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| Reportable:                       | YES / NO |
| Circulate to Judges:              | YES / NO |
| Circulate to Regional Magistrates | YES / NO |
| Circulate to Magistrates:         | YES / NO |

## IN THE HIGH COURT OF SOUTH AFRICA (Northern Cape High Court, Kimberley)

Saakno: / Case number: **38/2011**  
Datum gelewer: / Date delivered: **11 / 11 / 2011**

In the matter of:

**THE STATE**

and

**WILDENE FORTUIN**

Accused

*Coram:* Williams J et Olivier J

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### JUDGMENT ON REVIEW

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**OLIVIER, J**

[1] The accused in this matter was convicted on two counts of theft<sup>1</sup>. The two counts were taken together for purposes of sentence and the magistrate postponed the passing of sentence for a period of 6 months on condition that the

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<sup>1</sup> The second count involved the theft of articles from a motor vehicle.

accused reported to the De Aar Youth Centre<sup>2</sup> for a period of 6 months. The accused was ordered to appear in court again on 2 January 2012.

[2] The accused was 14 years old at the time of the commission of these crimes. The magistrate has submitted the proceedings for automatic review and has in this regard referred to the provisions of section 85(1)(a) of the Child Justice Act<sup>3</sup>, as well as to the as yet unreported judgment of Dlodlo, J in **S v Ruiter**<sup>4</sup>. For the sake of convenience the Child Justice Act will hereinafter be referred to as "*the CJA*" and the Criminal Procedure Act<sup>5</sup> as "*the CPA*".

[3] The provisions of section 85 of the CJA read as follows:

*"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, 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*

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<sup>2</sup> Presumably a centre as envisaged in Section 191 of the Children's Act, 38 of 2005.

<sup>3</sup> 75 of 2008

<sup>4</sup> A review judgment delivered on 14 June 2011 in the Western Cape High Court (Cape Town) under case number 101499.

<sup>5</sup> 51 of 1977

*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 a High Court having jurisdiction, irrespective of the duration of the sentence.*

(2) *The provisions of subsection (1) do not apply if an appeal has been noted in terms of section 84."*

[4] The wording of these provisions, and the facts of this matter, raise several questions:

4.1 The words "*irrespective of the duration of the sentence*", and their position within the layout of section 85(1), raise the question whether they may have been intended to apply also in respect of the sentence of a child who was under the age of 16 years at the time of the offence. If so, does the reference to the "*duration*" of a sentence suggest that, even in the case of such children, only sentences involving some form of custody or detention would be reviewable<sup>6</sup>, or that the reference to imprisonment and compulsory residence applies to such a child as well?

4.2 What was the intention behind the reference to imprisonment "*not wholly suspended*"?

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<sup>6</sup> In addition, of course, to sentences that would in any event in terms of section 302(1) of the CPA have been automatically reviewable, irrespective of the age of the accused.

4.3 Would orders postponing the passing of sentences<sup>7</sup> also be reviewable in terms of the provisions of section 85 (1) (a) of the CJA?

4.4 Should the provisions of section 85 of the CJA be interpreted to mean that the sentences envisaged there will be automatically reviewable, irrespective of whether or not the accused was legally represented<sup>8</sup>.

### **DURATION OF THE SENTENCE**

[5] In my view the words "*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*" could only have been intended to apply to accused persons as envisaged in subsection (b) of section 85(1) of the CJA<sup>9</sup>. Not only is this apparent from the layout of the provisions of section 85(1) as a whole, but any other interpretation would fail to distinguish between the two age groups mentioned in subsections (a) and (b) of section 85(1) of the CJA; a distinction which the legislature in my view quite clearly intended to draw.

[6] This would then mean that, in the case of children of 16 or

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<sup>7</sup> In terms of section 78 of the CJA, read with section 297(1)(a) of the CPA

<sup>8</sup> compare section 302(3)(a) of the CPA

<sup>9</sup> and not to the accused persons envisaged in section 85(1)(a) of the CJA

17 years old at the time of the offence, the proceedings would in terms of section 85 of the CJA also be reviewable where such a child *"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"*<sup>10</sup>.

