THE HIGH COURT OF SOUTH AFRICA
(MPUMALANGA DIVISION, MBOMBELA MAIN SEAT)

HIGH COURT REF NO: R03/2022
MAGISTRATE CASE NO. PCJC01/2021
MAGISTRATE SERIAL NO. 01/2022

REPORTABLE: YES
OF INTEREST TO OTHER JUDGES: NO
OF INTERESTS TO MAGISTRATES: YES
REVISED.
26 April 2022

In the matter between:

THE STATE

And

SM **(THE ACCUSED)**

REVIEW JUDGMENT

RATSHIBVUMO J

[1]. The accused (SM) is a child offender who was convicted by the Child Justice Court for the District of Chief Albert Luthuli sitting in Mayflower. The conviction followed a guilty plea tendered on his behalf by his legal representative on a charge of

housebreaking with the intention to steal and theft. He was sentenced on 14 June 2021 in terms of section 76(1) of Act 75 of 2008 (the Child Justice Act) to "compulsory residence at Ethokomala Child and Youth Care Centre until he completed his school education or turns 21 years of age." In light of this sentence, the proceedings are subject to automatic review in terms of section 85 of the Child Justice Act read with section 303 of Act 51 of 1977 (the Criminal Procedure Act).

[2]. The State alleged that this crime was committed on 25 November 2020 when the child offender broke into a shop and stole items comprising mainly in cigarettes and alcohol the total value of which was R32 665.00. In his plea, the child offender disclosed that the crime was committed by him and his friends at night and they proceeded to consume the alcohol that night and the following day with more friends invited. It was after they were drunk and were walking about that the victim to the crime was alerted and the police were called and arrested him.

[3]. The pre-sentence report reflected that he was born on 13 November 2005, meaning he was 15 years old at the time of his sentence. The State proved no previous convictions against the child offender. The pre-sentence report however reflected that it was not the first time the child offender was arrested. The cases he was arrested for were diverted and did not proceed to trials. The court a quo seemed to have taken these as previous convictions when imposing the sentence. I raised a query based on this formulated as follows,

> "The trial record reflects that the court *a quo* upon sentencing the child offender, concluded that "he previously committed similar offences" based on the pre-sentencing report prepared by the Probation Officer. The said report refers to an instance where in the past, there was a diversion of a criminal case faced by the child. Since the child was not convicted at the time and one cannot tell how the trial would have gone had he been charged; was the child not supposed to be sentenced as a first offender as opposed to repeat offender?"

[4]. To this, the Learned Magistrate responded as follows,

> "The court took note of the fact that this was the first conviction of the child offender and that in fact he was a first offender, however the court could not

turn a blind eye to the fact that the court had to do with a child offender that has been displaying uncontrollable behavior for the last three years, all previous interventions did not yield any positive results. He is no longer attending school and spends most of his time with friends and that he displays behavioral, psychological and emotional difficulties. The court took note of the profile of the child and concluded that in order for the child to receive the reception, development and secure care. It would be in the best interest of the child and the community and would help to build him holistically. In order for the court to accomplish this the court had to place the child in a Youth Care Centre in terms of section 76(1) of Act75 of 2008."

[5]. The other query raised together with the one above related to the sentencing jurisdiction. To avoid ambiguity, I will quote it in full:

> "The child offender was sentenced to "compulsory residence at Ethokomala Child and Youth Care Centre until he completed his school education or turns 21 years of age." This sentence was imposed in terms of section 76 of Act 75 of 2008 (the Child Justice Act) which also provides that a sentence of compulsory residence shall "be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest."
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> (i) The Probation Officer's report reflects that the child offender was 15 years old at the time the report was compiled. That age is also reflected on the J15. It is also recorded in the same report that the child offender dropped from school while doing Grade 4 because he could not understand the teachers. The sentence imposed means that if the child offender will start at Grade 4 and finish school in Grade 12, presuming he will not fail any grade, this would translate to 7 (seven) years of compulsory residence, unless he turns 21 before that. At the age of 15, it would seem that the child will turn 21, some 6 (six) years from the date of sentence. It would appear that the child would have been in compulsory residence for longer than the Child Justice Act permits. The Learned Magistrate is requested to comment.
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> (ii) Does the Child Justice Court presided over by a District Magistrate have the sentencing jurisdiction to impose the maximum period of compulsory

residence, permissible in terms of this section (five years), the same as the Regional Court would have?"

