S v DW

NORTHERN CAPE DIVISION, KIMBERLEY

KGOMO JP and MAMOSEBO J

2016 SEPTEMBER 16 CASE No 802/2015

Mamosebo J (Kgomo JP concurring):

[1] This is a special review in terms of s 304A of the Criminal Procedure Act 51 of 1977 (the CPA) as amended. The magistrate, Ms A du Toit, having noticed that there was non-compliance with the Child Justice Act 75 of 2008, commented as follows:

> '(iii) Dit het voorts onder my aandag gekom dat daar nooit 'n voorlopige ondersoek gehou was soos vereis deur Kindergeregtigheidswet, Wet 75 van 2008, nie. Artikel 1 van die Wet omskryf kind as 'n persoon onder die ouderdom van 18 jaar.
>
> (vi) In die lig van die onreëlmatigheid is ek van oordeel, met respek, dat die skuldigbevinding en die vonnis tersyde gestel moet word.'

[2] The accused was exactly 17 years and 11 months old, having been born on 19 April 1997, when the offence was committed on 19 March 2015. He was therefore one month short of turning 18 years. Section 1 of the Child Justice Act defines a *'child'* 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 case is tried in terms of s 4(2) of the Child Justice Act. He appeared before court on 8 July 2015 charged with housebreaking with intent to commit an offence unknown to the state but was not assessed prior to appearing before court for trial. The offender was legally represented by Ms Delie from the Legal Aid South Africa (LASA). He

pleaded guilty to the charge in terms of s 112 (2) which plea was accepted by the prosecutor. From the presiding officer's questioning it became apparent that the offence committed was in fact housebreaking with intent to trespass and trespass.

[3] *'*Assessment*'* means assessment of a child by a probation officer in terms of ch 5 of the Child Justice Act. Section 34 under that chapter stipulates:

> **'Duty of probation officer to assess children**
>
> (1) Every child who is alleged to have committed an offence must be assessed by a probation officer, as set out in subsections (2) and (3), unless assessment has been dispensed with in terms of section 41 (3).
>
> (2) A probation officer who has been notified by a police official that a child has been handed a written notice, served with a summons or arrested must assess the child before the child appears at a preliminary inquiry within the time periods provided for in section 43(3)*(b)*. . . .'

[4] Section 35 in ch 5 sets out the purpose of assessment:

> *'(a)* establish whether a child may be in need of care and protection in order to refer the child to a children's court in terms of section 50 or 64;
>
> *(b)* estimate the age of the child if the age is uncertain;
>
> *(c)* gather information relating to any previous conviction, previous diversion or pending charge in respect of the child;
>
> *(d)* formulate recommendations regarding the release or detention and placement of the child;
>
> *(e)* where appropriate, establish the prospects for diversion of the matter;
>
> *(f)* in the case of a child under the age of 10 years or a child referred to in section 10(2)*(b)*, establish what measures need to be taken in terms of section 9;
>
> *(g)* in the case of a child who is 10 years or older but under the age of 14 years, express a view on whether expert evidence referred to in section 11 (3) would be required;
>
> *(h)* determine whether the child has been used by an adult to commit the crime

in question; and

(i) provide any other relevant information regarding the child which the probation officer may regard to be in the best interests of the child or which may further any objective which this Act intends to achieve'

[5] It was only during the sentencing phase that the presiding officer enquired from the accused how old he was when the offence was committed to which he responded that he had not attained the age of 18 years. As stated earlier he was born on 19 April 1997 and was therefore 18 years and four months old when the trial took place on 8 July 2015. The magistrate sentenced him to R1500 or five months' imprisonment which was wholly suspended for five years on condition that he was not found guilty of housebreaking with intent to commit an offence unknown to the state or housebreaking with intent to commit an offence in contravention of s 1(1) of the Trespass Act 6 of 1959, committed during the period of suspension.

[6] Section 304A provides:

'*(a)* If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, *he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as is practicable, lay the same for review in chambers before a judge*, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303..

(b) When a magistrate or a regional magistrate acts in terms of paragraph *(a)*, he shall inform the accused accordingly and postpone the case to some future date pending the outcome of the review proceedings and, if the accused is in custody, the magistrate or regional magistrate may make such order with regard to the detention or release of the accused as he may deem fit.' [Emphasis added.]

[7] The issue for determination is whether the failure by the court to implement the Child Justice Act prior to the commencement of the trial vitiates the proceedings. The date of commencement of the Child Justice Act was on 1 April 2010. In its preamble the drafters of this piece of legislation start by recognising the following:

> '(T)hat before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law . . . .'

