IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE DIVISION, GRHAMSTOWN

CASE NO CA&R 202/16
DATE HEARD: 10/08/2016
DATE DELIVERED: 18/08/2016

In the matter between

SIVA JIJANA	**1ST APPLICANT**
MFUSA KOSANI	**2ND APPLICANT**
AYABONGA SIPAJI	**3RD APPLICANT**
OLWETHU NJOKWANA	**4TH APPLICANT**
JASON VALENT	**5TH APPLICANT**
KWANELE SINQANA	**6TH APPLICANT**
ZAYNODENE REINHARDT	**7TH APPLICANT**
EDWARD BOOI	**8TH APPLICANT**
SIYANDA NDIMA	**9TH APPLICANT**

and

THE STATE	**RESPONDENT**

JUDGEMENT

ROBERSON J:-

[1] This is an application in terms of s 304 (4) of the Criminal Procedure Act 51 of 1977 (the CPA) for the review and setting aside of the sentences imposed on the applicants by various magistrate's courts in this division. The application in respect of the fourth and ninth applicants was not argued and is to be postponed sine die. It

was agreed that counsel would submit written argument in these two cases. Prior to the hearing of this application the sentence of the eighth applicant expired and three days after the hearing of this application the sentence of the seventh applicant expired. There is no purpose in reviewing their sentences.

[2] With the exception of the second applicant, the applicants were all sentenced to compulsory residence in the Bhisho Child and Youth Care Centre (the Centre), in terms of s 76 (1) of the Child Justice Act 75 of 2008 (the CJA). The second applicant was sentenced to 5 years' imprisonment in terms of s 276 (1) (i) of the CPA. In his judgment the magistrate directed that the second applicant be held in the juvenile section of the prison. For unexplained reasons, he was sent to the Centre and not to prison.

[3] The applicants are no longer at the Centre, having first been transferred to the Qumbu Child and Youth Care Centre, and from the latter centre to Mdantsane Correctional Centre, where they have been held since 11 December 2015. These transfers were carried out in terms of orders of the Bhisho High Court, following *ex parte* applications by the MEC for Social Development, Eastern Cape (the MEC) on behalf of the Centre. The founding affidavit by the MEC in the second *ex parte* application contained allegations of serious misconduct on the part of the applicants. The order transferring the applicants to the Mdantsane Correctional Centre did not provide for them to be held there pending a review of their sentences which were obviously unworkable at that time. The presumably unintended effect of this order was that the applicants were to serve the remainder of their sentences in prison,

without their original sentences having been reviewed, set aside, and substituted with another sentence.

[4] Some attempt to remedy this untenable situation was made during March 2016 when, following an application by the applicants, now represented by the Centre for Child Law, both transfer orders were rescinded by a further order of the Bhisho High Court in terms of which, *inter alia*, the MEC was to cause a Quality Assurance Process to be conducted with regard to the Centre in terms of s 211 of the Children's Act 38 of 2005, and, depending on the recommendations contained in the report, to return the applicants to the Centre. The applicants were to remain at Mdantsane Correctional Centre pending compliance by the Department.

[5] The Quality Assurance Process was conducted and a report compiled. These were the findings:

- "Programmes are provided partially i.e. therapeutic, recreational, developmental, spiritual and residential, therefore the children do not derive maximum benefit from their time at the centre.
- There are no Operational Policies in place which has an impact on the operations of the Centre, as well as service delivery.
- Although the Centre has a functional Management Board, its interventions are minimal as the members are not clear of their roles and responsibilities.
- Child and Youth Care Workers are derelict in the performance of their duties, which can be partly ascribed to the lack of formal training.
- Integrated Service delivery is not practised by all the different role players which has a negative impact on the development of the respective children.
- Social workers are not consistent in keeping proper records of their interventions on the individual Case files as is required by the Norms and Standards for Child and Youth Care Centres as well as Generic Intervention Processes.
- Supervision, which is compulsory and critical in ensuring compliance and effective services, are either non-existent or inconsistent both from the Social Workers as well as the Child and Youth Care Workers side.
- Administration oversight at the Centre is lacking, resulting in delays in procurement processes, poor administration, poor records management and document control etc. affecting the general functioning and upkeep of the centre.
- Mandatory security measures relevant to an institution of this nature is partly applied Security services are procured on a short term basis with no

consideration of the specific requirements of Security Companies in this area of service delivery.

