



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

REPORTABLE

High Court Ref No.: 207/2024

Magistrate's Serial No.: 02/2024

In the Special Review:

THE STATE

And

DION DHLIWAYO

Accused

Case No.: A113/2024

In the Appeal:

DION DHLIWAYO

Appellant

And

THE STATE

Respondent

Date of hearing: 14 March 2025

Date of judgment: 25 March 2025

JUDGMENT

PANGARKER J (SHER J CONCURRING)

Introduction

1. This judgment addresses a review and an appeal which emanate from the Athlone Magistrates' Court. The magistrate sent the matter on special review to this Court in terms of section 16(2) of the Child Justice Act 75 of 2008 (CJA) on the premise that an error occurred regarding the age of the accused, who was accused 2 in Athlone case number H367/2022. The magistrate also granted leave to appeal against sentence and released the accused on bail pending appeal. The reasons for doing so become apparent from the history of proceedings set out below.

2. The appeal against sentence was due to be heard in August 2024 but was not heard because the review was pending and given these circumstances and others as I explain, the Judge President was requested to grant permission that a Court be constituted to hear the appeal and review simultaneously. The Judge President granted permission at the end of January 2025, and written submissions were requested from the legal representatives and duly provided. In order not to complicate matters unnecessarily, Mr. Dhliwayo is simply referred to as "*the accused*" in this judgment.

History of proceedings in the Court *a quo*

3. Yanga Botha was accused 1 in the Court *and* according to the record, a juvenile at the time of the offence and appearance. The offence of robbery, of which the accused were charged, occurred on **3 September 2022**. Accused 1 appeared in the Child Justice Court and subsequently absconded from Court, resulting in the magistrate authorising a warrant for his arrest. Subsequently, some seven months later, on **24 April 2023**, the accused was added as accused 2 to the matter. Bail was fixed and eventually paid, with the effect that the accused was on bail, duly extended, until a sentence of three years' direct imprisonment was imposed on him on 4 April 2024.

4. The accused was always legally represented by a practitioner of the Athlone Justice Centre. On 1 November 2023, he pleaded not guilty to the charge and the trial proceeded. On 11 January 2024, the magistrate delivered judgment and consequently convicted the accused of robbery, as charged. Thereafter, the magistrate requested probation and correctional supervision officers' reports, which were duly received and submitted to the Court by agreement on 25 March 2024.

5. On 4 April 2024, and after an *ex parte* address by the legal aid representative and prosecutor, the magistrate sentenced the accused to **3 (three) years' direct imprisonment**. On 9 May 2024, the Court *a quo* heard argument in an application for leave to appeal against sentence and during this application, the legal representative submitted that the accused, whose date of birth was **16 October 2004**, was a minor at the time of the commission of the offence, thus making the provisions of CJA applicable to him.

6. The magistrate subsequently granted leave to appeal and upon realizing that there was an error regarding the accused's age, she also granted bail pending appeal.

According to the record, bail was paid, and the accused was released from custody pending the appeal against sentence.

The trial in the Court *a quo*

7. The accused was charged with robbery of a Samsung A3 cellphone which occurred at Vangate Mall, Athlone on 3 September 2022. He pleaded not guilty and provided no plea explanation. The complainant, Ms Seliwe, testified that on the day, at approximately 14h15, she entered the parking area at the mall and had her cellphone in her jacket pocket and her handbag with her. The cellphone was partially visible. Three males approached, all armed with knives and one of them who bore a scar on his face, demanded her cellphone.

8. She threw her handbag at them and then threw the phone as well. The male with the scar picked up the phone and he and one of the others ran and jumped over the wall. The third suspect, Yanga Botha¹, was apprehended by security personnel and arrested by police who arrived on the scene. The complainant identified the accused as being the person with a scar on his cheek. She remembered him because he threatened her with a knife and the day was etched in her memory. He demanded her phone after she threw her handbag at her assailants. According to the complainant, the accused and the other suspects were one and a half metres from her and armed with knives.

