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

**(Coram: Holderness, AJ)**

*[Not Reportable]*

High Court Ref No: 780  
Regional Court Case No: RCD 117/2016  
Magistrate's serial No: 04/16

**THE STATE**

and

**S P**

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**REVIEW JUDGMENT: 16 FEBRUARY 2017**

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**HOLDERNESS AJ:**

[1] This matter comes before me by way of special review from the Magistrate, Khayelitsha, in terms of section 304 (4) of the Criminal Procedure Act 51 of 1977 ("the CPA"), read with s 85(1)(b) of the Child Justice Act 75 of 2008 ('the Child Justice Act').

[2] Section 85(1) of the Child Justice Act provides as follows:

***‘85 Automatic review in certain cases***

*(1) The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191 (2) (j) of the Children's Act, 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-*

- (a) the duration of the sentence;*
- (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;*
- (c) whether the child in question was represented by a legal representative;*  
*or*
- (d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.’*

[3] One of the guiding principles of the Child Justice Act, as set out in section 3(a) thereof, is that all consequences arising from the commission of an offence by a child should be proportionate to the circumstances of the child, the nature of the offence and the interests of society.

[4] The facts in this matter, briefly stated, are that the accused, a first offender, pleaded guilty to the charge of robbery with aggravating circumstances, and admitted all the material facts, which admissions were properly made in terms of section 112(2) of the CPA. He was convicted on the basis of the plea. The accused was represented by a private attorney throughout the proceedings.

[5] During the address on sentence, it emerged that the accused gave the incorrect date of birth to the police when he was arrested, and that his date of birth was in fact [...] 1999, and not 1997. Earlier in the proceedings the magistrate asked the accused how old he was and he informed the court that he was 19 years of age.

[6] As soon as it became apparent that the accused was in fact a minor, the Magistrate, quite correctly, enquired whether a family member of the accused was in court, and when this was confirmed, he stood the matter down.

[7] The magistrate placed on record that because the accused was a minor, certain pre-trial procedures should have been considered in terms of the Child Justice Act, including an assessment of the juvenile offender and the possibility of diversion.

[8] The court was of the view that, notwithstanding the fact that the accused was not properly assessed in accordance with the Child Justice Act, no undue prejudice was caused to him, particularly as the accused was in fact the cause of the error.

[9] The matter was then adjourned and the sentencing proceedings were conducted as provided for in terms of section 16 of the Child Justice Act, which states as follows:

**16 Error regarding age of child or adult who is alleged to have committed offence**

(1) *If, at any stage during proceedings in terms of this Act, a presiding officer is satisfied on the basis of evidence placed before him or her that the age of a child or adult who is alleged to have committed an offence (hereafter in this section referred to as person) is incorrect, the age must be altered on the record of the proceedings in accordance with section 14 and the proceedings must be finalised in accordance with the provisions of-*

*(a) this Act, if the person is found to be a child; or*

*(b) the Criminal Procedure Act, if the person is found to be an adult, unless the provisions of section 4 (2) are applicable.*

(2) *If a presiding officer is of the opinion that an error regarding age may have caused any prejudice to a person during the proceedings in question, the presiding officer must transmit the record of the proceedings to the registrar of the High Court having jurisdiction, in the same manner as provided for in section 303 of the Criminal Procedure Act, in which event the proceedings must be dealt with in terms of the procedure on review as provided for in section 304 of the Criminal Procedure Act.*

*(3) Subject to subsection (1), if a presiding officer is of the opinion that an error regarding age has not caused any prejudice to the person, the presiding officer must continue with the proceedings in terms of the provisions of this Act, in accordance with his or her age, as altered.'*

[10] A comprehensive pre-sentence report was filed and the accused's probation officer recommended that the accused be sentenced to compulsory residence in a child youth care centre, as envisaged in s 76(1) of the Child Justice Act.

[11] When delivering judgment on sentence, the court took proper cognizance of the fact that the accused was not assisted by a parent or guardian in the pre-trial proceedings or prior to conviction, but that he was legally represented at all times and it was clear from the outset that he wanted to plead guilty and that his plea was only made after proper consultation with his attorney, and was in accordance with such instructions.

[12] Another determinative factor was that after the accused had been released into his guardian's care at the previous appearance, he was involved in an altercation during which he was assaulted and his grandmother, who is his primary caregiver, indicated that she could not control him. It was therefore necessary to place him in a place of safety.

[13] The magistrate noted, from the probation officer's report, that considering the accused's personal circumstances, his involvement in gangsterism, his mother's poor

health and his occasional use of cannabis and alcohol, he requires professional help and intervention. The State and the accused's attorney agreed with these recommendations.

[14] The court further considered the object of sentencing and section 28 of the Constitution in terms of which the best interests of a child are paramount in all matters concerning children, and that in terms of section 2(c) of the Child Justice Act, one of the objectives is to make provision for the special treatment of children in a Child Justice System designed to break the cycle of crime which will contribute to safer communities and encourage children to become law abiding and productive adults.

[15] After considering the abovementioned factors and the law applicable to cases such as these, the accused was sentenced in terms of section 76(1), read with subsection 2 of the Child Justice Act, to a compulsory youth care centre for a period of three years, which is below the statutorily prescribed minimum period of five years.

[16] In considering whether the matter ought to be remitted to the trial court and the proceedings should run *de novo*, the review court needs to consider whether any undue prejudice resulted from the error in the accused's age, and whether, as a result, his right to a fair trial was infringed.

[17] After becoming aware of the error the magistrate immediately adjourned the proceedings and from that point onwards took every precaution to ensure that there was due compliance with the provisions of the Child Justice Act.

[18] In the circumstances I am satisfied that no injustice resulted from the error and that the proceedings were in accordance with justice. In any event the matter had to come to this court on special review, not only as a result of the error relating to the age of the accused, but also because the accused was sentenced to compulsory residence in a child youth care centre.

[19] The conviction and sentence of the second accused, Sandiso Pepper, is confirmed.

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**M HOLDERNESS AJ**

I agree, it is so ordered

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**R C A HENNEY J**