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**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

High Court Ref No: R14/2024

Magistrate's Serial No: 1/2024

Magistrate's Court No: 29/2024

Reportable: YES / NO

Circulate to Judges: YES / NO

Circulate to Magistrates: YES / NO

Circulate to Regional Magistrates: YES/NO

In the matter between:

THE STATE

and

B[...] T[...]

Accused

Coram: Stanton J et Chwaro AJ

Delivered on: 13/09/2024

Summary: Review- section 85 of the Child Justice Act 75 of 2008 read with section 304 of the Criminal Procedure Act 51 of 1977- child offender - 17 years at the time of arrest and turned 18 years during the course of the proceedings-sentenced to 2 years imprisonment-trial court not considering sentencing options contained in Chapter 10 of the Child Justice Act- sentence imposed not in accordance with justice-sentence imposed by trial court reviewed and set aside-remitted to Magistrates' Court for sentencing afresh before another Magistrate.

ORDER

1. The sentenced imposed by the trial court is reviewed and set aside.
2. The matter is remitted to the Magistrates' Court for the District of Pixley Ka Seme sitting at Hopetown for urgent consideration of sentence *de novo* before another Magistrate in accordance with the sentencing principles contained in Chapter 10 of the Child Justice Act 75 of 2008, including hearing of oral evidence from the probation officer and any other relevant witness.
3. The child offender, B[...] T[...], should forthwith be released from any Correctional Centre where he is presently incarcerated and to be transferred for placement at Molehe Mampe Child and Youth Care Centre pending the finalisation of the sentencing procedure referred to in paragraph 2 above.

REVIEW JUDGMENT

CHWARO AJ:

Introduction

- [1] This review serves before me pursuant to the provisions of section 85 of the Child Justice Act 75 of 2008¹, read with section 304 of the Criminal Procedure Act 51 of 1977² following the conviction and the imposition of a custodial sentence upon the child offender by the Magistrates' Court for the District of Pixley Ka Seme sitting at Hopetown. For the sake of completeness, section 85 of the CJA provides thus:

¹ ("the CJA")

² ("the CPA")

‘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 has been sentenced to any form of imprisonment 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-

- (a) the duration of the sentence;
- (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;
- (c) whether the child in question was represented by a legal representative; or
- (d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.

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

[2] At the time of his arrest and during his conviction on 19 March 2024 on the charge of robbery following his plea, the child offender was 17 years old. On 15 July 2024, he was sentenced to two (2) years imprisonment coupled with an ancillary order declaring him unfit to possess a firearm in accordance with the provisions of section 103 of the Firearms Control Act 60 of 2000.

The charge and plea

[3] The child offender was arraigned on a charge of robbery. The charge sheet alleged that on or about 11 February 2024 and at Hopetown, he unlawfully

and intentionally assaulted one John Frederick and with force took cash in the amount of R560.00, which was the latter's property or was in his lawful possession.

- [4] On 19 March 2024, the child offender, who was legally represented throughout the proceedings, pleaded guilty to the charge of robbery. He tendered a plea explanation contemplated in section 112(2) of the CPA where he admitted having unlawfully and intentionally assaulted John Frederick by hitting him with a fist on his mouth and took an amount of R160.00 from his wallet.
- [5] The trial court questioned the child offender on his plea explanation and after having satisfied itself that he admitted all the elements of the offence, and pursuant to the acceptance of the plea by the State, including the amount of cash reflected in the plea explanation referred to in paragraph 4 above, the trial court convicted the child offender on his plea.

Sentencing of the child offender

- [6] As he was enjoined by the provisions of section 71(1)(a) of the CJA, the Learned Magistrate requested and obtained a pre-sentence report from a probation officer detailing the personal circumstances of the child offender. The report was compiled by Mr V Ntshebethu, a probation officer of 26 years' experience and employed by the Northern Cape Department of Social Development.
- [7] In terms of the pre-sentence report, the child offender was born on 25 April 2006 and dropped out of primary school after completing grade 3. He resides with his mother and his two siblings in Steynville, Hopetown, whereas his father, who has been absent in his life since at a young age, resides with his family in Laingsburg, Western Cape. Due to his adolescent age, the child offender is not spared from exposure to drugs within his community. He started using dagga and later resorted to mandrax and methamphetamine, commonly known as "tik".