[7] It is equally clear, in my opinion, that the provisions of section 85(1) of the CJA were intended to widen, in cases involving children, the range of cases where proceedings will be automatically reviewable. In the preamble to the CJA the fact is acknowledged that the Constitution *"singles (children) out for special protection, affording children in conflict with the law specific safeguards"*, including the right *"to be treated in a manner ... that (takes) account of the child's age"*.

[8] The proceedings in criminal trials of accused persons who were 16 or 17 years old at the time of the offences would therefore not only be automatically reviewable in the case of the sentences envisaged in section 85(1)(b) of the CJA, but also in the case of sentences exceeding the limits laid down in terms of section 302(1) of the CPA generally. A contrary interpretation would produce the result that a sentence of a fine exceeding the limits prescribed in section 302(1)(a)(ii)

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<sup>10</sup> Once again, obviously, in addition to sentences which would in any event in terms of section 302(1) of the CPA be reviewable

of the CPA would be automatically reviewable in the case of an adult offender, but not in the case of a 16 or 17 year old child.

[9] Such a result would in my view be absurd and in conflict with the constitutional need to provide “*special protection*” and “*specific safeguards*” for children<sup>11</sup>. An interpretation that fails to recognise the need to distinguish between adults and children in this regard would be contrary to the fundamental right of children to be “*treated in a manner... that*” (takes) *account of (their) age*”<sup>12</sup>.

[10] The provisions of section 85(1)(b) of the CJA can be compared with those of section 84(1)(b) of that Act, which provide accused persons of 16 and 17 years old (at the time of the offence) with an automatic right of appeal<sup>13</sup> where such a person “*has been sentenced to any form of imprisonment that was not wholly suspended*”.

[11] Not only does the layout of section 84(1) of the CJA also make it clear that the qualifying words “*and has been sentenced to any form of imprisonment that was not wholly suspended*” apply only to accused envisaged in section 84(1) (b), but its wording leaves the possibility open for such an

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11 Over and above those applicable in the case of adult accused.

12 section 28(1)(g)(ii), read with section 39(2) of the constitution.

13 In other words without having to apply for leave to appeal.

accused to apply for leave to appeal where any other type of sentence has been imposed. The intention was therefore clearly to broaden the right of appeal of accused persons who were 16 or 17 years old at the time of the crime, and not to limit it.

[12] In the same way section 85(1)(b) was, in the case of accused persons who were 16 or 17 years old at the time of their offences, in my view intended to in effect add to the sentences that are already subject to automatic review in terms of section 302(1) of the CPA, those sentences set out in section 85(1) of the CJA. The result would therefore be that, for example, in the case of an accused who was 16 or 17 years old at the time of the crime, any form or duration of imprisonment, and not just a term of imprisonment as envisaged in section 302(1) of the CPA, would entitle such an accused to an automatic review. Also “*any*” sentence of “*compulsory residence in a child and youth centre*”, would entitle such an accused to automatic review.

[13] Once it is accepted that the words “*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*” were intended to qualify only the additional rights (created in section 85(1)(b) of the CJA) of accused persons who were 16 or 17 years old at the time

of the crime, it follows that, in respect of a child who was under the age of 16 years old at the time of the offence, the intention was to have any sentence<sup>14</sup> subject to automatic review<sup>15</sup>.

[14] The words "*irrespective of the duration of the sentence*" in my view refer to, and should be read with, the words "*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*". It is only a sentence involving some form of custody or detention that could conceivably have a "*duration*". What the legislature intended to provide, in my view, was therefore that a sentence to any term of imprisonment, irrespective of its duration, and to any term of "*compulsory residence in a child and youth care centre*", once again irrespective of the duration of such compulsory residence, would lead to the automatic review of such a sentence in a case where the accused person was 16 or 17 years old at the time of the offence.

