

The issue of criminal capacity based on a plea explanation:
The case of Obakeng v S (decided 26 March 2009)

Factual background

In this case an 11 year old boy was convicted of culpable homicide based solely on a plea explanation in which he pleaded guilty to the offence. The boy was legally represented at the time. On appeal it was argued that the plea explanation on its own was not sufficient to rebut the common law presumption that a child between the ages of 7-14 was “doli incapax”. It was argued that the magistrate committed an irregularity because it could not have been satisfied that the child had the necessary criminal capacity based on the plea explanation only. The state conceded the irregularity.

Two issues of importance arose in this case. The first issue concerned the duty on a court presented with a s112 guilty plea in a case where the accused was legally represented. The second issue concerned the proper interpretation of s312(1) of the CPA and how it applied in this particular case

A: The issue of legal representation at the time of making a s112 guilty plea

The appellants argued that the presence of a legal representative did not absolve the court a quo from ascertaining whether the accused had the required criminal capacity. To support this argument the case of *Mocumi v S* (2006) JOL 17525 was cited; where it was held that “the mere fact of legal representation at the time of making a s112(2) statement is not conclusive and does not relieve the court from properly evaluating the contents of such a statement to consider whether it could be said to fulfil the role that evidence would have had to fulfil if the plea had been not guilty and to make sure that it amounts to a proper plea of guilt” (para 20). The appellant thus argued that the fact that he was legally represented did not mean that the magistrate should simply have accepted the plea explanation at face value. The high court agreed with this submission.

B: Remitting the matter back to the court a quo: interpreting S 312(1) of the CPA:

The general rule in terms of s 312(1) of the CPA is that when a conviction and sentence of a lower court is set aside on appeal or review because the lower court failed to comply with the procedures set out in s112(1)(b) and (2) or 113 of the CPA then the matter should be remitted back to the lower court. In this case the state wanted a re-trial in the event of a decision to set aside the sentence and conviction. However, the appellant made extensive arguments against an order for remittal back to the court a quo.

- Firstly, the appellant argued that the case cited by the state in support of their argument for a remittal did not apply to this particular case. The respondent cited the case of *S v Khupiso; S v Africa* 1979 (2) SA 605 (O) where it was found that the objective of s 312(1) was to prevent an accused, who was convicted after a plea of guilty, from abusing the non compliance argument as grounds for a successful appeal or review. The appellant countered by stating

that what the court said in *S v Khupiso* did not apply to a child of 11 whose criminal capacity was not proved.

- Secondly, the appellant argued that the court should not remit the matter back to the lower court because the trial court would be unable to ascertain whether the appellant had the required criminal capacity at the time of the offence since the boy was not 13 years old. The reasoning here was that a remittal would be pointless because the lacking information on his criminal capacity at age 11 (when he committed the offence) could not be obtained now when he was 13 years old. The cases of *S v Mauwa* 1986 (4) 818 (SWA) and *S v Areense and Another* 1985 (2) 103 (CPD) were used to demonstrate this point.
- The third reason advanced against an order for remittal was that a further delay in the matter would be unjust given the fact that the appellant had already been in detention for 18 months at the time of the appeal. The case of *S v Chetty* 2008(2) SACR 157(W) was used as authority for this argument.

The appellant thus argued that if the conviction and sentence was set aside the court should order the relevant department of social development to open a children's court inquiry to establish whether the appellant was a child in need of care and protection in terms of the Child Care Act. Normally an appellant in this situation would be free to go home, but this 13 year old had no suitable family members willing to take care of him. The state submitted that if the court did not order a re-trial that it would accept an order for a children's court inquiry.

Court findings

- It was found that the plea explanation did not contain sufficient facts from which the magistrate could have ascertained that the accused had the required criminal capacity and that the presumption was rebutted.
- The magistrate should have put questions to the accused or obtained suitable evidence to satisfy himself that the accused had the required criminal capacity.
- The fact that the accused was legally represented did not "cure the irregularity".
- The court decided not to refer the matter back to the magistrates court

Court order

The conviction and sentence was set aside. A children's court inquiry was found to be justified and an order to that effect was granted. The court ordered further that the appellant was to be detained in the Mafikeng Youth and Development Centre pending the inquiry.