



**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

A 92/2015

26 February 2015
26/02/2015

High Court Ref. No. : 41/15

Magistrates serial no. : 33/14

Case no. : 662/14

THE STATE

VS

PRECIOUS SANELISWE THWALA

REVIEW

- [1] This is a special review in terms of section 304 A of Act 51 of 1977 (The Act) at the instance of a magistrate from Bethal.

- [2] The accused in this matter was convicted, of the offence of housebreaking with the intent to steal and theft, in terms of section 112 (1) (b) of the Act. A pre-sentence report was requested by the court.

- [3] The social worker who compiled the sentencing report established that the accused was 14 years old and not 19 years old as indicated on the charge sheet.

- [4] In view of the accused's age, which was placed on the charge sheet, the matter proceeded and the accused was convicted.

[5] No enquiry was conducted in terms of section 43 of the Child Justice Act 75 of 2008. (CJA)

[6] Section 43 of the CJA stipulates:-

(1) A preliminary inquiry-

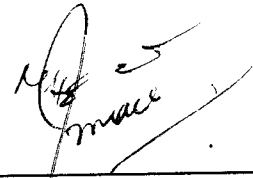
- (a) is an informal pre-trial procedure which is inquisitorial in nature;
[Para. (a) amended by s. 36 (a) of Act 42 of 2013.]
- (b) may be held in a court or any other suitable place, and [Para. (b) amended by s. 36 (a) of Act No. 42 of 2013].
- (c) must be presided over by a magistrate of the district within which the child is alleged to have committed the offence.
[Para. (c) added s. 36 (a) of Act No. 42 of 2013.]

(2) The objectives of a preliminary inquiry are to –

- (a) consider the assessment report of the probation officer, with particular reference to –
 - (i) the age estimation of the child, if the age is uncertain;
 - (ii) the view of the probation officer regarding the criminal capacity of the child if the child is 10 years or older but under the age of 14 years and a decision whether an evaluation of the criminal capacity of the child by a suitably qualified person referred to in section 11 (3) is necessary; and
 - (iii) whether a further and more detailed assessment of the child is needed as referred to in section 40 (1) (g);
- (b) establish whether the matter can be diverted before plea;
- (c) identify a suitable diversion option, where applicable;
- (d) establish whether the matter should be referred in terms of section 50 to a children's court referred to in section 42 of the Children's Act;

- (e) ensure that all available information relevant to the child, his or her circumstances and the offence are considered in order to make a decision on diversion and placement of the child;
 - (f) ensure that the views of all persons present are considered before a decision is taken;
 - (g) encourage the participation of the child and his or her parent, an appropriate adult or guardian in decisions concerning the child; and
 - (h) determine the release or placement of a child, pending –
 - (i) the conclusion of the preliminary inquiry;
 - (ii) the appearance of the child in a child justice court; or
 - (iii) the referral of the matter to a children's court, where applicable.
- (3) (a) A preliminary enquiry must be held in respect of every child who is alleged to have committed an offence, except where –
- (i) the matter has been diverted by a prosecutor in terms of Chapter 6;
 - (ii) the child is under the age of 10 years; or
 - (iii) the matter has been withdrawn
- (b) A preliminary enquiry referred to in paragraph (a) must be held –
- (i) within 48 hours of arrest as provided for in section 20 (5) if a child is arrested and remains in detention; or
 - (ii) within the time periods specified in a written notice in terms of section 18 or a summons in terms of section 19.
- (c) A child's appearance at a preliminary inquiry is regarded as his or her first appearance before a lower court, in terms of section 50 of the Criminal Procedure Act.
- (4) Section 90 of the Magistrates' Court Act, 1944 (Act No. 32 of 1944), applies with the changes required by the context to subsection (1) (c) [Sub-s (4) added by s.36 (b) of Act No. 42 of 2013]

- [7] Section 43 (3) directs that a preliminary enquiry must be held. The sub-section is therefore peremptory.
- [8] In view of the failure to hold an enquiry I am of the view that the section 112 proceedings in terms of the Act were irregular. Therefore the proceedings have to be set aside.
- [9] Accordingly, I make the following order:-
- 9.1 The conviction of the accused is set aside;
 - 9.2 The matter may proceed de novo before a different magistrate who shall hold a preliminary enquiry in terms of section 43 of the Child Justice Act 75 of 2008.



M ISMAIL
THE JUDGE OF THE GAUTENG HIGH COURT,
PRETORIA

I agree



N. V. KHUMALO
JUDGE OF THE GAUTENG HIGH COURT, PRETORIA