

**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable/Not reportable

Case number: R21/2024

Sasolburg Case No: A164/2024

In the matter between

THE STATE

And

I[...] S[...]

Heard: 8 July 2024

Delivered: 23 July 2024

Summary: Accused found to be a child aged 17 years after plea of guilty and conviction on charge of entering and remaining in RSA illegally – steps to be taken in the circumstances

ORDER

1. The proceedings in the Sasolburg Magistrate's Court and the subsequent conviction of the accused under case number A164/2024 are hereby reviewed and set aside.
2. The prosecution of the accused must commence de novo in terms of the provisions of the Child Justice Act 75 of 2008.

JUDGMENT

LOUBSER PJ

[1] This is a matter that was referred to the High Court by the presiding Magistrate for a review in terms of Section 304A of the Criminal Procedure Act.¹ The need for a review

¹ Act 51 of 1977

of the proceedings before the Magistrate arose when it transpired after the conviction of the accused on 15 March 2024, but before he was sentenced, that he was in fact under the age of 18 years when he committed the offence and when he was found guilty of the offence.

[2] It appears from the record of the proceedings that the accused was charged with a contravention of the provisions of Section 49(1)(a) of the Immigration Act² in that he had unlawfully entered and remained in the Republic of South Africa without the required documents, visa or passport to do so. The accused was unrepresented in the Court and his age was indicated as 20 years on the charge sheet. He pleaded guilty to the charge, and during questioning by the Magistrate in terms of Section 112(1)(b) of the CPA, it transpired that the accused entered South Africa during October 2023 from Mozambique. The accused told the Court that he had paid a taxi driver to bring him across the border without any papers which would entitle him to be in South Africa.

[3] The accused further informed the Court that there is no work in Mozambique and that he had to come to South Africa 'to look for greener pastures'. He knew, however, that his actions were unlawful and punishable by law.

[4] After the questioning, the Magistrate was satisfied that the accused had admitted all the elements of the offence, and he then found him guilty as charged. During the sentencing stage, the accused informed the Court of his personal circumstances, but he then revealed that he was only 17 years of age. Since there was nothing before the Court that could confirm the age of the accused, the Magistrate quite correctly postponed the sentencing of the accused and referred him to the district surgeon for an age determination.

[5] On the date of postponement the prosecutor handed in the report of the district surgeon, from which it appeared that the accused was between the ages of 16 and 18 years, but that he was 'most probably plus minus 17 years of age'. It was at this point that the Magistrate decided to refer the matter for a review, and the accused was released on warning to allow for the review to be dealt with by the High Court.

[6] Now having regard to all the circumstances, it may well be argued that the accused was not subjected to any prejudice so far, and that the present proceedings should simply continue under the principles governing the sentencing of a child. Such an argument, however, would lose sight of the principles and provisions of the child justice system

² Act 13 of 2002

introduced by the Child Justice Act³ since 1 April 2010. It is one of the main aims of this Act to divert as many children as possible from the criminal justice process. A child is defined in the Act as any person under the age of 18 years.

[7] In terms of the Act, an accused falling in the age category of the present accused, may be diverted in accordance with Chapter 6 of the Act. If not, he must be assessed by a probation officer, whereafter he must appear at a preliminary inquiry.⁴ At the preliminary inquiry, the accused may be considered for diversion. If he is not so diverted, the matter must then be referred to a child justice court for plea and trial.⁵ Once again, the child justice court may consider the matter for diversion before the conclusion of the case for the prosecution.⁶

[8] It speaks for itself that so far, the accused has been deprived of all these mechanisms and benefits to which accused persons of his age are entitled to. It follows that his prejudice so far cannot be in any doubt. The proceedings in the Magistrates Court and the subsequent conviction of the accused therefore stand to be reviewed and set aside.

[9] In the premises, the following order is made:

1. The proceedings in the Sasolburg Magistrate's Court and the subsequent conviction of the accused under case number A164/2024 are hereby reviewed and set aside.
2. The prosecution of the accused must commence *de novo* in terms of the provisions of the Child Justice Act 75 of 2008.

P.J. LOUBSER, J

I concur:

³ Act 75 of 2008

⁴ Section 5(2) and (3)

⁵ Section 5(4)(b)

⁶ Section 5(4)(c)

