

REPORTABLE

**IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE, PORT ELIZABETH**

CA&R:

Review no: 120037

Date delivered: 30.3.2012

In the matter between:

S

vs

C S

REVIEW JUDGMENT

SUMMARY- This review is about the interpretation of section 85 of the Child Justice Act 75 of 2008. It has been sent to me for, *inter alia*, a determination of whether or not the proceedings in respect of a child who was legally represented during his or her trial are reviewable in terms of the above Act. Decisions from other High Court divisions are conflicting on this issue.

We have ruled that such proceedings are reviewable and therefore this judgment should be a source of guidance for the sake of uniformity in our division. The record is returned herewith to the Port Elizabeth Magistrate's Court.

TSHIKI J:

A) INTRODUCTION

[1] This case comes before me by way of review in terms of section 85 of the Child Justice Act (the CJA)¹. According to the magistrate's note, which accompanies the record of the proceedings before the Port Elizabeth magistrate Mr D.L. Bender, the latter is of the view that the proceedings before him should not be subject to review in terms of the CJA. This is so, continues the note, for the reason that the minor child was legally represented during the criminal proceedings before him. The magistrate has requested this Court to make a determination on whether or not proceedings of the same nature where the minor accused has been legally represented should be subject to review in terms of section 85 of the CJA.

B) FACTS

[2] The accused herein was charged in the Magistrate's Court, Port Elizabeth, with two counts, the first one of using a motor vehicle without the consent of the owner in contravention of the provisions of section 66(2) read with section 89(1) of the National Road Traffic Act 93 of 1996. The second count was housebreaking with intent to steal and theft. He was legally represented by an attorney, pleaded guilty and was subsequently convicted on both counts. Both counts having been taken together for the purposes of sentence he was sentenced in terms of section 76(1) read with section 71(3) of the CJA as follows:

"It is ordered that the convicted child being under the age of eighteen years be sent to Bhisho Child and Youth Care Centre for compulsory residence for a minimum period of two (2) years and that a programme referred to in sec 191(2) (i) of the Children's Act be provided for.

In terms of sec 4(a) Act 75/2008 the court orders that the child must be taken in the

prescribed manner to the Bhisho Child and Youth Care Centre as soon as possible but not later than one month after this order was made.

In terms of sec 4(b) Act 75/2008 the court further orders:

1. The order must be brought to the attention of all relevant functionaries in the prescribed manner.

The child must be placed at Enkuselweni being a child and youth care [c]entre as referred to in sec 191(2)(h) of the Children's Act pending his removal to Bhisho Child and Youth Care Centre.

The court orders that Mr AH Heilbron being a probation officer to monitor the movement of the child to Bhisho Child and Youth Care Centre and to report to the court in writing once the child has been admitted to the centre.

The court finds that the age of the convicted child is 17 years attained on 9 December 2011."

[3] Section 85 of the Act provides:

"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 was, at the time of the commission of the alleged offence –
 - a) under the age of 16 years; or

16 years or older but under the age of 18years, and has been sentenced to any form of imprisonment that was not wholly suspended, 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 the duration of the sentence.

- 2) The provisions of subsection (1) do not apply if an appeal has been noted in terms of section 84."

[4] The child in question in the present case has been sentenced in terms of

section 76 of the CJA which provides:

“76 Sentence of compulsory residence in child and youth Care Centre

- 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 19(2)(j) of the Children’s Act.

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.”

[5] It follows from the provisions of section 85 of the CJA that the section deals with two categories of convicted children. The first category refers to children under the age of 16 years and the second category applies to children who are 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended, or any sentence of compulsory residence in a child and youth care centre. In respect of the first category of children the provisions of section 85(1) apply automatically irrespective of the nature of the sentence. With respect to the second category the child referred to therein must have been sentenced in terms of section 76(2) of the CJA whose provisions are detailed in para 4 *supra*. In both categories the sentence is automatically reviewable **in terms of section 304.**

[6] The child in the present case falls within the second category provided for in terms of subsection (1)(b) of section 85 of the CJA.

