Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

High Court Ref No: 141114
Magistrate's serial No: 78/2014
Case no.: SHE 59/14

From the Regional Court for the Regional Division of the Western Cape
Held at WYNBERG

In the matter between:

THE STATE

And

[S….] [N……] and [M…….] [Q…..]

REVIEW JUDGMENT

BINNS-WARD J:

[1] In this matter the two accused were convicted of murder in the regional magistrates' court at Wynberg. They were legally represented at their trial. They both pleaded guilty and were convicted upon the acceptance by the court and the prosecutor of the facts set forth in their written statements that were handed in in terms of section 112(2) of the Criminal Procedure Act 51 of 1977. The accused were

each sentenced to 10 years' imprisonment. Accused no. 1 was born on 11 December 1995 and accused no. 2 just two days earlier, on 9 December 1995. The offence was committed on 3 October 2013. The accused were arrested on the same day. They were both therefore not yet 18 years of age at the time of commission of the offence and their subsequent arrest, and thus children within the meaning of s 28 of the Constitution.[1]

[2] The matter came on automatic review in terms of s 85 of the Child Justice Act, which provides if a child, within the meaning of the Act, has been sentenced to any form of imprisonment, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of any of the factors set out in s 302 of the latter Act, such as that the accused had enjoyed legal representation, that would ordinarily exclude the requirement for an automatic review.

[3] Upon considering the record of proceedings I was struck by the disparity between the facts concerning the commission of the offence as set out in the accuseds' respective statements in terms of s 112(2) of the Criminal Procedure Act and the version of the fatal assault given in the magistrate's sentence judgment. It was also striking that there was nothing in the sentence judgment to suggest that the magistrate had been conscious that the accused qualified to be treated as children for sentencing purposes even though it is evident from the record that he was fully astute to the fact that he was presiding in a child justice court. I accordingly caused the following query to be addressed to the magistrate:

> The sentence judgment refers to facts which go beyond what was contained in the plea statements accepted by the State.
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> The plea statements suggest that the deceased was the initial aggressor, whereas the sentence judgment apparently relying on the hearsay description of the event derived from one of the probation officers' reports, treats the accused as brutal attackers who pursued the deceased. The two versions are inconsistent. On what basis does the magistrate justify accepting the version in the probation officer's report for sentence purposes?

[1] Section 28 of the Constitution is the provision in the Bill of Rights that provides for the rights of children. Section 28(3) defines 'child' for the purpose of the provision as 'a person under the age of 18 years'.

The sentence judgment makes no reference to s 28(1)(g) read with s 28(2) of the Constitution. To what extent, if any, were these provisions applied in the determination of an appropriate sentence?

The magistrate's urgent response is requested.

[4] The magistrate responded as follows:

> [1] As a matter of background, after the accused were convicted of murder, Mr Jikela, the attorney of the accused requested pre-sentence reports namely Correctional Supervision and Probation Officer's Reports. These reports were compiled by their respective authors. They were given to Mr Jikela. Mr Jikela must have read the reports.
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> [2] Unlike the Correctional officer's Reports, the Probation Officers Reports were all detailed. They contained more facts regarding this murder than the statements in terms of Section 112(2) in respect of the accused. Above all, both Probation Officers Reports contained adverse recommendations of direct imprisonment against both accused.
>
> [3] Despite that and notwithstanding the fact that the defence still had an opportunity, not to hand them in, the defence elected to hand in these reports.
>
> [4] These reports including any piece of evidential material formed part and parcel of the record. There is nothing which precluded the court from considering them for the purposes of sentence.
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> [5] Despite the "hearsay description of the evidence" contained in the Probation Officer's Reports. Mr Jikela handed in these reports as exhibits. By so doing, he consented or agreed to the reception of that evidence. What was contained in these reports was admitted by the defence. [fn. See section 3(1)(a) of the Law of Evidence Amendment Act 34 of 1988, which provides that subject to the provisions of any other law, hearsay evidence shall not be admitted as evidence at criminal or civil proceedings unless (a) each party against whom the evidence is to be adduced agrees to the admission thereof as evidence at such proceedings.] If it was not so, the defence should have expressly indicated which parts of the reports they did not agree with. There is nothing in law which precluded the court from considering the

contents of the reports which were admitted by the defence. Reference by the court to some aspects of the reports was therefore not a misdirection at all.

