

The influence of the Child Justice Act 75 of 2008 on the application of justice in South Africa: *interpretation quae parit absurdam, non est admittenda?*

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Abstract. The 2010 implementation of the Child Justice Act 75 of 2008 (hereinafter referred to as the CJA) which procedurally regulates the trial of a child in conflict with the law in South Africa informs the submissions hereunder. The authors seek to examine evidentiary and procedural *lacunae* created by the CJA. The averred disparities relate to admissions at a criminal proceeding and separation and joinder of trial respectively. In discussing the provisions, which appear to create an absurdity however, unintended, in the trial process of a child and may unfairly benefit an adult tried with a child, the authors will refer to the Criminal Procedure Act 51 of 1977 (hereinafter referred to as the CPA) which regulates the procedural mechanisms employed in the trial of an adult offender.

Keywords: child offender, admissions, separation/joinder of trial, rights of a child, child offenders, children in conflict with the law.

1. Introduction

In a practical and entirely unsentimental sense, children embody society's hope for, and its investment in, its own future. The Bill of Rights recognizes this. This is why it requires the state to afford them special nurturance, and affords them special protection from the states power!

The sentiments expressed above by Cameron J in a constitutional court case concerning the applicability of minimum sentencing legislation on children in South Africa is a precursor for the eventual implementation of a separate juvenile justice system for offenders under the age of 18 in South Africa. The CJA was implemented as a restorative justice response to the ratification by South Africa of the United Nations Convention on the Rights of a Child (specifically article 37 and 40) and the African Charter on the Rights and Welfare of a Child (specifically article 17). The CJA is indicative of sec 28 of the Constitution read with the United Nations Guidelines for the Prevention of Juvenile Delinquency and the United Nations Standard Minimum Rules for the Administration of Juvenile Justice all of which confirm a humanitarian approach to matters concerning children. An identified objective of the CJA is the creation of a justice system that is sensitive to and accommodating of the particular vulnerabilities experienced by children in conflict with the law. In order to implement the objective the legislature included diversion of trial procedure as an alternative to the formal trial process for children up to the age of 18 years. The central aim of a diversion programme is to hold the child accountable whilst at the same time rehabilitating him for reintegration into society. Diversion expressed simply, is a process whereby trial procedure is avoided and the child offender is rather mandated to perform a diversion task in terms of the CJA. If a trial is not diverted at any of the stages provided for by the Act, the child faces an accusatorial trial process in a child justice court. The CJA operates on a pronounced restorative justice paradigm, which is particularly evident in the inquisitorial

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nature of the pre-trial procedure as well as the role of victim(s) and family of the victim(s) in the process of justice. Despite the laudability of the aims, the CJA creates evidential and procedural tension when combined with the CPA. Although the CJA is premised on the creation of a completely separate criminal justice system for child offenders the CPA still provides the base procedural mechanisms of the trial process and when compared to the CJA in certain instances the two Acts are not speaking with a common voice.

2. Joinder and separation of trial in terms of the CPA

2.1. Separation

Co-accused in a criminal trial are entitled to apply for a separation of trial or to be joined with co-accused in the same trial after the trial has started. The discretion to grant such procedure lies with the court. The courts, prior to the implementation of the CJA, provided guidelines indicating grounds upon which co-accused, at the discretion of the court, could apply to be separated in terms of the CPA. The courts' grounds of separation are of practical or, in some instances evidential, use. A court has the discretion to grant a separation, which will usually occur where a probability of substantial injustice would otherwise result. A separation of trial will allow a co-accused to testify against his co-perpetrator but this should not be the sole ground upon which the court grants a separation.

2.2. Joinder

Section 155 of the CPA stipulates that any number of persons implicated in the same offence (or as accessories in the same offence) may be tried together. Sec 156 stipulates that offenders committing separate offences at the same time and place may be tried together and sec 157 allows the prosecutor to join an accused in a trial where evidence has not yet been led. Sec 63(2)(2) of the CJA stipulates that when a child and an adult are charged together in terms of sec 155, 156 or 157 of the CPA that the court shall apply the CPA to the adult offender and the CJA to the child offender. This does not mean to say that the trial of adult and child co-accused should be separated. The CJA stipulates that any court constituted by the CPA may act as a child justice court. In effect therefore, an adult and child co-accused are tried in the same court although the presiding officer is required to apply one set of rules to the child and one to the adult.

