

(REPUBLIC OF SOUTH AFRICA)



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA**

Case no: A74/14

A 395/15

11/6/2015

Magistrate Serial No: 06/2014

THE STATE

and

C. S.

REVIEW

[1] The matter serves before me on automatic review. The accused, a juvenile offender, was on 8 September 2014 indicted for theft and robbery in the Magistrate Court for the district of Mbabane sitting in terms of the Child Justice Act 75 of 2008 ("the Act") as a Child Justice Court, and upon his plea of guilty and submission of an s 112 (2) explanation of plea statement, convicted on both charges. The court was satisfied based on the evidence of the probation officer that the accused is a person as described in s 21 (1) of Act 20 of 1992 with a substance abuse problem and made an order in terms of s 296 (1) of the Criminal Law Act 51 of 1977 ("the CPA"), for the accused to be detained at a treatment centre established under the Prevention and Treatment of Drug Dependency Act 20 of 1992. The accused is still to be admitted at such a centre.

[2] At the time he committed both offences and of his conviction and sentence, the accused was 17 years old, born on 21 October 1996. After sentencing, he had to await his admission at Mkhondo Rehabilitation Centre therefore the Probation Officer in the meanwhile referred him to Hendrina Secure Centre where he was previously detained whilst awaiting trial and attended a life skills programme after his arrest on the first charge of theft. During that time accused turned 18 on 21 October 2014 and his placement at Mkhondo Treatment Centre was regarded as no longer suitable. The probation officer consequently applied for his admission at Swartfontein Treatment Centre. She also applied that the accused be released under the care and supervision of his father whilst awaiting his admission at the facility.

[3] When the matter served before me on review in November 2014, I requested an update on the accused's placement at Swartfontein Centre as part of the review process. A report was presented by the probation officer that three months after the application for the accused's admission at the centre was made, he was still not admitted. The report stated that provision was made for accused's admission at the centre on 8 December 2014 but the centre required the accused to be detoxed prior to admission as it no longer offers the service. On the date of admission the accused told the sister in charge during a pre-admission interview that he smoked dagga that morning before being transported to the centre and also 3 times over the weekend. The centre refused him admission. It is remarkable that no tests were conducted to verify the allegations.

[4] In her report the Probation Officer also detailed her subsequent futile attempts to find a facility that offers detoxification services and to get the accused to be admitted at the centre. The probation officer secured another date for his admission, namely 2 of January 2015 however again the accused was not admitted. This time she requested the accused's father to take the accused for detoxification at a private hospital before his admission date since the father has

a medical aid. Regrettably nothing was done. The accused is yet to be admitted at any facility and remains under the care of his father.

[5] Even though the proceedings were in terms of the Child Justice Act, no enquiries were conducted by the Child Justice Court or any attempts made to monitor its order.

THE PROCEEDINGS

[6] The charges against the accused as formulated in the charge sheet were, in respect of theft, that 'he on 23 February 2014 unlawfully and intentionally stole 6x2 litres of soft drinks valued at R144, 00 from Thibethe Wintum'. In respect of robbery, that 'on 6 July 2014 he unlawfully and intentionally assaulted one Percival Mamporo and took from him with force R50.00 cash.' The accused was legally represented throughout the trial.

[7] Evident from the charge sheet and the J15 is that the accused was arrested on two different times for each of the offences. He was arrested on 23 February 2014 for theft and appeared in court the next day, whereupon the provisions of s 60 (11B) of the CPA were invoked. The probation officer, Ms T A Mareme, ("Mareme") compiled an assessment report on the date of his first appearance on his background and offence that accused acknowledged to have committed. Ms Mareme recommended that accused be ordered to attend a diversion programme. The accused was sent to Hendrina for observation at a place of safety and further investigation in accordance with the Act. The court also ordered the accused, as recommended, to attend a diversion programme on life skills for a month. The necessary arrangements for attending the programme were made by the probation officer conferring with the accused's legal guardian.