[6] The legislation (see Section 3(1)(a) above as well as case law) authorised the court to accept the version in the probation officers report for sentence purposes.

[7] This brings me to the question of what is the probative value of the hearsay allegations in the reports of the probation officer's reports compiles by Messrs Cefa and Best. The answer to this question can be found in S v RO and Another [fn. 2010 (2) SACR 248 at 254 (SCA)] and S v Oliver [fn. 2010 (2) SACR 178 (SCA) at para 7].

[8] In S v RO, the court held that "where the factual basis of pre-sentence report or an omission or recommendation contained herein is disputed in a material respect, the author of the report is required to testify on oath. In the absence of a pertinent challenge thereto any controverting evidence, facts unequivocally admitted by the party become proved facts" (my emphasis").

[9] Having dealt with the first part of the remarks of the Reviewing Judge, I now turn to the second part of the remarks, namely "the sentence judgment makes no reference to section 28(1)(g) read with section 28(2) of the Constitution. To what extent were these provisions applied in the determination of an appropriate sentence.

[10] For the sake of completeness, I think it would be appropriate to quote the abovementioned sections verbatim. Section 28(1)(g) of the constitution reads as follows: [the magistrate quoted the provision]. Section 28(2) of the Constitution reads as follows: [the magistrate quoted the provision].

[11] The accused in this matter were 17 years when they were arrested. They were 18 years at the time of sentencing. In terms of section 28(3) of the Constitution, a 'child' means "a person under the age of 18 years".

[12] With all respect to the Judge's remarks, section 28(1)(g) is not applicable in this case as the accused were 18 years old when they

were sentenced. Be that as it may, the court was always mindful of the fact that it was dealing with young offenders. The youthfulness of the accused was not only paid lip service to, but was seriously considered during sentencing hence, these lenient sentences which were imposed on the accused despite the brutal and heinous nature of the offence which they committed.

[13] In conclusion, I submit that these proceedings are in accordance with justice.

[14] The original record is returned herewith ….

[5] In terms of s 28(1)(g) of the Constitution, every child 'has the right not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be-

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age'.[2]

Section 28(2) of the Constitution provides that 'A child's best interests are of paramount importance in every matter concerning the child'.

[6] In Centre for Child Law,[3] Cameron J, writing for the majority, explained this provision in the context of sentencing child offenders, stating 'The constitutional injunction that "[a] child's best interests are of paramount importance in every matter concerning the child" does not preclude sending child offenders to jail. It means that the child's interests are "more important than anything else", but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment' (footnote omitted).[4]

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[2] In *Centre for Child Law v Minister for Justice and Constitutional Development and Others* 2009 (2) SACR 477 (CC) ; 2009 (6) SA 632 (CC) ; 2009 (11) BCLR 1105 (CC) at para 25, it was observed that the wording of s 28 'draws on and reflects' The Convention on the Rights of the Child, which was adopted by the United Nations General Assembly on 20 November 1989 and ratified by South Africa on 16 June 1995

[3] Note 2, above.

[4] *Centre for Child Law* supra, at para 29.

[7] In Mpofu v Minister for Justice and Constitutional Development and Others 2013 (9) BCLR 1072 (CC); 2013 (2) SACR 407 (CC), it was remarked by Skweyiya J, writing for the majority, that 'Section 28 of the Constitution demands that children are accorded different treatment in sentencing. A failure to do so is … a constitutional failure'.[5]

[8] Section 7 of the Constitution imposes a duty on the state to respect, protect, promote and fulfil the rights in the Bill of Rights. In an act of fulfilment of this duty, in relation to s 28 of the Constitution, Parliament has enacted the Child Justice Act 75 of 2008. Of particular relevance in the current matter in the light of the magistrate's response, the Act purposively extends the meaning of 'child'. In s 1, 'child' is defined to mean '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 matter is dealt with in terms of section 4 (2)'. Section 4(2) provides that 'The Director of Public Prosecutions having jurisdiction may, in accordance with directives issued by the National Director of Public Prosecutions in terms of section 97 (4) (a) (i) (aa), in the case of a person who-

