

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

(Coram: Gamble, J *et Henney, J*)

[Reportable]

High Court Ref No: 7/2023

Magistrate's Case No: C547/2022

In the matter between:

THE STATE

vs

T[...] O[...]

REVIEW JUDGMENT: 4 AUGUST 2023

HENNEY, J

Introduction.

[1] The accused, a 19-year-old male, appeared in the Caledon Magistrate's Court on a charge of House Breaking with Intent to Steal and Theft. It is alleged in the charge sheet that on 1 October 2022 he broke into the property of the complainant and stole eight cellular phones belonging to the complainant.

[2] The accused elected to conduct his own defence after his right to legal representation had been explained. After several appearances in the Magistrate's Court, on the 11 January 2023 he tendered a plea of guilty to the alleged charge. The Magistrate questioned him in terms of the provisions of section 112(2) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[3] During the questioning, the accused admitted that he gained entry by breaking open the complainant's house, using a screwdriver to force open the door. He further admitted that after having entered the house, he stole 8 cellular phones belonging to the complainant. They left the house of the complainant afterwards with the intention to sell the cellular phones. They however only managed to sell two of the phones for an amount of R1500,00. The Magistrate, after having given the state as well as the accused an opportunity to address the court, sentenced him to a period of Two (2) years imprisonment.

[4] During the sentencing proceedings, the prosecutor proved the following "previous convictions" as reflected on the SAP69 Criminal Record against the accused:

- Theft –committed on 19 August 2020 and the contravention of the provisions of section 45(1) of Sea Fisheries Act 12 of 1988, committed on 21 March 2020. Both matters were referred to the Children's Court and on 14 December 2020, the accused was referred to a Child and Youth Care Centre.

- Contravention of the provisions of section 4(b) of the Drug and Drug Trafficking Act 140 of 1992- committed on 8 January 2022. Accused was sentenced to a fine of R200 with the option of 20 days imprisonment.¹

[5] What is apparent from the SAP69's is that both the matters on 14 December 2020 were finalised in the Children's court. The accused who at that stage was still a child, was referred to a Child Youth Care Centre, by the same Magistrate who conducted the criminal proceedings in this matter. This is also apparent from a reading of the sentencing proceedings, where the following exchange took place between the accused and the Magistrate²:

Hof: "Kyk T[...], ek ken mos nou vir jou van voor jy 18 of 19 geraak het, jou en jou broer.

Beskuldigde: Ja meneer.

Hof: En ek meen mos nou ek ken julle Ma, en ek kan onthou die eerste keer wat jy hier in gekom het, skoon gesig, die klonkie. Nou is jy ge-tattoo en jy het chappies op jou arm en jou voorkop en goed, en dit lyk net vir my jy beweeg, ek wil amper sê terug in tyd. Asof jy nie vorentoe gaan nie, jy is dan nog so jonk jy weet jou hele lewe lê voor jou.

Beskuldigde: Ek wil graag vorentoe gaan, meneer.

¹ Record page 9

² Court: Look T[...], I knew you before you turned 18 or 19, you and your brother.

Hof: Ja, maar nou jy sien jy wys nie vir mens jy wil vorentoe gaan nie, jy wys nie jy wil verander nie, jy wys nie jy wil 'n beter mens word nie. Ek luister nou die name wat jy genoem het nê, wat nou saam met jou was, daardie is manne wat twee, drie keer 'n jaar by die Hof kom vir huisbraak en vir diefstalle, en daardie is nou die klas element wat jy glad nie meer moet meng nie ... [onduidelik], maar dit is keuses wat jy mos maak T[...] oor wie jy meer moet uithang en daardie tipe ding.

En ongelukkig is dit so, jy ken die Afrikaanse spreukwoord; meng jou met die varke, of meng jou met die semels dan vreet die varke jou op as kos. Maar, nou daardie ouens moet jy vanaf weg bly, jy is nog so jonk ten spyte van jou tattoos en al die chappies wat jy het op jou arms en jou gesig. Jy is so jonk, jy kan net so besluit om jou lewe om te draai, so eenvoudig soos dit. Maar, nou weet ek ook al jou Ma is half raad op met jou en jou broer, ek dink die een was ook nou die dag hier. Wat is hom naam?

Beskuldigde: E[...] O[...].

Hof: E[...], ja.

Beskuldigde: Hy moet die 17de kom.

