IN THE SOUTH GAUTENG HIGH COURT OF SOUTH AFRICA (JOHANNESBURG)

Case No: RC258/2012
Review No: 02/2013
High Court Ref No: 61/2013

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: Yes
(4)

21 June 2013

SIGNATURE DATE

In the matter between:

THE STATE

And

T L T Accused

REVIEW JUDGMENT

C. J. CLAASSEN J:

[1] The accused, a child offender, was charged in the Alexandra Regional Court with murder. He was aged 15 and 10 months (his date of birth is confirmed as 7 April 1996) at the time of the offence (25 February 2012), and 16 years at the time of his sentence (19 March 2013).

[2] He was therefore dealt with in terms of the Child Justice Act, No 75 of 2008, and was admitted to the Walter Sisulu Child and Youth Care Centre on 26 February 2012, where he was kept for the duration of the court case. He pleaded guilty to the count of murder on 24 May 2012 in terms of section 112(2) of the Criminal Procedure Act, No 51 of 1977.

[3] From the transcript of the plea proceedings it appears that a fight erupted regarding a cap that was taken from his friend. The accused intervened, and when he got slapped, he pulled out a knife and fatally stabbed the deceased five times.

[4] The matter was postponed on several occasions to obtain the necessary reports in terms of the Child Justice Act. Eventually two reports, Exhibits "B" (by the probation officer) and "C" (by the social worker at the facility where he was detained) were obtained.

[5] The social worker gave a positive report regarding the behaviour of the accused at the facility after his arrest, and recommended a sentence in terms of section 76 of the Child Justice Act.[1] Section 76 reads as follows:

> "76(1) A child justice court that convicts a child of an offence may sentence him or her to compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)(j) of the Children's Act.
>
> (2) A sentence referred to in subsection (1) may, subject to subsection (3), 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.
>
> (3)(a) A child justice court that convicts a child of an offence –
>
> (i) referred to in Schedule 3;[2] and
>
> (ii) which, if committed by an adult, would have justified a term of imprisonment exceeding ten years,
>
> may, if substantial and compelling reasons exist, in addition to a sentence in terms of subsection (1), sentence the child to a period of imprisonment which

[1] See p. 3 of Exhibit "C"
[2] Schedule 3 refers *inter alia* to murder

is to be served after completion of the period determined in accordance with subsection (2)."

[6] In contradiction to this, the probation officer in Exhibit "B" recommended direct imprisonment.[3] He based his recommendation on the following facts:

6.1 The accused displayed constant misconduct and lack of discipline from a young age. This culminated in him being expelled from school in 2011[4];

6.2 The accused abused substances such as dagga and glue; and

6.3 The impact of the event on the deceased's family.[5]

[7] The accused was subsequently sentenced in terms of section 76(1) of the Child Justice Act to compulsory residence in a child care centre until he turned 19 years of age.

[8] In terms of section 302(1)(a)(i) of the Criminal Procedure Act 51 of 1977, the matter is subject to automatic review, and was received for this reason at the office of this court's Registrar on 10 April 2013. On 15 April 2013, the matter was placed before M. M. Hodes AJ for review. He returned the proceedings to the court *a quo* with various queries of which the following are pertinent:

8.1 In the light of the following, namely –

8.1.1 the five stab wounds having been inflicted with a knife; and

8.1.2 the contents of Exhibit "B" supra; as well as

8.1.3 the age of the offender, the date of the crime, and section 77(2) of the Child Justice Act[6],

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[3] See pp. 8 – 9 of Exhibit "B"
[4] See pp. 3 – 4 of Exhibit "B"
[5] See p 6 of Exhibit "B"
[6] Section 77(2) reads as follows:
"77 Sentence of imprisonment:

(1) …

> the presiding magistrate was asked to give his view as to whether the period of detention should not have been more than the period imposed which is in fact less than three years. He was also asked to comment on whether compulsory detention up to the age of 21 would not have been more appropriate.
>
> 8.2 A copy of the post-mortem report was also requested.

[9] On 13 May 2013 the magistrate complied with the queries, and conceded that the sentence of three years' compulsory residence might have been too lenient.

[10] The post-mortem report and medical report regarding the treatment of the deceased was also attached, and the following can be highlighted from the post-mortem report:

> "4. The external appearance of the body:
>
> 'Linear abrasions are noted over the root of the neck on the left,…There is a gaping penetrating incised wound over the upper left lateral chest wall,…to enter and terminate within the left lung at a depth of 4cm."

[11] The cause of death is identified as being this stab wound that entered the left lung. The medical report from the Alexandra Clinic describes lacerations to the left of the neck. It is assumed that these are the linear abrasions referred to in the post-mortem report.

[12] The accused admitted to stabbing the deceased five times.[7]

[13] On 27 May 2013 the matter was forwarded to the Director of Public Prosecutions for a written opinion. The Director of Public Prosecutions is complimented on a thorough report filed.

