

S v XM AND OTHERS

KWAZULU-NATAL DIVISION, PIETERMARITZBURG

SEEGOBIN J and POYO-DLWATI J

2015

CASE No AR601/14

Seegobin J (Poyo-Dlwati J concurring):**Preliminary remarks**

This judgment deals with two special reviews referred to this court by the office of the Director of Public Prosecutions, KwaZulu-Natal (DPP). The first matter was referred by Mr Sankar while the second was referred by Ms Blumrick. Since the issues in both matters are the same with similar orders to follow in each matter, I have decided to prepare a single judgment so as to avoid unnecessary duplication. I am indebted to both counsel for their helpful submissions.

First review AR601/14

[1] This matter was referred by the Director of Public Prosecutions for KwaZulu-Natal for special review in terms of s 304(4) of the Criminal Procedure Act 51 of 1977 (CPA). The Director of Public Prosecutions (DPP) is of the view that the proceedings before the court a quo were not in accordance with justice and should be reviewed and set aside. The matter is not subject to review in the ordinary course of s 302 of the CPA.

[2] This review concerns the circumstances pertaining to two minor children¹, namely, XM and AZ both of whom were 15 years old at the time. The DPP submits that the children were incorrectly diverted in terms of the Child Justice Act 75 of 2008 (CJA) in respect of sch 3 offences without the written consent of the DPP. It further submits that certain other serious irregularities have occurred. These relate in the main to the procedure that was followed, the diversion option that was chosen and the fact that the requirements for diversion were not met.

[3] From the preliminary inquiry record it is not entirely clear on what charge/s the children appeared at the preliminary inquiry held at the Stanger magistrates' court. At para 3 of the probation officer's assessment report under the heading 'CASE INFORMATION (PARTICULARS OF OFFENCE)' the following is recorded in respect of each child:

'XM

Charge: Armed Robbery

Circumstances of offence: The child offender and his co-accused are alleged to have robbed a female of her cellphone.²

AZ

Charge: Possession of unlicensed firearm.

¹ In terms of the Child Justice Act, 2008, a child means 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 s 4(2).

² Page 16 of the record.

The child offender and his co-accused were found in possession of an unlicensed firearm. The firearm was also used in an armed robbery.’³

[4] In both instances the above remarks are repeated at para 1 under the heading ‘Evaluation’.⁴

[5] The charge sheet itself merely refers to a contravention of s 3 read with certain other relevant sections of the Firearms Control Act 60 of 2000. The record contains no charge sheet dealing with the offence of armed robbery.

[6] In spite of the poor reference to the charges in the record, it would seem that the children were facing charges of robbery with aggravating circumstances and of being in possession of an unlicensed firearm. These offences are listed at paras 6 and 17(b) of sch 3 of the CJA.

[7] The CJA has divided offences into three schedules.⁵ They are: sch 1—minor offences; sch 2—more serious offences; and sch 3—most serious offences.

[8] A statutory offence, for instance, may fall within sch 3 of the CJA where the maximum penalty determined by a statute is imprisonment for a period exceeding five years or a fine for that period calculated in accordance with the Adjustment of Fines Act, 1991.⁶

³ Page 29 of the record.

⁴ Pages 18 and 31 of the record

⁵ Section 6(1) of the CJA.

⁶ Paragraph 21 of sch 3 of the CJA.

[9] Diversion is dealt with under ch 8 of the CJA. The objectives of diversion are set out in s 51(a)–(k) of the CJA. On a plain reading of ch 8 it is clear that a child may only be considered for diversion at a preliminary inquiry or at a trial if the prerequisites stipulated in paras (a)–(e) of s 52(1) have been satisfied. To place matters in perspective it is perhaps convenient to set out the provisions of s 52 in their entirety herebelow.

