

**IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, BHISHO)**

CASE NO: CA&R 26/2012

In the matter between:

THE STATE

VS

ODWA MBANE

LUVUYO KHAWULELA

MPUMELELO BUSIKO

KHULASANDE VIKANI

REVIEW JUDGMENT

DUKADA J:

- [1] This matter was referred to this Court by the Magistrate of the Magistrate's Court, Mdantsane, Mr C. Jacks, requesting that the proceedings be reviewed and conviction set aside in respect of accused no.1.
- [2] In his letter of referral the Magistrate states that the accused no.1 together with three others appeared in the Mdantsane Magistrate's Court on 12

September 2012. They pleaded guilty and were convicted of the offence of housebreaking with intent to steal and theft. At the commencement of the sentencing proceedings it transpired that accused no.1 is still a juvenile, aged 17 years, and that the provisions of the Child Justice Act 75 of 2008 were not complied with. The accused were represented from the start of the trial by an attorney Mr Bonani.

- [3] From the record it appears that accused no.1 appeared with accused no.2 for the first time in Court on the 29 June 2012 and both were remanded in custody to the 17th July 2012. Their case was remanded thereafter a number of times. Accused No.3 and 4 were joined on the 8th August 2012 and were all remanded in custody to the 12 September 2012. On the face of the charge sheet the age of accused no.1 was changed from 18 years to 17 years with a signature effected next thereto and the date 12 September 2012 written next to the signature. I assume that such change was made on the 12 September 2012. If my assumption is correct, it means that accused no.1 was 17 years of age when he first appeared in court and was remanded in custody.

- [4] That accused no.1 was 17 years of age was only raised by his attorney during the sentencing proceedings.

- [5] The proceedings in this matter were conducted in terms of the Criminal Procedure Act 51 of 1977 whereas the Child Justice Act 75 of 2008 applies to the accused no.1 in terms of section 4 (1)(b) of that Act. That section provides as follows:

“Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and

(a)

(b) was 10 years or older but under the age of 18 years when he or she was-

- (i) *handed a written notice in terms of section 18 or 22;*
- (ii) *served with a summons in terms of section 19; or*
- (iii) *arrested in terms of section 2 for that offence."*

[6] Section 2 (c) and (d) of the Child Justice Act sets out one of its objectives as follows:-

"(c) provide the special treatment of children in a child justice system designed to break cycle of crime, which will contribute to safer communities and encourage these children to become law abiding and productive adults;

(d) prevent children from being exposed to the adverse affects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanism, services or options more suitable to the need of children and in accordance with the Constitution, including the use of diversion".

[7] In the case of the State v Mhlali Gxaleka, Bhisho CA&R 21/2012, a matter which concerned a child accused who was under 18 years of age at the time of the commencement of his trial in terms of the Criminal Procedure Act and referred for review to this Court I remarked as follows in paragraph 17 of my judgment:

"The Act provides for processes, procedure, mechanism, services or options when dispensing with justice with a child as an accused, to mention a few:- holding of a preliminary enquiry, diversion process, legal and parental assistance, sentencing procedures, options in sentences, etc. From the

preamble and right across the Act the intention of the legislative comes out clearly that it is to provide a special justice dispensation in respect of the child accused in line with the Constitution of this country and the United Nations Charters, Conventions and Declarations on the rights and welfare of children.” (See also the comments by Moses AJ in sv RS 2012 (2) SACR (WCC) at 164 a-c).

Those remarks apply squarely to this matter.

- [8] After accused no.1 was arrested and later dealt with in terms of the Criminal Procedure Act 51 of 1977 instead of the Child Justice Act 75 of 2008, in my view, he was denied the special justice dispensation provided for in the latter Act. In my view that was a gross irregularity which has a great potential to result in a miscarriage of justice, and consequently, this Court has an inherent jurisdiction to review these proceedings. (See Wahlhaus v Additional Magistrate, Johannesburg 1959 (3) SA 113 (A) at 119 A-120A; Sv Burns and Another 1983 (3) SA 366 (C); Levack v Regional Magistrate, Wynberg 1992 (2) SACR 151 (C) at 157 e-158 a; Nourse v Van Heerden 1999 (2) SACR 198 (W) at 207 b-e; Sv The Regional Magistrate Wynberg and Another 1992 (2) SACR 13 (C); Sv Mathemba 2002 (1) SACR 407 (ECD) at 408 d-l; Khalema and five similar cases 2008 (1) SACR 165 (CPD) at 170-171 c and Moodley and Others v NDPP and Others 2008 (1) SACR 560 (NPA) at 568 f-s 69 d).

- [9] In a similar review matter Sv Mazibuko [2011] Jol 26689 (ECG) in which it transpired during the sentencing stage that the accused was 16 years old at the time of the commission of the offence of theft, the Court per Dambuza J with Sangoni JP concurring, set aside the conviction and remitted the matter to the Magistrate's Court for the accused to be dealt with in terms of the relevant provisions of the Child Justice Act 75 of 2008. In my view a similar order would be appropriate in this matter.

[10] As accused Nos 2, 3 and 4 appear to have been above the age of 18 years at the time of the commission of the offence, the proceedings in respect of them appear to me to be in accordance with justice and should proceed in terms of the Criminal Procedure Act, as before.

[11] In the result:

The conviction of accused no 1 (Odwa Mbane) is set aside and the matter is remitted to the Magistrate's Court, Mdantsane for the accused no 1 to be dealt with in terms of the relevant provisions of the Child Justice Act 75 of 2008.

D.Z DUKADA

JUDGE OF THE HIGH COURT

I agree

N.G.BESHE

JUDGE OF THE HIGH COURT