- [8] The probation officer indicated that the child offender had previous brushes with the law, being two convictions of theft in 2022 and 2023 respectively, where in both instances, his sentenced was postponed for a period of five years in terms of section 279(1) of the CPA. The probation officer discarded other sentencing options but recommended that due to the seriousness of the offence *in casu*, the child offender be sentenced to direct imprisonment in terms of section 77 of the CJA where he will subject himself to all programmes rendered by a correctional centre.
- [9] In mitigation of sentence, Ms Gerrits for the child offender, submitted that he was 18 years old, unmarried with no children and unemployed. He relies on his mother for a living and requested that he be granted a suspended sentence.
- [10] The State urged for direct custodial sentence as recommended by the probation officer having regard to the fact that the victim in the case was a 75-year-old who was assaulted by the child offender and robbed of his money and that robbery was prevalent in the area. The child offender did not learn from his previous convictions and kept on reoffending.
- [11] Prior to imposing sentence, the Learned Magistrate enquired from both the State and the child offender's legal representative as to whether the provisions of section 77 of the CJA were applicable to the child offender in that he was 17 years old at the time of his arrest but has since turned 18 years during the course of the proceedings. Both could not pronounce themselves firmly and adequately on the matter and the Learned Magistrate indicated that he was going to look it up.
- [12] In passing sentence, the Learned Magistrate only confined himself to the provisions of section 85 of the CJA relating to automatic review of a sentence imposed on the child offender. He considered the pre-sentence report dealing with the child offender's personal circumstances, the crime and its impact on society. The Learned Magistrate concluded that the sentence recommended

by the probation officer was suitable and thereupon sentenced the child offender two years imprisonment, with an ancillary order declaring him unfit to possess a firearm.

Discussion

- [13] A query was directed to the Learned Magistrate soliciting his sentiments on his omission to apply the provisions of Chapter 10 of the CJA in sentencing the child offender and to articulate that the offence upon which the child offender was convicted, was one of the offences contained in section 77(3) of the CJA.
- [14] In his commendably prompt response to the above query, the Learned Magistrate admitted that he did not make mention of any of the provisions of Chapter 10 of the CJA in passing sentence and solely relied on the probation officer's recommendation for a custodial sentence. On the issue relating to offences detailed in section 77(3) of the CJA, the learned Magistrate admitted that he did not refer to the said section but submitted that the aggravating circumstances that were placed before the trial court clearly indicate that the child offender was sentenced in terms of section 77(3)(b) read with schedule 2(3) of the CJA.
- [15] Section 28(2) of the Constitution provides that the best interests of the child are of paramount importance in every matter that concerns the child. In respect of children who are accused of committing offences, section 28(1)(g) provides for measures that are aimed at ensuring minimum detention period for children under conducive circumstances suitable to the age of the child.
- [16] In line with its international obligations established by various protocols³ and giving effect to the rights of children as contained in section 28 of the Constitution, the CJA was enacted to give direction and impetus on the realisation of the rights of children who are accused of committing offences.

³ Article 3(1) of the United Nations Convention of the Rights of the Child, 1989 and Article 4(1) of the African Charter on the Rights and Welfare of the Child, 1990

Chapter 10 of the CJA contains elaborate provisions which serve to guide those dealing with child offenders on the sentencing options that ought to be imposed under different circumstances.

[17] The constitutional values underpinned in these constitutional and legislative prescripts require of judicial officers dealing with sentencing of children to be alive to the separate and distinct system of criminal justice for children as opposed to those provided for in the CPA for it is a constitutional failure for a court to disregard to appreciate and accord child offenders different treatment in considering and imposing an appropriate sentence⁴

[18] In **S v CKM and Others**⁵ the court described the introduction of the present juvenile criminal justice system as embodied in the CJA in the following terms:

‘[I]t introduced a comprehensive system of dealing with child offenders and children coming into conflict with the law that represents a decisive break with the traditional criminal justice system. The traditional pillars of punishment, retribution and deterrence are replaced with continued emphasis on the need to gain understanding of a child caught up in behaviour transgressing the law by assessing her or his personality, determining whether the child is in need of care, and correcting errant actions as far as possible by diversion, community-based programmes, the application of restorative justice processes and reintegration of the child into the community’.

[19] On the facts established *ex facie* the record, it is common cause that the child offender was convicted of robbery and sentenced to 2 years direct imprisonment. In terms of section 77(1)(b) of the CJA, a sentence of imprisonment may only be imposed on a child who is 14 years or older at the time of being sentenced for the offence, as a measure of last resort and for the shortest appropriate period.