[15] The words "*duration of the sentence*" therefore in my view has no reference to the sentences of accused persons who were younger than 16 years old when the offences were

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<sup>14</sup> and not only those envisaged in section 302(1) of the CPA in respect of all other accused persons

<sup>15</sup> I will revert to whether a postponement of a sentence would constitute such a "sentence"



committed. All sentences of such persons – and not only those which would have a “*duration*” – are now in terms of section 85(1)(a) of the CJA automatically reviewable.

[16] It is of some significance that there is no such qualifying reference to the duration of a sentence in the provisions of section 84(1) of the CJA. In my view such a qualification would in any event be unnecessary, because the words “*any form of imprisonment*” (not wholly suspended) would make it clear that the duration of imprisonment would be irrelevant. The same applies, in my view, to the provisions of section 85.

[17] The words “*irrespective of the duration of the sentence*” could never apply to accused persons who were under the age of 16 years at the time of the offences, because such an interpretation would limit the rights of accused persons like that to cases where a sentence was imposed that has some sort of duration. Such an interpretation would fail to distinguish between the two age groups created by subsections (a) and (b) of section 85 (1) of the CJA. That, as I have already concluded, could not have been the intention of the legislature. As regards children who were 16 or 17 years old at the time of the crime, the words “*any form of imprisonment*” and “*any sentence of compulsory residence*”, would in my view already in themselves have

conveyed that any duration at all of imprisonment or of compulsory residence would entitle such an accused to automatic review.

[18] It is so that the introductory words of section 85(1) of the CJA make the provisions of chapter 30 (which would include section 302) of the CPA applicable to proceedings in which children are involved. Those words are clearly qualified, however, by the proviso following upon them. The proviso begins with the words "*Provided that*" and qualifies the general application of chapter 30 of the CPA when it comes to the sentence of a child who was under the age of 16 years old at the time of the offence<sup>16</sup> and to the sentence of a child who was 16 or 17 years old at the time of the offence and who is sentenced to imprisonment or compulsory residence in a child and youth care centre<sup>17</sup>. It must be borne in mind, however, that a proviso does not always qualify in the sense of limiting the preceding part. It sometimes provides "*something additional*"<sup>18</sup>. In this case the proviso expands the scope of the automatic reviewability of sentences in the case of accused persons and sentences as envisaged in section 85(1) of the CJA, and it therefore provides for the benefits of automatic review in more instances than provided for in section 302(1) of the CPA (as

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<sup>16</sup> Section 85(1)(a) of the CJA

<sup>17</sup> Section 85(1)(b) of the CJA

<sup>18</sup> **S v Rosenthal** 1980 (1) SA 65 (AD) at 81

incorporated into section 85(1) of the CJA).

## **SUSPENSION OF SENTENCE**

[19] This brings me to the question what the legislature intended to achieve by including the words "*that was not wholly suspended*" as a qualification to the words "*any form of imprisonment*" in section 85(1)(b) of the CJA. Since the repeal of subsection (2)(b) of section 302 of the CPA<sup>19</sup> the suspension or part suspension of a sentence of imprisonment makes no difference when determining the duration of such a sentence for the purposes of automatic review:

*"If the sentence exceeds the limit, it is reviewable, whether it is suspended or not"*<sup>20</sup>.

[20] It must nevertheless be assumed that the intention, in section 85(1)(b) of the CJA, was to make it clear that any form of imprisonment, which is not wholly suspended and which is imposed on an accused who was 16 or 17 years old at the time of the offence, will be automatically reviewable, irrespective of the duration of such a sentence.

[21] This would mean that any sentence of imprisonment that is

<sup>19</sup> by section 22 of the Criminal Law Amendment Act, 59 of 1983

<sup>20</sup> **Hiemstra's Criminal Procedure**, Kruger, 30-17

not wholly suspended will<sup>21</sup> be automatically reviewable, even if its total duration or period (both suspended and unsuspended) would not exceed the limits in section 302 (1) of the CPA.