9. Furthermore, on the morning of the day she testified, she saw the accused outside court and asked him what he and his accomplices had done with her cell phone, and once more saw the scar on the right side of his cheek. Upon her enquiry regarding

¹ Accused 1, who absconded

her phone, he informed her that they had sold it for R1200².

10. Approximately 3 months after the incident the investigating officer arrived at her home with a photograph identification album containing photographs of suspects with scars on their faces. She identified the accused immediately from the photo identification album as the person who robbed her.

11. During cross-examination she confirmed that Yanga Botha, when questioned on the scene by the security officers, had stated that the accused had taken the phone. Despite questions regarding her identification of the assailants, the complainant maintained that it was the accused who wanted to stab and kill her and that she could not forget the incident. As to why she did not indicate in her statement after the incident that the person who robbed her had a scar on his face, she stated that she did not know she had to mention everything.

12. The accused's version was put to the complainant, that is, that he and his friends were intending to purchase socks at the mall and asked her for R5 and he denied participating in the robbery. The complainant remained consistent throughout cross-examination that it was the accused who approached her and demanded the cell phone and that after she threw it at the three suspects, he was the person who picked it up. No further witnesses were called.

13. The accused testified that he and his friends Andisiwe and Yanga Botha went to the mall to purchase socks at Mr Price's but found that they were R5 short. They proceeded to ask passers-by for money but were unsuccessful. The complainant approached and they asked her for money, but she suddenly swore and shouted at

² According to the charge sheet, the cellphone was valued at R1699

them, causing them to respond likewise. Andisiwe suggested that they follow the complainant because she was so rude.

14. They proceeded to follow her, and that was when she threw her cell phone at them. The accused and Andisiwe clashed when both moved to retrieve the cell phone from the ground, with Andisiwe coming up trumps. The three friends then ran from the scene, but Yanga was caught by the security guard. The accused denied any involvement in the robbery and distanced himself from the cell phone. He said he parted ways with Andisiwe and confirmed that the complainant's cell phone was later sold for R1200, although he never sold it. The police were looking for the accused and he demanded to be paid his share of the proceeds from the sale of the cell phone.

15. In cross-examination the accused could not properly explain why, when they presumably intended to purchase socks, they would still pursue the complainant. The accused's explanation was that he did so because she shouted and swore at them. He could furthermore not explain why he would reach out for the cell phone when he had nothing to do with any robbery.

16. The accused could not reasonably explain why he did not inform the security guard about the commotion caused by the complainant, why he ran from the scene and why his version in no way indicated that there was a robbery. If his version were to be believed, then the complainant simply threw her phone at them for no reason. The record of the trial indicates that the bulk of his version was never put to the complainant in cross-examination.

The magistrate's judgments on conviction and sentence

17. In her judgment, the magistrate correctly found that the complainant was a good witness, and steadfast and that there was no issue about the identification of the accused who had placed himself on the scene of the robbery. The magistrate found the complainant, as a single witness, to have given a satisfactory account on all the material aspects related to the incident and offence and that there were no discrepancies in her testimony. The magistrate accepted the complainant's account of events. On the other hand, she found that the accused's version about jumping over the wall, selling the cell phone, demanding payment in instalments³ and more, was not reasonably possibly true.

18. The magistrate accepted the State's version and rejected the accused's version on the basis that it was improbable. She found that the accused was the person with the scar on his face and that it was the accused, armed with a knife, who robbed the complainant of her cell phone. The accused was accordingly convicted of robbery as charged.

19. In respect of sentence, the record reflects that the magistrate considered the accused's personal circumstances as follows: he was 19 years old, a first offender, single with no dependents, and had completed Grade 12 schooling. He was illegally in South Africa hence he was not a suitable candidate for correctional supervision. She regarded the offence of robbery to be very serious⁴ in that the complainant was robbed at knifepoint at a busy shopping mall and was clearly traumatized by the incident. The magistrate further found that it was evident from both pre-sentence reports that the accused had not taken responsibility for his actions and had showed no remorse and

³ Particularly in light of his apparent disassociation with the robbery

⁴ Record, p151

thus community service was not suitable as a sentence option. The magistrate concluded by finding direct imprisonment to be suitable and sentenced the accused to three years' direct imprisonment.