Hof: Ja, en jou Ma was hier gewees en jou Ma was ook raad op met julle, en ek het so gehoop dat daardie Kinder Hof waar julle na die jeug-sentrum toe gegaan het vir julle gaan change, maar dit het nie. In teendeel ek dink dit het dit erger gemaak.”³

³ Accused: Yes, sir

Court: What I actually say is that I know your mother. I can remember the first time you came in here, clean face, this boy. Now you have tattoos on your arm and forehead, and it seems to me as if you are moving back in time. It is like you are not moving forward, you are still so young and you know, your whole life lies ahead of you.

[6] It was for these reasons, that when I received the review, I addressed the following query to the Magistrate:

“The Magistrate should provide the review court with reasons why he was of the view that it was appropriate for him to preside in this matter given his previous interaction with the accused in court, on page 12 and 13 of the record.

From the record it also seems that the Magistrate was aware of the fact that the accused had previous convictions prior to it being presented to court during the sentencing proceedings. He was cognizant of the fact that the accused had previously been referred to a Child and Youth Care Centre for the offences as stipulated on his SAP 69’s. These facts it seems had a direct bearing on the sentence the Magistrate had imposed on the accused.”

In his reply, the Magistrate said the following:

Accused: I would really like to move forward, sir.

Court: Yes, but you are not showing me that you want to move forward, you do not show that you want to change, you do not show that you want to become a better person. I have listened to the names of the people that you had mentioned, that were with you, those are men that come to court two, three times a year for housebreaking and theft, and this is the type of persons that you should not mix with anymore...[unclear], but that is the choices you make. T[...], with whom you associate and are involved with. Unfortunately if you associating with the wrong people, you will end up like them. You must stay away from these kind of people, you are still so young despite your tattoos that you have on your arms and face. You are so young, and can decide in an instant to turn your life around, as easy as that. But, I now already know that your mother is at her wits end with you and your brother, I think that he was also at court, the other day. What is his name?

Accused: E[...] O[...]

Court: E[...], yes.

Accused: He must come on the 17th.

Court: Yes, and your mother was here and your mother is at her wits end with you, I had so hoped that the Children’s Court, where you were sent to the Child and Youth Care Centre, would make you change, but it didn’t. On the contrary, I think it had made it worse.

“The trial Magistrate encountered the accused as (sic) 16 year old child in conflict with the law during 2020. The accused at that stage had two criminal cases and(sic) were (sic) these matters transferred to the Children’s Court in terms of section 64 of Act 75 of 2008 (Child Justice Act) as it was deemed that the accused (at that stage(sic) still only 16 years old) was “a child in the need of care and protection.”

The child (accused T[...] O[...]) ended in the Children's Court on file 14/1/3- 43/2020. The Children’s Court Magistrate (in the current matter(sic) trial Magistrate) ordered in terms of section 156 of Act 38 of 2005 Children’s Act to a Child and Youth Care Centre. This decision was taken in light of all the available evidence which included the Social Workers Reports and the child's mother's input. That was the only contact the trial Magistrate had with the accused prior to his appearance on the current case. The trial Magistrate also had an encounter with the accused sibling as can be seen from record Page 12 paragraph 10 “...jou en jou broer”. And Page 13 paragraph 10 “... met jou en jou broer...” That is how far the trial Magistrate’s knowledge of the accused goes.

The trial Magistrate did not have any prior knowledge of the accused previous convictions as the Children's Court proceedings were not criminal court of nature and would no criminal record be available on those proceedings. (sic) The criminal record of the accused relates to convictions after the Children’s Court in 2020. The proceedings in the Children's Court gave the trial Magistrate a better insight into the personal circumstances of the accused. Those proceedings did have a direct bearing on the sentence imposed, but not to the prejudice of the accused as the sentencing court took other factors as provided for in Zinn 1969(2) SA 537 (A) into account during the sentencing proceedings. The trial Magistrate did not deem it necessary to

recuse himself from the proceedings as it was a guilty plea in terms of section 112 (1) (b) of the CPA with the safeguards if the court had to apply section 113 of the CPA. The trial Magistrate is not aware of any legislation which requires the presiding officer to recuse him/herself from proceeding is(sic) such officer presided over Children Court proceedings a few years prior when the accused was to the juvenile in conflict with the law. However, the trial Magistrate will take the guidance from the Honourable Review judge if such precedent do exist.”

[7] The first question that arises in this matter is whether it is appropriate for a judicial officer that previously dealt with a child in Children’s Court Proceedings to preside in a subsequent criminal trial of that same person.

[8] In this regard, it would be appropriate to look at the provisions of the CA which regulates Children’s Court proceedings and the relevant provisions of the Child Justice Act 75 of 2008 (“the CJA”) as well as the CPA which regulates all the proceedings involving a child.

