

REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED: YES/NO

CASE No: REV 77/2025

PILLAY AJ

SIGNATURE

DATE

5 November 2025

In the matter between:

AKUCHINYERE OBIKINE EZEAGWU

APPLICANT

and

THE STATE

RESPONDENT

Coram : Muller J et. Pillay AJ

JUDGMENT

KL PILLAY AJ:

- [1] The matter was referred to the High Court on special review in terms of the Child Justice Act 75 of 2008 as amended. In considering whether the proceedings were in accordance with justice regard was had to the matter of Connolly v Ferguson 1909 TS 195n, where Innes CJ at 198 noted the following;

'But as we have laid down upon several occasions recently, magistrates' courts have no inherent jurisdiction, such as the superior courts in the country possess.

The jurisdiction of magistrates' courts must be deduced from the four corners of the statute under which they are constituted.' (My emphasis).

- [2] From the reading of the transcribed record, the child offender was charged with the following offences:
- [2.1] Count 1 C/S 3 of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32/2007 as amended, in respect of an incident which occurred on the 20/08/2024 involving a child complainant MLA M who was six years old at the time of the incident.
- [2.2] Count 2 C/S 5 (1) C/S 3 of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32/2007 as amended, which occurred on the 21/08/2024 involving a child complainant MLA M who was six years old at the time of the incident.
- [2.3] Count 3 C/S 14(A) of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32/2007 as amended, in respect of an incident which occurred on the 21/08/2024 involving a child complainant LR P.
- [2.4] Count 4 C/S 19(a) of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32/2007 as amended, which occurred on the 20/08/2024 involving a child complainant MLA M who was six years old at the time of the incident.

- [2.5] Count 5 C/S 55 read with Section 3 of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32/2007 as amended, in respect of an incident which occurred on the 21/08/2024 involving a child complainant LR P.
- [3] The child offender represented by Ms. Maloka and assisted by his guardian, elected to speak in English and pleaded Not Guilty in respect of all the five counts on the 24 March 2025¹.
- [4] The child offender made admissions in terms of Section 220 of the Criminal Procedure Act², concerning the identity of the child complainants and being in their company on the dates alleged in the charge sheet.
- [5] Following the plea proceedings, VJ M, the mother of the complainant of MLA M testified in respect of the proceedings³. The trial was postponed to the 25 March 2025 for purposes of further trial.
- [6] On the 25 March 2025⁴, the trial was postponed to the 10 April 2025 for the child offender to make further S220 admissions. On the 10 April 2025 the child offender made those admissions, in respect of the various counts in terms of Section 220 and same was received as Exhibit "A"⁵. The State handed in Exhibit "B" and "C" being the birth certificates of the child complainants and exhibit "D" the S 212⁶ affidavit and J88

¹ See page 103 to page 150 of the transcribed record.

² See The Criminal Procedure Act 51 of 1977 as amended

³ See page 151 to page 168 of the transcribed record.

⁴ See page 196 to page 202 of the transcribed record.

⁵ See page 203 to page 216 of the transcribed record.

⁶ See Criminal Procedure Act 51 of 1977 as amended

medical report compiled by Dr Stewart⁷. The exhibits were received by consent contents admitted by the Defence. The case was postponed to the 15 April 2025 for purpose of Judgment.

- [7] On the 15 April 2025, The Court noted in Judgment the following⁸, *"Upon perusing the formal admissions made by the child confirmed by the guardian and confirmed by the legal representative, the Court found the following problems, I will start with Count 5 the one of attempt to commit a sexual offence which is attempted rape. The facts there do not tally with the offence itself. The conduct of the child offender to the victim does not amount to attempted rape. It cannot be the victim who is pulling down the trouser of the child offender, is everybody here the relatives of the child and the victim relatives? As I have already indicated it cannot be the victim who is pulling down the trouser of the child offender it should have been the other way round in order to be an attempted rape. It should have been the child offender who pulled down the pants of the victim in order for the offence to amount to attempted rape. **Therefore, in this case the state should have charged the child offender with contravention of Section 14 Act 32/2007 which is the intimidation. That is the, the problem the Court considered and noted during the process of perusing the formal admissions by the child and also perusing the charge sheet and it is unmatched. The second problem that this Court discovered is the problem with the J88 report. When the J88 was read into the Court by the state in the history that has been stated to the doctor by the child victim, the victim, okay LM then the state read the [indistinct] as to how the child was raped. The doctor indicated that the child reported that the perpetrator inserted his finger in her vagina which is count 1. Which triggered the state to charge the child offender with the count of rape which is count 1. Now there is this last provision that the state overlooked***

⁷ See page 217 to page 220 of the transcribed record.