Issues to determine

20. The following issues are to be determined:

20.1 The special review: whether the error in respect of the accused's age vitiated the proceedings before the magistrate.

20.2 The appeal against sentence.

The magistrate's referral in terms of section 16(2) of the Child Justice Act

21. In her correspondence addressed to this Court referring the matter on special review in terms of section 16(2) of the CJA read with section 303 of the Criminal Procedure Act 51 of 1977 (CPA), the magistrate explained that the accused was 18 years old when he first appeared in Court, hence no preliminary enquiry in terms of the CJA was held. At all times, he maintained that he was 19 years old, and this age was reflected on the charge sheet. She was accordingly under the impression throughout the proceedings that the accused was an adult, and it was only during the hearing of the leave to appeal application, that she was alerted to the fact that he was 17 years old when he committed the offence. She was satisfied that indeed he was 17 years old at the commission of the offence and that an error occurred regarding his age. According to the magistrate, the Child Justice Act should have applied.

22. The magistrate explained further that, had she been aware that the accused was

a minor during the commission of the offense, she would have applied the provisions of the CJA and imprisonment would have been used as “*a measure of last resort*”, in that she would have wholly suspended the three year imprisonment sentence.⁵ She indicated further that she released the accused on bail subsequent to granting leave to appeal.

The special review: discussion and findings

23. The probation and correctional supervision officers’ reports⁶ record the accused’s date of birth as being **16 October 2004**. These reports were before the prosecutor, the accused’s legal representative and the magistrate during the sentencing proceedings. In the legal representative’s *ex parte* address on sentence, and the engagement between him and the magistrate regarding the accused’s current age, the legal representative referred to the accused’s date of birth when addressing his personal circumstances, but it is apparent that neither the magistrate, prosecutor or legal representative were alive to the significance thereof⁷. Given the date of the incident, it should have been evident to all that the accused was a minor at the time the offence was committed. Despite the legal practitioner’s reference to his client’s age, there seems to have been confusion in that the magistrate at some stage believed that this was a reference to accused 1⁸.

24. From the above exposition I conclude that in relation to his age at the time of the commission of the offence, the accused was 17 years and approximately 11 months

⁵ Magistrate’s correspondence, p 205

⁶ Exhibits F and E

⁷ Record, p70-71

old. In this regard, the magistrate's correspondence and the record confirm that the accused was sentenced as if he were a major/adult at the time when he committed the robbery. The oversight or error did not end there because during the later leave to appeal application, the prosecutor stated that the accused had waited until such application to raise, for the first time, that he was a minor at the time of the commission of the offense. This was clearly an incorrect submission because the accused, via his legal practitioner, raised the age at commission of the offence during sentencing proceedings on more than one occasion, only to have the Court, and the prosecutor, not heed the submission and its significance.

25. Remarkably and inexplicably, the prosecutor at the leave to appeal stage then requested the magistrate to dismiss the averment that the accused was a minor at the time of the offense. When the leave to appeal application was heard, the record included the probation and correctional supervision officers' reports and it would have been a simple task to refer to them to ascertain and confirm whether the accused, and his legal representative, were in fact correct regarding his date of birth and age at the time of the offense.

26. In addition to the reports, the leave to appeal application contained grounds of appeal that the accused was a minor at the time of the commission of the offence, hence the provisions of the CJA applied. In my view, had the prosecutor referenced the reports and leave to appeal application, he/she would have realized at the latest during such application, that the accused and his legal practitioner were in fact correct.

27. Taking the above factual account of the proceedings in the Court *a quo* into

⁸ Record, p69-71

account, it is evident from the record and the magistrate's referral letter that she only realised during the leave to appeal hearing that she had made an error regarding the accused's age. As indicated above, she then acted in terms of section 16(2) of the CJA read with section 303 of the CPA.