[10] Section 52 of the CJA reads as follows:

‘52 Consideration of diversion

(1) A matter may, after consideration of all relevant information presented at a preliminary inquiry, or during a trial, including whether the child has a record of previous diversions, be considered for diversion if—

- (a) the child acknowledges responsibility for the offence;
- (b) the child has not been unduly influenced to acknowledge responsibility;
- (c) there is a prima facie case against the child;
- (d) the child and, if available, his or her parent, an appropriate adult or a guardian, consent to diversion; and
- (e) the prosecutor indicates that the matter may be diverted in accordance with subsection (2) or the Director of Public Prosecutions indicates that the matter may be diverted in accordance with subsection (3).

(2) A prosecutor may, in the case of an offence referred to in Schedule 1, if the matter has not already been diverted in accordance with Chapter 6, or in the case of an offence referred to in Schedule 2, after he or she has—

- (a) considered the views of the victim or any person who has a direct interest in the affairs of the victim, whether or not the matter should be diverted, unless it is not reasonably possible to do so; and
- (b) consulted with the police official responsible for the investigation of the matter,

indicate that the matter may be diverted.

(3)(a) The Director of Public Prosecutions having jurisdiction may, in the case of an offence referred to in Schedule 3, in writing, indicate that the matter be diverted if exceptional circumstances exist, as determined by the National Director of Public Prosecutions in directives issued in terms of section 97 (4)(a)(iii).

(b) A Director of Public Prosecutions may only indicate that a matter may be diverted in terms of paragraph (a) after he or she has—

- (i) afforded the victim or any person who has a direct interest in the affairs of the victim, where it is reasonable to do so an opportunity to express a view on whether or not the matter should be diverted, and if so, on the nature and content of the diversion option being considered and the possibility of including in the diversion option, a condition relating to compensation or the rendering of a specific benefit or service and has considered the views expressed; and
- (ii) consulted with the police official responsible for the investigation of the matter.

(c) In order to obtain the written indication of the Director of Public Prosecutions in terms of paragraph (a), the inquiry magistrate or child justice court may postpone the matter.

(d) A Director of Public Prosecutions may not delegate his or her power to decide whether a matter may be diverted in terms of paragraph (a).

(4) The written indication referred to in subsection (3) must be handed to the presiding officer at the preliminary inquiry or child justice court and must form part of the record of the proceedings.

(5) If the prosecutor or a Director of Public Prosecutions indicates that the matter can be diverted in terms of subsection (2) or (3), the prosecutor must request the presiding officer at the preliminary inquiry or child justice court to make an order for diversion in respect of the child, in accordance with the provisions of this Chapter.

(6) If the presiding officer does not divert the matter as provided for in subsection (5), he or she must refer the matter to the child justice court to be dealt with in accordance with Chapter 9.'

[11] In view of the fact that the children were facing offences referred to in sch 3, only the DPP having jurisdiction was allowed to indicate in writing whether the matter could be diverted. In terms of s 52(3)(a) of the CJA the DPP may only do so in exceptional circumstances as determined by the National Director of Public Prosecutions in directives issued in terms of s 97(4)(a)(iii). In terms of s 52(3)(d) the DPP is not permitted to delegate this power. When a prosecutor has identified an appropriate sch 3 matter for diversion he or she is required to comply with para O3(c) of the National Director of Public Prosecutions' directives.⁷ In other words he or she is required to refer the matter to the DPP for a written indication to divert the matter in terms of s 52(5) of the CJA.

⁷ These directives were issued in terms of s 97(4) of the CJA and published in GN R252 in GG 33067 of 31 March 2010.

[12] In the present matter the prosecutor did not have a written indication from the DPP to divert the matter. If the prosecutor was in possession of such a written indication, it was incumbent upon him or her to hand it in to the inquiry magistrate so that it may form part of the record.

[13] In my view, the obtaining of the DPP's written indication was a prerequisite for a diversion in the present case and without it the inquiry magistrate was precluded from making an order in terms of the CJA. It follows, in my view, that the failure to obtain the DPP's written indication constitutes a fatal irregularity that serves to vitiate the proceedings.