[8] On the accused's next appearance on 24 March 2014, after he had, according to the probation officer's report, successfully completed a Life Skill Programme at Hendrina Secure Care, the diversion process was not finalised and the proceedings withdrawn or stopped, but instead the matter was

postponed for a period of more than 3 months to 26 June 2014, supposedly for a social worker's report. On recommendation of the probation officer the accused was released under the supervision of his mother. He had legal representation at that time.

[9] On 26 June 2014 neither the accused nor his guardian were at court, apparently having forgotten the date as reported by their legal representative. A warrant of arrest was issued against both and the matter postponed to 2 July 2014. On that day the guardian was at court and the arrest warrant against her was withdrawn. The accused however remained at large and consequently the court postponed the matter to 5 August 2014 purportedly **for holding of an enquiry**.

[10] On 6 July 2014, the accused was arrested for robbery and appeared in court with his grandmother on 7 July 2014. The warrant of arrest was withdrawn and he was remanded to a place of safety at Hendrina until 5 August 2014, the date of enquiry. On 5 August 2014 no enquiry was held instead the accused was again remanded to the place of safety for nearly a month by arrangement between the prosecution, Mareme and his legal representative and the matter postponed to 4th of September 2014, yet again for an enquiry.

[11] On 4 September 2014, the prosecutor informed the court that he was awaiting a report related to the accused addiction to drugs from the probation officer. The prosecutor then sought a postponement of the matter to 8 September 2014, this time for a plea, abandoning the holding of an enquiry. The accused was once again remanded in custody at the place of safety.

[12] At the commencement of the trial on 8 September 2014, the magistrate started by announcing to the prosecutor that the accused was going to plead guilty. Both charges were put to the accused and he indeed pleaded guilty to both upon which, after his s112 (2) statement, he was convicted on both counts. The probation officer then submitted her report titled "Assessment report for children in conflict with the law/pre-sentence report. According to the report the

assessment took place on 7th July 2014 on the accused's first appearance, within 48 hours after his arrest for robbery. However it was signed off on 4 September 2014, seemingly prepared prematurely as a pre-sentence report. It practically contained the same information presented at accused's first appearance on the charge of theft in February 2014. It confirmed like in the first report, that the accused is a substance abuser and slightly improved to accommodate comments on the second offence. The assessment on 7 July 2014 was very significant as it was accused's first appearance on the charge of robbery. It is a date on which a preliminary enquiry was supposed to have been held.

[13] In proceedings envisaged to be in terms of the Child Justice Act, when a prosecutor contemplates not to divert a matter, s 41 (6) of Chapter 6 of the Act applies. In terms thereof a preliminary enquiry must be held, as provided for in Chapter 7 of the Act. The purposes thereof being, *inter alia*, to establish if a matter can be diverted before plea and a suitable diversion option identified, where applicable (see s 43 (2) (b) and (c)). The enquiry preceded by an assessment of the child is to take place within 48 hours of the child's first appearance in court. The purpose of the assessment is to assist the role players to have the general understanding of the makeup of the juvenile or child being dealt with, so that they can from the outset of the case agree on how to proceed with the matter.

[15] In terms of the Act all children are legible to be considered for diversion. The Act also provides a framework to facilitate diversion at every level of the child justice process and finally ensures that diversion is regulated to ensure consistency of practice and legal certainty. Diversion can occur in three ways: first, through prosecutorial diversion of children charged with Schedule 1 offences; second, a child's diversion may be ordered by the magistrate at the preliminary inquiry; and finally if not yet diverted a child may still be diverted at the child justice court before the finalisation of the case.

[16] As highlighted by the National Director of Public Prosecution in their response to a request for a comment on the proceedings and failure of the probation officer to get the order of the court to be implemented, the two offences (theft and robbery) the accused was charged with fall under Schedule 1 and Schedule 2 offences, respectively, of the Act. Section 53 (2) (a) thereof accords an option of a level one diversion under Schedule 1 or a level two diversion in respect of the Schedule 2 offences. The diversion processes are dealt with in Chapter 8.