(a) is alleged to have committed an offence when he or she was under the age of 18 years; and

(b) is 18 years or older but under the age of 21 years, at the time referred to in subsection (1)(b),

direct that the matter be dealt with in terms of section 5 (2) to (4)'. The accused in the current matter qualified to be dealt with as children for the purposes of the Act in terms of the criteria set forth in s 4(1) of the Act because they were under 18 when

[5] *Mpofu* at para 61, n. 37.

they were arrested.[6]

[9] The aforementioned provisions of the Child Justice Act confirm that there is no arbitrary end to childhood for children who have committed offences before they attained the age of adulthood, but are still being processed through the criminal justice system when they turn 18. The legislation is thus recognisably directed at promoting the spirit, purport and objects of s 28(1) and (2) of the Constitution. One need not go beyond the preamble to Act to appreciate this. It does so by giving a generous and expansive effect to the constitutional provisions and avoids any reading down of them that a misguidedly narrow application of the definition in s 28(3) of the Bill of Rights could bring about. The effect is manifest, for example, by the provision that child offenders may be committed in terms of s 76 of the Act to compulsory residence in youth care centres until they attain the age of 21. The reasoning behind the approach evident in the wider application of the Child Justice Act is manifestly sound. It has an effect on the manner in which offenders falling within its wider definition are processed through the criminal justice system from arrest or arraignment. Insofar as sentencing is concerned, it is incidentally in accordance with the Constitutional Court's application of s 28(1)(g) in Centre for Child Law and Mpofu in respect of persons who are over 18 when they come up for sentencing in respect of offences committed while they were still under that age.

[10] Children are deserving of different treatment from that given to adults by virtue of factors such as their physical and psychological immaturity, which renders them more open to 'impetuous and ill-considered actions and decisions'[7] and thus, in general, less morally culpable for their wrongdoings than adults are.[8] [9] When a person commits an offence while under the age of 18, their conduct falls to be judged in the context of these considerations. It would make no sense then to treat them as adults for sentencing purposes simply because the intervening passage of time has

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[6] Section 4(1) provides: '*Subject to subsection (2), this Act applies to any person in the Republic who is alleged to have committed an offence and-*
(a) was under the age of 10 years at the time of the commission of the alleged offence; or
(b) was 10 years or older but under the age of 18 years when he or she was-
(i) handed a written notice in terms of section 18 or 22;
(ii) served with a summons in terms of section 19; or
(iii) arrested in terms of section 20,
for that offence'.

[7] *Roper, Superintendent, Potosi Correctional Center v Simmons* 543 U.S. 551 (2005) at 569.

[8] *R v B (D)* 2008 SCC 25 at para 41.

[9] See generally *Centre for Child Law* supra, at para 24-38.

resulted in their being adults when sentencing occurs. That would mean punishing them for what they had done as children as if it had been done when they were adults. That such an approach would impinge on the substance of the rights provided in terms of s 28 of the Constitution is axiomatic, or so I would have thought. The point is borne out by the striking down by the Constitutional Court in Centre for Child Law[10] of provisions which were directed at making the minimum sentencing regime prescribed in terms of the Criminal Law Amendment Act 105 of 1997 applicable to certain offences committed by persons when they were between the ages of 16 and 18 as being unjustifiably limiting of the rights in terms of s 28 of the Constitution. It is obvious that many of the persons affected would be over 18 by the time they came to be tried and sentenced.

[11] It follows that the content of paragraphs 9 -12 of the magistrate's response to my query is predicated on a fundamentally misdirected understanding of the ambit of s 28(1)(g) of the Constitution. It is evident that the magistrate treated the accused as youthful adult offenders rather than children when he imposed sentence. The magistrate placed the accused on the wrong side of the 'stark but beneficial distinction between adults and children'[11] created in terms of s 28 of the Bill of Rights and thus approached the determination of their punishment on the incorrect assumption that s 28(1)(g) was not applicable. This demonstrates that there was - to borrow the expression used by Skweyiya J in Mpofu, quoted above[12] - a 'constitutional failure' in the sentencing proceedings. In particular, no consideration was given by the magistrate to sentencing the accused to compulsory residence in a youth care centre in terms of s 76 of the Child Justice Act. This, by itself, necessitates that the sentences imposed must be set aside and the determination of an appropriate punishment reconsidered afresh consistently with the children's rights provisions in the Bill of Rights and proper regard to the sentence options and sentencing objects in the Child Justice Act.