[7] The concern of the magistrate who has requested this Court to provide clarity, and for the sake of uniformity, is whether the above provisions dealing with review of sentences apply to a child who was legally represented at the trial.

[8] It should be noted that the automatic review of proceedings herein is triggered not by the application of section 302 of the Criminal Procedure Act² (the CPA) but by the provisions of section 85(1) of the CJA quoted *supra*.

[9] Section 304 of the CPA deals specifically with the procedure on review which must be adopted by the Judge when he or she is reviewing the record of the proceedings of the case which was heard before the magistrate or any Court referred to in the CJA. The section provides:

“304 Procedure on review

- 1) If, upon considering the proceedings referred to in section 303 and any further information or evidence which may, by direction of the judge, be supplied or taken by the magistrate’s court in question, it appears to the judge that the proceedings are in accordance with justice: or that doubt exist whether the proceedings are in accordance with justice, he shall endorse his certificate to that effect upon the record thereof, and the registrar concerned shall then return the record to the magistrate’s court in question.

(a) If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal ...”

Section 304, therefore, does not sanction the review of the sentence imposed in terms of section 85 of the CJA as is the case in review judgments in terms of section 302 of the CPA, but it provides for the procedure to be adopted when the case has been referred to for review in terms of section 85 of the CJA.

[10] In my view, legal representation of a child who appears before a Child Justice

Court is compulsory, if not peremptory. It seems to me that when the legislature enacted the provisions in terms of section 85 of the CJA it also had in mind the provisions of section 83 of the CJA which provide:

“83 Child may not waive legal representation in certain circumstances

- 1) No child appearing before a child justice court may waive his or her right to legal representation.

If a child referred to in subsection (1) does not wish to have a legal representative or declines to give instructions to an appointed legal representative the court must enter this on the record of the proceedings and a legal representative must, subject to the provisions of the Legal Aid Guide referred to in section 3A of the Legal Aid Act, 1969 (Act 22 of 1969), be appointed by the Legal Aid Board to assist the court in the prescribed manner.”

[11] It is apparently clear from the provisions of the above section that it is compulsory for a child to be legally represented during the trial before the Child Justice Court. Therefore, a legal representative will be appointed for the child accused even if he or she refuses to be legally represented, and this is done in the interests of justice for the purposes of assisting the Court with a view to protect the interests of the child in question. Invariably, the appointed legal representative would represent the child in question.

[12] Although it may appear from some of the relevant sections of the CJA that the Act itself has not been clearly drafted, in order to get the true meaning of the statute or some of its sections, one has to have regard to the provisions of the whole Act. The object of interpretation is to understand the meaning of operative sections in a statute and this may be achieved by reading the statute as a whole. And such reading being merely a step in the process of interpretation³.

[13] Having had the provisions of section 83 in mind the drafters of the CJA still

³ Jaga v Dönges N.O. and Another; Bhana v önges, N.O. and Another 1950 (4) SA 653 (A); Kellaway - Principles of Legal Interpretation - Statutes, Contracts & Wills, 1995 ed p 4

make emphasis on the automatic review of certain cases as provided for in section 85(1) of the CJA. Although there is nothing to suggest that the proceedings before the regional court where the child accused is being tried are reviewable, it appears from the context that such an intention can be gleaned from the sections of the CJA⁴.

[14] Due to lack of wisdom and maturity a child accused can make blunders in the manner in which he or she instructs his or her legal representative. The legal representative may as well lack the necessary experience and therefore may find himself or herself floundering in the process of representing the child accused. It is for that reason and others, that the legislature saw it fit to ensure the proper application of the administration of justice by not only making provision for the child's legal representation to be in Court for the benefit of the child, but to have such proceedings reviewed even in cases where the child is legally represented. The purpose for the legislation is to protect the child from the ills of either ignorance, or immaturity, and to ensure the proper administration of justice in all criminal trials which involve the child accused. The High Court is and will always be regarded as the upper guardian of all children whose interests the High Court should jealously protect⁵.