[16] Upon the accused's arrest for theft, a level one diversion option was available, that is the prosecutorial diversion. That kind of diversion occurs based on the common law principle that a prosecutor is *dominus litis* (see s 179 (2) of the Constitution and s 20 (1) of the National Prosecuting Authority Act 32 of 1998) and therefore has the discretion to prosecute a particular matter. He or she, as a result, can decide whether a child can be diverted instead of being prosecuted. The view was also sustained in *S v D* 1997 (2) SACR 671, where the court found that even though the diversion was regularly being used in the province for the type of offence in question, the prosecutor was *dominus fitis*, and therefore had the right to proceed with the criminal charges.

[17] Be as it may, even though the discretion is within the prosecutor's domain as *dominus litis*, the fair administration of justice demands that it be exercised rationally, and properly. In this context it also has got to be exercised in the best interest of the child in conformity with the Bill of Rights that demands the treatment of children to take into account their age and discourages the unsystematic general incarceration of children, which has got to happen as a measure of last resort. In *M v The Senior Public Prosecutor Randburg & Another* unreported case no 3284/2000 (WLD) referred to in Juta's *Child Law in South Africa* by Trynie Boezaart (ed), the court on examining the exercise of the prosecutorial discretion found that there was no evidence that the prosecutor applied his or her mind to the possibility of diversion ("not to prosecute"), and in the absence of such evidence, the court found that the discretion has not been properly exercised.

[18] For that reason, where the prosecution has decided to dispense with or abandon the diversion after initiation thereof, he or she must explain the decision by placing on record the reasons for having abandoned or dispensed with it in order for the court to be able to determine if the discretion was exercised reasonably and properly. Since an improper and/or irrational exercise of the discretion that results in the accused child suffering any prejudice and therefore an injustice might result in the vitiation of the proceedings.

[19] On the accused's first appearance on the Schedule 1 charge, the assessment report was made available to the court, recommending, with the consensus of all the role players, that the accused attend a diversion programme at the same time as the observation and the investigation was continuing. He successfully completed the programme as confirmed by the probation officer. The further postponement of the case for an enquiry following the successful completion of the programme, instead of the withdrawal or cessation of proceedings, seeking also to refer the matter for a fresh enquiry after his arrest on robbery, and the subsequent prosecution of the accused on the theft charge without any reasons recorded for abandoning the diversion, all amounted to a gross irregularity. This does not accord with a proper and rational exercise of the prosecutorial discretion or a fair administration of justice by the court and it was without a doubt not in the best interest of the child or that of justice. Erasmus AJ with Kgomo J concurring highlighted in *S v EA* 2014 (1) SACR 183 at 186d-e, that 'in terms of s 59 (1) (a), which specifically deals with the legal consequences of a decision to divert an accused, a prosecution based on the same facts may not be instituted against an accused who has completed a diversion programme successfully. As a result it would be in the interest of justice to set aside the conviction on that charge.

[20] In respect of the charge of robbery, upon the accused's first appearance on the day following his arrest on 7 July 2014, although an assessment was conducted the same day and the accused remanded in custody, the matter postponed to 5 August 2014 without holding a preliminary enquiry and with no

report submitted. The case was again postponed on 5 August 2014 without holding an enquiry or an assessment report submitted. The prosecutor informed the court that the accused is addicted to drugs and is awaiting a report in that regard. The report was only signed off by Mareme on 5 September 2014 and presented to court for sentencing.