[14] However, the matter does not end there as, from the record, it is not clear precisely what procedure was followed when the matter was diverted. Enquiries made by Mr Sanker of the DPP's office to the Stanger Magistrates' Court have revealed that the minor child XM appeared at a preliminary inquiry and was referred to the child justice court on the same day. The position of the minor child AZ was different. He was merely added to the child justice court proceedings on the same day without first appearing at a preliminary inquiry.

[15] In view of the fact that all children are required to appear at a preliminary inquiry in terms of the general provisions of ch 2 of the CJA and in the instant case, in terms of s 5(3), the failure on the part of the authorities to bring the child AZ to a preliminary inquiry constitutes a further irregularity.

[16] In terms of the CJA, a preliminary inquiry is one of the most important steps in the judicial process involving a young offender. The primary purpose of such

an inquiry is to safeguard the basic rights of any child who is alleged to have committed an offence. These basic rights include the right—*

- not to be detained, except as a measure of last resort, and if detained, only for the shortest appropriate period of time;
- to be treated in a manner and kept in conditions that take account of the child's age;
- to be kept separately from adults, and to separate boys from girls, while in detention;
- to family, parental or appropriate alternative care;
- to be protected from maltreatment, neglect, abuse or degradation; and
- not to be subjected to practices that could endanger the child's well-being, education, physical or mental health or spiritual, moral or social development.

[17] The purpose of a preliminary inquiry should be understood not only in the context of ch 7 itself, but also with regard to the objects of the CJA which are set

* Preamble to CJA—Eds.

out in s 2⁸ and the guiding principles set out in s 3.⁹ Where a child has been arrested and remains in detention the preliminary inquiry must be held within

⁸ Objects of Act:

‘The objects of this Act are to—

- (a) protect the rights of children as provided for in the Constitution;
- (b) promote the spirit of ubuntu in the child justice system through—
 - (i) fostering children's sense of dignity and worth;
 - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
 - (iii) supporting reconciliation by means of a restorative justice response; and
 - (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act in order to encourage the reintegration of children;
- (c) provide 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 these children to become law-abiding and productive adults;
- (d) prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution, including the use of diversion; and
- (e) promote co-operation between government departments, and between government departments and the non-governmental sector and civil society, to ensure an integrated and holistic approach in the implementation of this Act

⁹ Guiding principles:

‘In the application of this Act, the following guiding principles must be taken into account:

- (a) 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.
- (b) A child must not be treated more severely than an adult would have been treated in the same circumstances.
- (c) Every child should, as far as possible, be given an opportunity to participate in any proceedings, particularly the informal and inquisitorial proceedings in terms of this Act, where decisions affecting him or her might be taken.
- (d) Every child should be addressed in a manner appropriate to his or her age and intellectual development and should be spoken to and be allowed to speak in his or her language of choice, through an interpreter, if necessary.
- (e) Every child should be treated in a manner which takes into account his or her cultural values and beliefs.
- (f) All procedures in terms of this Act should be conducted and completed without unreasonable delay.
- (g) Parents, appropriate adults and guardians should be able to assist children in proceedings in terms of this Act and, wherever possible, participate in decisions affecting them.
- (h) A child lacking in family support or educational or employment opportunities must have equal access to available services and every effort should be made to ensure that children receive similar treatment when having committed similar offences.
- (i) The rights and obligations of children contained in international and regional instruments, with particular reference to the United Nations Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child.’

48 hours of the child's arrest subject to certain exceptions permitted in the circumstances referred to in s 20(5). While such an inquiry is required to be conducted with the least amount of formality, the provisions of the statute must be adhered to.

