IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

2016-08-18

Reportable: No

Of interest to other judges: No

Revised.

HIGH COURT REF. NO.: 119/16

MAGISTRATE'S CASE NO.: SH278/15

MAGISTRATE'S SERIAL NO.: REVIEW 3/16

DATE: 18/8/2016

THE STATE

And

E. N.

REVIEW JUDGMENT

MABUSE J:

[1] This matter came before me as a review in terms of special legislation of s 85(1)(a) of the Child Justice Act No. 75 of 2008 ("the Child Justice Act").

[2] The accused, a child as envisaged by s 1 of the said Act, appeared before a regional

court in Benoni where he was charged with, and convicted of, rape in contravention of s 3 of Act 32 of 2007 following his plea of guilty to the said charge. Upon conviction he was sentenced to twelve (12) years' imprisonment and in addition declared unfit, in terms of the provisions of s 103 of the Firearms Control Act 60 of 2000 ("the Firearms Control Acf'), to possess a firearm.

[3] Upon receipt of the relevant file I requested the office of the Director of Public Prosecutions to comment on the proceedings. I am indebted to the said office, in particular to both Ms S Scheepers and Mr HM Meintjies for their incisive memorandum. Section 5 of the Child Justice Act reads as follows:

> *"5 (2) Every child who is 10 years or older, who is alleged to have committed an offence and who is required to appear at a preliminary enquiry in respect of that offence must, before his or her first appearance at a preliminary enquiry, be assessed by a probation officer, unless assessment is dispensed with in terms of section 41(3) or 47(5).*
>
> *(3) A preliminary enquiry must be held in respect of every child referred to in subsection (2) after he or she has been assessed, except where the matter -*
>
> (a) *has been diverted in accordance with Chapter 6;*
>
> (b) *involves a child who is 10 years or older but under the age of 14 years where criminal capacity is not likely to be proved, as provided for in section 10(2)(b); or*
>
> (c) *has been withdrawn."*

In the present proceedings the accused appeared for the first time in the regional court on 10 July 2015. During this appearance of 10 July 2015 he was asked how old he was and he informed the court that he was twenty (20) years old. He was also asked if he had any passport or papers and he indicated that he did not have any such documents.

[4] His next appearance was on 16 July 2015. On this date he told the Court that he was fifteen (15) years old and that his parents have passed away. According to information made available to the Court, he was born on 7 January 1995. Arrangements were made for the accused to be taken to the district surgeon for the determination of his age. The accused age was thereafter determined at seventeen (17) years.

[5] On 20 August 2015, the matter was remanded for the accused to be assessed. Immediately when the accused indicated that he was fifteen (15) years old the regional court magistrate directed that he be held in a single sell at Benoni Police Station. Arrangements were also made for his guardian to appear with him. The accused also had legal representation during the entire proceedings.

[6] The magistrate referred to the preliminary enquiry. The office of the Director of Public Prosecutions made enquiries at magistrate court Benoni with the senior public prosecutor who confirmed that a preliminary enquiry had indeed been held after the age assessment indicated that the Child Justice Act was applicable in the instant matter. Before the imposition of sentence a probation officer's report, compiled in respect of the accused, was handed in as an exhibit. It is clear that at the time of the assessment by the probation officer for purpose of sentence at the stage when a plea bargain was considered that the accused did not accept responsibility for the rape.

[7] I am satisfied that the accused had indeed been dealt with by the Court *a quo* in accordance with the provisions of the Child Justice Act and in particular s 5 thereof.

[8] Section 77 of the Child Justice Act provides as follows:

> *"(1) A Child Justice Court -*
>
> *(b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time.*
>
> *(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in -*
>
> (a) *Schedule 3;*
>
> (b) *Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment,·*
>
> (c) *Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.*

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment -

(a) *for a period not exceeding 25years; or*

(b) *envisaged in s 276(1)(i) of the Criminal Procedure Act."*

[9] Rape is listed in schedule 3. Accordingly a sentence of imprisonment as referred to in s 77(3)(a) of the Child Justice Act, is a competent sentence. The court *a quo* was provided with a psycho-social report as enjoined by s 71(1)(b) of the Child Justice Act and in line with the decision in S v Phulwane and Others 2003(1) SACR 631 T where it was held that when the youth or juvenile strays from the path of rectitude to that of criminal conduct, it is the responsibility of the judicial officer bestowed with the task of sentencing such a youth offender to obtain all the relevant information pertaining to such a juvenile, in order to structure a sentence that will best suit the needs and interest of the particular youth. See p. 634 h-i.