[12] Regrettably, it is also necessary to address the magistrate's misdirections on the evidence with regard to sentence. It appears from the magistrate's response that he saw no reason to be astute to the effect of evidence adduced in respect of the

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[10] Note 2
[11] *Centre for Child Law* supra, at para 14 (per Cameron J).
[12] In para [2].

sentence proceedings that was at odds, in respect of the circumstances of the commission of the offence, with that which had been accepted for the purpose of convicting the accused. The response also reflects a material misapprehension by the magistrate of the ambit of s 3 of the Law of Evidence Amendment Act 45 of 1988 and of the import of the relevant passages in the two judgments of the Supreme Court of Appeal to which he referred.

[13] The versions given by the accused in their respective statements in terms of s 112(2) of the Criminal Procedure Act concerning the commission of the offence corresponded with each other in all respects. It will therefore serve the purpose of this judgment sufficiently to quote only that given by the first accused. It went as follows:

> I the undersigned, Sabelo Ngwayimbana, do hereby declare freely and voluntarily that:
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> 1. I am accused in this matter and I understand the charge against me.
> 2. I plead guilty to the charge of murder in that or upon about the 3rd October 2013, and at or near Nyanga in the regional division of the Western Cape, I unlawfully and intentionally killed Ana Lumfowie a male person by stabbing him with a knife.
> 3. I admit the following:
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> 3.1 On the day of the incident I and my friends were at school and we came down from the classes on the upper level.
>
> 3.2 At the ground level we met the deceased together with someone else and they were seated.
>
> 3.3 The deceased then stood up and took out a knife and stabbed my co-accused,that is accused 3 [the other accused (four persons were initially arraigned on the charge, but charges were withdrawn against accused 2 and 4)], and a fight then ensued.
>
> 3.4 While the fight was on I took out my knife and I stabbed the deceased a number of times but I cannot remember how many times I stabbed him.
>
> 3.5 The deceased then fell to the ground and I then ran away with my co-accused.
>
> 3.6 I admit that I foresaw that by stabbing the deceased indiscriminately in his body would lead to his death and I reconciled with that possibility.

3.7 I admit that my actions were unlawful and punishable by a court within the relevant jurisdiction and I confirm the jurisdiction of this court.

3.8 I am fully remorseful and ask that the Court have mercy on me.

[14] The facts accepted by the state and the court for the purpose of the conviction thus placed the deceased in the role of the aggressor in the fight in which he was killed. They had the deceased starting the fight by stabbing the second accused and being fatally stabbed himself in the ensuing melee.

[15] In his sentence judgment, the magistrate made the following remarks:

> Violence at schools has reached such a high level of degree that it needs to be curtailed. Parents are sending their children to school not to be killed and butchered like it was done to the deceased, but to be educated and prepared for their future. Children who have been sent to school are expected to behave as schoolchildren, not to behave as adults.
>
> This offence is so serious that the deceased was murdered cold-bloodedly. He was chased, he ran away from you, one of you tripped him. He fell on the ground and whilst on the ground he was viciously stabbed by you. This happened in broad daylight at the school in the presence of pupils and teachers.
>
> …You were so determined to murder the deceased. You were not prepared to be deterred by the crying children and the teachers. School children and the teachers were traumatised by what you did.
>
> ….I take into consideration the fact that you may have been provoked by the conduct of the deceased. The deceased too is not a holy cow here. He too did not have a right to possess a knife at school and stab the other people. You and the deceased made a mockery of our education system. There are pupils who want to study and to become something in life and you disturbed them from obtaining that.
>
> …I must hasten to add that no amount of provocation entitled you to act like you did. Two wrongs do not make a right. If you [had] reported the matter to the police, I can assure you that the deceased would have been standing before me on a charge of attempted murder. He would still have been alive.