[6]. The Learned Magistrate responded as follows,

"(i) The court took note of the fact that according to the charge sheet [J15] the child offender was 15 years of age and that the date of arrest was indicated to be 20 February 2020. According to the report compiled by Mrs. Q F Mkhanazi a Social worker stationed at Mayflower, the child offender's ID number is 051113[....], this report was compiled during December 2020. Taking that into account as well as the fact that the mother indicated that she wanted to apply for an ID for the child and the fact that according to the defense attorney Miss Lungwana, the child was 16 years of age. Therefore, there was no doubt in the mind of the court that the child offender was in fact 16 years of age. In the light of the above reasoning the child will turn 21 years of age in 5 years which falls within the time period mentioned in section 76 of Act 75 of 2008.

(ii) A Child Justice Court is defined as 'any court provided for in the Criminal Procedure Act, dealing with bail application, plea, trial or sentencing of a child.' 'Therefore I am of opinion it was the intention of the legislature that any court could impose compulsory residence in terms of section 76 when it had to do with the sentencing of a juvenile. The Honorable Reviewing Judge is requested to confirm abovementioned review case.

[7]. The court is indebted to the Deputy Director of Public Prosecutions, Mpumalanga (the DDPP), Advocate Mpolweni who together with the assistance of Advocate Mata, was able to research and formulate an opinion regarding this matter. I will refer to these views and remarks as they are relevant and important.

[8]. **Previous convictions.**

It is common cause that the State did not prove any previous conviction against the child offender in this case. It is trite that the duty to prove previous convictions falls squarely on the shoulders of the State. The accused does not have a duty to prove previous convictions against himself. Even when the same is volunteered by the accused, it is irregular for the court to elicit such information from him or even attach any weight thereto as there could be mistakes, misunderstanding or even deliberate

intention to mislead the court on the part of the accused.[1] It is well settled that the State should be the only source of previous convictions proved against an accused person.

[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 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 that 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 good foundation. If these would still be considered as previous convictions against them, it puts them in a worse situation than the 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.

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[1] See *S v Kqawane* 2004 (2) SACR 80 (T) and *S v Petkar* 1988 (3) SA 571 (A).

[11]. **The child offender's age.**

The Learned Magistrate proceeded to deal with the question of age of the child offender in an inexplicable way. In his response, he noted that the child offender's ID number was 051113 […], as contained in the report compiled by the Probation Officer. As if to suggest that the ID number (and not the age) was changing with time passage, he goes on to say, "but the report was prepared during December 2020." The child offender was only sentenced in June 2021. What I fail to comprehend in this response is how the passage of time would affect the ID number. One's ID number does not change a year or two after it is scribed. There is no way a court would think that a child with ID numbers noted above would be 16 years old on 14 June 2021, unless it did not note it. But to the contrary, he avers that he noted it.

[12]. Just as the DDPP pointed out, the Learned Magistrate missed an opportunity to clarify the issue of age which he could have done by simply requesting the birth certificate from the mother of the child offender who was present in court, or call her to give evidence over this aspect. If by any chance, there was uncertainty about the child offender's age (of which there was not given the fact that nobody challenged the ID number provided in the report), then section 14 of the Child Justice Act enjoins the presiding officer to hold an inquiry regarding the child offender's age, which he failed to do.

[13]. **Incompetent sentence.**

The sentence imposed by the court *a quo* is in terms of section 76 of the Child Justice Act which provides that a sentence of compulsory residence shall "be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question turns 21 years of age, whichever date is the earliest." [My emphasis]. The sentence imposed by the court a quo is not only ambiguous for not being clear and precise on the date on which the child offender would be released, but it is incompetent.