28. From the Court *a quo*'s record, it is common cause that there was no preliminary enquiry in the Child Justice Court in respect of the accused as was the case with accused 1, but this is so because he was already an adult at the time of his first appearance on 24 April 2023. To clarify the age issue in relation to the accused, the following must be noted:

28.1 the accused's date of birth is 16 October 2004;

28.2 the offence was committed on 3 September 2022;

28.3 therefore, on the date of commission of the offence, the accused was 17 years and 10 months old;⁹

28.4 the accused turned 18 on 16 October 2022, approximately six weeks after the commission of the robbery¹⁰;

28.5 at his first appearance in Athlone Magistrate's Court on 24 April 2023, the accused was 18 years old; and

28.6 at the date of sentencing on 4 April 2024, the accused was 19 years old¹¹.

29. Section 16(1)-(3) of the CJA states as follows:

⁹ Rounded off

¹⁰ The offence was committed on 3 September 2022

16. Error regarding age of child or adult who is alleged to have committed offence

(1) If, at any stage during proceedings in terms of this Act, a presiding officer is satisfied on the basis of evidence placed before him or her that the age of a child or adult who is alleged to have committed an offence (hereafter in this section referred to as person) is incorrect, the age must be altered on the record of the proceedings in accordance with section 14 and the proceedings must be finalised in accordance with the provisions of— (a) this Act, if the person is found to be a child; or

(b) the Criminal Procedure Act, if the person is found to be an adult, unless the provisions of section 4(2) are applicable.

(2) If a presiding officer is of the opinion that an error regarding age may have caused any prejudice to a person during the proceedings in question, the presiding officer must transmit the record of the proceedings to the registrar of the High Court having jurisdiction, in the same manner as provided for in section 303 of the Criminal Procedure Act, in which event the proceedings must be dealt with in terms of the procedure on review as provided for in section 304 of the Criminal Procedure Act.

(3) Subject to subsection (1), if a presiding officer is of the opinion that an error regarding age has not caused any prejudice to the person, the presiding officer must continue with the proceedings in terms of the provisions of this Act, in accordance with his or her age, as altered.

30. In my view, section 16 should not be read in isolation and must be read with section 4 of the CJA which states that:

4. Application of Act

¹¹ The accused turned 19 on 16 October 2023

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

(a) *was under the age of 12 years at the time of the commission of the alleged offence; or*

(b) *was 12 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 20,*

for that offence.

[S 4(1) subs by s 2 of Act 28 of 2019 wef 19 August 2022.]

(2) *The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97(4)(a)(i)(aa), in the case of a person who—*

(a) *is alleged to have committed an offence when he or she was under the age of 18 years; and*

(b) *is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),*

direct that the matter be dealt with in terms of section 5(2) to (4).

(3)

(a) *The Criminal Procedure Act applies with the necessary changes as may be required by the context to any person referred to in this section, except in so far as this Act provides for amended, additional or different provisions or procedures in respect of that person.*

(b) *For purposes of paragraph (a), Schedule 5 to this Act, which is not part of this Act and does not have the force of law, contains an exposition of the interface between the Criminal Procedure Act and this Act.*

31. The CJA defines “**child**” in section 1 of the Act 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 Act, the provisions of the CJA also apply to a person who is older than 12 years but younger than 18 years when he/she was given notice, served with a summons and arrested for the offence.

32. Standing still at this point, and with reference to the facts of this matter, it is apparent from the legislative provisions that a person older than 12 but under 18 years who was arrested for the offence, is also considered as a child in terms of the CJA. In this matter, one does not know when the accused was arrested for the offence but given that his first appearance was only on 24 April 2023, taken with the information in the reports, I may conclude that he was arrested the day prior to his appearance. That being the case and recalling that he was already 18 at the time of his first appearance, the accused would not have fallen under the provisions of section 4(1)(b)(iii). In other words, the jurisdictional fact which would have triggered the protection of the CJA was absent in that at the time of his arrest, he was not under the age of 18 when arrested for the offence, thus he was not a child.