[15] I also endorse the suggestion that it is important to note the distinction drawn between a review of criminal proceedings of lower courts in accordance with Chapter 30 of the CPA which applies in all instances referred to in the main part of section 85 of the CJA, and the review of any sentence referred to in the *proviso* to section

4 S v Mpumelelo Innocent Zondi – Kwazulu Natal High Court case no R717/2011 – unreported judgment by Koen J delivered on 6 December 2011.

5 S v Ruiter (311/2010) [2011] ZAWCHC 265 (14 June 2011) Western Cape High Court judgment by Dlodlo J

85(1) of the CJA. The fact that all appeals involving a child accused are automatically noted without having to apply for leave to appeal in terms of section 309B of the CPA, is a clear indication that section 85(1) of the CJA was designed for the protection of the child accused against an injustice. And one of the safeguards for such protection against an injustice is to make provision for automatic review of the Magistrate's Court criminal proceedings involving a child accused.

[16] I have been referred to two conflicting judgments from other divisions of the High Court. In the North West High Court Division⁶ this issue was raised and the Court held that a sentence of imprisonment or compulsory residence imposed upon a child, as contemplated in section 85 of the CJA who was represented by a legal adviser is not subject to automatic review.

[17] I am not sure about the use of the phrase automatic review and would prefer to use the words review in terms of section 85(1) of the CJA. In this case Gutta J at page 4 para [6] of his judgment remarked as follows:

“The rationale for excluding cases where the accused is legally represented from automatic review is obvious, namely, that the legal representative will protect the rights and interests of the accused and avoid injustices and erroneous decisions and ensure that the rights of the accused to a fair trial are protected. An unrepresented accused requires the protection offered by the system of automatic review.”

[18] For the above reasons Gutta J ruled that the automatic review of cases involving children in terms of section 85 of the CJA “only applies to minor children

6 S v Jan Nakedi – case no 12/2011 unreported judgment by Gutta J, Landman J concurring, delivered on 2 January 2012

who were not assisted by a legal advisor⁷.”

[19] With due respect, I find myself unable to agree with the learned Judge’s conclusion in the above case. The learned Judge sought to justify his reasoning on item (p) of Schedule 4 read with section 99(1) of the CJA which substitutes section 302(1)(a)(i) of the CPA.

[20] Upon close scrutiny it appears to me that section 85(1)(a) and (b) of the CJA sanction an automatic review in circumstances provided therein. In addition and most importantly, the review in terms of section 85(1) of the CJA applies irrespective of the duration of the sentence imposed. This in fact is in conflict with the provision in the amendment contained in item (p) which reads:

“(p) Amendment of section 302 by the substitution for paragraph (i) of subsection (1)(a) of the following paragraph:

- i) which, in the case of imprisonment (including detention in a child and youth care centre providing a programme contemplated in section 191(2)(j) of the Children’s Act, 2005, (Act 38 of 2005), exceeds a period of three months, if imposed by a judicial officer who has not held the substantive rank of magistrate or higher for a period of seven years, or which exceeds a period of six months, if imposed by a judicial officer who has held the substantive rank of magistrate or higher for a period of seven years or longer.”

[21] It is clear from the wording of the above amendment that there is a conflict between section 302 of the CPA as amended by item (p) of Schedule 4, and the provisions of section 85(1)(a) and (b) of the CJA. In terms of section 85(1) of the CJA the sentence is automatically reviewable irrespective of the duration of the sentence whereas in terms of item (p) of Schedule 4, the sentence can only be reviewed if it exceeds three (3) months and six months respectively depending on the experience of the presiding magistrate.

