

(EASTERN CAPE LOCAL DIVISION – PORT ELIZABETH)

CASE NO. CA&R 54/2015

In the matter between:

THE STATE

And

KWANELE SINGANA

REVIEW JUDGMENT

MAJIKI J

[1] When this matter was referred to this court on automatic review, by the magistrate in the Regional Court of Uitenhage who sentenced the accused, he raised a preliminary issue whether the matter was subject to automatic review. I shall set out the reasons for this concern in due course.

[2] The accused was convicted in the Magistrate’s Court, Uitenhage on two charges of housebreaking with intent to steal and theft. The accused was thereafter committed for sentence by the Regional Court in terms of section 114 of the Criminal Procedure Act 51 of 1977 (“the CPA”).

[3] He was sentenced by the Regional Court magistrate to 24 months imprisonment wholly suspended for five years, on condition that the accused is not convicted of housebreaking with intent to steal and theft or theft committed during the period of suspension. He was further sentenced to 24 months correctional supervision subject to specific conditions as outlined by the magistrate.

[4] In his judgment on sentence the magistrate took the view that the matter was reviewable in terms of section 85 of the Child Justice Act 75 of 2008 and he explained the accused's rights in that regard to both the accused and his guardian. The accused was 17 years old when he committed the offence in question.

[5] Despite the magistrate's conclusion that the matter was automatically reviewable, he must thereafter have entertained doubts as to whether it was, hence he highlighted this preliminary issue. This arose because of the effect of the amendment to section 85 of the Child Justice Act brought by the Judicial Matters Amendment Act 42 of 2013.

[6] Section 85(1) of the Child Justice Act, before amendment provided:

“The provisions of the Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child was, at the time of the commission of the alleged offence-

(a) Under the age of 16 years; or

(b) 16 years or older but under the age of 18 years, and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and

youth care centre providing a programme provided for in section 191 (2)(J) of the Children’s Act, the sentence is subject to review in terms of section 304 of Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of the duration of the sentence.”

[7] Section 85(1) was amended before the offence in this matter was committed. The section now provides :

“The provisions of Chapter 30 of Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children’s Act, the sentence is subject to review in terms of section 304 of Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of

- (a) the duration of sentence;*
- (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;*
- (c) whether the child in question was represented by a legal representative; or*
- (d) whether the child in question appeared before a District Court or a Regional Court sitting as a Child Justice Court”.*

[8] Section 302 of Criminal Procedure Act governs automatic reviews.

Section 302 (1)(a) provides :

“any sentence imposed by a Magistrate’s Court -

- (i) *which in case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in Section 191 (2)(j) of the Children’s Act, 2005 (Act 38 of 2005)), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held a substantive rank of magistrate or higher for a period of seven years or longer;*
- (ii) *which in the case of a fine, exceeds the amount determined by Minister from time to time by notice in the Gazette for the respective judicial officers referred to in sub paragraph (i);*
- (iii) ...

Shall be subject in the ordinary cause to review by a judge of the provincial or local division having jurisdiction”.

[9] Section 85(1) of the Child Justice Act is clearly intended to extend the protection by automatic review to children. It does so by providing that in addition to the qualified right to automatic review created by section 302 of the CPA, if a child is sentenced to any form of imprisonment or detention in a child and youth care centre, he or she has, in addition, an unqualified right to have the proceedings reviewed automatically.

[10] It seems to me that the core issue that has to be addressed is whether a sentence of imprisonment that has been wholly suspended, as in this case, is included in the term ‘any form of imprisonment’ in the amended section 85(1).