33. Furthermore, section 4(1) of the CJA is subject to sub-section (2), and section 4(2)(b) allows the prosecution to be instituted by the Director of Public Prosecutions (DPP) against a person who is older than 18 years but younger than 21 years at the time referred to in sub-section 4(1)(b)¹². However, as the Act indicates, this only happens in certain circumstances, the details of which are not relevant for the purposes of this discussion. Suffice then to indicate that where the offender falls within this

¹² In this instance, at the time of arrest

category, the DPP may direct that the provisions of section 5(2) to (4) of the CJA would apply to the person even though he/she was an adult at the relevant time described in section 4(1)(b), such as at the time of arrest¹³.

34. From the facts of this matter and the procedural history, there is no evidence nor any indication from the record that the DPP issued a directive in relation to the accused that the provisions of the CJA would apply to him. Furthermore, section 5(2) to (4) refers to the preliminary enquiry referred to in Chapter 7 of the CJA and to the diversion process, which the accused did not benefit from as he intended to plead not guilty and was an adult at his first appearance. Thus, in view of the above legislative provisions in sections 4 and 5 read with section 1 of the CJA, I conclude that, firstly, the accused was not a child within the definition of the Act at the time when he first came before the magistrate and, secondly, the provisions of the CJA in relation to the holding of a preliminary enquiry and diversion also did not find application.

35. As the issues in the special review and the sentence appeal overlap to an extent, the question which must also be asked is whether the accused, who was 17 at the time of the commission of the offence but an adult at the time of arrest (and subsequent appearance in Court), should have been the recipient of a sentence applicable to a child? In answering this question, I have found the judgment of Binns-Ward J (with Bozalek J concurring) in **S v SN and Another**,¹⁴ most helpful. Briefly, the matter came before the High Court as an automatic review in terms of section 85 of the CJA, emanating from the Regional Court. The accused were each sentenced to 10 years' direct imprisonment after pleading guilty to murder. They were under 18 at the time of

¹³ See *"The legal position of a child charged with a crime who is apprehended as an adult and the impact of sentencing"* by M de Vos, De Rebus, 1 October 2021

the commission of the offence and, unlike as in this matter, still under 18 at the time of their arrest on the charge.

36. Binns-Ward J's concerns included the absence from the record, of an appreciation by the magistrate that the accused were to be treated as children for sentencing purposes even though the Court *a quo* appreciated that it sat as a Child Justice Court¹⁵. Referencing ***Mpofu v Minister for Justice and Constitutional Development and Others***¹⁶, the judgment addressed, *inter alia*, the importance of bearing in mind the provisions of section 28(1)(g) of the Constitution in that children are to be treated differently when it comes to sentencing¹⁷.

37. At paragraphs [10] and [11] of ***SN and Another***, the Court stated the following¹⁸:

"[10] ... When a person commits an offence while under the age of 18, their conduct falls to be judged in the context of these considerations. It would make no sense then to treat them as adults for sentencing purposes simply because the intervening passage of time has resulted in their being adults when sentencing

¹⁴ [2015] ZAWCHC 5

¹⁵ S v SN, par 2

¹⁶ 2013 (2) SACR 407 (CC) par [7]

¹⁷ Mpofu, par 61.

¹⁸ The entire paragraph [10] is not referenced. All footnotes are omitted

occurs. That would mean punishing them for what they had done as children as if it had been done when they were adults. That such an approach would impinge on the substance of the rights provided in terms of s 28 of the Constitution is axiomatic, or so I would have thought. ...

- [11] *It follows that the content of paragraphs 9 -12 of the magistrate's response to my query is predicated on a fundamentally misdirected understanding of the ambit of s 28(1)(g) of the Constitution. It is evident that the magistrate treated the accused as youthful adult offenders rather than children when he imposed sentence. The magistrate placed the accused on the wrong side of the 'stark but beneficial distinction between adults and children created in terms of s 28 of the Bill of Rights and thus approached the determination of their punishment on the incorrect assumption that s 28(1)(g) was not applicable. This demonstrates that there was - to borrow the expression used by Skweyiya J in Mpofu, quoted above¹⁹ - a 'constitutional failure' in the sentencing proceedings. In particular, no consideration was given by the magistrate to sentencing the accused to compulsory residence in a youth care centre in terms of s 76 of the Child Justice Act. This, by itself, necessitates that the sentences imposed must be set aside and the determination of an appropriate punishment reconsidered afresh consistently with the children's rights provisions in the Bill of Rights and proper regard to the sentence options and sentencing objects in the Child Justice Act."*

