

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Special Review Number: 184/2015

In the review between:

T. T. First Appellant

M. M. Second Appellant

and

THE STATE Respondent

CORAM: MOLEMELA, JP et REINDERS, AJ

JUDGMENT BY: REINDERS, AJ

DELIVERED ON: 5 NOVEMBER 2015

[1] This matter has been sent on special review in terms of Section 304(4) of the Criminal Procedure Act, 51 of 1977, from the Clocolan Magistrate's Court.

[2] Ms PP Miti, Magistrate (Clocolan) in a letter attached to the special review, briefly set out the following summary of the relevant circumstances and facts:

“The accused in this matter appeared before the Magistrate on the 19th August 2015 on a Charge of Housebreaking with the intent to steal and Theft.

The Public Prosecutor put the charge to them and they both pleaded guilty to the charge.

Their Attorney (Mr Khumalo) read their statements in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 into the record.

When the Magistrate asked the Public Prosecutor if the State accepts the Plea, the Public Prosecutor only then informed the court that both accused are still minors, both of them being 17 years old.

It was not apparant from the J15 that they were minors.

Both accused have pleaded guilty before the Magistrate but were not yet convicted.

In light of the above information, there was non-compliance with the provisions of the Child Justice Act 75 of 2008.

The Magistrate therefore requests the Honourable Judge in Chamber to set aside the proceedings and the case to start *de novo* in accordance with provisions of the Child Justice Act 75 of 2008.

Original Charge sheet and the transcribed record attached.

Awaiting the Honourable Judge's decision."

- [3] Having read the record of the transcriptions together with the supporting documentation attached thereto, it is evident that Ms Miti acted in accordance with the peremptory provisions of the Child Justice Act 75 of 2008 (the Act). Section 16(2) of the Act reads as follow:

"If a presiding officer is of the opinion that an error regarding age may have caused any prejudice to a person during the proceedings in question, the presiding officer must transmit the record of the proceedings to the registrar of the High Court having jurisdiction, in the same manner as provided for in Section 303 of the Criminal Procedure Act, in which event the proceedings must be dealt with

in terms of the procedure on review as provided for in Section 304 as the Criminal Procedure Act."

- [4] One of the objects of the Act in terms of Section 2 (d) include the use of diversion as a means of preventing minors being exposed to the adverse effects of the formal justice system. It is clear from the record that neither the magistrate, prosecutor or legal representative of the accused was aware of the fact that the accused were minors at the onset of the proceedings. Only after the accused had pleaded guilty to the charges and their statements in terms of Section 112(2) of the Criminal Procedure Act 51 of 1977 were read into the record, it was brought to the attention of the magistrate that the accused might be minors (which fact was later confirmed). The legal representative of the accused then indicated that he was advised by his clients that they were eighteen years of age. It is thus clear that the prejudice that might have been caused to accused can be found in the fact that the option of diversion as is contemplated in Section 52 of the Act, could not have been considered by the prosecutor either at a preliminary enquiry or at the trial. Furthermore, Section 80(1) of the Act sets out the requirements that the legal representative of minors must comply with in order to act on their behalf in criminal proceedings, including promoting diversion. It follows that the legal representative could not have promoted diversion to the accused as he was unaware of the fact that they were indeed minors, thus also leading to possible prejudice that might have been caused to the accused.
- [5] It is trite that a distinction is drawn between children and adults in our criminal justice system as was confirmed once more recently by the Constitutional Court in **Mpofu v Minister of Justice and**

Constitutional Development 2013 (2) SACR 407 (CC), referred to in **S v Melapi** 2014(1) SACR 363 (GP) at 369 paragraph [33]. In view of the fact that it was established that the accused were under the age of eighteen years when the alleged crimes occurred, (according to the record they have since turned 18 on respectively 1 September and 12 October 2015), the provisions of the Act should indeed have been followed.

[5] Consequently the following order is made:

4.1 The proceedings are set aside.

4.2 The matter is remitted back to the magistrate's court to be dealt with *de novo* in accordance with the provisions of the Child Justice Act 75 of 2008.

C. REINDERS, AJ

I concur.

M.B. MOLEMELA, JP