[14]. The Probation Officer's report reflects that the child offender was 15 years of age on the date of sentence and that he dropped from Grade 4 at school. Presuming that the child would turn out to pass all the grades up to Grade 12, this child offender has

a minimum of nine years before finishing school education. Given the Probation Officer's report regarding his school performance, he is likely going to require more than nine years to complete his Grade 12. If the Learned Magistrate's intention was that the child offender would have to stay in compulsory residence for this long, then the sentence is incompetent because this exceeds the maximum period allowed by the legislature which is five years.[2]

[15]. The alternative to the completion of school does not help salvage the situation either. By the time the child offender turns 21, he would have served longer that the five-year period which is the maximum permissible in terms of the Child Justice Act. If he was 15 on the date of sentence, he will turn 21 in six' years' time from the date of sentence. In whichever angle the sentence is viewed, it is incompetent in that a simple calculation would reflect that the child offender would serve a period longer than five years in compulsory residence. What is saddening is that even when this is raised as a query, the Magistrate cannot see anything wrong with the sentence. Even with hind sight opportunity to sit down and re-calculate based on the ID numbers that demonstrate that the child offender will not be released until after serving six years; one would have expected him to ask for an opportunity to rectify this. He is rather asking that the Review Court should confirm the sentence he imposed.

[16]. **Sentence jurisdiction.**

Presuming that the Learned Magistrate did not impose a sentence in excess of five years of compulsory residence on the child offender, the question is whether a Magistrate appointed for the District has jurisdiction to impose a sentence of five years' compulsory residence envisaged by section 76 of the Child Justice Act. The Magistrate's view is in affirmation. In his view, "[a] Child Justice Court is defined as 'any court provided for in the Criminal Procedure Act, dealing with bail application, plea, trial or sentencing of a child.' 'Therefore I am of opinion it was the intention of the legislature that any court could impose compulsory residence in terms of section 76 when it had to do with the sentencing of a juvenile."

[17]. It is the reading of the Learned Magistrate that if section 76 of the Child Justice Act provides that "a Child Justice Court that convicts a child… may sentence him to

[2] *S v Bangiso* 2013 (1) SACR 558 (GNP)

compulsory residence… for a period not exceeding five years…" then any court sitting as a Child Justice Court can impose the said sentence irrespective of whether it is the District, Regional or High Court. If this reading is true, then it would also be true for section 77(4)(a) of the same Act which provides that "a Child Justice Court… may sentence a child… for a period of imprisonment not exceeding 25 years." This may be an extreme example but it demonstrates well that such could not have been the intention of the Legislature. There are many other legislations that make provision for the sentence without categorising as to which court has jurisdiction to impose such sentence.

[18]. Once the legislation provides that a court that convicts an accused for a particular offence, it can sentence him/her to a fine or imprisonment for life,[3] it does not confer the jurisdiction to any court that would have convicted such accused person. It is expected of each judicial officer to know his/her position in judicial hierarchy and the maximum penal jurisdiction allowed for the office he/she is appointed. Section 92(1)(a) of Act 32 of 1944 (the Magistrate Court Act) provides, "save as otherwise in this Act or in any other law specially provided, the court, whenever it may punish a person for an offence by imprisonment, may impose a sentence of imprisonment for a period not exceeding three years, where the court is not the court of a regional division, or not exceeding 15 years, where the court is the court of a regional division." [Own emphasis].

[19]. I agree with the submissions by the DDPP to the effect that the Child Justice Act does not explicitly establish the child justice courts. Instead, the Act defines it as "any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child." I can add that there is no 'special provision' in the Child Justice Act for penal jurisdiction of the various courts or where an increased penal jurisdiction is made. The limited instances where a legislation makes a special provision for increased penal jurisdiction, such is done expressly and without any ambiguity.[4]

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[3] See for example section 4(2) of the Prevention and Combating of Trafficking in Persons Act no. 7 of 2013 which provides for a sentence of a fine not exceeding R100 million or imprisonment for life.

[4] See section 64 of the Drugs and Drug Trafficking Act, no. 140 of 1992 which provides, "[A] magistrate's court shall have jurisdiction to impose any penalty mentioned in section 17, even though that penalty may exceed the punitive jurisdiction of a magistrate's court.

[20]. The DDPP recommends that the sentence be set aside and the matter be remitted back to the trial court for sentencing of the child offender afresh in accordance with the penal jurisdiction of that court. This in my view is the appropriate remedial action in this case.

[21]. I therefore propose the following order.

21.1 The conviction is confirmed.

21.2 The sentence imposed by the trial court is hereby set aside.

21.3 The matter is remitted back to the trial court for sentence to be imposed afresh.

21.4 The Magistrate should receive any evidence in mitigation and aggravation for the sentence as the Defence and the State may wish to present.

TV RATSHIBVUMO
JUDGE OF THE HIGH COURT

I agree

D GREYLING-COETZER
ACTING JUDGE OF THE HIGH COURT
26 APRIL 2022