⁷ Nakedi *supra* at page 6 para [13]

[22] It, therefore, follows that the review of the proceedings in terms of section 85(1) of the CJA is an exception and cannot be said to be done in terms of section 302 of the CPA. It is a provision *sui generis* and should be treated as an exception on its own. In terms of section 302 of the CPA, sentences which do not exceed three months and six months respectively depending on the experience of the presiding magistrate are not reviewable whether or not the accused was legally represented. Therefore, review cases in terms of section 85(1) of the CJA cannot be said to be governed by section 302 of the CPA. This is so for the reason, *inter alia*, that in terms of section 85(1) of the CJA the reviewability of the sentence does not depend on the experience or otherwise of the presiding magistrate but is sanctioned by the CJA. This is confirmed by the *proviso* that review of the sentence will take place irrespective of the duration of the sentence.

[23] It is for the above reasons that I find myself unable to agree with the decision by Gutta J and I am of the view that the exception provided for by the *proviso* is not subject to the terms of, and is not governed by Chapter 30 of the CPA. It applies to all situations that comply with section 85(1)(a) and (b) irrespective of whether the accused is legally represented or not.

[24] My view becomes more clear when one has regard to appeals. In the case of appeals in terms of section 84 of the CJA an accused person who falls within the category in section 84(1)(a) and (b) does not have to apply for leave to appeal before he or she can note an appeal to the High Court against the conviction and/or sentence. On the contrary the amendment introduced by item (q) of Schedule 4 provides:

“Amendment of section 309 by the substitution for paragraph (a) of subsection (1) of the following paragraph:

- a) Subject to section 84 of the Child Justice Act, 2008, any person convicted of any offence by any lower court (including a person discharged after conviction) may, ***subject to leave to appeal being granted in terms of section 309B or 309C***, appeal against such conviction and against any resultant sentence or order to the High Court having jurisdiction...”

[25] It, therefore, follows in my view, that on reading the whole CJA, including

the relevant provisions of the CPA, the provisions of the CJA should be interpreted by having regard to the provisions of the entire CJA together with the provisions of the CPA relating to reviews, especially sections 84 and 85 of the CJA and sections 302 and 304 of the CPA, read with item (p) of Schedule 4 to the CJA.

[26] It is clear, in my view, that the provisions of section 85(1) provide for automatic review of the proceedings before the magistrate including the Regional Court magistrate in cases and circumstances described in section 85(1)(a) and (b) of the CJA. Although in terms of section 302(3)(a) of the CPA the provisions of subsection (1) of the same Act shall only apply with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser, the same cannot be said of a child referred to in section 85(1)(a) and (b) of the CJA.

[27] If the legislature in terms of section 85(1) of the CJA, had intended to exclude from review, the proceedings where the child accused was legally represented, it would have indicated that. Section 302(3) of the CPA specifically provides that the provisions of subsection (1) of the same section shall only apply with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser. This exclusion is absent from the provisions of the CJA, and in my view, its omission was deliberate with a view to indicate that all proceedings before a magistrate involving a child accused where section 85 (1)(a) and (b) of the CJA is applicable are reviewable. That even the Regional Court proceedings involving a child accused are reviewable supports my view that all cases tried in terms of section 85(1)(a) or (b) are automatically reviewable irrespective of whether the child accused is legally represented. It seems to me that the reviewability of the proceedings

involving a child accused is based on the constitutional provisions⁸. It should also be noted that in the absence of a clear intention of the legislature as gleaned from the language used in the statute, when one interpretes a statute in cases of any doubt or ambiguity it should give an interpretation which is least oppressive to the person sought to be protected by such statute. We are here dealing with a statute which protects the interests of the child and, in my view, a less oppressive interpretation should be resorted to herein. The best interests of the child must

8 Section 28(1) of the Constitution of the Republic of South Africa, 1996

always be a primary consideration⁹. It also follows that the Children's Act¹⁰ was enacted solely for the purposes of giving effect to the provisions of section 28(1) of the Constitution. In *S v Mpumelelo Innocent Zondi supra Koen J* at page 6 of the judgment para [14] also cautioned that it is important to note the distinction drawn between a review of criminal proceedings of lower courts in accordance with Chapter 30 of the CPA which applies in all instances referred in the main part of section 85(1) of the CJA and the review and sentence referred to in the *proviso* to section 85(1).