[9] A further aspect of concern is the fact that on the SAP 69’s handed in at court during the sentencing proceedings, referred to 14 December 2020 that were referred to Children’s Court when the accused was 16 years old. Even though the accused was a child at the when he allegedly committed these offences, it seems that the crimes and the Children’s Court order were recorded against his name at the Criminal Record Centre in the register of the South African Police as a previous conviction. From the explanation given by the Magistrate as referred to above, it clearly is without a doubt, these matters which he referred to during the sentence proceedings.

[10] The magistrate further asserts that in the initial proceedings in 2020 when the accused was still regarded as a child he appeared in the Criminal Court and was dealt with in terms of the provisions of the CJA. The accused then appeared before a different Magistrate in the Child Justice Court on a criminal charge in terms section 63 of the CJA. Upon being found that the accused was a child in need of care and protection the matter was then referred to the Children's Court in terms section 64 of the CJA.

[11] Section 64 of CJA states, that *'if it appears to the presiding officer during the course of proceedings at the Child Justice Court, if the child is a child in need of care and protection referred to in section 50 the court must act in accordance with that section.'* If the presiding officer in the child justice court is of the view that the child is in need of care and protection the presiding officer may refer that child to the Children's Court.

Section 50 of the CJA further provides as follows:

'50 Referral of children in need of care and protection to children's court

If it appears to the inquiry magistrate during the course of a preliminary inquiry that—

- (a) a child is in need of care and protection referred to in section 150(1) or (2) of the Children's Act, and it is desirable to deal with the child in terms of sections 155 and 156 of that Act; or*
- (b) the child does not live at his or her family home or in appropriate alternative care; or*
- (c) the child is alleged to have committed a minor offence or offences aimed at meeting the child's basic need for food and warmth, the inquiry magistrate may stop the proceedings and order that the child be brought before a*

children's court referred to in section 42 of that Act and that the child be dealt with under the said sections 155 and 156.'(emphasis added)

[12] Whilst this section refers to the "inquiry magistrate" which refers to a preliminary inquiry that must be conducted in terms of section 43 read with section 49 of the CJA, it is also applicable in cases where a child accused had been referred to trial in terms of section 47(9) read with 49(2) of the CJA.

[13] The consequences of an order in terms of section 64 of the CJA to deal with a child who appears to be in need of care and protection referred to in section 150 (1) or (2) of the CA to be dealt with in terms of section 155 and 156 of the CA, effectively brings to an end or stops any criminal proceedings against the child in terms of which he had been prosecuted and subsequently arraigned before the Child Justice Court in terms of section 63 of the CJA. Thereafter, the provisions of the CA take effect. And the provisions of Section 156 of the CA states that:

(1) If a children's court finds that a child is in need of care and protection the court may make any order which is in the best interests of the child, which may be or include an order–

(a) ...

(b) ...

(c) ...

(d) ...

(e) ...

(i) ...

(iii) ...

(iv) ...

- (v) ...
- (f) ...
- (g) ...
- (i) ...
- (ii) ..
- (h) *that the child be placed in a Child and Youth Care Centre selected in terms of section 158 which provides a secure care programme suited to the needs of the child, if the court finds—*
 - (i) *that the parent or care-giver cannot control the child; or*
 - (ii) *that the child displays criminal behaviour.*

[14] This brings me to the second question in this matter, which is, whether it was lawful to record such an order as a previous conviction against the name of such a child. For obvious reasons such a child cannot incur any criminal conviction neither does such a child acquire a criminal record, because all criminal proceedings against such a child from the moment such an order is made is effectively stopped. Any order therefore made in terms of the provisions of section 156 of the CA shall not appear on any document which purports to be the criminal record of such a child as has happened in this case, because the prosecution was stopped against such a child.

[15] It follows therefore that the entry of any order in terms of section 156 of the CA onto the criminal record against the name of a child is therefore unlawful, as has happened in this case. Which brings me to the second issue that as such any reference in the SAP 69's to the order that was made in terms of section 156 of the CA, as in this particular case, which the order that the child be placed in a Child and Youth Centre was unlawful. Furthermore, the proof thereof as a previous conviction

in subsequent criminal cases was not only inadmissible, but also unlawful and in contravention with the provisions of the CA.

[16] The other difficulty I have is, with the fact that the Magistrate was also the Magistrate that dealt with the Children's Court proceedings. The references to those proceedings during the current proceedings by the very same Magistrate is not only inappropriate but also unlawful. The CA does not permit the disclosure of any information of those proceedings which remains confidential to protect the best interest of the child.

