

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Review No. : 70/2013

In the matter between:-

THE STATE

and

THABO SEKOERE

CORAM: KRUGER, CJ MUSI *et* DAFFUE, JJ

JUDGMENT BY: DAFFUE, J

DELIVERED ON: 27 JUNE 2013

I INTRODUCTION

- [1] This judgment concerns the question whether a case in which a 16 or 17 year old child was legally represented at the trial and sentenced to imprisonment that was not wholly suspended must be sent on automatic review to the High Court.

- [2] This matter came before us from the Welkom Magistrates' Court by way of automatic review. In view of conflicting judgments on the issue a full bench was convened by the acting Judge President of this division to deal with the matter. Adv Liebenberg of the Office of the Director of Public Prosecutions and Adv I van Rhyn of the local Bar who acted as *amicus curiae* are sincerely thanked for preparing helpful heads of argument and presentation of oral submissions at short notice.
- [3] The accused, a 17-year-old child, together with a major co-accused were charged with the offence of housebreaking with the intent to steal and theft. Both accused were represented by a legal representative. They pleaded guilty and written statements in terms of s 112(2) of the Criminal Procedure Act, 51 of 1977 ("the CPA") were prepared on their behalf, read into the record and handed in as exhibits. On 6 December 2012 they were convicted as charged.
- [4] On 22 February 2013 and only after a pre-sentence report and *viva voce* evidence of Ms Hans, a probation officer in the employ of the Department of Social Development, Free State Province had been considered, the court *a quo* sentenced the minor accused to twelve months' imprisonment. His list of previous convictions indicated two previous convictions of housebreaking with the intent to steal and theft committed in 2011 and 2012 respectively

and one conviction of escaping from custody in 2012. His co-accused was sentenced to nine months' imprisonment.

[5] These review proceedings concern the minor accused only and from now on he will be referred to as "the accused". His co-accused was a major person when the crime was committed and he was represented by a legal representative at the trial. Consequently he is not entitled to automatic review as the provisions of s 302(3) of the CPA apply.

[6] At the heart of this judgment is the interpretation of s 85(1) of the Child Justice Act, 75 of 2008, ("the CJA") which deals with automatic review in certain cases. The cardinal question is whether 16 and 17 year old children who have been sentenced to any form of direct imprisonment are entitled to the benefit of automatic review notwithstanding being legally represented during the trial. Various contradictory judgments will be considered *infra* and particular emphasis will be placed on the development of child justice instruments across the world and in our country in particular.

II HISTORICAL DEVELOPMENT LEADING TO INTERNATIONAL CHILD JUSTICE INSTRUMENTS AND THE CJA

[7] Section 85(1) of the CJA reads as follows:

"85. Automatic review in certain cases –

(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence –

(a) under the age of 16 years; or

(b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children's Act,

the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence."

(emphasis added)

A casual reading of s 85(1) makes it clear that not a word is said about legal representation of the child during his trial. Contrary to this, s 302(3) of the CPA stipulates that no right of automatic review exists in the event of an accused being legally represented at his trial. In order to consider this apparent anomaly it is necessary to delve into the history to establish the *ratio* for the creation of the CJA and s 85 in particular. This we are entitled to do to ensure that a proper approach to interpretation of the conflicting statutes and/or sections is adopted.

- [8] The following passages in the judgment of Wallis, JA, written for the full court in Natal Joint Municipal Pension

Fund v Endumeni Municipality, 2012 (4) SA 593 (SCA)

are apposite:

“[18]Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appear; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document.”

“[19] from the outset one considers the context and the language together, with neither pre-dominating over the other. This is the approach that courts in South Africa should now follow, ...”

“[25] Most words can bear several different meanings or shades of meaning and to try to ascertain their meaning in the abstract, divorced from the broad context of their use, is an unhelpful exercise. The expression can mean no more than that, when the provision is read in context, that is the appropriate meaning to give to the language used. At the other extreme, where the context makes it plain that adhering to the meaning suggested by apparently plain language would lead to a glaring absurdity, the court will ascribe a meaning to the language that

avoids absurdity. This is said to involve a departure from the plain meaning of the words used.”