> (2) Notwithstanding any provision in this or any other law, a child who was16 years or older at the time of the commission of an offence referred to in Schedule 2 to the Criminal Law Amendment Act, 1997 (Act 105 of 1997) must, if convicted, be dealt with in accordance with the provisions of section 51 of that Act."

[7] See Exhibit "B" at p 5, paragraph 8(b)

[14] Section 77(2) is no longer applicable in view of the decision in **Centre for Child Law v Minister of Justice and Constitutional Development and Others (National Institute for Crime Prevention and the Reintegration of Offenders, as Amicus Curiae)** 2009 (2) SACR 477 (CC) in which the application of section 51 of the Criminal Law Amendment Act 105 of 1997 on offenders who were under the age of 18 at the time of the commission of the crime, was declared unconstitutional. As already mentioned in paragraph 1 supra, the accused was 15 years and 10 months at the time of the commission of the offence. Hence, the only other section that provides for an appropriate sentencing option in the present instance is indeed section 76.

[15] The learned Magistrate conceded, regarding the appropriateness of the sentence imposed, that he erred in not adequately taking into account the factors listed under section 69(3)(a) and (c) (see *infra*) with particular reference to the following facts, namely:

15.1 that the accused displayed previous troublesome behaviour;

15.2 that the deceased was stabbed several times;

15.3 that the accused was armed with a knife;

15.4 that this incident caused a severe impact on the family of the deceased; and

15.5 that a concerning prevalence of this kind of senseless violence existed.

[16] In view of the fact that the accused was convicted of murder, the magistrate should have sentenced the accused in terms of section 76(3)(a) supra, instead of section 76(1). In this regard section 76(3)(a) is relevant:

> "The head of the child and youth care centre to which a child has been sentenced in terms of subsection (1) must, on the child's completion of that sentence, submit a prescribed report to the child justice court which imposed the sentence, containing his or her views on the extent to which the relevant objectives of sentencing referred to in section 69 have been achieved and the possibility of the child's reintegration into society without serving the additional term of imprisonment."

[17] Section 69 deals with the objectives of sentence, as well as the factors to be taken into account when a sentence in terms of section 76 is considered and it states:

> "69 Objectives of sentencing and factors to be considered.
>
> (1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to –
>
> (a) encourage the child to understand the implications of and be accountable for the harm caused;
>
> (b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;
>
> (c) promote the reintegration of the child into the family and community;
>
> (d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and
>
> (e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time.
>
> (2) …
>
> (3) When considering the imposition of a sentence involving compulsory residence in a child and youth care centre in terms of section 76, which provides a programme referred to in section 191(2)(j) of the Children's Act, a child justice court must, in addition to the factors referred to in subsection (4) relating to imprisonment, consider the following:-
>
> (a) whether the offence is of such a serious nature that it indicates that the child has a tendency towards harmful activities;
>
> (b) whether the harm caused by the offence indicates that a residential sentence is appropriate;
>
> (c) the extent to which the harm caused by the offence can be apportioned to the culpability of the child in causing or risking the harm; and
>
> (d) whether the child is in need of a particular service provided at a child and youth care centre."

[18] The magistrate has the following discretion in terms of subsection 76(3)(c):

> "(c) The child justice court, after consideration of the report and any other relevant factors, may, if satisfied that it would be in the interests of justice to do so –
>
> (i) confirm the sentence and period of imprisonment originally imposed, upon which the child must immediately be transferred from the child and youth care centre to the specified prison;
>
> (ii) substitute that sentence with any other sentence that the court considers to be appropriate in the circumstances; or
>
> (iii) order the release of the child, or without conditions."

[19] By imposing a sentence in terms of section 76(3)(a), subsection 76(3)(c) adds extra options to the court, because, if the accused misbehaves during his period of residence at the child care centre, he runs the risk of having to serve the remaining portion of the sentence in prison. If, however, he corrects his anti-social behaviour, and the head of the child care centre submits a report to the effect that the objectives of sentence as envisaged in section 69 have been met, the magistrate will have a wide discretion as to how to deal with the accused further.

[20] For the reasons set out above, the sentence imposed by the magistrate in the court a quo should be set aside and the matter should be referred back to the court a quo in order for sentence to be considered afresh in terms of section 76(3) as read with section 69 of the Child Justice Act. The following order is issued:

1. The conviction is confirmed, but the sentence is set aside.

2. The matter is referred to the Regional Court, Alexandra Magistrate's Court for re-sentencing of the accused in terms of section 76(3) as read with section 69 of the Child Justice Act 75 of 2008.

DATED THE 21st DAY OF JUNE 2013 AT JOHANNESBURG

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C. J. CLAASSEN
JUDGE OF THE HIGH COURT

I agree

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R. MOKGOATHLENG
JUDGE OF THE HIGH COURT

It is so ordered.