[17] It is for these reasons that certain provisions of the CA seek to protect the identity of a child and prohibits the publication or disclosure of any information concerning Children's Court Proceedings. In terms of section 56⁴ of the CA proceedings in the Children's Court are closed and not open to the public. Section 66 of the CA further provides that no person has access to children's court records except for performing official duties in terms of the act; or in terms of an order of court, if the court finds that such access would not compromise the best interest of the child; for the purpose of any review or appeal; or for the purpose of bona fide

⁴ Section 56: Attendance at proceedings

Proceedings of a children's court are closed and may be attended only by-

- (a) a person performing official duties in connection with the work of the court or whose presence is otherwise necessary for the purpose of the proceedings;
- (b) the child involved in the matter before the court and any other party in the matter;
- (c) a person who has been instructed in terms of section 57 by the clerk of the children's court to attend those proceedings;
- (d) the legal representative of a person who is entitled to legal representation;
- (e) a person who obtained permission to be present from the presiding officer of the children's court; and
- (f) the designated social worker managing the case.

research or the reporting of cases in law reports, provided the provisions of section 74 are complied with.

[18] A further important provision of the CA is to protect the confidentiality of Children's Court proceedings, the identity of a child or any information relating to those proceedings. This is found in section 74 which states that *'no the person may without the permission of a court in any manner publish any information relating to the proceedings of a Children's Court which reveals the name or may reveal the name or identity of a child who is a party or a witness in the proceedings.'* Davel and Skelton under Chapter 4 on their discussion of this provision states the following:⁵

"A very important provision is contained in s 74 of the Act, which specifies that no information relating to the proceedings or the identity of a child who is or was concerned may be published. The court may, however, authorise the publication of such information. Whereas the Child Care Act had the proviso that this authorisation could only be granted if such publication would in the opinion of the commissioner of welfare be just and equitable and in the interest of any particular person, this has not been included in the present Act.

A similar provision is s 154(3) of the Criminal Procedure Act, which prohibits the publication of any information that reveals or may reveal the identity of an accused or witness under the age of 18 at criminal proceedings. The presiding officer is the only person who can authorise such publication if he or she is of the opinion such publication is just and equitable and in the interest of any particular person.

⁵ Commentary on the Children's Act RS 13 2022 at Part 4 Miscellaneous matters (ss 74–75)

Media reports that can lead to the identification of child victims are therefore unlawful. The media may respond by saying that the parents or school consented to being interviewed, but the question then arises as to whether that was informed consent. The identification of child victims, who may or may not testify, is very serious and has enormous consequences for the healing of a victim. This is a justifiable limitation on the right to free speech.

The protection of children's identity from media reports was the subject matter in the case of Johncom Media Investments Ltd v M and Others (Media Monitoring project as Amicus Curiae)⁶ in which the Constitutional Court, albeit in relation to the Divorce Act, declared that the publication of the identity of and any information that could make known the identity of any party or child in divorce proceedings is prohibited. The prohibition stands as the general rule and may only be deviated from in exceptional circumstances when the court's authorisation has been granted.”

[19] It is therefore also not open to anyone to disclose any information of those proceedings by any person, including the presiding officer, unless permitted to do so by the relevant provisions of the CA as referred to above, and even more so in subsequent criminal proceedings in which that very same Magistrate presides. No person with any knowledge of those proceedings may reveal what happened during those proceedings to anyone or in any other proceedings where that child may be involved. Section 305(1) (b) of the CA makes any contravention of this section a criminal offence.

⁶ 2009 (4) SA 7 (CC).

[20] The Magistrate in his reply to my query submits that he did not have prior knowledge of the accused's previous convictions as the Children Court proceedings were not of a Criminal Court in nature and in the result, there would be no criminal record of those proceedings. That may well be so, but he had prior knowledge of the fact that the accused was a child in conflict with the law, with whom he had dealt during Children's Court proceedings after the child was referred to that court by the Child Justice Court. This fact is evident during his interaction with the accused during the sentencing proceedings. He was the source of that information.

[21] The Magistrate furthermore either failed to observe or was aware that the order which he made in the Children's Court referring the accused (as a child) to a Child and Youth Care Centre, somehow was entered against the name of the child by the South African Police Services' Criminal Record Centre, as a "previous conviction". The SAP 69's subsequently formed part of the record to prove the accused's previous convictions. Afterwards this was signed by the accused as well as the Magistrate. Both of the offences that ought not to have appeared on the SAP 69's are recorded on the SAP 69's as follows:

GUILTY OFFENCE

SENTENCE

2020-12-14 THEFT

-DATE COMMITTED 2020-08-09

GEFINALISEER IN KINDERHOF

GESTUUR NA CYC (CHILD AND

YOUTH CARE CENTRE⁷

CALEDON C217/20 (SENTENCE DATE, COURT AND COURT CASE NR

DATE GUILTY OFFENCE

SENTENCE

2020-12-14 ACT/ORD 12 of 1988 ACCUSED SENT TO CHILD YOUTH CENTRE

SEC/REG 45 SUBSEC (1)

DATE COMMITTED 2020-03-21

SEA FISHERIES ACT BAG RESTRICTIONS GENERAL

[22] It is apparent that the Magistrate was aware of this fact if not at the commencement of the hearing, at the very least at the time when he sentenced the accused. This, in my view, disqualified the Magistrate from presiding over the matter and infringed the accused' right to a fair trial. In *S v S.M* (R03/2022; PCJC01/2021;01/2022) [2022] ZAMPMBHC 27 (26 April 2022), RATSHIBVUMO J said the following about references to prior criminal cases of a child offender that cannot be regarded as a previous conviction albeit in the context of diversion in terms of section 59 of the CJA. There are nevertheless a number of similarities between what transpired in that case and this case. In that case, the source of the previous brushes with the law of the accused when he was a child, was the probation officer who compiled a pre-sentence report in the criminal case.

⁷ Loosely translated – "Finalised in Children's Court; referred to CYC"

[9]. *In casu, the source of information regarding previous cases was the Probation Officer who had dealt with the child offender in the past. To the Probation Officer's credit, these were not reflected as previous convictions as it was clear from the record that they were diverted. In his response, the Magistrate seemed to be aware that cases that were diverted could not be considered as previous conviction. The DDPP agrees with this approach. The DDPP however questions whether the Magistrate was alive to this at the time of trial and sentencing of the child offender. The DDPP remarked,*

"Although the Learned Magistrate in his reply states that when sentencing the child offender, he considered the case before him as the first conviction of the child offender, the record of proceedings depicts a different picture. From the case record it appears the Learned Magistrate certainly took into account the previous incidences mentioned in the Probation Officer's report... as previous convictions against the child offender, this despite the fact that the State did not prove any previous conviction against him."

[10]. *The assertions by the DDPP are based on the utterances on record wherein, before the sentence was pronounced, the court said the child offender "previously committed similar offences." I cannot think of any other way that a court would refer to previous convictions of the offender as aggravating circumstances than this statement. Another reason why these cannot be considered as previous convictions is that one would never know how the diverted matters would have been finalised had they gone through trials. Like in any other criminal trial, there are two possible end results, to wit, a conviction or an acquittal. It would be unfair if any case of arrest was to be considered as a conviction. Diversion of criminal cases against children is meant to help them avoid criminal records and start on a good foundation. If these would still be considered as previous convictions against them, it puts them in a*

worse situation than adults and it defeats the purpose. It suffices to state that considering the diverted cases as previous conviction was a misdirection on the part of the Learned Magistrate.” (own emphasis)

[23] Similarly, in a case like this, where prior knowledge of the involvement of an accused when he was as a child in conflict with the law is considered as an aggravating factor in a later criminal case it is prejudicial to an accused. Even more so, where the same Magistrate who has previously presided over the Children’s Court matter of an accused person, also in a later criminal trial, was the primary source of that information when he referred to it in the sentencing proceedings, when it was considered as a factor or aggravating circumstance during sentencing. Although prior knowledge of the previous conviction or prior conduct of an accused may not always result in the recusal of a presiding officer, especially in cases where an accused had pleaded guilty and the court convicts such a person on the strength of that guilty plea, and at a later stage, after previous conviction had been proven alters the plea to one of not guilty in terms of the provision of section 113 (See *S v Moses* 2019 (1) SACR 75 WCC, *S v Sass* 1986 (2) SA 146 (NC)). It may not always vitiate those proceedings and lead to an injustice.

The circumstances in this particular case are different, for the reasons cited and in particular, where the Magistrate was the source of the information regarding the accused’s previous criminal conduct in circumstances where he actively engaged with the accused about it. This amounts to a gross misdirection. Such gross misdirection in my view would vitiate the proceedings. And the proceedings would clearly not be in accordance with justice and fall to be set aside.

[24] In the result, I would make the following order:

- 1) The conviction and sentence are set aside;
- 2) The Office of the Director of Public Prosecutions is directed to request the South African Police Service: Criminal Record Centre to forthwith remove any order of the Children's Court in terms of section 156 of the Children's Act, 38 of 2005 recorded against the name of the accused, which purports to be a previous conviction.

RCA HENNEY

Judge of the High Court

I agree and it is so ordered.

PAL GAMBLE

Judge of the High Court