- Some personnel members show no interest in working with children and are not adequately equipped to be employed in a Child and Youth Care Centre where specialised skill and expertise is required.
- At the time of the assessment there was a sense of calmness and stability at the Centre."

(all sic)

[6] Under the heading "Evaluation" the report states:

> "The Bhisho Child and Youth Care Centre has, from operations to management to resource allocation only managed to partly comply with the minimum requirements of a Child and Youth Care Centre. This is reflected within the manner in which professional services rendered by the Social Workers and the Child and Youth Care Centre Workers as well as the provision of Security Services (sic)."

[7] The report goes on to make recommendations on action to be taken in order for the Centre to become fully operational.

[8] The current status of the applicants' rescission application is not before us but clearly there is a need for the sentences to be reviewed.

[9] *S v Z and 23 similar cases* 2004 (1) SACR 400 (E), was a case which involved children who had been sentenced to detention in a reform school in terms of s 290 of the CPA (now repealed). The children had spent long periods in detention waiting for their sentences to be put into effect. At paras [29] to [31] Plasket J said the following:

> "[29] In *S v Sithole*[1] Eloff DJP dealt with the power to review a sentence competently imposed but which subsequently became impossible to carry out. He held:
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> 'Volgens hierdie en ander gewysdes is die posisie dan dat, indien daar 'n uitsondering is (en soos reeds gesê ag ek dit onnodig om te beslis of daar wel is), dit slegs in buitengewone omstandighede is waar die Hof kennis sal neem van omstandighede wat voorgeval het na die voltooiing van die verrigtinge, en op grond daarvan die vonnis sal verander. Daardie

[1] 1998 (4) SA 177 (T)

omstandighede behoort alleen in aanmerking geneem te word indien daar nie 'n ander remedie is vir die probleem onder bespreking nie.'

[30] *Sithole's* case has been revisited, in *S v Mahlangu*,[2] in the light of the changes to the legal system brought about by South Africa becoming a constitutional democracy in terms of a supreme Constitution embodying a justiciable Bill of Rights. That case, like this one, involved a lengthy delay in a juvenile offender sentenced to reform school commencing her sentence. Du Plessis J held that the Court had the power to review the proceedings:

'If a competent sentence can for practical reasons not be carried into effect, and the accused is prejudiced thereby, the proceedings cannot be said to have been in accordance with justice: the test is not only whether the proceedings were technically sound, but also whether their practical effect is just. Section 304(4) of the Criminal Procedure Act vests this Court with the substantive power to review and set aside a sentence. The question whether that can be done with reference to subsequent facts is procedural. In that sense s 173 of the Constitution resolves the question left open in the *Sithole* case: If justice so demands, this Court can in a review in terms of s 304(4) have regard to facts which took place after the sentence in the magistrate's court had been imposed. This is also the effect of the judgment in *Hansen v Regional Magistrate, Cape Town and Another* 1999 (2) SACR 430 (C). . . . I am not convinced that the requirement in the *Sithole* case that the circumstances must be exceptional still stands in the light of s 173 of the Constitution, but I need express no final view; the circumstances in this case are exceptional. If there is another practical and effective remedy available to the accused, the interests of justice will not require this Court to act in terms of s 304(4). The latter requirement set in the *Sithole* case is therefore still binding on this Court.'

[31] I am in agreement with the views expressed by Du Plessis J. I add, for the sake of clarity, that in circumstances such as these, s 304 of the Criminal Procedure Act, when interpreted in accordance with the spirit, purport and objects of the Bill of Rights, and bolstered by the inherent jurisdiction of the Superior Courts to regulate their process and develop the common law in the interests of justice, envisages courts having the power to review competent sentences where subsequent events, if no interference occurs, would create or lead to a miscarriage of justice. The focus of the Courts should, in my view, be on the justice of the end result, rather than the technicalities of the process. If I am wrong, and s 304 cannot be interpreted in this way, then the inherent jurisdiction, on its own, vests the Court with the necessary power to remedy such injustices."

[10] The situation is clearly one where subsequent events have demonstrated that the sentences imposed have not been carried out and, leaving aside the sentence imposed on the second applicant, are incapable of being carried out in the near future. The Centre is not functioning in accordance with the purpose of the sentences imposed and the Department has had the applicants removed from the Centre. The applicants are currently in prison and a serious failure of justice will be

[2] 2000 (2) SACR 210 (T)

perpetuated should they remain there. The sentences must therefore be reviewed and set aside. In the case of the second applicant, while the sentence imposed is capable of being carried out, the passage of time since sentence, the error in sending him to the Centre, and the failure to implement the intended sentence, in my view constitute subsequent events necessitating the review and setting aside of the sentence.

