

CHILD LAW MATTERS

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SCA precedent on guilty plea explanations and the issue of remittal The case of *SM v S*^[1]

In the last Issue we considered the question of guilty plea explanations made by accused that are rebuttably presumed to lack criminal capacity and the issue of remitting the matter to the trial court. The focus in that Issue was on the High Court judgment of *Obakeng v S*. In May 2009 the SCA considered exactly the same subject matter that was addressed in *Obakeng* and has now set a national precedent in this regard. Today's Issue is thus dedicated to the SCA judgment in *SM v S*. We believe this judgment is of great importance to Legal Aid Board defence attorneys who represent children.

The facts in *SM v S* were very similar to that in the *Obakeng* matter. The appellant in *SM v S* was 13 years old when he stabbed a 14 year old boy to death. He was convicted on his s112 guilty plea explanation and sentenced to eight years imprisonment. He was legally represented at the trial. An appeal to the High Court against his conviction was unsuccessful, but the sentence was set aside and remitted back to the trial court for reconsideration. He appealed on the merits to the SCA.

The SCA had to consider whether the statement tendered on behalf of the appellant complied with s 112(2) of the CPA and if not whether the SCA should remit the matter to deal with the plea proceedings afresh, or simply set aside the conviction.

SCA's interpretation of the requirements in s 112

In its interpretation of the requirements for a s112 guilty plea the SCA confirmed the basis of the findings in the *Obakeng* case that the statement must set out the facts to which the accused admits and on which he/she has pleaded guilty and that the presiding officer must be satisfied that the accused is indeed guilty of the offence. After examining the statement tendered by the appellant the court held that the statement did not comply with s 112 because it did not admit all elements of the charge fully. The court again confirmed the finding in *Obakeng* that because the accused was rebuttably presumed to lack criminal capacity the onus was on the prosecutor to rebut the presumption. It found that the prosecutor failed to rebut this presumption.

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

Just like in the *Obakeng* case council for the state suggested that although the statement tendered in terms of s112 was deficient the deficiency was cured by the fact

[1] Please note that this is not yet the official reference of the case but it is referenced here in that manner to protect the identity of the child accused in this case.

that the child was legally represented. The court found that it did not. In finding that the deficiency was not cured by the child having a legal representative the court noted that the child's council did not appear to appreciate or realise that the statement tendered did not comply with s 112. It is thus important for practitioners representing children to ensure that guilty plea explanations comply with s 112 in the manner set out by the court. The admission must be sufficient and appropriate enough to relieve the state from its obligation to rebut the presumption of criminal incapacity. This is a heavy responsibility for the legal representative, as it means that he or she must assess whether the child has criminal capacity. Is a legal representative really in a position to do this? It will usually be advisable to hold the state to its responsibility to prove criminal capacity, and not to concede this by including clauses in the section 112(2) statement such as "I unlawfully and intentionally". The courts have found that these are merely legal conclusions and are insufficient to fulfil the requirement of section 112(2). The courts have found that this is even more of concern where the accused is a child.

Remitting the matter to the trial court: The SCA's interpretation of s 312(1)

The SCA set the conviction aside prompting the application of section 312(1) of the Criminal Procedure Act (CPA). This section requires a matter to be remitted to the trial court when a conviction and sentence was set aside by a higher court due to non compliance with s 112 or 113 of the CPA. The SCA considered whether the provisions of s 312(1) was peremptory in nature and if it did not allow for discretion on whether to remit a matter or not. In looking at the purpose of s 312(1) and noting that it must be interpreted in a manner that is consistent with the Constitution the SCA found that the section was not peremptory because construing the section to be peremptory may result in an injustice or an infringement of an accused person's fair trial rights. The court held that the remittal procedure must be followed but if the appeal or review court is of the view that an injustice would arise if the matter is remitted or that remittal would be futile then it has the discretion not to order a remittal. In the end the appeal succeeded and the conviction and sentence was set aside. This was because it would be unjust to re-open the matter as the matter had already been remitted back to the trial court once for sentence to reconsidered, and the child had already served two years in prison.