[16] It is thus apparent that the version of events suggested in the sentence judgment differs starkly from that set out in the accused's plea statements, which, amongst other things, has the deceased falling to the ground as a result of being stabbed. The judgment, by contrast, gives a picture of the accused chasing after the deceased, tripping him and 'cold bloodedly' stabbing him to death while he lay on the ground. It is not apparent which of the accused tripped the deceased, or which of them stabbed him. It suggests that the fatal assault was perpetrated or persisted with, notwithstanding the wails or entreaties of onlookers. The sentence judgment describes a killing committed with direct intention to kill, whereas the plea statements were consistent with an admission of murder with the indirect or 'legal' intention to kill (dolus eventualis). The distinction is a most material one in any proper consideration of appropriate punishment. The additional information included in the sentence judgment, which plainly contains matter that gives a more damning description of events than that contained in the plea statements was obtained by the magistrate from one of the two probation officer reports prepared in respect of the accused. Two different probation officers gave reports, one dealing with the first accused and the other with the circumstances of the second accused.

[17] The magistrate's statement in his response to my query that the probation reports had been prepared and produced at the trial at the instance of the accused's legal representative is not supported by the record. After the conviction of the accused and the prosecutor had intimated that they had no previous convictions, there was an interruption in proceedings in order to deal with the position of the two other accused with whom they had originally been charged. The record then reflects an exchange between the court, the prosecutor and the accused's legal representative, Mr Jikela. It is evident from the content of the exchange that the probation officers' reports had by then already been acquired at the instance of the prosecution and that the matter was postponed to enable reports to be obtained from a correctional services officer at the instance of the accused's legal representative.

[18] The apparent impression of the magistrate that the probation officers' reports had been produced at the request of the defence attorney is in any event disturbing. In terms of s 71 of the Child Justice Act, the magistrate was not empowered to proceed to sentence the accused before he had considered a pre-sentencing report prepared by a probation officer. Such reports would in the ordinary course be procured for the

court by the prosecutor, as indeed would appear to have been the case in the current matter as suggested by the prosecutor's intimation in the passage in the record to which I have just referred that 'The State already has the probation report Your Worship'.

[19] When proceedings resumed on 23 September 2014, the prosecutor announced that 'This matter is on the roll for a correctional as well as the social worker's report, Your Worship for sentence purposes'. The magistrate then stated 'Thank you. Mr Jikela did you manage to get the plea proceedings reports Mr Jikela?'. To which the defence attorney replied 'Your Worship, I confirm my appearance on behalf of both the accused in this matter. Your Worship, indeed I confirm that we did receive both reports, that of the correctional officer and also that of the of the probation officer Your Worship'. The magistrate without further ado entered the probation officers' reports into the record as exhibits 'G' and 'H', respectively, and those of the correctional services officer as exhibits 'I' and 'J'. It would appear that the magistrate must have been provided with the opportunity to consider the reports before they were formally handed in because he proceeded immediately to hear submissions on sentence from the defence attorney and the prosecutor, whereafter he forthwith delivered the sentence judgment without any need to adjourn.

[20] The probation officer who reported on the first accused was Mr. M. Cefa. The report, which was dated 11 July 2014 – that is nearly six weeks before the date of the plea statement - contained the following passages of particular relevance to sentencing generally and the nature of the offence in particular (I have not edited the language in any way):

> When the officer consulted the principal and other school teachers, they described the concerned as a learner who was uncontrollable, displaying disruptive behaviour. It was reported that the concerned displayed the tendency of not attending classes….
>
> The school principal informed the officer that a meeting was called in April 2012 with the parents and learners who have been associated with the gang related activities of which the concerned was one of them.
>
> The purpose of the meeting was to talk with all learners who were involved in gang related activities. At that meeting it transpired that the accused was a gang member. It was also revealed at the meeting that that the concerned

promised another learner to kill him. The minutes of that meeting was issued to the officer and is attached to this report.

The concerned denied his involvement in gang activities. He informed the undersigned that he used to drink alcohol on special occasions but that he no longer drinks alcohol and does not use drugs.

According to the concerned he has friends of his age and most of his friends are still at school. The concerned reported that he usually spend his free-time at home and sometimes with his friends…

…Most of the teachers consulted by the officer portrayed the concerned as a person who displays challenging behaviour.