[11] It is disturbing and deeply regrettable that this situation has arisen. The Legislature enacted legislation which provides sentencing options especially tailored to meet the interests of children in conflict with the law, and which differentiates them from adult offenders. The Centre featured in the matter of *S v Goliath* 2014 (2) SACR 290 (ECG). The accused in that matter had been sentenced to compulsory residence in the Centre which subsequently closed down. Paragraph [18] of the judgment reflects that the Centre was built at a cost of R300 million, commenced functioning, and thereafter became dysfunctional. Since re-opening, it is still not functioning as envisaged. The present conditions at the Centre have caused a failure of justice which must be remedied as a matter of urgency. I intend directing that a copy of this judgment be sent to the Director General for Social Development and to the MEC for their urgent attention.

[12] The State agreed that the sentences should be reviewed and set aside but the parties differed with regard to the further course of action. Mr Courtenay for the applicants suggested various sentencing options, none of which included imprisonment, whereas Mr Bezuidenhout for the State submitted that the applicants should be detained for the duration of their sentences at the juvenile facility at the

Cradock Correctional Centre. In my view this would not be a competent substitution of sentence. It would effectively be an increase in sentence which is not permitted on review. Mr Bezuidenhout submitted that because the applicants are all now over the age of 18 years, the CJA no longer applies to them. Again I disagree. The applicants were children when the offences were committed, and they were tried and sentenced when they were children. The fact that they are no longer children should not mean that they are now excluded from the protection of the CJA and be exposed to a sentencing regime which applies to adults. See in this regard *S v Melapi* 2014 (1) SACR 363 (GP) at paras [53] to [59].

[13] I deal now with the individual applicants.

[14] First applicant – Sive Jijana

He was convicted of robbery with aggravating circumstances and murder. The offences were committed when he was 15 years old. On 10 December 2014 he was sentenced to 4 years' compulsory residence in a Child and Youth Care Centre in terms of s 76 (1) of the CJA. In addition he was sentenced to 10 years' imprisonment for robbery and 15 years' imprisonment for murder, in terms of s 76 (3) of the CJA, both sentences to run concurrently. It was submitted on his behalf that this court should substitute the sentence in identical terms, except that the Department should be ordered to have him placed in a functional Child and Youth Care Centre in the Western Cape. In my view, bearing in mind the administrative process involved in such a course, as well as the fact that the sentence has not been carried out as intended, it would be more appropriate to remit the matter to the magistrate to sentence the first applicant afresh.

[15] Second applicant – Mfusi Kosani

He was convicted of rape committed when he was almost 15 years old. As already mentioned, he was sentenced to 5 years' imprisonment in terms of s 276 (1) (i) of the CPA but was apparently in error sent to the Centre. The place of detention on the committal warrant was changed from East London Prison to "Bhisho Place of Safety". Although his situation differs from the other applicants, his sentence has not been carried out. He was sentenced on 14 December 2012 and has therefore served almost 3 years and 9 months. It was submitted on his behalf that his sentence be replaced with a caution and discharge by this court, in view of the length of time he has served and because a person sentenced to imprisonment in terms of s 276 (1) (i) of the CPA may be placed under correctional supervision after serving one sixth of the sentence. I do not think this course is appropriate. It cannot be said that he would have been released after serving one sixth of his sentence and even if he had been, he would have been subject to correctional supervision. The sentence intended by the magistrate has not been carried out and I think it more appropriate that the matter be remitted to the magistrate for sentencing afresh.

[16] Third applicant - Ayabonga Sipaji

He was convicted of rape committed when he was 15 years old. He was sentenced on 25 April 2013 to compulsory residence in the Centre for 4 years. It was submitted on his behalf that because he has served in excess of 75% of his sentence, it should be replaced with a caution and discharge by this court. I do not think that this is an appropriate course. The sentence imposed has not been carried out as intended and the matter should be remitted to the magistrate for sentencing afresh.