2.3. National Prosecuting Authority Directives relating to joinder or separation of trial

Sec 97(4) of the CJA mandates the issuing of directives by the National Prosecuting Authority *regarding all matters which are reasonably necessary or expedient to be provided for in order to achieve the objectives of the Act*. One such directive deals with the issue of trial separation when a child offender is tried with an adult co-accused. Paragraph P states that a court can sit simultaneously as an ordinary court and a child justice court when trying an adult and child co-accused. Further, prosecutors are instructed that there is no reason to request a separation of trials even though the child was dealt with separately during the preliminary enquiry.

2.4. Juxtaposition of procedures

The result of the two procedures created for adult and child offenders is keenly observed in the manner in which a child offender eventually proceeds to the trial phase in the child justice court. Unfortunately, the two distinct procedures do not result in a perfect union in the case of an adult and child co-accused. Consider the following:

- The CJA is inquisitorial in nature whereas the CPA, in alignment with the South African Anglo-America or strict legal system, is accusatorial. The foremost difference between these two fact-finding systems lies in the role of the presiding officer. If the presiding officer is expected to fulfil the dual role of a fact finder in the case of a child and an impartial umpire in the case of an adult offender then the trial of an adult and child co-accused may simply give way to a plethora of confusion. Although the courts are capable of balancing the requirements of both procedures the burden may cause unnecessary delays in the justice system and/or result in a flood of review proceedings in which procedural irregularity could be alleged.

- The second implication of using both the CPA and CJA in one trial lies in the advantage conferred on the adult accused tried with a child. Section 9 of the South African Constitution states that all people are equal before the law and have the right to equal protection and benefit of the law. The CJA however creates certain procedures and prescriptive elements, which logically would also apply to an adult co-accused if tried with a child. For example, a trial in a child justice court cannot be postponed for more than 14 days if the child is incarcerated pending the finalisation of trial, 30 days if he is in a youth care facility or 60 days in the event he is on release. The CPA does not set any such time limits on the postponement period for adults and uses section 342A to remedy an unreasonable delay in trial. The definition of ‘unreasonable’ in South Africa is porous at best. Without going into detail one recent case before a Pretoria court has been postponed 21 times. The adult tried with a child will now obviously obtain the benefit of a ‘speedy trial’ constitutional protection in the true sense of the term, which, predominantly, is not the situation for an adult accused. An adult who uses a child to commit a crime or commits a crime with a child is essentially in a far better legal position than one who commits a crime with an adult offender or in isolation. The situation becomes ludicrous when one considers that the very legislation intended to soften the process for a child offender may very well end up protecting an adult offender.
- An adult co-accused cannot attend the pre-trial procedure created by the CJA unless he is subpoenaed to appear at the discretion of the court. The right to confront may be infringed to a certain degree by this exclusion especially if one considers that the child co-accused may be diverted at this stage if he admits responsibility for the act. The right to confront is a fundamental basis of South African law and although the preliminary enquiry is a pre-trial process information may be given by the child co-accused implicating the adult co-accused who is not present to confront such evidence. Although the record of the pre-trial hearing is inadmissible at the trial phase, sec 47(10) CJA allows the preliminary magistrate to preside over the trial in the child justice court provided that he has not heard any information prejudicial to the unbiased determination of the trial of the child. One would hope that this same proviso applies to any prejudicial information heard during the preliminary enquiry as regards to the adult co-accused.
- The right to confront is further hampered in a child/ adult co-accused case by the limitations of cross-examination. In terms of para P (5) of the prosecutorial directives (mentioned above in 2.2) a prosecutor should refrain from hostile and inappropriate cross-examination of a child and should object to such cross-examination by any other person. We can suppose that the prosecutor would object to a hostile examination technique utilised by the legal representative of the adult co-accused when questioning the child accused. Whilst there are limits to cross-examination in South Africa, it remains a basic tenant of the accusatorial system and any limitation thereof for the protection of a child co-accused may unfairly prejudice the adult co-accused.
- *“The constitutional injunction that ‘a child’s interests are of paramount importance in any matter concerning the child’...means that a child’s interests ‘are more important than anything else’ but not that everything else is unimportant”*ⁱⁱ – Cameron J. The rights of the adult accused to a fair trial cannot be limited by section 36 of the Constitution on the basis of the ‘best interest of the child standard’. Holding a joint trial of a child and adult co-accused can, in some instances be viewed, as a limitation of the right to a fair trial for both parties. This limitation renders the rule of law ineffective. The situation can however be entirely avoided by amending the CJA to require a separation of trials in the case of a child and adult co-accused. Co-accused are not compellable witnesses in the same trial in terms of South African law and enjoy the right to silence and the compellability of a witness after separation of trial in precarious at best. This therefore ensures that a separation would not damage the case for the prosecution although admittedly it would create a greater workload on the courts and prosecution service.
- A recent example in the South African milieu of the procedural mismatch between the CPA and the CJA is the murder trial of Eugene *Terre’Blanche*, a political figurehead, allegedly murdered by a 15 year old and a 27 year old on April 3rd 2010. The child and the adult were charged as co-accused before the implementation of the CJA. On implementation of the CJA the court became responsible