…According to the concerned he has been attacked by the deceased the day before the incident at hand. The concerned informed that he reported the incident to the deputy principals Mr Tyandela and Ms Gunguluza who promised that they will attend to it.

The concerned provided his version of what happened on the day of incident: He was on his way to another class with his friend [the other accused's name was given] to take his memory card to one of the learners by the name of [xxx]. They met the deceased in the passage. The deceased withdrew a knife and he stabbed his friend [the other accused]. His friend…retaliated and he joined his friend in fighting with the deceased. Both of them stabbed the deceased.

….He reported that it was not his intention to kill the deceased his intention was to defend himself against the deceased who was always attacking him. The accused shows remorse for his criminal conduct.

I should mention that the minutes of the April 2012 meeting – some 18 months before the date of the commission of the offence - do not provide a particularly coherent record of the event and are of limited relevance or assistance on their own and unsupported by the oral evidence of the persons present who spoke to the alleged behaviour of the two accused at the time.

[21] The probation officer who prepared a report for the second accused was Mr. Vusumzi Best. His report was also dated 11 July 2014. The most pertinent passages in the report went as follows (the language is reproduced as it appears, without editing):

The mother reported that the teachers were complaining about late coming at school, wearing of school uniform and doing school work. According to the mother the concerned follows instructions at ease and adheres to rules and regulations at home.

The brother of the concerned reported that the concerned is a member of the Vura gang. The concerned denied gang membership. His brother believe that the concerned was recruited to join the gang as he resides in the area of Vara gang and needs protection. The concerned reportedly associates with peers of bad behaviour who are older than him. His mother mentioned that the concerned is used by older people to commit criminal activities.

According to the information obtained from the teachers [the second accused] was a member of Vura gang. He is described as the ring leader of the gang. According to information obtained from the school the current incident was not the first time that a child was stabbed at school. There was reportedly an incident at school whereby the concerned and his friends use a gang member who is not attending school to stab one of the learners at school. The gang member was wearing a uniform and camouflaged as one of the pupils.

The teachers reported that the concerned and the co-accused associate with gang members who rob cellular phones, money and school bags of children. They reportedly wait outside the school premises and rob children after school of their valuables.

According to the teacher's perspective, the gang claims the territory and therefore the school as the school is in their area.

Mr. Tyopho, the correctional official described the concerned as a quiet child. He reportedly co-operates well with staff members in prison and has a good relationship with inmates.

…..

PRESENT OFFENCE

According to the accused, the incident of murder happened on 04 October 2013 on the premises of the school. He explained that before the incident happened, his friend had an argument with their rivals over the obstruction of the sun. One of his friend arrived in accused's home early in the morning. This friend told him that Sabelo and his friends were sitting on the grass in the

back field of the school. One of their girlfriends borrowed a memory stick from [the first accused]. The victim's friend came while they were sitting on the grass. They provoked, obstructed him from the sun and beat him. The school children arrived and stopped the fight. [The first accused] was taken to the principal's office and asked about what happened. [The first accused] told how the fights started. According to the accused, the deputy principal instructed [the first accused] to go class as he was going to deal with this matter during lunch break. The deputy principal had never called to address this matter. His biological mother reported that he was appearing in Goodwood court for his outstanding case [the report mentions that the second accused had been on remand on a charge of housebreaking at the Goodwood magistrate's court] when the argument started. The next day after the argument, his friend arrived in home to go to school together as usual. They met Abongile and Sandile at school, went upstairs to one of the classes to fetch memory stick which was borrowed by one of their girlfriends. While they were on their way to the classroom, they met the victim. According to the accused, the victim assumed that he and his friends were avenging themselves against them as rivals about the fight of the previous day. The accused explained that the victim took the knife from his waist and stabbed in his chest. His cousin gave him a knife to defend himself against the deceased. The victim passed away on that day. [The first accused] and Andile took him to Crossroad Community Health Centre. The victim died on the same day. After he was discharged from hospital, he went back home. He and his friends were taken by car to the police station. Their parents reported to the police station and they were charged with murder. The accused admitted guilt for the office of murder he committed and verbalizes remorse.