(footnotes omitted)

38. The circumstances of the accused in **SN and Another** were that they appeared in the Child Justice Court and were minors not only at the time of commission of the offence but also at the time of arrest, and subsequently were adults by the date of sentencing. In this matter, the accused was a minor at the date of commission of the offence, but not at the time of arrest. Be that as it may, it is apparent from the judgment

¹⁹ In para **Error! Reference source not found..**

in *SN and Another* as highlighted above, that the principles applicable when sentencing an offender who was a minor at the time of commission of the offence but subsequently reached the age of majority before or on the sentencing date, would require of the Court to sentence the person as a child offender and not as an adult. To follow the rationale of Binns-Ward J, with which I agree, the accused is to be punished for his deeds committed as a child or minor and is not to be punished as an adult. I see no reason why such principle should not apply in this instance.

39. To then sum up the discussion, section 16, which is the section utilized by the magistrate to refer the matter on special review, refers to “*persons*” who appear in terms of the Act. There was certainly an error or oversight in respect of a failure to consider the fact that the accused was under 18 at the date of commission of the offence, of that I have no doubt. The question, though, is whether such error caused the accused prejudice during the proceedings in question? Section 16(2) of the CJA must be read with section 304(1) of the CPA, which addresses reviews and the determination of whether the proceedings were in accordance with justice.

40. In answering the question regarding prejudice, I highlight that the accused exercised his section 35(3) constitutional rights as follows: he was legally represented throughout the trial until its conclusion; he made an informed choice to plead not guilty and remain silent in respect of a plea explanation; he challenged the State’s evidence through cross-examination of the complainant; he elected to testify in his own defence and presented his version to the magistrate without hinderance or interference. His fair trial rights were exercised further by proceeding to appeal against the sentence, and thus I am satisfied that certainly in respect of the trial and until its conclusion, the oversight in respect of his age did not cause him any prejudice and the proceedings were in accordance with justice. To add, and in view of the reasons I set out above, the accused did not fall in the categories of persons falling under section 4(1) or 4(2).

41. In respect of the sentence, I am of the view that the failure or oversight to take account of the accused's age at the time of commission of the offence, when it was glaringly obvious from the two reports, the Department of Home Affairs refugee status permit document and the certified copy of birth registered in Zimbabwe which were handed into Court as evidence, prejudiced the accused in that he was sentenced as an adult for an offence committed when he was a child offender. Not only did this occur but the sentence imposed was one of direct imprisonment, which is a sentence of "*last resort*" in terms of section 77(1)(b) of the CJA.

42. In my view, the proceedings prior to and during the trial were in accordance with justice. The prejudice caused to the accused by the oversight in realising his age at the time of the offence and failing to sentence him as a child offender, was limited only to that aspect but it had the far-reaching effect that he was imprisoned. At the time of sentencing, the accused was already an adult, although a youthful adult at the age of 19 years. His incarceration lasted from 4 April 2024, when he was sentenced, to 15 May 2024, when he was released on R500 bail pending appeal, by all accounts five weeks.

43. The prejudice, albeit that the Court imposed a sentence of imprisonment, was limited. While I am satisfied that the irregularity did not vitiate the trial proceedings, which were in accordance with justice, the sentence imposed requires closer scrutiny under the appeal. In my view, this is not a situation such as in ***SN and Another*** where the entire proceedings were coloured by the irregularity which resulted in a finding that those proceedings were not in accordance with justice. I intend therefore to confirm the conviction.