## **POSTPONEMENT OF PASSING OF SENTENCE**

[22] This brings me to the question whether the postponement of the passing of a sentence would be a “*sentence*” for the purposes of section 85(1) of the CJA. I must immediately say that in my view this question can only be relevant as far as the “*sentence*” of a child under the age of 16 years old (at the time of the offence) is concerned. Even if the postponement of the passing of sentence is to be regarded as a “*sentence*” it could never be regarded as a “*form of imprisonment*” or “*as a sentence of compulsory residence in a child and youth care centre*”, as envisaged in subsection (b) of section 85(1).

[23] In **S v Kiewiet**<sup>22</sup> an order postponing the referral or committal of the accused to a rehabilitation centre<sup>23</sup> was held to be not subject to automatic review. The effect of such an order was equated to that of the suspension of a sentence and it was held that the order of referral or

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21 In the case of the children as envisaged in section 85 (1) (b) of the CJA

22 1980(1) SA 535 (C)

23 in terms of section 16 of Act 1 of 1971

committal would become automatically reviewable once it was put into operation. I have already referred to the fact that the suspension of a sentence, or of any part thereof, no longer makes any difference in determining whether it is automatically reviewable.

[24] In **In re Doubell**<sup>24</sup> the Court was again concerned with the postponement of an order that the accused be committed to a rehabilitation centre. It was once again held that such an order was not subject to automatic review:

*"...: 'n bevel waardeur vonnisoplegging **uitgestel** word is iets anders as 'n **vonnis**, hetsy opgeskort al dan nie, waardeur 'n persoon tot een van die strawwe waarop outomatiese hersiening betrekking het, **veroordeel** word en slegs sodanige **veroordelings** is aldus hersienbaar. Insgelyks, 'n **bevel** ingevolge art 31(1) waardeur die uitreiking van 'n bevel vir die aanhouding van 'n persoon in 'n rehabilitasiesentrum **uitgestel** word, is iets anders as 'n **bevel** ingevolge arts 30(6) en 31(5) waardeur die **aanhouding** van 'n persoon in 'n sodanige sentrum **gelas** word en slegs laasgenoemde bevele is outomaties hersienbaar"*<sup>25</sup>.

[25] A similar order<sup>26</sup> was the subject of the judgment in **In re Afrikaner**<sup>27</sup>. It was held not to be automatically reviewable and was, significantly, also compared to the postponement of the passing of a sentence:

*"Dit is, soos 'n bevel wat 'n vonnis uitstel, iets anders as 'n bevel vir*

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<sup>24</sup> 1985(1) SA 274 (T)

<sup>25</sup> **In re: Doubell**, *supra*, at 280B to D

<sup>26</sup> although then in terms of section 23(1) of Act 20 of 1992

<sup>27</sup> 1996(1) SASV 359 (K)

*gevangesetting waarop art 302(1)(a) nie toegepas kan word nie, ook nie met noodsaaklike wysigings nie. Om, wat outomatiese hersiening betref, 'n verskil te maak tussen 'n uitstelbevel sonder enige voorwaardes en een met voorwaardes wat in elk geval kan verskil, is in my oordeel nie geregverdig nie"*<sup>28</sup>.

[26] In contradistinction, however, reference may be made to **S v Strauss: In re Strauss**, where the desirability of the automatic review of the postponement of orders of committal to rehabilitation centres was expressed, although only *obiter*. It was pointed out, in my respectful view correctly, that such a postponement could be made subject to very onerous conditions<sup>29</sup>.