⁸ See page 225 to 228 of the transcribed record.

where the doctor has indicated that the perpetrator put his penis in her mouth, in the victim's mouth. If, if one look at the elements of rape, the explanation of sexual penetration is as follows: it includes any act which causes penetration to any extent whatsoever by the genital organs, anus or mouth of another person. And the mouth, inserting the organ of another person into another person that is rape itself. That is provided for by Section 1 of Act 32/2007 which is the Criminal Law Sexual Offences and Related Matters Amendment Act 32/2007. On those basis, the Court at this stage cannot accept the admissions of the child because of the problems that I have indicated and picked up. And as the Court is that I am seated here I am obligated to see that justice is done not only for the victims but also for the child offender therefore I cannot sit back when there are some problems. Those are the problems that were overlooked by the state and the Court cannot put the thumb to the mistakes made by the state. I am not here to side with any party the state or the defence, the child offender or the victims I am here to dispense justice. I am accountable to the law and to the Constitution and to dispense the law to all the country without favor, prejudice and without fear. I thank you".

- [8] The State thereafter informed the Court that the State is withdrawing Count 5 in terms of Section 86 of the Criminal Procedure Act 51 of 1977 and also adding a count of C/S 3 of the Criminal Law (Sexual offences and Related Matters) Amendment Act 32/2007 as amended, in respect of an incident which occurred on the 20/08/2024 involving a child complainant MLA M pursuant to the Courts address and this was done in terms of Section 86 (Count 5) of the Criminal Procedure Act 51 of 1977⁹.

⁹ See page 228 to page 236 of the transcribed record.

[9] On the 16 April 2025 the child offender's legal representative informed the Court that the child had no objection to the abovementioned changes and the Court ruled it to be admissible.¹⁰ Thereafter Count 5 was removed from the charge sheet as highlighted above and in its place Count 5 the charge of C/S 3 Act 32 of 2007 was read into the record and explained to the child offender.¹¹

[10] The child offender did not plead to this charge but made S220 admissions which was marked as Exhibit "A", which was the amended formal admissions as the Court indicated the previous ones, "*are not considered by Court*".¹² The child offender was convicted as per the Judgment,¹³ on the amended charges and subsequently sentenced to

On the 16 April 2025, the child offender was convicted of the following offences:

- (a) *Count 1 and Count 5 – two counts of Rape – Contravention of S3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.*
- (b) *Count 2 – Sexual Assault – Contravention of S 5 (1) of Act 32 of 2007.*
- (c) *Count 3 – Sexual Intimidation – Contravention of S 14 (A) of Act 32 of 2007*
- (d) *Count 4 – Display of Pornography to Children – Contravention of 19(a) of Act 32 of 2007.*

[2] *In terms of S77 (4)(a) of the Child Justice Act 75 of 2008, the child offender is sentenced as follows*

¹⁰ See page 241 to page 246 of the transcribed record.

¹¹ See page 247 to page 254 of the transcribed record.

¹² See page 254 to page 259 of the transcribed record

¹³ See page 265 to page 270 of the transcribed record

- (a) *Count 1 – Rape – Contravention of S3 of the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007, the child offender is sentenced to 10 years of imprisonment)*
- (b) *Count 2 – Contravention of S 5(1) of Act 32 of 2007 [Sexual Assault], the child offender is sentenced to 3 years of imprisonment.*
- (c) *Count 3 – Contravention of S14(A) [Sexual Intimidation], the child offender is sentenced to 3 years imprisonment.*
- (d) *Count 4 – Contravention of S19(a) of Act 32 of 2007 [Display Pornography to Children], the child offender is sentenced to 3 years imprisonment.*
- (e) *Count 5 – Rape – Contravention of S3 of Act 32 of 2007 the child offender is sentenced to 10 years of imprisonment.*

[52] In terms of Section 280(2) of the Criminal Procedure Act 51 of 1977 as amended, it is ordered that the sentence in Count 2, 3, 4 and 5 shall run concurrently with the sentence in count 1. The effective term is 10 years of imprisonment.

[11] Having considered the record, a query was submitted to the Presiding Officer and also a request for the opinion of the Director of Public Prosecutions, concerning the procedure utilized in Court. Comment was sought on the following aspects.

[11.1] How was the matter postponed for purpose of Judgment, without the finalization of cross examination of the State Witness and without either the State or Defence closing their cases and the parties addressing the Court on the merits of the case? In terms of which legislation was the abovementioned procedure followed?

[11.2] In respect of the proceedings on the 15 April 2025, can a charge be withdrawn and or added after a child offender has already pleaded? Can the provision of

Section 86 of the Criminal Procedure Act¹⁴ be utilized to effect these changes?

Is it appropriate for the provisions of Section 220 admissions to be made concerning a charge to which the child offender had not pleaded?