According to the teachers who witnessed the incident, the victim was brutally murdered. They heard a noise outside while they had a briefing about the stabbing of [the first accused]. The victim was getting in the classroom and the children ran outside the classroom. They chased the victim and he ran away. While he was running, one of [the first accused's] friends tripped him on his feet. He fell and was stabbed several times on his head, chest and stabbed.

….

The accused was in grade 10 when he was arrested. His academic progress was not satisfactory and his involvement in extra-mural activity at school was to play soccer in primary school. He has never worked before and relies on his family members for a living.

The family is living in a low-socio economic area which is characterized with high rate of unemployment, drug abuse, criminal activities and gang violence.

The concerned is described as an intelligent, good, hard working person who does household chores like cleaning and cooking. His mother reported that she has never received any complaints from the community about his involvement in criminal activities.

It was reported that the accused belongs to the Vura gang. Teachers regard the concerned as the ring leader at school. Gangsterism is rife in his area and he was recruited to join the gang members for protection.

The accused and his co-accused brutal murdered the victim and he is regarded as the sole instigator. He admitted guilt for the offence of murder he committed. The undersigned is of the opinion that a strict sentence should be imposed due to the nature of the offence and the harm he did to the victim.

[22] The magistrate was incorrect in concluding that the accused had agreed to the hearsay evidence in contradiction of the version of events given in their plea statements being admitted against them. As mentioned, he appears to have formed his view under the impression that the probation officers' reports had been obtained and introduced at the instance of the defence attorney. That was not the case. The magistrate should have been astute to the statutory requirement that the court obtain a probation officer's report before imposing sentence. He should also have noted that the reports predated the plea statements and that it was most unlikely in the circumstances that the accused were agreeing to a different and adverse hearsay version of the incident being accepted as evidence against them. On the contrary, it was evident from the defence attorney's address in mitigation, during the course of which the attorney submitted that 'one would be inclined to say that it [the stabbing incident] is bordering on the accused before the court trying to defend themselves', that it was advanced on the basis of the facts put up in the plea statements, and at odds with the hearsay version described in the report of Mr. Cefa.

[23] Furthermore, the hearsay descriptions of the facts in the probation officers' reports did not coincide in all respects. There was no basis on the record for the magistrate to accept the most damning version of the facts put up against the accused. The facts given in the plea statement did not justify the description of the stabbing of the deceased as 'cold-blooded' murder. The magistrate should have raised the issue of the conflict between the probation officer reports and the facts admitted by the accused if he was considering preferring either of the versions in the reports. The prosecutor was certainly not at liberty to lead evidence in aggravation in contradiction of the facts that had been accepted for plea purposes; see e.g. S v Moorcroft 1994 (1) SACR 317 (T) at 320g, S v Nel 2007 (2) SACR 481 (SCA) at para 20 and S v Mnisi 2009 (2) SACR 227 (SCA) at para 33 (p. 238f). The magistrate did not ask the accused's legal representative whether the accused were willing to admit the adverse versions of the facts in the probation officer's reports. Moreover, nothing in what the defence attorney said in his address in mitigation of sentence justified the magistrate inferring that there was agreement that the hearsay evidence adverse to the accused and inconsistent with their plea statements might be admitted against them. There was thus no basis for the magistrate's purported reliance on s 3(1)(a) of the Law of Evidence Amendment Act.

[24] The magistrate's reliance on the dicta uttered by Majiedt AJA (Griesel AJA concurring) in para 33 of the minority judgment in S v RO was misplaced. The learned acting judge of appeal expressly limited his remarks concerning the admissibility of hearsay evidence in sentencing reports to 'facts unequivocally admitted by a party' (my underlining). He also stated, citing S v Olivier at para 7 and the cases referred to there, that 'material factual averments ought generally to be proved on oath during the sentencing stage'. (The probation officer involved in S v RO in fact gave oral evidence at the trial, and had not been cross-examined by the defence.) It should be evident from what I have said earlier that in the face of the defence attorney's submission in mitigation it cannot be said that there was any, even less an 'unequivocal', admission of the hearsay facts adopted by the magistrate for his sentence judgment in the current case. The judgment in S v Olivier, also relied upon by the magistrate in his response to the review query, is distinguishable. That judgment went to the duty of prosecutors not to allow ex parte factual submissions by

the defence to go in unchallenged when they were at variance with the information in the police docket.

