

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

REPORTABLE



NORTH WEST HIGH COURT, MAFIKENG

HIGH COURT REF NO: 12/2011

In the matter between:

THE STATE

and

J[...] N[...]

REVIEW JUDGMENT

GUTTA J.

[1] This matter was sent to me on automatic review. Accompanying the record of review was a letter from the Magistrate who presided over this matter, Andre Kleynhans, of the Swartruggens Magistrate Court in which he said the following:

“1. The attached case was finalised at Magistrate Swartruggens on 14/09/2011.

2. The accused is a minor of 15 years of age. He pleaded guilty to 3 counts of housebreaking with intent to steal and theft. He was sentenced in terms of section 76(1) of the Child Justice Act 75 of 2008 to undergo 5 years' compulsory residence in a child and youth care facility.
3. I have already established that the child was indeed admitted at the Secure Care Centre specified in my sentence.
4. The child was legally represented throughout the proceedings. I was thus of the opinion that the proceedings are not automatically reviewable.
5. I however became aware of a review judgment by the Western Cape High Court where Dlodlo J held that even when the child is legally represented, the matter still needs to be sent on automatic review.
6. I thus herewith submit the matter for review. It would be appreciated if the North West Division of the High Court could give clarity on the aspect whether cases where a minor accused had an attorney indeed need to be submitted for automatic review or not. If your judgment in this regard can be reported, it will be invaluable to magistrates in this Province on how to deal with this aspect.
7. For your convenience I attach a copy of the Western Cape case. Your decision and/or further comments on the matter is awaited."

[2] The only issue for consideration is whether a minor accused, who is legally represented and who was found guilty and sentenced in terms of Section 85 of the Child Justice Act 75 of 2008 ("the CJA"), is subject to automatic review.

[3] Dlodlo J in an unreported decision of *The State v Johan Pierre Ruiter*, **Case No. A 278/2011**, delivered on 14 June 2011 in the Western Cape High Court, considered this issue, and **at paragraph 3** found that:

“[3] The High Court is the upper guardian of all minors within its jurisdictional area. 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. The instant matter is therefore hereby reviewed and the proceedings are found to be in accordance with justice.”

[4] Sections 302(1) and 302(3) of the Criminal Procedure Act 51 of 1977 (“the CPA”) read:

“302 Sentences subject to review in the ordinary course

(1)(a) Any sentence imposed by a magistrate’s court—

- (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;
- (ii) which, in the case of a fine, exceeds the amount determined by the minister from time to time by notice in the Gazette for the respective judicial officers referred to in subparagraph (i);
- (iii) . . . shall be subject in the ordinary course to review by a judge of the provincial or local division having jurisdiction.

(b) The provisions of paragraph (a) shall—

- (i) be suspended in respect of an accused referred to in the first proviso to section 309(1)(a) who has duly noted an appeal in terms of section 309(2) against a conviction or sentence and has not abandoned the appeal;

- (ii) be suspended in respect of an accused who has duly noted an appeal in terms of section 309(2) against a conviction or sentence, after being granted leave to appeal in terms of section 309B or 309C, and has not abandoned the appeal; and
- (iii) cease to apply in respect of an accused when judgment in the appeal is given.

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- (3) The provisions of subsection (1) shall only apply—
 - (a) with reference to a sentence which is imposed in respect of an accused who was not assisted by a legal adviser.”

- [5] The general rule applicable to automatic review is that automatic review does not apply where the accused was represented at the trial by a legal adviser. See Section 302(3) of the CPA.
- [6] 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. See Kruger Hiemstra’s *Criminal Procedure* at 30-16 (issue 3).
- [7] Automatic review under Section 302 is accordingly aimed at ensuring the validity and fairness of the convictions and sentences of unrepresented accused in lower court proceedings.
- [8] Does Section 85 of the CJA alter this position?
- [9] Section 85 of the CJA reads:

“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
 - (b) 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 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.”

[10] Section 85 commences by expressly providing that the provisions of Chapter 30 of the CPA dealing with the review of proceedings of lower courts apply in respect of all children convicted in terms of the CJA.

[11] The section however, goes on to provide that a sentence of imprisonment (except if it is wholly suspended) or compulsory residence imposed on a child under 16 at the date of commission of the offence and certain children above the of 16 but under the age of 18, “is subject to review in terms of Section 304 of the CPA, irrespective of the duration of the sentence”. The reference to Section 304, which deals with the proceedings on review and the powers of a reviewing Judge and not Section 302, which deals with sentences eligible for automatic review, has raised the question whether it

should be interpreted to mean that all these sentences are to be reviewed regardless of the other provisions of Chapter 30. See the note by the Magistrate quoted in *S v John Pierre Ruiter supra*.

- [12] This problem is solved by a reference to Item (p) of Schedule 4 read with Section 99(1) of the CJA, which in essence substitutes Section 302(1)(a)(i) of the CPA. The amendment is indicative of the fact that the remaining provisions of Section 302 are applicable, which includes referral for automatic review where the accused is not assisted by a legal adviser.
- [13] Accordingly, I am of the view that the automatic review of cases involving children in terms of Section 85 of the CJA only applies to minor children who were not assisted by a legal advisor.
- [14] Section 28(2) of the Constitution of the Republic of South Africa provides that “a child’s best interests are of paramount importance in every matter concerning the child”.
- [15] The duty of the High Court as the upper guardian is to ensure that the criminal proceedings are implemented consistently with the Constitution. See *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development & Others 2009 (2) SACR 130 (CC)*.
- [16] The referral of all matters wherein the minor child is legally represented for automatic review is not consistent with the CPA and CJA, as stated *supra*, but also does not call for the situation where the

High Court as upper guardian needs to intervene to protect the interests of the minor child.

[17] In the result, the 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.

N. GUTTA
JUDGE OF THE HIGH COURT

I agree

A.A. LANDMAN
JUDGE OF THE HIGH COURT

DATED: 02 JANUARY 2012