[21] Sec 43 (a) of the Act is clear that a preliminary enquiry must be held in respect of every child alleged to have committed an offence, except where, *inter alia*, the matter has been diverted by a prosecutor in terms of Chapter 6. The preliminary enquiry must be held within 48 hours of the arrest as provided for in s 20 (5) if a child is arrested and remains in detention. Section 40 provides that where it is likely that a child could be detained after the first appearance at the preliminary inquiry or that a further and more detailed assessment of the child is required in order to consider the circumstances, *inter alia*, where the child has a history of repeatedly committing offences or absconding or the possibility that the child may be admitted to a substance abuse programme or other intensive treatment programme, on that first appearance the probation officer must complete an assessment report with recommendations on those issues, which must then be submitted to the prosecutor before the commencement of the preliminary inquiry. As shown none of this happened on 7 July or 4 August 2014. On 4 September 2014, the prosecutor was still awaiting the report.

[22] The enquiry magistrate may dispense with assessment but only if it is in the best interest of the child to do so. It must however enter the reasons for that decision on the record of the proceedings. He may also postpone the proceedings of a preliminary inquiry for the purposes of further investigation of the matter but not for a period exceeding 48 hours. This matter was twice after the arrest of accused on July 7 postponed on each period for approximately a month whilst the accused was kept in detention.

[23] To add to the woes of the accused, although s 45 (2) provides that no information furnished by any person at a preliminary inquiry in relation to the child may be used against that child in any bail application, plea, trial or sentencing

proceedings, what took place at the commencement of the trial on 8 September 2014 was contrary to those provisions. No alternatives were as a result considered and yet children who have re-offended have been diverted, depending on the circumstances. The court proceeded with the trial without a recordal of the reasons for failure to hold an enquiry.

[24] After conviction the accused was further prejudiced in that he was not afforded the benefit of the sentences prescribed in Chapter 10 of the Act that are to be imposed on conviction of the child that has been tried under the Act, which extends the sentencing option available in respect of such children that encourages restorative justice. Instead, with the recommendation of the probation officer who confirmed the accused status as a drug abuser, imposed a sentence in terms of s 296 (1) of Act 51 of 1977. The recording is of a poor quality making it difficult to follow the exact process followed.

[25] In *Hiemstra's Criminal Procedure*; an order in terms of s 296 (1) of the CPA for the detention of the accused in a treatment centre is in itself a "sentence" or "punishment". The order entails involuntary and possibly lengthy detention, being a substantial encroachment by the authorities by means of the criminal procedure on the freedom of an individual, inherently a sanction of a punitive nature, a sentence (*S v Tolmay* 1980 (1) SA 182 -184A-B (NC); *S v Reay* 1987 (1) SA 873 (A); *S v M* 1991 SACR 91 (T)).

[26] As a result the sentence that was imposed is against the tenets of the Child justice Act which recognises that before a sentence of incarceration or detention can be imposed, due regard should be taken of the provision of s 28 (1) (g) of the Constitution. The section gives every child the right "not to be detained except as a measure of last resort, in which case in addition to the rights the child enjoys under s 12 and 35 of the Constitution, the child may be detained only for the shortest appropriate period of time, and to be kept separate from detained persons over the age of 18 years; and treated in a manner and kept in conditions, that take account of the child's age, taking into consideration that the accused was 17 even at the time of sentencing.

[27] The appropriate procedure is to set aside the proceedings in the court a quo or the order sentencing the accused to a detention centre and to remit the matter back to the magistrate court for a proper enquiry to be held and a proper sentence in terms of Chapter 10 to be considered should it be necessary.

[28] I therefore make the following order:

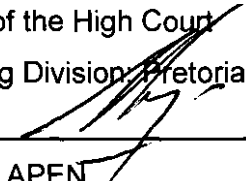
[28.1] The order sentencing the accused in terms of s 296 (1) of the Criminal Procedure Act is hereby set aside and the matter is remitted to the court a quo for a sentence to be dealt with in terms of Chapter 10 of the Child Justice Act.

I agree and it is so ordered



NVKHUMALO

Judge of the High Court
Gauteng Division: Pretoria



N KOLLAPEN
Judge of the High Court
Gauteng Division: Pretoria