary inquiry on 25 April 2013.

Exhibit D of the record Book J546, shows both accused names were entered in a preliminary enquiry for possession of house breaking implements. For reasons unknown to the court, it appears that the preliminary enquiry was not conducted even though accused 4 and 5 were notified to appear at such an enquiry.

[14] The test to determine whether an irregularity was gross or not was decided in the matter of **S v Felthun**² whereby Vivier JA stated that:

² *S v Felthun* 1999 (1) SACR 481(SCA)

"Generally speaking, an irregularity or illegality in the proceedings at a criminal trial occurs whenever there **is a** departure from those formalities, rules and principles of procedure with which the law requires such a trial to be initiated and conducted. The basic concept underlying s 317(1) is that an accused must be fairly tried."³

[15] In the matter of State v Van Wyk, Case No: 803/2016 unreported matter of the Northern Cape Division, Kgomo JP said:

"the non-compliance with the Child Justice Act is not of such a nature that it *per se* results in a failure of justice."

[16] Having regard to the **S v Felthun**, the irregularity is not of such a nature that it *per se* results in a failure of justice, taking into consideration the following factors:

1. The accused were 17 years old when the offence was committed, no evidence was adduced whether they were immature for their age.
2. However, when the trial commenced the accused were both 20 years old. The record shows they clearly understood the court proceedings.
3. The accused received notices in terms of section 18 of the Child Justice Act to appear at a preliminary enquiry. On the record it is unclear why the enquiry was not held. It is unnecessary to act in terms of the provisions of section 24(7) due to the effluxion of time.
4. Accused 4 and 5 were legally represented at the trial and their legal guardians were present.
5. The accused raised a defence which they understood and gave a detailed account of the events leading up to their arrest as well as the events after the arrest.
6. The oversight of their legal representative to bring to the court's attention the relevant provisions of the Child Justice Act is condonable,

³ Ibid at 48Sg- 486e

as the instructions to represent the accused, were received four years later when, the accused had already reached the age of majority.

[17] When an irregularity is found, the test is whether the irregularity is so fundamental that it amounts to a failure of justice. If it is so fundamental that it nullifies the proceedings, the result will be that the proceedings will be set aside.

[18] The Child Justice Act in its directives rather states that⁴

"Failure by a prosecutor to comply with these Directives and/or any duty imposed on him/her in terms of this Act may lead or result in disciplinary steps being taken against such prosecutor".

It does not say that the proceeding will be nullified, but rather steps will be taken against the prosecutor and section 35 of the constitution provides that-

"Everyone who is arrested for allegedly committing an offence has the right-

(d) to have their trial begin and conclude without unreasonable delay;

(o) of appeal to, or review by, a higher court"

[19] However the Child Justice Act is specific in terms of dealing with child offenders. Any child's trial should be finalised as speedily as possible. Any frequent postponements should be avoided in

⁴ GNR252 GG 33067 of 31 March 2010, No: R. 252 Title: Child Justice Act (75/2008): Directives in terms of section 97(4) Origin: Justice and Constitutional Development, Department of Class: Government Notice Page: 130

order to give the child a fair and speedy trial. In this matter, the charges were withdrawn by the state against the accused, but were then reinstated later.

[20] It has further been stressed that the underlying reluctance of the courts to interfere in unfinished proceedings in a lower court is the undesirability of hearing appeals or reviews on a piecemeal basis.

In **S v Western Areas Ltd and Others**⁵ Howie stated that:

"Long experience has taught that in general it is in the interests of justice that an appeal awaits the completion of a case whether civil or criminal. Resort to a higher Court during proceedings can result in delay, fragmentation of the process, determination of issues based on an inadequate record and the expenditure of time and effort on issues which may not have arisen had the process been left to run its ordinary..."

[21] I am therefore of the view that the irregularity is not of such a nature that *per se* it results in a failure of justice. Accused 4 and 5 were brought correctly before court. The accused legal guardians were notified when the accused were arrested at age 17. The legal guardians signed the written notices that were served on the accused. The accused had a legal representative throughout the trial. The accused's version of the events that was put to the state witnesses was an indication that accused 4 and 5, clearly understood the charges against them and the proceedings of the trial.

[22] The absence of a preliminary inquiry therefore does not result in a gross irregularity in respect of accused 4 and 5. Further that by

⁵ *S v Western Areas Ltd and Others* 2005 (SJ SA 214 (SCA) para 25

prosecuting them four years later did not result *per se* in failure of justice.

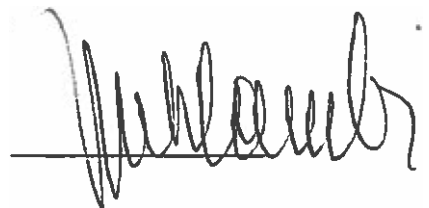
[23] In the result thereof their conviction is confirmed.

[24] The following order is made:

1. The conviction of accused 4 and accused 5 is confirmed.
2. The matter is referred back to the trial court to sentence accused 4 and 5 in accordance with chapter 9 of the Child Justice Act 75 of 2008.



S CHESIWE, AJ



JJ MHLAMBI J

I CONCUR