9 Minister for Welfare and Population Development v Fitzpatrick and Others 2000 (3) SA 422 (CC) paras 16-18. See also section 28(1) of the Constitution of the Republic of South Africa, 1996 which provides:

“28(1) Every child has the right –

a) to name and a nationality from birth;

to family care or parental care, or to appropriate alternative care when removed from the family environment;

to basic nutrition, shelter, basic health care services and social services;

to be protected from maltreatment, neglect, abuse or degradation;

to be protected from exploitative labour practices;

not to be required or permitted to perform work or provide services that –

i) are inappropriate for a person of that child's age; or

Place at risk the child's well-being, education, physical or mental health or spiritual moral or social development;

b) 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 condition, that take account of the child's age;

c) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and

(i) not to be used directly in armed conflict; and to be protected in times of armed

conflict.

(2) A child's best interests are of paramount importance in every matter concerning the child.

(3) In this section 'child' means a person under the age of 18 years.”

In my view, the importance of the distinction illustrates and underscores my view for the fact that Chapter 30 of the CPA may be applicable to review proceedings in the lower courts but the *proviso* to the same section makes a distinction between such cases and the review of proceedings provided for in the *proviso* to section 85(1) of the CJA.

[28] One should not read more to the first sentence of section 85(1) which commences with the following words:

“The provision 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.”

[29] Fundamental canons of construction in interpretation of statutes require that an excepting or qualifying *proviso* should be construed as excepting (or qualifying) something which, save for the exception (or qualification) would be included in the statutory provision¹¹. It is apparently clear that the *proviso* that follows creates an exception to those cases where Chapter 30 applies. Therefore, in respect of the categories of children specified in terms of section 85(1)(a) and (b) of the CJA review of the proceedings will be in terms of the latter Act and no other Act or section in conflict therewith would apply in such cases. I am of the view that if the provisions of Chapter 30 were to apply automatically and as they were before the promulgation of the CJA in all cases involving children there could have been no need to introduce the provisions of section 85(1) of the CJA. The purpose of its introduction was to make an exception to what is contained in Chapter 30 of the CPA. In ***S v Ruiter supra*** Dlodlo J made this important remark:

“The High Court is the upper guardian of all minors within its jurisdictional area.

11 Kelleway on Principles of Interpretation of Statutes, Contracts and Wills *supra* fn 3

For that reason and that one alone I am of the view that cases provided for or referred to in section 85 of the Act under consideration should always be the subject of automatic review in the ordinary cause regardless of whether or not the said minor child was legally represented at trial.”

[30] I agree with the above important dictum putting emphasis on the fact that the High Court is the upper guardian of all minors. I do so based on my interpretation of section 85(1)(a) and (b) of the CJA. I have no other interpretation other than to conclude that section 85(1)(a) and (b) applies to all cases including the trial proceedings in which the minor concerned was legally represented at the trial.

[31] For the above reasons, I rule that in terms of section 85(1)(a) and (b) of the CJA the proceedings in this case are reviewable despite the child having been legally represented by a legal advisor at his or her trial.

[32] I have, however, perused the proceedings and I am of the view that they are in accordance with justice. Consequently, the proceedings in this case are confirmed. I also wish to extend my gratitude for the legal opinion I was provided with by the Port Elizabeth magistrate, Mr Bender, which was of valuable assistance to me.

P.W. TSHIKI

JUDGE OF THE HIGH COURT

Beshe J:

I agree.

N. BESHE
JUDGE OF THE HIGH COURT