[10] The court *a quo* considered all the sentencing options and after careful consideration of all relevant factors placed before it, rejected the sentence proposed by the probation officer and chose to impose a sentence based on its discretionary powers. On the other hand s 71(4) of the Child Justice Act provides that the reason for imposing the sentence other than that recommended in the pre-sentence report must be entered into the record. I am satisfied that the magistrate has complied with the requirements of s 71(4) of the Child Justice Act in that she has given reasons for the sentence that she had contemplated imposing on the accused person.

[11] Considering the aggravating circumstances set out in the pre-sentencing report and the medico- legal report in respect of the complainant I find nothing wrong with the sentence that was imposed on the accused by the magistrate.

[12] In terms of s 50 of the Criminal Law Amendment Act 32 of 2007 the accused's name was entered into the sexual offences register. Section 50(1) states that:

"S 50(1) The particulars of the following persons must be entered in the Register:

(a) *a person who in terms of the Act or any other law –*

(i) *has been convicted of a sexual offence against a child or a person who is mentally disabled* “

The accused has been convicted of a sexual offence referred to in s 3 of Act 32 of 2007. He is therefore a person referred to in s. 50(1)(a)(i) of the said Act.
S 50(2)(a) of the [Criminal Law (Sexual Offences Related Matters)] said Act provides as follows:

"2 (a) A court that has in terms of this Act or any other law -

(i) *convicted a person of a sexual offence against a child or a person who is mentally disabled, after sentence has been imposed by that court for such offence, in the presence of the convicted person; or*

(ii) *made a finding and given a direction in terms of section 77(6) or 78(6) of the Criminal Procedure Act 1977, that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence was, by reason of mental illness or mental defect, not criminally responsible for the act which constituted a sexual offence against a child or a person who is mentally disabled, in the presence of that person, must, subject to paragraph (c), make an order that the particulars of the person be included in the Register.*

(b) When making an order contemplated in paragraph (a), the court must explain the contents and implications of such an order, including section 45, to the person in question."

The following paragraphs 50(2)(c) and 50(2)(d) were introduced by section 7(b) of Act 5 of 2015 on 7 July 2015. These amendments followed upon the decision of J v National Director of Public Prosecutions and Another 2014(2) SACR 1 CC: ("J v NDPP")

"(c) If a court has, in terms of this Act or any other law, convicted a person "A "*of a sexual offence referred to in paragraph (a)(i) and* "A " *was a child at the time of the commission of such offence, or if the court has made a finding and given a direction referred to in paragraph (a)(ii) in respect of* "A" *who was a child at the time of the alleged commission of the offence, the court may not make an order as contemplated in paragraph (a) unless –*

(i) *the prosecutor has made an application to the court for such an order,·*

(ii) *the court has considered a report by the probation officer referred to in s 1 of the Child Justice Act, 2008 which deals with the probability of* "A" *committing another sexual offence against a child or a person who is*

mentally disabled, as the case may be, in future;

(iii) *"A"·has been given the opportunity to address the court as to why his or her particulars should not be included in the register,·and*

(iv) *the court is satisfied that substantial and compelling circumstances exist based upon such report and any other evidence, which justify the making of such an order.*

(d) In the event that a court find that substantial and compelling circumstances exist which justify the making of an order as contemplated in paragraph (a) the court must under such circumstances on the record of the proceedings. •

[13] The problems with the proceedings before the regional court can be identified as follows. The amended provisions of s 50(2)(c) of Act 32 of 2007 which came into operation on 7 July 2015 were not adhered to. Firstly, the state, through the public prosecutor, did not make an application for the accused's details to be entered in the register. There was also no probation officer's report dealing with the probability of the accused committing another sexual offence against a child. The accused was also not given an opportunity to address the court as to why his particulars should not be included in the register. It is uncertain if the court found that substantial and compelling circumstances existed which justified the making of such an order. However, this should have been entered on the record of proceedings. This was not done. It would appear that the only remedy to the situation is to set aside the order that the magistrate court made in terms of s 50 of Act 32 of 2007 and to refer the matter back to the magistrate in order to enable her to comply with the provisions of s 50(2)(c) and (d) of Act 32 of 2007.