[11.3] The Presiding Officer was requested to indicate why the charge sheet, and annexures did not correspond with the transcribed record of proceedings? Was it appropriate to remove Count 5 C/S 55 read with Section 3, Act 32 of 2007, which occurred on the 21/08/2024 involving a child complainant LR P which the child offender pleaded to on the 24 March 2025, and then have it replaced with Count 5 C/S 3 Act 32 of 2007 offence which occurred on the 20/08/2024 involving a child complainant MLA M, to which the child offender had not pleaded?

[11.4] On what basis and in terms of which legislation, could the first S220 admissions which was received as exhibit A be replaced with the second S220 admissions as exhibit A?

[11.5] As the keeper of the record, was the charge sheet and record, in line with the transcribed digital recording, and at the time Judgment was delivered was it not appropriate for the Court to consider all the evidence, including the witness who testified and whose evidence was just left without being finalized?

[11.6] Whether these proceedings were in accordance with justice?

¹⁴ See Criminal Procedure Act 51 of 1977 as amended.

[12] Both the Presiding Officer and the Director of Public Prosecutions responded, and their input were greatly appreciated.

[13] The Criminal Procedure Act provides the mechanism on how a criminal trial was to proceed in Court. The provisions of Section 106 provide as follows:

106. Pleas

(1) *When an accused pleads to a charge he may plead—*

(a) *that he is guilty of the offence charged or of any offence of which he may be convicted on the charge; or*

(b) *that he is not guilty; or*

(c) *that he has already been convicted of the offence with which he is charged; or*

(d) *that he has already been acquitted of the offence with which he is charged; or*

(e) *that he has received a free pardon under section 327(6) from the State President for the offence charged; or*

(f) *that the court has no jurisdiction to try the offence; or*

(g) *that he has been discharged under the provisions of section 204 from prosecution for the offence charged; or*

(h) *that the prosecutor has no title to prosecute.*

(i) *that the prosecution may not be resumed or instituted owing to an order by a court under section 342A(3)(c).*

(2) *Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.*

(3) *An accused shall give reasonable notice to the prosecution of his intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which he bases his plea: Provided that the requirement of such notice may be waived by the Attorney-General or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.*

(4) *An accused who pleads to a charge, other than a plea that the court has no jurisdiction to try the offence, or an accused on behalf of whom a plea of not guilty is entered by the court, shall, save as is otherwise expressly provided by this Act or any other law, be entitled to demand that he be acquitted or be convicted.*

[14] It was expected that the child offender was entitled to be convicted or acquitted in respect of the offences to which he pleaded. Moreover, from the record it was clear that evidence was already being led by the State, to prove the allegations implicating the child offender in the commission of the offence. It was also clear that once the child offender had made certain admissions in terms of Section 220 of the Criminal Procedure Act, it was prudent that the witness testifying have her evidence finalized and the State and Defence both afforded the opportunity to close their respective cases and address the Court before the matter could be postponed for Judgment. This was not done, instead once the S220 admissions were read into record the Presiding Magistrate postponed the case for Judgment. This was the first of many irregular procedures and orders under the control and direction of the Presiding Magistrate. This misstep placed the entire proceedings in question, as to whether the interest of justice

was served and whether the Court as the upper guardian of the child offender in the Judgment was bias against this child, when one considers that the offences implicating the child offender were as per the charge sheet and his plea. It was improper for the Presiding Magistrate to find further charges to be instituted against the child offender, flowing from the information contained in the J88. That was the moment when the Presiding Magistrate took over the role of the Prosecutor.

[15] The Judgment as indicated above set in motion the use of Section 86 of the Criminal Procedure Act to withdraw Count 5 and add a new Count 5. The provisions of Section 86 of the Criminal Procedure Act provides as follows:

86. Court may order that charge be amended

(1) *Where a charge is defective for the want of any essential averment therein, or where there appears to be any variance between any averment in a charge and the evidence adduced in proof of such averment, or where it appears that words or particulars that ought to have been inserted in the charge have been omitted therefrom, or where any words or particulars that ought to have been omitted from the charge have been inserted therein, or where there is any other error in the charge, the court may, at any time before judgment, if it considers that the making of the relevant amendment will not prejudice the accused in his defence, order that the charge, whether it discloses an offence or not, be amended, so far as it is necessary, both in that part thereof where the defect, variance, omission, insertion or error occurs and in any other part thereof which it may become necessary to amend.*

(2) *The amendment may be made on such terms as to an adjournment of the proceedings as the court may deem fit.*

- (3) *Upon the amendment of the charge in accordance with the order of the court, the trial shall proceed at the appointed time upon the amended charge in the same manner and with the same consequences as if it had been originally in its amended form.*
- (4) *The fact that a charge is not amended as provided in this section, shall not, unless the court refuses to allow the amendment, affect the validity of the proceedings thereunder.*

[16] As highlighted above, Section 86 is utilised to clear up a defect in the allegations contained in the charge sheet, so that the offence is clearly identified. It makes no provision for the withdrawal and or substitution of charges, with specific reference to this case, where the child offender had already pleaded and in law was entitled to be convicted or acquitted of those charges. The State could not rely on Section 86 to withdraw what has already been pleaded to by the child offender. The State was not entitled to use Section 86 to add a new charge, especially one to which the child offender had not pleaded, when the trial commenced, as was evident in record of proceedings. This new offence was only identified by the Presiding Magistrate when Judgment was being delivered and at that stage it was too late for further charges to be put to the child offender, and something which the Presiding Magistrate, Prosecutor and Defence Attorney, should have been alive to in respect of the conduct of proceedings in criminal Court.