[27] In the present matter the postponement of the passing of sentence was also made subject to a condition that would seriously impact upon the accused's right to freedom. Compulsory residence in such a child and youth care centre may be imposed by a child justice court as a sentence in itself<sup>30</sup>. Such a sentence would then, *inter alia* in the case of an accused who was 16 or 17 years old at the time of the crime, be automatically reviewable in terms of section 85(1) (b) of the CJA. It would be an anomaly if a condition of postponement with for all practical purposes a similar effect, *viz* compulsory residence in such a centre, would then not be regarded as a "sentence" and not be automatically

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28 Ibid, at 365(b)

29 1970 (2) SA 18 (NKA) at 20 to 21

30 section 76 of the Child Justice Act

reviewable where the accused was under the age of 16 years old at the time of the offence; this while it is clear that the legislature intended to create wider automatic review rights for such children than for those who were already 16 or 17 years old at the time of the offence.

[28] In my view, therefore, a postponement of the passing of sentence on condition that the accused "*reside*" in a child and youth care centre for a period of time should be regarded as a "*sentence*" for the purposes of automatic review in terms of section 85(1)(a) of the CJA. Such an approach would give recognition to the "*paramount importance*" of a child's interests<sup>31</sup> and would ensure that the desirability and suitability of such a condition, and its possible effect on the child, will be scrutinised by means of automatic review.

[29] On the facts of this matter it is not necessary for me to decide whether even an unconditional postponement of the passing of sentence would be automatically reviewable in the case of a child who was under the age of 16 years old at the time of the offence. I will only make the following two remarks in this regard:

29.1 If an accused in such a case is not called upon to

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31 section 28(2) of the Constitution

appear again, such an accused shall be deemed to have been cautioned and discharged. The conviction, however, “*shall be recorded as a previous conviction*”<sup>32</sup>. I doubt, however, whether the legislature intended the mere fact that criminal proceedings against a child resulted in a previous conviction, to be a justification for automatic review.

29.2 The automatic review of an unconditional postponement of the passing of a sentence may result in the same proceedings<sup>33</sup> being reviewed twice if a reviewable sentence is then later imposed.

[30] Lastly, and as far as children who were 16 or 17 years old at the time of the offence are concerned, I think the legislature should consider providing for automatic review not only where the child is sentenced to compulsory residence in a child and youth care centre, but also where such residence is made a condition of the postponement or even suspension of sentence. In both such cases the only way to avoid the more serious consequences of either the imposition of sentence or, in the case of a suspended sentence, the sentence itself, would be to reside in such a centre for the period determined by the court.

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32 section 297(3), read with section 297(1)(c), of the CPA

33 at least as far as the conviction is concerned



[31] The **Concise Oxford English Dictionary**<sup>34</sup> defines the word “*compulsory*” as meaning “*required by law or a rule; obligatory, involving or exercising compulsion; coercive*”. The imposition of such a condition of postponement or of suspension of sentence could probably not be regarded as a form of compulsion or coercion, in the strict sense of the word, but the offender is at the same time not really left much choice. Either he/she submits to the condition or he/she faces the imposition of an impliedly more severe sentence or the reality of having to serve a more serious sentence.

## **LEGAL REPRESENTATION**

[32] This finally brings me to the issue of legal representation. Section 302(3)(a) of the CPA limits the right to an automatic review to an accused who was “*not assisted by a legal adviser*”. Section 85 of the CJA contains no such limitation. The question is therefore whether an accused person falling within the age categories created by subsections (a) and (b) of section 85(1) of the CJA, and whose sentence would

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<sup>34</sup> 10<sup>th</sup> edition, p294

otherwise qualify for automatic review because of the extended protection afforded by those provisions, will be entitled to the additional automatic review protection even though he or she was legally represented at the trial.

[33] In the **Ruiter** judgment referred to by the magistrate<sup>35</sup> Dlodlo J answered the question in the affirmative. As the only reason for this finding Dlodlo J referred to the fact that the "*High Court is the upper guardian for all minors within its jurisdictional area*" and said that "*For that reason and that one alone*" cases envisaged in section 85 "*should always be the subject of automatic review in the ordinary cause (sic) regardless of whether or not the said minor child was legally represented at trial*"<sup>36</sup>.

[34] Dlodlo J made no reference to the fact that section 302(3) (a) – a part of chapter 30 of the CPA that is in terms of the introductory words of section 85(1) of the CJA specifically made applicable to "*criminal proceedings in the lower courts in respect of all children*" – exclude automatic review in cases where the accused person was legally represented.