[8] If the Child Justice Act was correctly applied to this case seeing that the child offender was below the age of 18 years when he was arrested, the role-players would have ensured that:

[8.1] His needs and circumstances are assessed.

[8.2] He was provided special circumstances or procedures to secure his attendance at court.

[8.3] An informal, inquisitorial, pre-trial procedure, designed to facilitate the disposal of his case in his best interests by considering the diversion of his matter and keeping him away from the criminal proceedings, having properly assessed whether the circumstances of his case warranted same was created.

[9] This child offender was deprived of the following:

[9.1] In terms of s 5(3) of the Child Justice Act, a compulsory preliminary enquiry after he was assessed; and

[9.2] the possibility of a diversion in terms of s 5(4)*(a)*(i) or (ii).

[10] The South African Police Services (SAPS) are the first point of contact when a child offender comes into conflict with the law. Their participation in the matter can make or break a case. In many instances the police overlook ascertaining the age of children in conflict with the law and treat them in the ordinary way. Care must be taken that as soon as the child is apprehended his or her age must be established. In the event that the police being unable to

do so s 12 of the Child Justice Act must be resorted to. This section provides that an opinion expressed either by a probation officer or a medical practitioner on the age of the child offender must be obtained or his or her age be determined at the preliminary inquiry. The child offender's age can also be estimated by the probation officer in terms of s 13 of the Child Justice Act or an inquiry by a magistrate or the child justice court in terms of s 14 of the Child Justice Act.

[11] The Child Justice Act is not only peremptory but also very specific in terms of dealing with a child offender. For instances s 66(1) stipulates:

> 'A child justice court must conclude all trials of children as speedily as possible and must ensure that *postponements in terms of this Act are limited in number and duration*.' [Emphasis added.]

[12] The child offender was issued with a summons to appear in the Kakamas district court by means of a J175 for trial on 21 August 2015. It is unclear how the age of the offender was fixed at 18 years because his identity number was not recorded. The summons reflects that the offence was committed on 19 March 2015. The trial awaiting period or time lost between the 19 March and 21 August 2015 is about five months. On the 21 August 2015 when his rights to legal representation were explained to him he opted for assistance by LASA. A practitioner whose name does not appear on the transcribed record appeared for the accused. The following postponements and delays are recorded:

[12.1] Postponement to 14 October 2015 *for consultation*;

[12.2] Mr Van Niekerk appeared on behalf of the accused on 14 October 2015. The case was postponed to 29 October 2015 *for plea*;

[12.3] Ms Delie assisted him on 29 October 2015 and the case was further postponed to 10 February 2016 *for trial*;

[12.4] the case was crowded out on 10 February 2016 and postponed to 26 April 2016 **for trial**. The witnesses were warned to appear.;

[12.5] on 26 April 2016 the accused was absent and a warrant was authorised for his arrest;

[12.6] the accused appeared on 28 April 2016. The case was remanded to 8 July 2016 for

trial. He was released on his own recognisance; and

[12.7] overall it took a year and four months before the accused's case was heard and disposed of.

[13] The child offender, who had in the meantime become of age, pleaded guilty and was convicted on his plea. This is where, as the saying goes, *'the child offender was failed by the system'*. The fact that he cannot be assessed retrospectively or diverted resulted in prejudice to him. Had the police verified his age from the onset his parents or guardian and the probation officer would have been involved at the preliminary stages. This offender would probably have been diverted after acknowledging his wrongful conduct which programmes may have added value to his life. The probation officer may also have ascertained whether he qualified to be categorised as a child in need of care and protection.

[14] Whereas the legal practitioner received instructions after the accused had already turned 18 years, he also failed his client by not establishing during consultation how old he was at the time of the commission of the offence. It is crucial for a practitioner to go the extra mile where child offenders are involved. At the end of the day, justice must not only be done but must be seen to be done. The best interests of this child should have been regarded as of paramount importance as required by s 28(2) of the Constitution of the Republic of South Africa, 108 of 1996. A proper case scheduling coupled with the good use of the allocated court diary would not only have ensured speedy access to justice for him but other cases would also receive the deserved attention. These aspects form part of the standing agenda of the local court and case-flow management meetings.

[15] I have already mentioned that the accused pleaded guilty and that he was legally represented. Had an assessment been conducted immediately after he was charged he would in all probabilities have been diverted. The test to determine whether an irregularity was gross or not is articulated by the Supreme Court of Appeal in *S v Felthun* 1999 (1) SACR 481 (SCA) ([1999] 2 All SA 182) at 485*g*–486*e* Vivier JA pronounced:

> 'Generally speaking, an irregularity or illegality in the proceedings at a criminal trial occurs whenever there is a departure from those formalities, rules and principles

of procedure with which the law requires such a trial to be initiated and conducted. The basic concept underlying s 317(1) is that an accused must be fairly tried (per Botha JA in *S v Xaba* 1983 (3) SA 717 (A) at 728D).