[18] The referral of a child offender to the child justice court occurs in certain defined circumstances. These are (a) when the child does not acknowledge responsibility for his actions. The inquiry magistrate is required to act in terms of s 47(9)(c)¹⁰ and to refer the child, or (b) where the requirements of diversion are not met¹¹, or (c) where the prosecutor indicates that the matter may not be diverted, the inquiry magistrate must obtain confirmation from the prosecutor that, inter alia, based on the facts at his disposal there is sufficient evidence for the matter to proceed¹². The prosecutor's confirmation is entered on the record and the child is referred to the child justice court¹³.

[19] Chapter 9 of the CJA deals with the child justice courts and the conduct of trials involving children in these courts. Whenever a child is referred to the child justice court the inquiry magistrate is required to comply with the provisions of s 49(2) of the CJA. In the present matter the inquiry magistrate failed to act in terms of s 49(2).

[20] A child justice court may, at any time before the conclusion of the case for the prosecution, make an order for diversion in respect of a child in accordance

¹⁰ Section 47(2)(b) of the CJA.

¹¹ Section 52(1)(a)–(e) of the CJA.

¹² Section 47(9)(a) of the CJA.

¹³ Section 47(b)–(e) of the CJA.

with the provisions of s 52(5). When this happens, the proceedings are then postponed pending the child's compliance with the diversion order. The court is further required to warn the child that any failure to comply with the diversion order may result in any acknowledgment of responsibility being recorded as an admission in terms of s 220 of the Criminal Procedure Act 51 of 1977. On receipt of a report from the probation officer that a child has successfully complied with the diversion order, and if the child justice court is satisfied that the child has complied, it must make an order stopping the proceedings. In the present matter, the presiding officer appears to have finalised the matter instead of postponing it pending the compliance certificate.

[21] Apart from the irregularities referred to above, the diversion option chosen by the inquiry magistrate is a level one diversion option, that is, a reporting order in terms of s 53(1)(3) of the CJA as set out in form 6. As pointed out earlier, the offences with which the children were charged were sch 3 offences. This meant that the diversion option that must be chosen is a level two diversion option. The diversion order set out in form 6 relate to diversion options that are specifically excluded as diversion options in respect of sch 2 and 3 offences. It follows that the incorrect diversion option chosen by the inquiry magistrate has rendered the proceedings flawed and irregular.

Second review: AR186/15

[22] This review concerns the minor child ZM (the child), a 16-year-old male, who appeared at a preliminary inquiry at the magistrates' court, Pietermaritzburg, on a charge of contravening s 120(6)(b) of the Firearms Control Act, 200 (FCA).

[23] The offence with which the child was charged fell within sch 3 of the CJA. In terms of the FCA the offence carries a maximum sentence of 10 years' imprisonment.

[24] As pointed out in the first review, *supra*, only a DPP may, in exceptional circumstances, indicate in writing that an offence referred to in sch 3 of the CJA may be diverted. In the present review it is clear that the prosecutor did not have such a written indication from the DPP to divert the child. A failure to obtain the DPP's written indication amounts to a total irregularity that vitiates the proceedings.¹⁴

[25] As far as the diversion option is concerned it is apparent that the inquiry magistrate chose the incorrect diversion option. Bearing in mind that the child was facing a sch 3 offence, the diversion option that was required to be chosen was a level two diversion option.¹⁵ In the present matter the diversion option chosen by the inquiry magistrate was a level one diversion option, namely, a supervision and guidance order in terms of s 53(3)(c) of the CJA.

[26] In making the diversion order the inquiry magistrate made use of form 6. However, the diversion options set out in form 6 relate to diversion options that are specifically excluded as diversion options in respect of sch 2 and 3 offences.¹⁶ It follows, in my view, that the diversion option chosen by the inquiry magistrate is fatally flawed and irregular.

¹⁴ *S v Sobekwa* [2013] JOL 30901 (ECG).

¹⁵ Section 53(4) of the CJA.

¹⁶ Section 53(4) of the CJA.