[17] Fifth applicant – Jason Valent

He was convicted of rape and robbery committed when he was 15 years old, and two further counts of robbery committed when he was 16 years old. On 19 June 2015 he was sentenced on the rape count to compulsory residence at the Centre until he reached the age of 21 years. The three robbery counts were taken as one for the purpose of sentence and he was sentenced to 4 years' imprisonment, conditionally suspended for five years. It was submitted on his behalf that in view of the fact that he has served in excess of 50% of his sentence this court should replace his sentence with a caution and discharge. Alternatively it is submitted that he should be sent to another child and youth care centre. In my view neither option is appropriate. The sentence imposed could not be carried out as intended and the matter should therefore be remitted to the magistrate for sentencing afresh.

[18] Sixth applicant – Kwanele Sinqana

He was convicted of theft committed when he was 17 years old. He had previous convictions for housebreaking and robbery. On 14 September 2015 he was sentenced to 3 years' compulsory residence in the Centre. It was submitted that this court order that his sentence be served in a different child and youth care centre. In view of the fact that the sentence imposed has not been carried out as intended the matter is remitted to the magistrate for sentencing afresh.

[19] In the event that the matters were remitted to the magistrates, Mr Bezuidenhout submitted that the applicants should be detained at the juvenile section of the Cradock Correctional Centre. I am of the view that this is an appropriate place of detention pending re-sentencing.

[20] The following orders are made:

[20.1] The application in respect of the fourth and ninth applicants is postponed *sine die*.

[20.2] The application for the review and setting aside of the sentences imposed on the seventh and eighth applicants is dismissed.

[20.3] The sentence of the first applicant, Sive Jijana, imposed in terms of ss76(1) and 76(3) of the Child Justice Act 75 of 2008, is reviewed and set aside. The matter is remitted to the magistrate for sentencing afresh. Pending re-sentencing the first applicant is to be held at the juvenile section of the Cradock Correctional Centre. It is recorded that the first applicant has been in detention at Mdantsane Correctional Centre since 11 December 2015.

[20.4] Second applicant, Mfusa Kosani. The certificate dated 12 February 2013 by Van Zyl J in terms of s 304(1) of the Criminal Procedure Act 51 of 1977 is withdrawn. The sentence is reviewed and set aside. The matter is remitted to the magistrate for sentencing afresh. Pending re-sentencing the first applicant is to be held at the juvenile section of the Cradock Correctional Centre. It is recorded that the first applicant has been in detention at Mdantsane Correctional Centre since 11 December 2015.

[20.5] Third applicant, Ayabonga Sipaji. The certificate dated 10 June 2013 by Lowe J in terms of s 304(1) of the Criminal Procedure Act 51 of 1977 is withdrawn. The sentence is reviewed and set aside. The matter is remitted to the magistrate for sentencing afresh. Pending re-sentencing the first applicant is to be held at the juvenile section of the Cradock Correctional Centre. It is recorded that the first applicant has been in detention at Mdantsane Correctional Centre since 11 December 2015.

[20.6] Fifth applicant, Jason Valent. The certificate dated 08 July 2015 by Makaula J in terms of s 304(1) of the Criminal Procedure Act 51 of 1977 is withdrawn. The sentence on the count of rape is reviewed and set aside. The matter is remitted to the magistrate for sentencing afresh. Pending re-sentencing the first applicant is to be held at the juvenile section of the Cradock Correctional Centre. It is recorded that the first applicant has been in detention at Mdantsane Correctional Centre since 11 December 2015.

[20.7] Sixth applicant, Kwanele Siqana. The certificate dated 07 October 2015 by Chetty J in terms of s 304(1) of the Criminal Procedure Act 51 of 1977 is withdrawn. The sentence is reviewed and set aside. The matter is remitted to the magistrate for sentencing afresh. Pending re-sentencing the first applicant is to be held at the juvenile section of the Cradock Correctional Centre. It is recorded that the first applicant has been in detention at Mdantsane Correctional Centre since 11 December 2015.

[21] The Registrar is directed to forward a copy of this judgment to the Director General for Social Development and to the MEC for Social Development, Eastern Cape.

J M ROBERSON
JUDGE OF THE HIGH COURT

BLOEM J:-

I agree

G H BLOEM
JUDGE OF THE HIGH COURT

Appearances;

For the Applicants: Adv R Morgan Courtenay, instructed by `Centre for Child Law, Pretoria

For the Respondent: Adv J Bezuidenhout, Director of Public Prosecutions, Grahamstown