As to the question whether there has been a failure of justice, this Court has in a number of decisions recognised that in an exceptional case the irregularity may be of such a kind that it per se results in a failure of justice vitiating the proceedings, as in *S v Moodie* 1961 (4) SA 752 (A) and *S v Mushimba en Andere* 1977 (2) SA 829 (A). Where the irregularity is not of such a nature that it per se results in a failure of justice, the test to be applied to determine whether there has been a failure of justice is simply whether the Court hearing the appeal considers, on the evidence (and credibility findings, if any) unaffected by the irregularity or defect, that there is proof of guilt beyond reasonable doubt. If it does so consider, there was no resultant failure of justice (per Holmes JA in *S v Tuge* 1966 (4) SA 565 (A) at 568F–G; and see also *S v Xaba* (supra at 736A–B) and *S v Nkata and Others* 1990 (4) SA 250 (A) at 257E–F).

The first question which thus arises for decision in the present case is whether the trial Court's ruling allowing the reopening of the State case constituted an irregularity within the meaning of s 317(1) of the Act. Counsel for the appellant submitted that it did so and that it was, moreover, an irregularity of the kind which per se vitiated the proceedings.

That a trial Court has a general discretion in both civil and criminal cases to allow a party who has closed his case to reopen it and to lead evidence at any time up to judgment is beyond doubt. The proper approach is that the Court's discretion should be exercised judicially upon a consideration of all the facts of each particular case, having due regard to the considerations mentioned in the cases and applying them as guidelines and not as inflexible rules. In *Mkwanazi v Van der Merwe and Another* 1970 (1) SA 609 (A) Holmes JA stated the correct approach thus at 616B–D:

> "It is inappropriate for judicial decisions to lay down immutable conditions which have to be satisfied before the relief sought can be granted. Over the years the Courts have indicated certain guiding considerations or factors, but they must not be regarded as inflexible requirements, or as being individually decisive. Some are more cogent than others; but they should all be weighed in the scales, the pros against the cons."'

[16] Having regard to the tests propounded in *S v Felthun* (above) I am of the view that the irregularity is not of such a nature that it per se results in a failure of justice. The following factors inform my conclusion:

[16.1] The young man was 17 years and 11 months old when the offence was committed. He therefore turned 18 years in a month's time. Nothing on record points to his inherent immaturity.

[16.2] The accused's rights to legal representation were explained to him on 21 August 2015. A Mr Van Niekerk of LASA represented him on 14 October 2015. At that stage he was already 18 years old. The legal representative's oversight to bring the relevant provisions to the attention of the court is condonable. The state and the trial magistrate also did not play their part. In any event, the trial would no longer be conducted in camera. See s 63 of the Child Justice Act read with s 154(3) of the CPA.

[16.3] The accused enjoyed competent legal representation, notwithstanding the aforesaid lapse. He pleaded guilty as already described above, correctly so because he admitted all the elements of the offence he was charged with. In determining the nature of the irregularity the court has to consider whether 'unaffected by the irregularity or defect, that there is proof of guilt beyond a reasonable doubt'.

[16.4] The conviction should therefore not be set aside as the magistrate has requested. A re-trial where there has not been shown to have been a gross irregularity vitiating the trial would be improper and unprocedural.

[17] As far as the sentence is concerned the accused must be given the benefit of the doubt that had the police, the prosecutor and the magistrate been aware of the accused's correct age at his first appearance he may have been treated in terms of and have had the benefit of

the Child Justice Act as already addressed. 'It is trite that this court will not interfere with the sentence imposed by the court a quo unless it is satisfied that the sentence has been vitiated by a material misdirection or is disturbingly inappropriate'. See *S v Kekana* 2013 (1) SACR 101 (SCA) at 105 para 11. In respect of sentence, I would alter the sentence imposed by the magistrate.

[18] In the result the following order is made:

1. The conviction is confirmed.

2. The existing sentence is hereby reviewed and set aside and is substituted by the following sentence:

'The accused is cautioned and discharged'.

3. A copy of this judgment should be made available to:

3.1 The cluster head, Mr Krieling;

3.2 the chief prosecutor;

3.3 the head of the Justice Centre, Kimberley;

3.4 the SAPS provincial head; and

3.5 the provincial head: Department of Social Development.