⁴ Mpofo v Minister of Justice and Constitutional Development and Others 2013 (2) SACR 407 (CC) para 58

⁵ 2013 (2) SACR 303 (GNP) para 7

[20] Section 77(3) of the CJA provides as follows regarding sentence of imprisonment of a child offender who is 14 years or older at the time of sentencing:

‘(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.’

[21] The definition section of the CJA defines a “child” as “*any person under the age of 18 years and, in certain circumstances, means a person who is 18 years or older but under the age of 21 years whose matter is dealt with in terms of section 4 (2)*”. In terms of section 4(1)(b) of the CJA, the provisions of the Act apply to a child offender if such child was between the ages of 10 and 18 when the child was handed a written notice, served with a summons, or arrested. This much was confirmed in **S v Nteta**⁶ where the court reasoned as follows:

‘In my view, there is a perfectly logical and rational reason as to why the legislature required that the child offender should have been under the age of 18 years when he is alleged to have committed the offence and similarly also have been under the age of 18 years when he was arrested in order for the CJA to find application. The very purpose of the CJA was clearly to establish a criminal justice system for children, and children only, who are in conflict with the law and accused of committing offences.....’

⁶ 2016 (2) SACR 641 (WCC) para 11

- [22] In the present case, it is common cause that the child offender was arrested on 13 February 2024, before turning 18 years and thus the provisions of the CJA applied to him. It is further undisputable that at the time of imposition of sentence on 15 July 2024, the child offender was 18 years old. The question whether sentencing of a child offender who was arrested whilst under 18 years of age but turned 18 before the imposition of sentence is supposed to be dealt with in accordance with the provisions of the CJA has been authoritatively answered.
- [23] In **S v Melapi**⁷ the court held that a purposive interpretation of the provisions of section 28 of the Constitution favours that the sentencing provisions of the CJA should remain applicable for a child who turned 18 during the course of the proceedings, rather than an interpretation that excluded a child from the protection of that Act if he turned 18 during the course of proceedings.
- [24] In **S v RS and Others**⁸ the court held that the sentencing principles and considerations contained in Chapter 10 of the CJA have legal force and effect and non-compliance therewith will result in the sentence imposed by a court to be not only irregular but also unlawful and a violation of the principle of legality.
- [25] The record reveals that the Learned Magistrate failed to apply any provision of Chapter 10 of the CJA when sentencing the child offender in this case and provided no reasons for such failure. The Learned Magistrate's response to the query directed to him on this aspect puts this matter to rest. The Learned Magistrate only considered the fact that the imposition of the sentence was reviewable in terms of section 85 of the CJA.
- [26] The Learned Magistrate failed to exercise a judicial discretion in determining an appropriate sentence for the child offender and, as indicated in his response to this Court's query, solely relied on the probation officer's recommendation without giving reasons on why other sentencing options

⁷ 2014 (1) SACR 363 (GP) para 53

⁸ 2012 (2) SACR 160 (WCC) para 30

contained in Chapter 10 of the CJA could not be considered. This amounts to a misdirection and a gross irregularity that vitiates the sentence imposed by the trial court. It follows that the sentence cannot stand and falls to be reviewed and set aside.

[27] In conclusion, the Learned Magistrate's reply to this Court's query as adumbrated above contains a statement to the effect that Child and Youth Care Centres are reluctant to accommodate a person of 18 years or older. This cannot be a reason to impose a custodial sentence effectively committing and exposing a child offender to older offenders accommodated at various correctional centres.

[28] In **Melapi**⁹, the court clearly set out the interpretation of section 76 of the CJA and concluded that it allows a child to remain in a child and youth care centre up to the age of 21 years. It follows that any reluctance by the management of these centres to accommodate child offenders who have not reached the age of 21 years is an affront to the provisions of the CJA and thus not permissible.

Order

[29] In the circumstances the following order is made:

1. The sentence imposed by the trial court is reviewed and set aside.
2. The matter is remitted to the Magistrate's Court for the District of Pixley Ka Seme sitting at Hopetown for urgent consideration of sentence *de novo* before another Magistrate in accordance with the sentencing principles contained in Chapter 10 of the Child Justice Act, No. 75 of 2008, including hearing of oral evidence from the probation officer and any other relevant witness.

⁹ Footnote 7 above, para 54

3. The child offender, B[...] T[...], should forthwith be released from any Correctional Centre where he is presently incarcerated and to be transferred for placement at Molehe Mampe Child and Youth Care Centre pending the finalisation of the sentencing procedure referred to in paragraph 2 above.

OK CHWARO
ACTING JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY

I concur.

A STANTON
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION, KIMBERLEY