Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA
(Northern Cape High Court, Kimberley)

REVIEW CASE NO: **14/2016**
DATE DELIVERED: **28/10/2016**

In the matter between:

THE STATE

and

N., S. Accused

Coram: Olivier J *et* Mamosebo J

JUDGMENT

Olivier J:

[1.] The accused, N, was arrested and held in custody for "*shoplifting*". He subsequently appeared in the Kuruman Magistrate's Court on a charge of the theft of 6 trousers, with an alleged value of R650.00 each.

[2.] The information in the police docket, and consequently also the charge sheet, reflected the age of the accused as 18 years[1].

[3.] It appears that the matter was at some stage delayed for an acknowledgement of guilt fine to be determined, which for some reason never materialised. In the meantime the accused remained in custody, having decided not to proceed with an application for bail.

[4.] The accused, who was legally represented, eventually pleaded guilty and was convicted as charged. In addressing the Court on sentence his Legal Aid attorney then submitted, as a mitigating factor, that the accused was only 17 years old. This was followed by several postponements to verify the date of birth of the accused, during which period the accused remained incarcerated, but at least then at a place of safety.

[5.] When it was finally established that the accused was indeed 17 years old[2], and therefore a child as envisaged in the **Child Justice Act**[3] ("*the Act*"), the Magistrate stopped the proceedings and submitted the matter for review. The Magistrate requested that the conviction be set aside and expressed the view that, as far as the court proceedings were concerned, the accused as a first offender "*would have been diverted and not been exposed to the criminal Court environment*" and "*that the oversight on the part of his attorney regarding his age*" had accordingly caused prejudice.

[6.] It is not clear at what stage the attorney had become aware of the fact that, contrary to what was reflected in the docket and in the charge sheet, the accused

---

[1] Although it appears that the police had not even taken the trouble to record the accused's date of birth or identity number in the docket.
[2] He turned 18 on 25 September 2016.
[3] 75 of 2008

was in fact only 17 years old. What is, however, a cause for concern is that the attorney seems not to have realised the implications of the accused's age, particularly in the context of the protection afforded child offenders in terms of the Act[4]. Even if the attorney had only after conviction become aware of the correct age of the accused, one would have expected him to have immediately addressed the Magistrate on the issue of prejudice and on the possible need to submit the case for review.

[7.] Adv A H Van Heerden of the Office of the Director of Public Prosecutions has provided me with a most helpful opinion in this regard. She too has expressed the view that the accused was prejudiced by not having been considered for diversion, particularly in the light of the relatively low value of the stolen goods (all of which were recovered when the accused was apprehended as he was leaving the shop) and the absence of any previous convictions.

[8.] A real prospect that this particular accused may, in the specific circumstances of this case, have been diverted away from the criminal justice environment had he been treated as a child, would in my view in itself lead to an inescapable inference of potential prejudice[5].

[9.] In the circumstances it is therefore unnecessary to consider whether the fact that an error regarding the age of an accused had resulted in diversion not being considered, would always[6] lead to a finding of prejudice and to the setting aside of such a conviction[7]. The facts of the present matter are in any event clearly distinguishable from those in the **Gani** matter.

---

[4] Compare **S v Van Wyk**, an as yet unreported judgment on review in this Division under case number 31/2016, delivered on 16 September 2016.

[5] Even without considering all the other advantages the accused, as a person envisaged in section 4 of the Act, would have been entitled to; See **S v Gxaleka** 2013 (2) SACR 399 (ECB) para [17]

[6] And irrespective of the prospects that diversion could indeed have been decided upon.

[7] Compare **S v Gani NO** 2012 (2) SACR 468 (GSJ) para [13]

[10.] In the present matter the absence of previous convictions, the circumstances of the offence itself and the attitude of the prosecuting authority are strong indications that, had the Act been applied, the accused might have been diverted from the criminal justice system even before being confronted in Court with a criminal charge[8].

[11.] It could possibly be argued that the proceedings thus far were not strictly speaking proceedings in terms of the Act[9] and that a review of the proceedings can therefore not take place on the basis of the provisions of section 16 of the Act, but I have no doubt that this Court would then still have the power to review the proceedings in terms of section 304A of the Criminal Procedure Act or in the exercise of its inherent jurisdiction to intervene in uncompleted proceedings when the interests of justice so require[10].

[12.] In my view it would not suffice to simply set aside the conviction, because that would leave the accused with the plea of guilty to a charge which may, had the age of the accused been known from the outset, never have been put to him. The proceedings as a whole should be set aside.

[13.] In my view it is not necessary to order that the accused be tried *de novo*, as suggested by Mrs Van Heerden. It would indeed as a matter of law follow that the accused could again be charged[11], and it would be for the prosecution to decide whether to do so. The period that the child accused was detained before

---

[8] The alleged value of the stolen goods would have slightly exceeded the limit in Schedule 1of the Act, which would have made it impossible for the prosecutor to have considered diversion in terms of section 41 of the Act, but there would still have been the possibility of diversion at the preliminary enquiry (See section 5 (4) (a) (ii) of the Act), and therefore before having the child formally confronted with a criminal charge.
[9] See section 16 (1) of the Act.
[10] Compare **S v Gxaleka, supra**.
[11] Compare section 313, read with section 324, of the **Criminal Procedure Act,** 51 of 1977.

being released would possibly be relevant, also in determining conditions should the accused be diverted[12].

[14.] I conclude by remarking that the police should, in view of the provisions of the Act, as well as those published[13] under Government Notice 759 of 2 September 2010[14], always be very careful about verifying the age of youthful offenders. The same applies to prosecutors[15].

[15.] The following order is made:

THE PROCEEDINGS IN THE KURUMAN MAGISTRATE'S COURT UNDER CASE NUMBER 134/2016 ARE SET ASIDE.

____

C J OLIVIER
JUDGE
NORTHERN CAPE DIVISION

I concur.

____

[12] Even if it could be argued that the accused would in a new prosecution no longer be a person as envisaged in subsection (1) of section 4 of the Act, he could still be a person as envisaged in subsection (2) and could theoretically still be dealt with as a child in terms of section 5 of the Act: See section 4 (2) of the Act, read with paragraph M of the directives issued in Government Notice 252 of 31 March 2010 (Government Gazette 33067).

[13] In terms if section 97 (5) of the Act

[14] Government Gazette 33508

[15] See paragraph N of the directives referred to in footnote 12 above.

M C MAMOSEBO
JUDGE
NORTHERN CAPE DIVISION