“[26] ... In resolving the problem, the apparent purpose of the provision and the context in which it occurs will be important guides to the correct interpretation. An interpretation will not be given that leads to impractical, unbusinesslike or oppressive consequences or that will stultify the broader operation of the legislation or contract under consideration.”

(emphasis added)

- [9] With due deference to Wallis JA one may add that once a statutory provision is considered to be reasonably capable of different meanings, the court confronted with its interpretation should prefer an interpretation which better promotes the spirit, purport and objects of the Bill of Rights. See **Wary Holdings (Pty) Ltd v Stalwo (Pty) Ltd** 2009 (1) SA 337 (CC) paras [46], [84] and [107]. All aspects relating to the purpose and context of the CJA will be dealt with *infra* whereafter a critical evaluation of the review procedure of sentenced children will be undertaken with reference to certain conflicting judgments.

- [10] In a research report by Ann Skelton and Charmain Badenhorst published in **Child Justice Alliance (2011)** under the title “The Criminal Capacity of Children in South Africa: International Developments and Considerations for a Review”, they held the view that the United Nations Convention of the Rights of a Child, 1989 and related international instruments provide the seminal international

framework within which children in conflict the law should be managed. Prominent in this regard are the United Nations Standard Minimum Rules on the Administration of Juvenile Justice, 1985, (the Beijing Rules), the United Nations Guidelines for the Prevention of Juvenile Delinquency, 1990, (the Riyadh Guidelines), the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990, (the UN JDL Rules). Article 3(1) of the United Nations Convention on the Rights of a Child provides that in all actions concerning children, whether undertaken by the public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. This provision resonates not only in article 4(1) of the African Charter on the Rights and Welfare of a Child, 1990, but also in s 28(2) of the Constitution of the Republic of South Africa and s 9 of the Children's Act, 38 of 2005.

- [11] Section 28(2) of our Constitution stipulates that the best interests of a child, to wit a person under the age of eighteen years, are of paramount importance in every matter concerning the child. In **Centre for Child Law v Minister of Justice** 2009 (2) SACR 477 (CC), Cameron J, writing for the majority, considered children's rights under the Bill of Rights in dealing with the minimum sentences regime, the Criminal Law Amendment Act, 105 of 1997. Whilst recognising that children do commit heinous crimes, he emphasised that the Constitution draws a "sharp

distinction between children and adults not for sentimental considerations, but for practical reasons relating to children's greater physical and psychological vulnerability." See paras [26] and [29]. The "best interests" principle is echoed in the Children's Act with reference to s 6 and 7 and 9 thereof in particular, in the CJA with reference to the preamble, s 2, as well as the various special measures introduced to give effect to the aforesaid constitutional rights of children.

- [12] The CJA, according to its long title, aims to establish 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 as well as our country's international obligations. In the preamble the right of a child not to be detained except as a measure of last resort and if detained, only for the shortest appropriate period of time, is recognised. This is in line with s 28(1)(g) of the Constitution. If the CPA is read in its entirety there can be no doubt that the legislature intended to create a new criminal justice system for minor accused. It introduced a comprehensive system of dealing with child offenders regarding their treatment and there is no doubt that the legislature intended a decisive break with the traditional criminal justice system. The following should be mentioned in addition to these remarks:
- (i) in terms of chapter 7 an informal inquisitorial pre-trial procedure is in place;

- (ii) children are assessed in accordance with the provisions contained in chapter 5 of the Act;
- (iii) diversion in terms whereof children are dealt with outside the formal criminal justice system may be effected in accordance with the provisions of chapter 8;
- (iv) there are special guidelines pertaining to trials and sentencing as contained in chapters 9 and 10;
- (v) as will be shown *infra*, special measures have been adopted in chapters 11 and 12 for legal representation, reviews and appeals,
- (vi) the expungement of records of certain convictions and diversion orders in accordance with the provisions of chapter 13, and
- (vii) the establishment in chapter 14 of One-Stop Child Justice Centres to promote co-operation between various government departments and between them and Non-Governmental organisations and civil society to ensure an integrated and holistic approach in the implementation of the CJA. See in general: Kruger A, **Hiemstra's Criminal Procedure**, loose-leaf ed at 28-60 *et seq.*

[13] Section 82 of the CJA stipulates that a child should be provided with legal representation at the State's expense, whilst s 83 endorses the legislature's concerns pertaining to legal representation for children as follows:

“83 Child may not waive legal representation in certain circumstances –

- (1) No child appearing before a child justice court may waive his or her right to legal representation;
- (2) If the child referred to in subsection (1) does not wish to have a legal representative or declines to give instructions to an appointed legal representative, the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Guide referred to in section 3A of the Legal Aid Act, 1969 (Act No 22 of 1969), be appointed by the Legal Aid Board to assist the court in the prescribed manner.” (emphasis added)

[14] Legal assistance in the “prescribed manner” is set out in detail in reg 48 of the regulations published in terms of the CJA in GN 251 of GG 33067 on 31 March 2010:

“48(1) A legal representative appointed in terms of section 83 of the Act to assist the court must –

- (a) attend all the court proceedings in respect of the case unless, excused by the court;
 - (b) address the court on any matter requested by the court;
 - (c) have access to the documents and statements in the docket to the extent permissible in criminal proceedings; and
 - (d) ensure that the best interests of the child are upheld at all times.
- (2) A legal representative appointed to assist the court may -
- (a) address the court on the merits and procedural aspects of the case;
 - (b) address the court on the sentence to be imposed;

- (c) cross-examine a witness in relation to the evidence adduced by the witness;
 - (d) discredit the evidence of a witness;
 - (e) raise an objection to a question posed to the child or state witness;
 - (f) question the admissibility of evidence led by the state;
 - (g) present evidence that will be in the best interests of a child;
 - (h) assist in any other manner as the court may request.
- (3) A legal representative may attend the proceedings of a preliminary inquiry if so requested by the inquiry magistrate.”

The effect of the statutory provisions is that it is unthinkable, or at least highly unlikely, that a minor accused will ever be without legal representation. Section 85(1) must be interpreted not only within this context, but also in light of the international instruments referred to and our Constitution.

- [15] Unlike under the CPA applicable to accused in general, s 84 of the CJA provides for an automatic right of appeal without the necessity to apply for leave to appeal in respect of minor accused and in particular 16 and 17 year old accused, but only in the event of a sentence of imprisonment in any form not wholly suspended. No such proviso applies to accused under the age of 16 years. The wording “imprisonment not wholly suspended” is also contained in s 85. Clearly and notwithstanding the purpose of the CJA in general and the beneficial provisions thereof, both s 84 and s 85 limit the rights of minor 16 and 17 year

old accused, in situations where sentences of imprisonment are wholly suspended. In the first instance the minor accused does not have an automatic right of appeal and in the second instance no automatic right of review.

[16] Section 302(1)(a) of the CPA reads as follows:

“(1)(a) Any sentence imposed by a magistrates’ court –

(i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children’s Act, 2005 (Act 38 of 2005), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer;

(ii)

shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.”

[17] It is instructive to note that the distinction between unsuspended and suspended or partially suspended sentences for purpose of reviewability in accordance with the provisions of s 302 of the CPA was abolished in 1983. The effect hereof is that if, for example, a judicial officer who has held the substantive rank of a magistrate or higher for a period of 7 years or more imposes a sentence in excess of six (6) months’ imprisonment, such sentence shall still be reviewable irrespective of whether it is wholly or partially

suspended. The subsection was amended in accordance with s 99(1) of the CJA to introduce detention in a child and youth care centre as a reviewable sentence in certain instances.

III **JUDGMENTS**

[18] The interpretation and application of s 85(1) of the CJA led to two diametrically opposed views. The one view is that, unless s 302(1)(a) applies, a 16 or 17 year old child does not have the benefit of automatic review if he has been represented by a legal representative during the trial, notwithstanding the fact that a sentence of direct imprisonment or of compulsory residence in a child and youth care centre has been imposed. Two judgments support this view, the one from the North West, being **S v Nakedi** (12/2012) [2012] ZANWHC 5 (2 January 2012) and the other from the Free State, to wit **S v TS** 2013 (1) SACR 92 (FB). This led to my knowledge to confusion amongst magistrates in the Free State in that some of them became aware of the contrary judgments in other High Courts referred to *infra*, but considered them bound by the Free State judgment.