[35] The question is whether the legislature intended the proviso in section 85(1) of the CJA not only to prescribe sentences which would (in addition to those provided for in section

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<sup>35</sup> see paragraph 2 and footnote 4 above

<sup>36</sup> para [3] of the judgment

302(1) of the CPA) be automatically reviewable in the case of accused persons who were children at the time of the offences, but also to create an exception to section 302(3) (a) of the CPA when it came to the review of those sentences.

[36] It is so that the wording of the proviso, and more specifically the provision that a sentence in a case like that “*is*” reviewable, could be argued to lay down an immutable rule that sentences in the cases envisaged in subsections (a) and (b) of section 85(1) of the CJA will always be automatically reviewable, in other words even in cases where such an accused was legally represented at the trial.

[37] The proviso cannot, however, be read in isolation and as if it is an independent clause or section.

*“There is a fundamental rule of construction for an ambiguous proviso in a statutory provision, namely that the proviso must be interpreted in relation to the principal matter to which it stands as a proviso. It cannot be treated as an independent enacting clause in that it is a component of the enacting provision”<sup>37</sup>.*

*“The plaintiff’s case, therefore, so it was argued, falls squarely within the language of para. (aa) of the second proviso to sec. 11(1), and the defendant is, therefore, liable towards the plaintiff to the extent therein set out notwithstanding the general provisions of the first proviso.*

*This argument altogether overlooks the true function and effect of a proviso. According to Craies, **Statute Law**, 7<sup>th</sup> Ed., at p. 218 –*

*'the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, 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 contributing to it that effect'*

*In **R. v. Dibden**, 1910 P. 57, Lord Fletcher Moulton at p.125, in the Court of Appeal, said –*

*'the fallacy of the proposed method of interpretation (i.e. to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, ..., have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso''<sup>38</sup>.*

[38] In this case the principal matter is the introductory part of section 85(1) of the CJA, which specifically provides that chapter 30 of the CPA, insofar as it deals with the review of criminal proceedings in the lower courts, will apply also in the case of convictions of children in terms of the CJA.

[39] Section 302 of the CPA is a part of chapter 30. It is titled "*Sentences subject to review in the ordinary course*". It provides for the automatic review of criminal proceedings in certain cases. In subsection (3)(a) it specifically excludes cases where the accused were legally represented. The *ratio* behind this is easy to understand. The system of

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<sup>38</sup> **Mphosi v Central Board for Co-operative Insurance Ltd** 1974 (4) SA 633 (AD) at 645

automatic review creates an additional workload for judges and automatic review is regarded as unnecessary where the accused were legally “*assisted*”<sup>39</sup>.

[40] As a consequence of the introductory words of section 85(1) of the CJA the provisions of chapter 30 of the CPA, including those of section 302(3)(a) – which exclude automatic review in cases where the accused was legally represented, were incorporated into, and should be read as a part of, the CJA<sup>40</sup>.

[41] The question is therefore really whether the proviso in section 85(1) of the CJA can be interpreted as widening the scope of automatic review to not only include sentences that would not normally have been automatically reviewable, but to also do so even where the accused in those cases were legally represented (and therefor to qualify and limit the application of chapter 30 of the CPA as far as the issue of legal representation is concerned).

[42] This is certainly not specifically provided for. The proviso adjusts the scope of sentences which will be subject to automatic review with reference to the age of the accused and, in respect of a certain age category of accused persons, the type of sentences imposed. It makes no mention of the

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39 Compare **S v Mboyany en 'n Ander** 1978 (2) SA 927 (T) at 930; **S v Van Wyk** (1) 2000 (1) SASV 79 (T) at 80j

40 **Principles of Legal Interpretation**, *supra* page 248; and compare **Ringrose v Rex** 1907 TS 46

issue of legal representation.