[25] It has been noted many times that sentencing is a vitally important part of a criminal trial; and yet one that is often dealt with superficially and with too little care by both judicial officers and legal representatives for the prosecution and the accused. The current matter exemplifies a lack of proper attention to the issue of determining an appropriate punishment within the applicable constitutional and statutory framework. None of the legal actors involved in the trial of the accused applied themselves, to the extent that the circumstances of the case required, in looking into the circumstances of the accused or the context in which the crime was committed. Evidence should have been elicited directly from the parents of the accused and from their headmaster or teachers. The probation officers should have been called to give oral evidence, especially in the context of the failure of one of them to even acknowledge the existence of the sentencing option provided in terms of s 76 of the Child Justice Act, and the unmotivated indication by the other that such a sentence should not be considered on account of the nature of the offence.[13]

[26] The fact that the accused were legally represented did not excuse the magistrate from calling for such evidence as was necessary to enable him to exercise a proper judicial sentencing discretion (see S v Van de Venter 2011 (1) SACR 238 (SCA) at para 16 and the other authority cited there). The indications are that both accused had progressed quite far in their education and were from supportive family backgrounds. The probation officers' reports identify aspects in respect of each of the accused that suggest that they are amenable to reform and rehabilitation. There are also indications that the school environment in which the incident occurred was dysfunctional and might have affected the accused's personal and social development adversely. The matter cries out for an investigation into whether the accused would benefit from a rehabilitative regime during compulsory residence at a youth care centre, rather than being incarcerated in prison for a lengthy period, which experience tells is all too frequently like admission to a university of crime. Attention is directed in this connection, in particular, to s 76(3), which provides that, if appropriate, such

[13] The probation officer who referred to s 76 of the Child Justice Act in his report, but discounted it as a viable sentencing option because of the nature of the offence (murder) appears to have misunderstood the ambit of the provision. He appears, like the magistrate, to have failed to have regard to s 76(3), with its express reference to the offences referred to in Schedule 3 to the Act, which include murder.

sentence can be coupled with a sentence of imprisonment to be served after the offender attains the age of 21. This is subject to the power of the child justice court to consider later, after consideration of a report from the head of the child care centre as provided in terms of s 76(3)(b) of the Child Justice Act, whether the prison sentence should actually be served or not.

[27] I consider that it would not be fair to the accused if the reconsideration of an appropriate sentence were to be dealt with by the same magistrate. In my view the accused could reasonably assume that any reconsideration of their sentences would be tainted by the trial magistrate's demonstrated readiness to accept the most adverse version of the facts based on the hearsay versions in the probation officers' reports. Section 304(2)(c)(v) of the Criminal Procedure Act empowers this court to remit the matter to be dealt with in such manner as it may think fit. In my judgment this includes the power, if the interests of justice so require in a given case, to direct that the sentence proceedings commence afresh before a different magistrate.[14]

[28] The following order is therefore made in terms of s 304(2)(c) of the Criminal Procedure Act:

1. The sentences of ten years' imprisonment imposed on each of the accused are set aside.

2. The matter is remitted to the trial court for the urgent consideration of sentence afresh before a different magistrate, with due regard to the guidance furnished in this judgment and after hearing the oral evidence of the probation officers and any other witnesses such as the parents or teachers of the accused as he may consider fit.

3. After sentence has been imposed afresh, the matter is to be resubmitted on review in terms of s 85 of the Child Justice Act 75 of 2008.

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[14] This course was adopted on review by the High Court (Van Rensburg and Eksteen JJ) in *S v Yelani* 1986 (3) SA 802 (E) and *S v Roberts* 1999 (4) SA 915 (SCA). In *Roberts*, the Supreme Court of Appeal subsequently altered the order made by the High Court (Van der Merwe and Schwartzmann JJ) by setting aside the conviction, but gave no indication that the High Court's order directing that sentence proceedings occur afresh before a different magistrate had been outside the court's power.

A.G. BINNS-WARD
Judge of the High Court

BOZALEK J:

I agree.

L.J. BOZALEK
Judge of the High Court