[19] The second view is that s 85(1) provides for automatic review in the circumstances set out in the section even if the child has been represented by a legal representative during the trial. This approach has been adopted by the Western Cape High Court in **S v Ruiter** (311/2010) [2011] ZAWCHC

265 (14 June 2011) and **S v LM (Faculty of Law, University of the Western Cape: Children's Rights Project of the Community Law Centre and others as amici curiae)** 2013 (1) SACR 188 (WCC), the Northern Cape High Court in **S v Fortuin** (38/2011) [2011] ZANCHC 28 (11 November 2011), the Gauteng North High Court in **S v FM** 2013 (1) SACR 57 (GNP), the KwaZulu-Natal High Court in **S v Mpumelelo Innocent Zondi** and the Eastern Cape High Court in **S v CS** 2012 (1) SACR 595 (ECP).

- [20] In **S v Nakedi** (North West, above) Gutta J, with whom Landman J concurred, relied on the amendment of s 302(1)(a)(i) of the CPA, following the introduction of the CJA, (the inclusion of detention in a child and youth care centre) for the conclusion in para [12] of the judgment that the amendment is indicative of the fact that the remaining provisions of s 302 remain applicable to minor accused and therefore their right to automatic review remains limited to those cases where they were not assisted by legal representatives. According to the learned judge the referral of all matters where minor accused are legally represented for automatic review

“is not consistent with the CPA and CJA ... but also does not call for the situation where the High Court as upper guardian needs to intervene to protect the interests of the minor child.”

(at para [16]).

- [21] In the Free State High Court judgment, **S v TS**, Lekale J, with whom Molemela J concurred, adopted the approach of

the North West High Court. It was found that even a liberal interpretation of s 85(1), “allows some minor children to fall into the cracks as far as automatic review goes” with reference to those accused whose custodial sentences are wholly suspended and below the threshold specified in s 302(1)(a) of the CPA. Reliance was also placed on the heading of s 85 which refers to automatic review “in certain cases”. The court endorsed the approach in **S v Naledi** (North West, above) pertaining to the amendment brought about to s 302(1)(a) of the CPA by the CJA and it finally concluded that if the legislature intended to exclude minor accused from the purview of s 302 it would have done so explicitly.

[22] In **S v Ruiter** (Western Cape, above) Dlodlo and Samela JJ found in a concise judgment that the High Court as upper guardian of all minors within its jurisdictional area should always be entitled to consider the cases involving minor accused on automatic review in accordance with s 85(1) of the CJA, regardless of whether or not they were legally represented at the trial. The court did not find it necessary to interpret s 85(1) in the context of the history of children’s rights and the Constitution, but based its conclusion on the traditional and pre-constitutional role of our High Courts in respect of children.

[23] In **S v CS** (Eastern Cape, above) Tshiki J, with whom Beshe J concurred, considered the judgment of Gutta J in

Nakedi (North West, above), but did not agree therewith. The court found that in terms of the CJA legal representation of a child is peremptory and although some of the relevant sections of the Act have not been drafted clearly, it had to take the provisions of the whole Act into consideration. In disagreeing with the North West (and necessarily also the Free State view point), it found in para [22] that reviews in terms of s 85(1) of the CJA are not governed by s 302 of the CPA and finally concluded as follows in para [30]:

“I have no interpretation other than to conclude that section 85(1)(a) and (b) applies to all cases, including the trial proceedings in which the minor concerned was legally represented at the trial.”

[24] The judgment of Olivier J, with whom Williams J concurred, in **S v Fortuin** (Northern Cape, above) is instructive and I respectfully agree with the following reasoning and conclusion:

“[51] The legislature must be presumed to have been aware of the provisions of sections 82 and 83 (and of what it intended to be prescribed in respect of a representative to assist the court) when enacting section 85 of the CJA. To interpret section 85(1) of the CJA as excluding cases where the child was legally assisted would indeed render the provisions of the proviso to section 85(1) meaningless to a large extent, and defeat the clear intention to afford children additional protection by means of automatic review.

[52] When the peremptory language used in section 85(1), and more specifically the use of the word “is”, is viewed against this background, the only interpretation that would give effect to the expressed intention (in the preamble to the CJA) to afford children in conflict with the law “special protection” and “specific safeguards”, is that cases envisaged in section 85(1) of the CJA will be automatically reviewable, regardless of whether or not the child was legally represented or the court legally assisted, and that the effect of the proviso, as a whole and read in context, is to qualify the general applicability of Chapter 30 of the CPA by excluding the operation of section 302(3)(a) of the CPA in cases like this.”