[43] The fact that the wording of the proviso, when read in isolation and as if it is an independent enactment, simply renders the envisaged sentences or proceedings automatically reviewable, without reference to an exception where the accused was legally represented, would not in itself justify the inference or implication that this rule was intended to be immutable and not subject to any exception (like in cases where the accused were legally represented).

[44] The wording of the proviso is in this sense similar to that of section 302(1) of the CPA, which provides that the sentences prescribed in terms of that section "*shall*" be subject to automatic review. The wording of that section also does not contain any qualification in respect of accused persons who were legally represented. The exception, to the general provisions in section 302(1), is however to be found in subsection (3)(a) of section 302 of the CPA, where cases in which the accused were legally presented are specifically excluded from automatic review.

[45] On the face of it there is no indication in the wording of section 85(1) of the CJA that this exception would not, by incorporation, also apply in respect of the general rule laid down by the proviso regarding certain sentences not

otherwise covered by section 302(1) of the CPA.

*"When a later statute is to be construed that incorporates an earlier one, the later statute is not to be interpreted as being of wider application than the earlier one"*<sup>41</sup>.

[46] Adv Barnard of the local office of the Director of Public Prosecutions, to whom I am indebted for his legal opinion in this matter, drew my attention to the provisions of sections 82 and 83 of the CJA. In section 82(1) it is provided that, should a child not have his/her own legal representative, the magistrate must refer the child to the Legal Aid Board.

[47] The provisions of section 83 are somewhat difficult to follow. In subsection (1) it is provided that a child appearing before a child justice court may not waive the right to legal representation. Subsection (2), however, does envisage that the child may *"not wish to have a legal representative"* or may decline *"to give legal instructions to an appointed legal representative"*, and provides that in such a case the Legal Aid Board must appoint a legal representative *"to assist the court in the prescribed manner"*.

[48] The *"prescribed manner"* can be found in regulation 48<sup>42</sup> in

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41 **Principles of Legal Interpretation**, *supra*, page 248; see also the passage quoted from Craies' **Statute Law** in **Mphosi v Central Board for Co-operative Insurance Ltd**, *supra*, at 645

42 titled *"Legal representative appointed to assist court"*

chapter 10<sup>43</sup> of the regulations published in terms of the CJA<sup>44</sup>:

- "(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; or*
  - (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."*

[49] When regard is had to these provisions it is indeed clear

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<sup>43</sup> titled "Legal representation"

<sup>44</sup> published in GN 251 on 31 March 2010 (GG 33067)



that, as submitted by Mr Barnard, a child appearing before a child justice court will in effect never be without legal representation. The duties and rights of a legal representative appointed to assist the court will, for all practical purposes, be the same as in the case of an own legal representative.

[50] It is clear that the intention was that a child should at all costs be legally assisted, either directly by his/her own representative or indirectly by a representative appointed in terms of section 83. Even if one should adopt a technical approach and view a representative who was appointed in terms of section 83 as somebody who “*assisted*” the court, and not the accused<sup>45</sup>, children will clearly be legally assisted in the majority of cases.

[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<sup>46</sup>. 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.

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<sup>45</sup> section 302(3)(a) of the CPA

<sup>46</sup> **Stellenbosch Wine Trust v Oude Meester Group Ltd** 1977 (2) SA 221 (C) at 240D

[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*”<sup>47</sup>, 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.

[53] The conclusion to which I have therefore come is that cases where the accused were legally represented would be included in the extended automatic review provided for in the proviso to section 85(1) of the CJA.

## **CONCLUSION**

[54] I have therefore reviewed the proceedings in this matter and found them to be in accordance with the law.

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47 **Centre for Child Law v Minister of Justice and Constitutional Development and Others** 2009 (6) SA 632 (CC) para [25]

[55] In the premises the following order is made:

**THE CONVICTIONS AND SENTENCE ARE CONFIRMED.**

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**C.J. OLIVIER**  
**JUDGE**

I agree.

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**C.C. WILLIAMS**  
**JUDGE**