44. To conclude the review part of this judgment, I am of the view that the submission by counsel for the accused that the provisions of sections 84 and 85(2) of

the CJA apply, is incorrect as it is based on an incorrect assumption that the accused was to be categorized as a child in terms of the CJA, for the proceedings before the magistrate. As illustrated and found above, he was not, and the CJA did not apply to him except that in respect of sentencing, he should have been sentenced with due regard for the fact that the offence which he was to be punished for was committed when he was still a minor, and not an adult.

The grounds of appeal against sentence

44. The grounds of appeal against the sentence imposed by the magistrate may be summarized as follows:

- 44.1 the magistrate erred in over-emphasising the interests of the community and the severity of the offence and under-emphasising the interests of the accused (appellant).
- 44.2 she did not exercise mercy when imposing sentence in that she imposed direct imprisonment, which would hinder the rehabilitation and reintegration of the accused back into society;
- 44.3 she failed to take into account the personal circumstances of the accused in that he was a minor at the time of the offence and the provisions of the CJA were applicable to him;
- 44.4 the magistrate failed to adequately take into account the recommendation by the probation officer of a suspended sentence; and

44.5 the sentence was startlingly inappropriate and therefore induced a sense of shock and another Court may come to a different conclusion in the matter.

Discussion and findings

45. During argument, counsel for the appellant submitted that should the appeal succeed, the matter should not be remitted to the Court *a quo* for sentencing. In her written submissions, counsel for the State requested similar relief, emphasizing that while the trial was conducted fairly and the irregularity did not vitiate the proceedings, the sentence should be set aside. Having regard to the grounds of appeal and submissions of counsel, I agree that the sentence imposed by the magistrate should be set aside for the reasons which follow.

46. In ***S v Kekana***²⁰, the Supreme Court of Appeal (SCA) held that interference on appeal will only occur in circumstances where the appeal Court is satisfied that the sentence imposed was vitiated by a material misdirection or is disturbingly inappropriate. Having already found that the magistrate should have sentenced the accused for his actions as a child, and not as an adult, a sentence of direct imprisonment should have been the last resort.

47. From my consideration of the record of proceedings, it is apparent that despite requesting probation and correctional supervision reports, the magistrate paid little regard to the probation officer's report particularly and the motivation therein for

²⁰ 2013 (1) SACR 101 SCA 105 par 11

recommending a suspended sentence which I deal with below. The accused's personal circumstances were scantily addressed by the magistrate. When I consider the information in the two reports, it is evident that both officers indicated that the accused was employed. The information in the correctional supervision report indicates that the accused worked as a cleaner and caretaker at a creche since January 2024 and earned R2400 monthly²¹. This information was clearly not considered by the magistrate when she dealt with the accused's personal circumstances.

48. I am of the view that the accused's employment status at the time he appeared before the magistrate for sentencing was a relevant factor in the determination of whether a custodial sentence for someone who was a child at the time of the offence but who, with the passage of time, had become an employed adult, should have been imposed. Furthermore, I agree with the correctional supervision officer and the magistrate that the accused, whose permit to remain in South Africa expired in September 2022, caused him to be illegally in the country, and thus rendered correctional supervision in terms of section 276(1)(h) of the CPA to be an inappropriate sentencing option.²²

49. The magistrate emphasized that the accused displayed no remorse for the commission for the offence nor accepted responsibility for his role in the offence. However, she did not address or enquire why the information on this aspect differed from one report to the other. In the correctional supervision report, it is recorded that the accused admitted his involvement in the robbery, regretted his actions and accepted responsibility for the robbery, yet in the probation officer's report which was compiled a

²¹ Record, p191

²² Exhibit E, p194

month after the other report, it was recorded that he does not express remorse in relation to the offence and the effect it had on the complainant.

50. The stark disparity in the information provided by the two officers was simply not addressed and the record does not indicate that the magistrate either acknowledged it or that she requested that the probation officer be called to testify regarding such information. Ultimately, it was therefore not correct to have found that the accused expressed no remorse for the impact of the offence on the victim as the finding was premised on incomplete or contradictory information. I hold the view that the magistrate should have interrogated the issue by calling the probation officer to testify, which she failed to do.