[11] In *Jaga v Donges NO and Another; Bhana v Donges NO* and Another 1950 (4) SA 653 (A), this question was answered. Centlivres JA, for the majority of the court, held that a wholly suspended sentence of imprisonment was indeed a sentence of imprisonment for purposes of the legislation there under consideration. His reasoning is as follows and, in my view, is dispositive of the issue in this case. He stated at **657 H – 658 A**):

*“In the first place the language used by the Legislature is unqualified : a sentence of imprisonment, the whole of which is suspended on a specified condition, is as much a sentence of imprisonment as a sentence of imprisonment none of which is suspended. It is true that the sentence cannot be enforced unless the condition is breached but it remains in force and can be carried into execution if during the period of its suspension the accused breaches the condition. The test imposed by the Legislature is not whether an accused has served a term of imprisonment (cf. **Cape Ord. 10 of 1912, sec. 35(1)**) but whether he has been sentenced to imprisonment”.*

[12] The conclusion that section 85(1) makes provision for automatic review when a child has been sentenced to a wholly suspended term of imprisonment is all the more compelling when the provisions of the original section are considered. In terms of section 85(1) the protection additional to section 302 of the CPA was only extended, in the case of children older than 16 years but younger than 18 years, if they were sentenced to ‘any form of imprisonment that was not wholly suspended’. Clearly, the amendment was directed at removing this limitation.

[13] The purpose of the Child Justice Act is to provide as much protection for children who have violated the law as reasonably possible. This is clear from its preamble which states in part:

“• the Constitution, while envisaging the limitation of fundamental rights in certain circumstances, emphasises the best interests of children, and singles them out for special protection, affording children in conflict with the law specific safeguards, among others, the right-
- not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;”

Elsewhere it goes further to state:

THIS ACT THEREFORE AIMS TO-

- *establish a criminal justice system for children, who are in conflict with the law, in accordance with the values underpinning our Constitution and our international obligations, by, among others, creating, as a central feature of this new criminal justice system for children, the possibility of diverting matters involving children who have committed offences away from the criminal justice system, in appropriate circumstances, while children whose matters are not diverted, are to be dealt with in the criminal justice system in child justice courts;*
- *expand and entrench the principles of restorative justice in the criminal justice system for children who are in conflict with the law, while ensuring their responsibility and accountability for crimes committed;*
- *recognise the present realities of crime in the country and the need to be proactive in crime prevention by placing increased emphasis on the effective rehabilitation and reintegration of children in order to minimise the potential for re-offending;*
- *balance the interests of children and those of society, with due regard to the rights of victims;*
- *create incrementally, where appropriate, special mechanisms, processes or*

- procedures for children in conflict with the law-*
- *that in broad terms take into account-*
 - *the past and sometimes unduly harsh measures taken against some of these children;*
 - *the long-term benefits of a less rigid criminal justice process that suits the needs of children in conflict with the law in appropriate cases; and*
 - *South Africa's obligations as party to international and regional instruments relating to children, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child;*
 - *in specific terms, by-*
 - *raising the minimum age of criminal capacity for children;*
 - *ensuring that the individual needs and circumstances of children in conflict with the law are assessed;*
 - *providing for special processes or procedures for securing attendance at court of, the release or detention and placement of, children;*
 - *creating an informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of cases in the best interests of children by allowing for the diversion of matters involving children away from formal criminal proceedings in appropriate cases;*
 - *providing for the adjudication of matters involving children which are not diverted in child justice courts; and*
 - *providing for a wide range of appropriate sentencing options specifically suited to the needs of children,”*

[14] The interpretation of section 85(1) of the Child Justice Act that a wholly suspended term of imprisonment is automatically reviewable is in conformity with the objects of the Act and overcomes the problem that the putting into effect of a suspended sentence is not subject to automatic review. In my view, the legislature intended, with the amendment of section 85(1) to extend the

safeguards aimed at ensuring that children in conflict with the law will only be detained as a measure of last resort. See *Du Toit et al Commentary* on the *Criminal Procedure Act* at 30-11.

[15] Having concluded that the conviction and sentence of the accused is subject to automatic review in terms of Chapter 30 of the CPA, it is necessary to consider whether the proceedings are in accordance with justice. Having perused the record, I am satisfied that they are.

[16] I make the following order:

(a) It is ordered that proceedings in which a child is convicted and sentenced to imprisonment that is wholly suspended is in terms of section 85(1) of the Child Justice Act, 75 of 2008, subject to automatic review in accordance with Chapter 30 of the Criminal Procedure Act 51 of 1977.

(b) The proceedings in this matter are in accordance with justice and are confirmed.

B Majiki

Judge of the High Court

I agree :

M N Hinana

Acting Judge of the High Court

Delivered on: 04 March 2015