[14] The court made a further order that the accused may not work with children. Section 114(1) of the Children's Act 38 of 2005 (''the Children's Act'') states as follows:

"114 Contents of Part A of register -

(1) Part A of the register must be a record of-

(a) all reports of abuse or deliberate neglect of a child made to the Director General in terms of this Act,·

(b) all convictions of all persons on charges involving the abuse or deliberate neglect of a child;

(c) all findings by Children's Court that a child is in need of care and protection because of abuse or deliberate neglect of the child. "

[15] Section 120(1)(b) of Act 38 of 2005 states that any court in any criminal proceedings may make a finding that the accused is unsuitable to work with children. According to s 120(2) the court may make such a finding on its own volition or an application by the prosecutor. Section 120(4)(a) indicates further that in any criminal proceedings, a person must be found unsuitable to work with children on conviction of murder, attempted murder, rape, indecent assault or assault with the intent to do grievous bodily harm with regard to a child. Accordingly upon a conviction of, among others, rape, a criminal Court must make a finding that the person concerned is unsuitable to work with children. It is therefore not enough to inform such a person that the National Child Protection Register will be informed of such a conviction nor is sufficient to inform the National Child Protection Register of such person's conviction. Consequently, it must appear *ex facie* the record that the finding referred to in s 120(4) was made by a court seized with criminal case in respect if the person affected by such a finding. Failed to do so is not fatal and cannot render the proceedings abortive. The situation can be recovered by the setting aside the magistrate failure to do so and by requesting the magistrate to follow the prescripts of the said s 120(4). As the law stands the order made by the magistrate that the accused may be entered in the child protection register is in order ...

[16] Mr. HM Meintjies (SC), the Deputy Director of Public Prosecutions at the office of the National Director of Prosecutions and who is the co-author of the memorandum from that office, has expressed his opinion that while a sentence per se cannot be faulted, the magistrate did not refer to the prescripts of s 77(1)(b) of the Child Justice Act. This section provides that:

> *"77(1) A Child Justice Court -*
>
> > *(b) when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time."*

[17] Furthermore, Mr. Meintjies has taken a point that the Magistrate, in considering a sentence to be imposed on the accused, made no reference to the paramountcy of the child's best interest in terms of s 28(2) of the Constitution of the Republic of South Africa Act 108 of 1996 ("the Constitution"), which is the starting point in matters relating

to the child. In this regard Mr. Meintjies placed reliance on the case of J vs NDPP [2014(2) SACR 1 CC].

[18] He opined that the order made by the magistrate in terms of s 50 of Act 32 of 2007 did not comply with the decision of J v NDPP supra. According to him it is the decision of J v NDPP that led to the amendment of s 50 of Act 32 of 2007 and that the relevant amendment was introduced by Act 5 of
2015.

[19] Before proceeding further with the views expressed by Mr. Meintjies, and I will return to the rest of them, I need to deal with first with the three problems he has raised namely:

1. that the magistrates did not refer to the prescripts of s 77(1)(b);
2. that no reference to s 38(2) of the Constitution was made; and
3. that the order made by the magistrate in terms of s 50 of Act 32 of 2007 does not meet the requirements of the authority of J vs NDPP supra.

[20] <u>The magistrate did not refer to the prescripts of s 77(1)(2) of the Child Justice Act 75 of 2008</u>

I have dealt with these issues sufficiently in paragraph 9 supra. In the first place, it will be recalled that the court, in R v Dhlumayo and Another 1948(2) 677 AD at page 706 said that:

> *"12 An Appellate Court should not seek anxiously to discover reasons adverse to the conclusions of the trial judge. No judgment can ever be perfect and all-embracing, <u>and it does not necessarily follow that because something has not been mentioned, therefore it has not been considered</u> "*

In my view, it is not necessary that the magistrate should have specifically referred to the provisions of s 77(1)(b) of the said Act. It is enough if the magistrate consciously dealt with the determination of the sentence in terms of the prescripts of the said section. That she did so can be gleaned from the fact that she had before her a psycho-

social report prepared by Mr. A Sihlangu. The report itself indicates quite clearly that it was a pre-sentencing report of a child offender. This report contained all the relevant information pertaining to the accused as a child. Secondly, the fact that the court took steps to have the accused's age expertly assessed, in my view, showed that the magistrate was at all material times conscious of the fact that she was dealing with a child as envisaged by the Child Justice Act. It is in the circumstances highly unlikely that the magistrate could have omitted to have regard to the prescripts of s 77(1)(b) when she determined the appropriate sentence to be imposed on the accused or when she considered the steps that has to precede the imposition of an appropriate sentence on the accused as a child. Moreover s 77(3) of the Child Justice Act provides otherwise. Reference to this section has already been made in paragraph 9 supra. Accordingly I would accept the approach of Ms. S Scheepers in this regard.