51. Furthermore, it is also startling that the magistrate only considered the probation officer's recommendation that community service be imposed²³ and failed to appreciate that the sentence recommended at paragraph 7 of that report was a suspended sentence in terms of section 297(1)(b) together with community service at Gugulethu SAPS. Nowhere in her judgment on sentence was a suspended sentence option either addressed or considered and it bears mentioning that the appellant's legal practitioner also submitted that a suitable sentence in the circumstances was a suspended sentence.

52. It bears mentioning also that a suspended sentence is one of the myriad sentence considerations or options available in terms of the CJA and is referred to in section 78 thereof. Having regard to the above discussion, I am of the view that the magistrate over-emphasized the seriousness of the offence and the interests of the

community above the accused's personal circumstances, and in addition, her incorrect assessment of certain aspects in the two reports, and her failure to consider a suspended sentence, led to a sentence which was not balanced, not tempered with mercy and was ultimately startlingly inappropriate. In doing so, the magistrate failed to consider that one of the purposes or aims of sentencing is rehabilitation.

53. I agree with the State that the aggravating factors were that the accused was part of a group armed with knives, that they clearly lay in wait of the unsuspecting complainant to opportunistically rob her, and that he gained financially from the offence. In the accused's favour, however, was his youth, that he was employed, that he intended improving his life and was taking positive steps in that direction, that the complainant was unharmed, that he completed grade 12 and that he was 17 at the time of commission of the offence. These aspects were simply not considered during the sentencing.

54. In my view, by imposing direct imprisonment, the magistrate failed to consider the accused's chances of rehabilitation within the community and so imposed a sentence which was inappropriate and coloured by one or more material misdirection's. In the circumstances, the sentence of direct imprisonment should be set aside and replaced with a suspended sentence.

²³ Exhibit F, p201

Conclusion

55. As recently as 2023, Lekhuleni J (with Nziweni J) in *S v LJ*²⁴, provided guidelines to Courts and sounded a caution to judicial officers who are faced with a child offender, to comply with the provisions of section 28 of the Constitution and the CJA. At paragraphs [14] and [15] of the judgment, the Court set out the various sentencing options which the CJA provides for and emphasized that there should be compliance with the provisions of the Act. I align myself with the findings in *LJ*.

56. In conclusion, this matter highlights the failure of the role players to recognize the importance of heeding the age of the accused, and the effect and consequences of such failure, which caused prejudice to the accused in the sentencing process. While the accused presented himself as a 19-year-old adult on his first appearance, that statement in no way absolved the prosecutor and magistrate from taking note of the accused's date of birth at the opportunities when such information presented itself.

57. In conclusion, it is important that magistrates should thoroughly consider the content of pre-sentence reports and sentence options and should address any disparity and contradictory information in such reports because a failure to do so, as seen in this matter, may result in an imbalanced sentence, tainted by material irregularities.

Order

58. In the result, I would make the following orders:

²⁴ [2023] ZAWCHC 6 par [12]-[15]

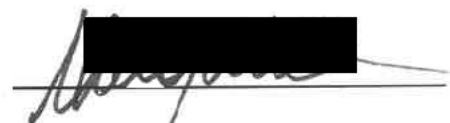
58.1 The special review in terms of section 16(2) of the Child Justice Act 75 of 2008, read with sections 303 and 304 of the Criminal Procedure Act 51 of 1977, is dismissed.

58.2 The conviction is confirmed.

58.3 The appeal against sentence is upheld.

58.4 The sentence imposed by the magistrate on 4 April 2024 is set aside and replaced with the following sentence which is antedated to 4 April 2024:

The accused is sentenced to 3 (three) years' imprisonment, wholly suspended for 5 (five) years, on condition that he is not convicted of robbery or attempted robbery committed during the period of suspension.


M PANGARKER
JUDGE OF THE HIGH COURT

I agree and it is so ordered.


M L SHER
JUDGE OF THE HIGH COURT

APPEARANCES

For the appellant:

Ms S Kuun

Cape Town Justice Centre

For the respondent:

Adv E Erasmus

National Prosecuting Authority

Cape Town