[25] I have been made aware of the unreported judgment of Koen J in **S v Mpumelelo Innocent Zondi**, (KZN case No R 717/2011, 6 December 2011) which was approved in **S v CS** (Eastern Cape, above) and the fact that the learned judge found that cases falling within the purview of s 85(1) are subject to automatic review, even if the sentences were imposed by the regional court. I could not obtain a copy of this judgment, but it apparently supports the second view.

[26] Tuchten J, with whom Molopa J concurred in **S v FM** (North Gauteng, above), considered a special review from a regional magistrate under s 304 of the CPA and also found that proceedings in the regional courts are subject to review in terms of s 85(1) of the CJA. He agreed with the judgments of Olivier J in the Northern Cape and Tshiki J in the Eastern Cape when concluding in para [38] that s 85(1)

should be interpreted to provide for automatic review in respect of all children who are sentenced to any form of imprisonment, not wholly suspended, or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in s 191(2)(j) of the Children's Act, including children who are so sentenced in a regional court.

- [27] Henney J, writing for the full bench in **S v LM** (Western Cape, above), received inputs from various *amici* including an *amicus* on behalf of the Minister of Justice and Constitutional Development, gave a well-reasoned exposition of the law. The court considered the judgments referred to herein and stated in para [32] that "(T)here is a constant refrain in all the cases referred to above, apart from the **Nakedi** case that on a proper interpretation of the CJA and after having regard to the paramountcy contained in s 28 of the Constitution, the CJA must be interpreted in accordance with this section." In para [33] the full bench gave cogent reasons why, in the event of conflict between the CJA and the CPA, the application of the CJA should be preferred above the CPA. It also found that the provisions of s 85(1) of the CJA are applicable to children convicted and sentenced in the regional court.

IV **CONCLUSIONS ON JUDGMENTS**

- [28] I respectfully disagree with the reasoning of the judges who hold the first view for the following reasons:

- 28.1 The proviso to s 85(1) of the CJA specifically states that the stipulated sentences are automatically reviewable in terms of s 304 of the CPA. Unlike automatic review in terms of s 302 of the CPA, s 85(1) does not contain a limitation insofar as legal representation is concerned. The reference to s 304 of the CPA is merely to indicate the procedure to be followed on review.
- 28.2 When considering the background circumstances and context within which the legislature adopted the CJA, and not to forget the overall purpose of this piece of legislation, the specific purpose was clearly to ensure that all minor accused should be legally represented at their criminal trials. Section 85(1) (and s 84 dealing with appeals), was drafted within this context whilst everybody concerned in the process of drafting and adoption of the legislation would have been aware of this. If the legislature intended to exclude minor accused who were legally represented from automatic appeal or review proceedings, it should have enacted it in clear language. This is not the case. In fact, to hold that s 85(1) applies to unrepresented minor accused only, will make a mockery of the constitutional rights of minors and the introduction of a new criminal justice system for children. The paramountcy of children's rights, especially in the criminal courts in general and in respect of sentencing in particular, has been

accepted and maintained as far as possible even before the promulgation of the CJA on 1 April 2010. See **Director of Public Prosecutions, Kwazulu-Natal v P** 2006 (1) SACR 243 (SCA) at paras [17] to [19].

- 28.3 Unlike s 302 of the CPA where the three months and six months periods of imprisonment, depending on the experience of the presiding magistrate, are clearly set out, the duration of imprisonment or compulsory residence in a child and youth care centre is irrelevant for purposes of s 85(1). If the first view point is to be accepted, it would mean that a minor accused (even if unrepresented), sentenced to direct imprisonment of up to three months in the one instance or up to six months in the other, would not be entitled to automatic review in terms of s 85(1). This is clearly untenable and contrary to the aim and spirit of the international instruments referred to, the Constitution and the CJA.
- 28.4 Although as a general proposition the provisions of Chapter 30 of the CPA dealing with the review of criminal proceedings in the lower courts apply in respect of all minor accused as set out in s 85(1) of the CJA, the proviso in s 85(1) is intended to qualify this general proposition that chapter 30 and s 302 in particular applies. The following passage relied upon in **Mphosi v Central Board for Co-operative Insurance Ltd** 1974 (4) SA 633 (A) and endorsed in

Strydom v Engen Petroleum Ltd [2013] 1 All SA 563 (SCA) at para [15] is instructive:

“(T)he effect of an excepting or qualifying proviso is to except out of the preceding portion of the enactment or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect.”