[17] Regard was had to the case of *S v Gulekane*¹⁵ which dealt specifically with the irregularity by the State to withdraw a charge after the accused had pleaded to the charge where the Review Court in that matter noted as follows,

¹⁵ See (HC 04/23) [2023] ZANWHC 206 (14 November 2023)

"It is settled law, that subsumed in section 6(a) and (b) of the CPA, are two distinct independent prosecutorial processes. Section 6(a) empowers a Director of Public Prosecutions or any other duly authorised prosecutor, who is still dominus litis, to withdraw the charge/s before the accused has pleaded, in which event the accused is not entitled to a verdict of acquittal on that charge/s. Section 6(b) speaks to the procedure that finds application after an accused has pleaded, in which case the stopping of the prosecution at the instance of a Director of Public Prosecutions or any other duly authorised prosecutor, only empowers the court trying the accused, to acquit the accused in respect of that charge/s", and further at paragraph[15] The withdrawal of the charge of malicious injury to property (count 2) by the prosecutor, in which Magistrate Spandiel acquiesced, in the face of a charge sheet which clearly indicates that a plea of not guilty was noted by Magistrate Jacobs to that charge, falls foul of section 6(b) of the CPA. This constitutes a gross irregularity in the proceedings and in the ordinary course stands to be reviewed and set aside".

- [18] The Legal Representative was clearly inexperienced and unaware of how a criminal trial was to be conducted. This further prejudiced the child offender whose rights through this inexperienced Legal Representative was not protected, resulting in there being no objection to the proceedings in Court and the resultant S220 admissions, without the child offender pleading to the charge, perpetuated this already irregular proceedings. It was disheartening to note that the Presiding Magistrate State and Defence aligned themselves to the irregular proceedings, totally contrary to the provisions of the Criminal Procedure Act, Child Justice Act and the Constitution. From the onset this case was riddled with irregularities.

- [19] In as much as the Presiding Magistrate sought that this Court disregard the new Count 5 which was added, and accept the remainder of the proceedings to be in accordance with justice and confirm the child offender's conviction and sentence, this unfortunately was not possible in light of the glaring irregularities, in respect of the entire case. This Court aligns itself with the submissions by the Director of Public Prosecutions that the proceedings were not in accordance with justice and that same be set aside.
- [20] The further irregularity which needs mentioning pertained to the record keeping by the Presiding Magistrate who as the keeper of the record held a vital position in protecting the integrity of the legal proceedings, to ensure an official record of the case. This record serves as a historical account of the proceedings and Judgment, ensuring transparency and accountability in the Judicial system. The Presiding Magistrate by maintaining a proper record of the proceedings in Court, upholds the rule of law and ensures that justice is served fairly and impartially. Their role in maintaining accurate records, preserving evidence, and issuing legally binding decisions cannot be overstated and is crucial for justice not only being done but being seen to be done. The count 5 to which the child offender initially pleaded and the first exhibit A, namely the S220 admissions were received and already formed part of the record. It was highly improper and irregular that they were removed and replaced by the new count 5 charge which were supposedly done in terms of Section 86¹⁶ and the new S220 admissions made by the child offender. All these processes contrasted with the transcribed record and not in accordance with Justice. As the keeper of the record, the Presiding Magistrate was obliged to ensure that all the documents were included in the record of proceedings and

¹⁶ See the Criminal Procedure Act 51 of 1977

not add and remove documents which is indicative of improper record keeping and should be avoided at all costs.

[21] It is for the abovementioned reasons that this Court is satisfied that the proceedings were not in accordance with justice and the conviction cannot stand and the subsequent sentence, which was imposed, also has to be set aside. This Court notes the seriousness of the offences committed and therefore orders that the case be proceeded with *de novo* before another Presiding Magistrate.

ORDER

[22] Accordingly I make the following Order;

[22.1] The conviction and sentence is set aside.

[22.2] The case is remitted back to proceed *de novo* before another Presiding Magistrate.

[22.3] The period of the sentence already served will no doubt be considered if the child offender is convicted.


KL PILLAY

Acting Judge of the High Court
Limpopo Division, Polokwane

I concur,


GC MULLER

Judge of the High Court
Limpopo Division, Polokwane