

S v HJ

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CHETTY J and JEFFREY AJ

2015 SEPTEMBER 15

CASE No DR162/15

Order

1. The conviction is set aside.
2. The matter is remitted to the court a quo to be commenced de novo and in compliance with the provisions of the Child Justice Act 75 of 2008 and in particular chs 7 and 8 of that Act.

Jeffrey AJ (Chetty J concurring):

[1] This is a special review referred to this court by the presiding magistrate, Mr PB Bhengu, at the Durban Magistrates' Court, who has requested that the conviction he imposed on the accused be set aside and that the matter be referred to the relevant childrens' court.

[2] The accused was arrested on 9 August 2015 on a charge of contravening s 49(1)(a) read with ss 1, 9, 10, 25, 26 and 32 of the Immigration Act 13 of 2001. It was alleged that he was from Malawi and he entered or remained in South Africa without a valid permit.

[3] The matter came before the presiding magistrate on 11 August 2015. The accused conducted his own defence, pleaded guilty and was convicted as charged. The charge sheet stated that he was 18 years of age; but, before being

sentenced, he informed the presiding magistrate that he was 17 years of age. Upon being so informed, the presiding magistrate properly remanded the case to enable the Westville Youth Centre to assess the accused's age. This assessment was done and on 20 August 2015 the presiding magistrate was informed that it had been established that the accused was indeed 17 years of age. In addition he was informed that the accused's parents were dead and that the accused was living with a friend in Sydenham. The presiding magistrate then ordered that the accused be detained at the Westville Youth Centre and he referred the matter on special review to this court.

[4] The presiding magistrate properly concedes that the conviction that he imposed does not comply with the provisions of the Child Justice Act 75 of 2008 (CJA).

[5] It is clear that the conviction cannot stand.

[6] But more than that, on the facts before us, the accused is a minor, a foreign child whose parents are both dead and his only brush with the law, as far as we know, is his failure to be in possession of a valid permit to be in South Africa. The accused's background, what became of his parents, how he entered South Africa, for what reason, how long he has been here, and who, if anyone, is caring for him are just some of the matters that require thorough investigation.

[7] I respectfully agree with what Victor J said in *S v Gani NO 2012 (2) SACR 468 (GSJ) 468j–469a* at para 1:

‘Deeply embedded in the soul of our nation have been the protection and appropriate care of our children in situations of acrimonious

matrimonial dispute, in wide-ranging forms of abuse, in orphanages, and amongst child refugees and those who clash with the law.’

The CJA, which commenced on 1 April 2010, was enacted with the specific objective of protecting the rights of children that are entrenched in the Constitution. Section 28(2) of the Constitution requires that a child’s best interests have paramount importance in every matter concerning a child, subject to any justifiable limitation under s 36. See *S v M (Centre for Child Law as Amicus Curiae)* 2007 (2) SACR 539 (CC) (2008 (3) SA 232; 2007 (12) BCLR 1312; [2007] ZACC 18) 249E–250C at para 26. The first guiding principle set out in s 3(a) of the CJA to be taken into account in its application states 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.’

[Emphasis added.]

Importantly the Act also provides a mechanism for diverting any matter concerning a child from the criminal justice system. In my view, on the facts of this case, a diversion of this matter would seem to be appropriate and in the interests of justice. But this must be thoroughly investigated in terms of chs 7 and 8 of the Act.

[8] The order, therefore, that I propose is:

1. The conviction is set aside.
2. The matter is remitted to the court a quo to be commenced de novo and in compliance with the provisions of the Child Justice Act 75 of 2008 and in particular chs 7 and 8 of that Act.