If it were not the case, no cases or hardly any cases involving minor accused sentenced to direct imprisonment would be subject to automatic review. Such an interpretation would render the deemed protection of minors meaningless and should be regarded as insensible. It does not promote the spirit, purport and objects of the Bill of Rights and s 28(2) of the Constitution in particular.

28.5 Most importantly, a criminal justice system for children in conflict with the law has now been created and in interpreting any section of the CJA or the CPA this should be appreciated and if any conflict is detected between the provisions of the two Acts, those of the CJA should prevail. Section 85(1) might have been worded more precisely, and the legislature should accept the blame for the confusion created, but there can be no doubt how the section should be interpreted. A sensible meaning is to be preferred to one that undermines the apparent

purpose of the section or may lead to insensible results.

V CONCLUSION ON REVIEWABILITY

- [29] Kim Hawkey, the editor of *De Rebus*, raised a valuable point in her editor's note in the November 2012 issue of **De Rebus** that conflicting judgments are not only undesirable, but the result may also infringe on the rights of the public. The consequent lack of clarity threatens one of the basic tenets of our legal system, namely legal certainty. In Johannesburg Housing Corporation (Pty) Ltd v Unlawful Occupiers, Newtown Urban Village 2013 (1) SA 583 (GSJ) at paras [38] and [39] Willis, J made the point that intrinsic to the rule of law is predictability, reliability and certainty. The criticism of Calli Ferreira in her article, "The Quest for Clarity: An Examination of the Laws Governing Public Contracts", **SALJ**, (2011) 172 at 188-192 pertaining to the contradictory approaches taken by the courts in a totally different context, to wit administrative law, is well founded and equally applicable *in casu*.
- [30] In so far as the *stare decisis* doctrine is concerned it is accepted that a decision otherwise binding can be departed from only if the later court of equal standing considers it to be clearly wrong, or is convinced that it was decided wrongly. See National Chemsearch (SA) (Pty) Ltd v Borrowman and Another 1979 (3) SA 1092 (T) at 1101 B-F. Having considered the different approaches, the

background circumstances, the legislation within their context and the purpose of the CJA in particular, I am convinced of the correctness of the second view point and therefore that the view of the North West and Free State High Courts is wrong and should not be followed. Both counsel who argued the matter before us made similar submissions. In conclusion, all matters falling within the provisions of s 85(1) of the CJA must be referred to the High Court for automatic review in accordance with that section, whether or not the children concerned were represented by legal representatives.

VI THE FACTS OF THIS CASE

[31] The tragic personal circumstances of the accused have been set out in the pre-sentence report of Ms Hans which she confirmed under oath. His parents passed away and he was placed in the foster care of his paternal uncle. He started stealing from friends, family members and from school at a tender age. His behaviour escalated from stealing bread and stationary to stealing money and cell phones and later to shoplifting and housebreaking. He was removed from his foster family and sent to an industrial school during 2010, but the placement failed due to his uncontrollable behaviour. He was then placed in Bloem Secure Centre, but escaped from this institution four times and became involved in gang related activities. In 2011 he was convicted for housebreaking with the intention to steal and theft. The passing of sentence was postponed for

three years. A year later he committed a similar offence and was sent to compulsory residence in a child and youth care centre for a period of three years. He was also convicted of escaping from custody and sentenced to five years' imprisonment which was wholly suspended. There are several cases pending against him and it is apparent that he has been involved in criminal activities since returning to Welkom after escaping from the youth care centre. It was not in the interest of justice to impose any other sentence than that imposed by the court *a quo*. In the circumstances I am satisfied that the proceedings were in accordance with justice and that the sentence is in order.

VII ORDER

[32] The proceedings are confirmed.

J. P. DAFFUE, J

I concur.

A. KRUGER, J