[21] <u>The magistrate did not refer to the best interest of the child in terms of s 28(2) of the constitution</u>

In the cause of their argument and in particular in support of their approach, the amity in J v NDPP and Another supra referred to the provisions of s 28(2) of the constitution. The said section provides that:

"A child's best interests are of paramount importance in every matter conceming the child"

Then the court itself followed and stated that:

*'The amici is correct that the starting point for matters concerning the child is section 28(2). This Court has held that the "best – interests" or "paramountcy" principle creates a right that is independent and extends beyond the recognition of other chosen the right in the Constitution**."*

What the amici stated was a constitutional principle enshrined in the constitution itself. What followed thereafter was confirmation by the Court of that constitutional principle. When the amici restated the said principle and the court confirmed it they were not prescribing what a court that deals with child-related issues should quote. In other words it is not necessary, as suggested by Mr. Meintjies, that a court should refer to s 28(2) of the Constitution. In my view it is enough if the court is at all material times conscious of the fact that it deals with a child and that the prescripts of 28(2) of the Constitution are obeyed.

[22] The order made by the Magistrates in terms of s 50 of Act 32 of 2007 does not meet the requirements of J v NDPP 2014(2) SACR 1 CC

The issue that Mr. Meintjies raised in respect of this aspect have already been covered in paragraphs 11 and 12 supra.

[23] It is opined by Mr. Meintjies that in terms of s 120(4) of the Childrens' Act 38 of 2005 the finding that a person is unsuitable to work with children must be made upon a conviction of rape of a child. Mr. Meintjies states that, in this instant matter, the magistrate failed to make such a finding. Instead of doing so the magistrate informed the accused that the National Child Protection Register would be sent a notification of the conviction. S 120(1) of the Children's Act 38 provides that:

> *"(1) A finding that a person is unsuitable to work with children may be made by –*
>
> (a) *a children's court;*
>
> (b) *any other court in any criminal or civil proceedings in which that person is involved; or*
>
> (c) *…*
>
> *A finding in terms of subsection (1) may be made by a court or forum contemplated in subsection (1) on its own volition or on application by –*
>
> (a) *an organ of state involved in the implementation of this Act,·*
>
> (b) *a prosecutor, if the finding is sought in criminal proceedings; or*
>
> (c) *a person having a sufficient interest in the protection of children.*
>
> *(3) Evidence as to whether a person is unsuitable to work with children may be heard by the court or forum either in the course of or an the end of its proceedings."*

[24] In terms of s 120(1) a discretion to make a finding that a person is unsuitable to work with children is granted to a children's court, any court dealing with either criminal or civil proceedings in which an affected person is involved or any forum established for this purpose. This finding may be made by the court on its own or by a forum as contemplated in (1) or on an application by an organ of state involved in the implementation of the Act; a prosecutor in criminal proceedings or a person having sufficient interest in the protection of children.

[25] Section 120(4) imposes a duty on the court in criminal proceedings to make a finding that such a person involved in the criminal proceedings is unsuitable to work with children. It provides as follows:

> *"120(4) In criminal proceedings a person must be found unsuitable to work with children –*
>
> (a) *on conviction of murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child; or*
>
> (b) *if a court makes a finding and gives a direction in terms of s 77(6) or 78(6) of the Criminal Procedure Act 1977 (Act No. 51 of 1977) that the person is by reason of mental illness or mental defect not capable of understanding the proceedings so as to make a proper defence or was by reason of mental illness or mental defect not criminally responsible for the Act which constituted murder, attempted murder, rape, indecent assault or assault with intent to do grievous bodily harm with regard to a child."*

I agree with Mr. Meintjies that the magistrate failed to make such a finding. This aspect has been dealt with in paragraph 14 supra.

[26] Accordingly the following order is made:

1. the order in terms of section 50 of Act 32 of 2007 made by the magistrate is hereby set aside;
2. the magistrate is hereby ordered to make a proper order in terms of section 50(2)(c) and (d) of Act No 32 of 2007 as amended by section 7 of Act 5 of 2015;
3. the order made by the magistrate in terms of section 120 of the Children's Act 38 of 2005 is hereby set aside;
4. the magistrate is ordered to comply with the provisions of section 120(4) of the Children's Act 38 of 2005;
5. the record must be returned to the Registrar of this Court as soon as the magistrate has complied with the orders as set out in 1-3 supra for further review.

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P. M. MABUSE

JUDGE OF THE HIGH COURT

I agree, and it is so ordered.

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L M MOLOPA-SETHOSA

JUDGE OF THE HIGH COURT

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