[27] Exhibit 'B' of the record contains the diversion order made by the inquiry magistrate. The manner in which the document was completed leaves much to be desired. As correctly pointed out by Ms Blumrick the order itself is confusing. This stems from the fact that crosses have simply been inserted in the first eight diversion options. This creates the impression that all eight diversion options were chosen. These diversion options relate to those set out in s 53(1)(a)–(f) of the CJA. However, only part F of Form 6 has been completed. Regulation 29(3)(a) of the regulations relating to the CJA¹⁷ read with s 53(1) of the CJA provides that the diversion orders referred to in s 53(1)(a)–(f) must correspond substantially with parts A–F respectively. In the present matter there has been no substantial correspondence with parts A–E of Form 6.

[28] Apart from the irregularities highlighted above, the record evidences other procedural irregularities. These relate to the following:

[28.1] The child was arrested but released on a written notice.¹⁸ A police official is empowered to arrest a child who is alleged to have committed a sch 3 offence.¹⁹ However, once arrested in respect of a sch 3 offence only a presiding officer may release a child from detention.²⁰ The child's appearance at the preliminary inquiry was accordingly irregular.

[28.2] The child's first appearance at the preliminary inquiry was on 10 February 2015. The matter was again postponed to 17 February 2015 for a NICRO assessment.

¹⁷ Published under GN R251 in *GG* 33067 of 31 March 2010.

¹⁸ A written notice is only issued in respect of a sch1 offence in terms of s 18 of the CJA.

¹⁹ Regulation 14 of the National Commissioner's National Instruction 2 of 2010: Children in Conflict with the Law published under GN 759 in *GG* 33508 of 2 September 2010.

²⁰ Section 21(3) of the CJA.

[28.3] In terms of s 48(1)(b)(vi) of the CJA, an inquiry magistrate may postpone the preliminary inquiry proceedings for a period not exceeding 48 hours to inter alia have a child assessed where no assessment was previously done. A matter may be postponed for a further 48 hours, if the postponement is likely to increase the prospects of diversion, after which the preliminary inquiry, if it has not been concluded, must be closed and the prosecutor must refer the child to the child justice court.²¹ A matter can be postponed for a period not exceeding 14 days if the probation officer has in terms of s 40(1)(g) recommended that a more detailed assessment be undertaken.²²

[29] In the present matter no such recommendation was made in the assessment report or during the preliminary proceedings. Additionally, the referral to NICRO is not a requirement by law.

[30] For all the reasons set out herein, the diversion order made by the inquiry magistrate cannot stand and must be set aside.

Concluding remarks

[31] These reviews highlight certain serious irregularities being committed by lower courts in dealing with young offenders. Without doubt, children remain the most vulnerable members of our society. The CJA recognises that young offenders who come into conflict with the law and are accused of committing offences are required to be dealt with in accordance with the values that underpin the Constitution and the international obligations of the Republic.

²¹ Section 48(2) of the CJA.

²² Section 48(4)(a) of the CJA.

Inquiry magistrates are encouraged to adopt a more active role in giving effect to the aims and objectives set out in the CJA. In these instances (as in the present matters) where children are charged with very serious offences, lower courts should ensure that they comply fully with the provisions of the CJA before making diversion orders that result in a complete failure of justice.

[32] In view of the fact that the office of the DPP has indicated that it intends to review the decisions to prosecute in the event of these proceedings being set aside, I do not intend referring these matters to the magistrates who conducted the preliminary inquiries. The orders I intend making in both matters will be the same.

Order

[33] In light of the irregularities referred to above, the following order is made:

- (a) The diversion orders made by the inquiry magistrates are reviewed and set aside;
- (b) the matters are referred to the Director of Public Prosecutions (KwaZulu-Natal) in view of his undertaking that if a prosecution should be required he will have the children brought before a preliminary inquiry to be dealt with in terms of the Child Justice Act 75 of 2008.