

Reportable:	YES / NO
Circulate to Judges:	YES / NO
Circulate to Magistrates:	YES / NO
Circulate to Regional Magistrates:	YES / NO



**IN THE HIGH COURT OF SOUTH AFRICA
NORTHERN CAPE DIVISION, KIMBERLEY**

**Case No: Special Review CA & R 31/2023
Available on: 05/10/2023**

In the matter between:

THE STATE

APPLICANT

and

CNP

ACCUSED

Coram: Phatshoane AJP et Mamosebo J

JUDGMENT ON SPECIAL REVIEW

MAMOSEBO J

- [1] This is an automatic review in terms of s 85 of the Child Justice Act 75 of 2008¹ read with s 302(1)(a) of the Criminal Procedure Act, 51 of 1977 (the CPA).
- [2] The 16-year-old child offender, whose legal guardian was present throughout the proceedings, appeared in the Child Justice Court, Kimberley, before Magistrate Du Toit on a charge of robbery of an I Phone valued at R5,000.00. He was legally represented by Ms Magashule on the instruction of Legal Aid South Africa. On 09 May 2023 he pleaded guilty in terms of s 112(2) of the CPA which plea the State accepted. Having satisfied itself that the accused admitted all the elements of the offence, the trial court returned the verdict of guilty. The State did not prove any previous convictions. The child offender was sentenced on 28 June 2023 to the De Aar Child and Youth Care Centre in terms of s 76 of the Child Justice Act, 75 of 2008 till he reached the age of 18 years old.
- [3] The case was postponed for the pre-sentence report. While awaiting the pre-sentence report the matter was postponed several times to cater for the requirements laid down in section 66(2)(a) of the Child Justice Act which stipulates:
- “(2) If a child –*
(a) *is in detention in prison, a child justice court may, prior to the commencement of a trial, not postpone the proceedings for a period longer than 14 days at a time.”*
- [4] The trial resumed on 28 June 2023. Ms Magashule did not address the trial court in mitigation of sentence but relied on the pre-sentence report which

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

was handed into evidence by consent and had been discussed with the child offender's legal guardian. In aggravation of sentence the State prosecutor emphasised the seriousness and prevalence of the offence of robbery within the jurisdiction of the Court.

- [5] The social worker, Ms Monica Tshepiso Kantane, employed by the Department of Social Development, with twenty years' experience as a Probation Officer, confirmed the age of the child offender as 16 years. He turned 17 on 29 June 2023 and is the third of five children. He participated in soccer and rugby when he attended school but has, on his own accord, dropped out of school in 2022 in Grade 8. He worked as a taxi assistant earning R180.00 a day. His father passed away in 2021. His biological mother was interviewed and expressed her request for the child offender to be sent away for the correction of his uncontrollable behaviour. He has been in custody at the Child and Youth Care Centre for a period of eight (8) months. At para 12 of her report under the heading 'recommendations', Ms Kantane wrote:

"In view of the information stated above, it is recommended that Chad Neville Piers, be sentenced to De Aar Child and Youth Care Centre in terms of section 76 of the Child Justice Act, 75 of 2008."

- [6] The State supported the social worker's recommendations above as the child offender was a suitable candidate for rehabilitation.

- [7] The presiding magistrate couched the sentence in this manner:

"Taking everything into account then the court is satisfied that the sentence is as follows: I am going to try and keep it to a minimum period due to the fact that you are a first offender before this Court. You are therefore sentenced to De Aar Child and Youth Care Centre in terms of section 76 of the Child Justice Act, 75 of 2008 till the age of 18 years old. This case is reviewable...."

- [8] The sentence is incompetent for the following reasons.

8.1 The Magistrate has not specified that the sentence of the offence of robbery is read with Schedule 2 of the Act to distinguish it from the offence of robbery under Schedule 3 which includes aggravating circumstances.

8.2 The trial court's order does not address s 76(4)(b) which stipulates:

“(b) When making an order referred to in subsection (1), the child justice court must –

(i)

(ii) Cause the order to be brought to the attention of relevant functionaries in the prescribed manner;

(iii) Give directions where the child is to be placed for any period before being admitted to the centre specified in the order, preferably in another child and youth care centre referred to in section 191(2)(h) of the Children's Act, but not in a police cell or lock-up; and

(iv) Direct a probation officer to monitor the movement of the child to the centre specified in the order, in compliance with the order, and to report to the court in writing once the child has been admitted to the centre.”

8.3 In terms of s 77(1)(b) sentencing a child to imprisonment is considered to be a measure of last resort. The presiding officer is required to specify the reasons for the imposition of direct imprisonment on the child offender.

8.4 The presiding officer is also required to, in terms of s 77(5) of the Child Justice Act, consider the number of days that the child has already spent in a child and youth care centre prior to his sentence being imposed. Apparent from the pre-sentence report the child offender had been incarcerated in the child and youth care centre for a period of eight months before being sentenced. The Magistrate did not specify whether this period had been taken into consideration.

[9] Despite the fact that the social worker attached the recommended programmes to the pre-sentence report, namely, the Wake Up Call Substance Abuse Programme which runs for three and a half months as well

as the Rhythm of Life Programme which also runs for three and a half months, bringing the duration of the two programmes to seven (7) months, the record is silent on the exact period of sentence except to state that until the offender turns 18 years old. There is no explanation why the period of imprisonment extends to one year. It is also remarkable that the order does not specify when the child offender is to undergo the specified programmes. It was important for the Magistrate to order that the referral was in terms of s 191(2)(j)(i) of the Children's Act 38 of 2005 which provides:

“(2) A child and youth care centre must offer a therapeutic programme designed for the residential care of children outside the family environment, which may include a programme designed for –
(j) the reception, development and secure care of children in terms of an order –
(i) under section 29 of Chapter 10 of the Child Justice Act, 2008.”

[10] On a conspectus of all the facts in this matter I am unable to arrive at a conclusion that the proceedings are in accordance with justice.

[11] In the premises, the following order is made:

The sentence imposed by the Magistrate is replaced and substituted with the following:

1. The child offender, Chad Neville Piers, is sentenced to De Aar Child and Youth Care Centre in terms of s 76(1) of the Child Justice Act, 75 of 2008.
2. The child offender is to undergo 'The Rhythm of Life Programme' and 'Wake Up Call Programme' as contemplated in s 191(2)(j)(i) of the Children's Act 38 of 2005.
3. Should the De Aar Child and Youth Care Centre not be in a position to immediately admit the child, arrangements should be made to keep him in an alternative child and youth care centre but not a police cell or lock-up.

4. The probation officer, Ms Monica Kantane, is directed to monitor the movement of the child to the De Aar Child and Youth Care Centre and to report to the trial court once the child has been admitted.
5. The child is to be released on completion of both programmes which may be before turning 18 years old.

MC MAMOSEBO
JUDGE OF THE HIGH COURT
NORTHERN CAPE DIVISION

Phatshoane AJP concurs in the Judgment of Mamosebo J.