to apply the procedures in the CJA to the child and the CPA to the adult in the same trial. The prosecutor in this case has requested that the trial be conducted in-camera due to the youth of the child accused and, to a certain although not irrefutable degree, because of the politically charged nature of the trial. If the child is however diverted out of the justice system before the trial commences the possibility of, holding proceedings in-camera must rest on a different ground, which may not be so easily proven by the prosecution. This presents the prosecutor with a tortured choice: (a) divert the child accused and the trial is held in the open as justice was intended or, (b) refuse to divert the child simply to ensure that the proceedings continue in-camera.ⁱⁱⁱ In essence, the CJA leaves children open to being manipulated by adult offenders and syndicates to commit crime because they will be either diverted or most likely incur a light sentence. Viewed from a different perspective an adult accused can essentially enjoy many of the advantages of the CJA if he commits a crime with a child.

3. Admissions in terms of the CPA

Sec 220 of the CPA, which in brief states that the accused may admit any fact placed in issue at a criminal proceeding and such admission shall be considered sufficient proof of that fact, governs admissions in South African criminal procedure. Sec 60(11B) of the CPA allows testimony presented by an accused during bail proceedings to be regarded as admissions provided due warning has been given to the accused.

3.1 Paragraph H (4) and (5) of the National Prosecuting Authority Directives issued under sec 97(4) of the CJA

In an ordinary trial, a child who pleads guilty during a sec 112 proceeding makes admissions during questioning by the court. If the court subsequently finds that the child pleaded guilty incorrectly for one reason or another sec 113 would allow such admissions to become proof of the allegations. The CJA however creates a unique position with regard to admissions. Theoretically sec 220 of the CPA is applicable to any admission made during the course of a sec 112 plea but sec 58(4)(b) of the CJA and para H (4) and (5) if the National Prosecuting Authority Directives create a *sui generis* evidential procedure. For a child to be diverted during the preliminary enquiry or during the trial phase it is essential that the child '*acknowledges responsibility for his actions*'. The CJA in sec 1 defines '*acknowledging responsibility*' as '*acknowledging responsibility without a formal admission of guilt*'. If a child is diverted and fails to complete such programme the child is brought back before the court. In the event that the court concludes that the failure to comply was wilful, the child may be prosecuted further or ordered to undergo further diversion. If however the acknowledgement of responsibility is made at the preliminary enquiry stage the admissions made therein may not be used against the child during a bail application, plea, trial or sentencing procedure. If however the child made the acknowledgement of responsibility during the trial stage before the state closed its case then any admissions made therein are accepted as proof of the fact in court. In terms of sec 67(1)(b) of the CJA the court is expected to warn the child in the child justice court that if he fails to comply with the diversion order his acknowledgement will harden into an admission. The purpose of this warning is to ensure compliance with the diversion order and to ensure that the admission has evidential value.

3.2 Juxtaposition of procedures

If a child acknowledges responsibility for his actions during a preliminary enquiry and is diverted his acknowledgement has no evidential value if he fails to complete the diversion option. The justification for this lies in the notion that the preliminary enquiry is a pre-trial initial procedure, which is inquisitorial in nature and does not signify the beginning of a formal trial but rather the first appearance of a child. At the preliminary enquiry, the presiding officer may decide to divert the matter or refer it to the child justice court. The record of the preliminary proceedings is not admissible at the trial phase and any acknowledgements made are inadmissible. Juxtaposed with the position of an adult offender who undergoes a bail application procedure one notices a conflict in reasoning between the CPA and CJA. A bail procedure is inquisitorial in nature and occurs during the first appearance of the adult accused. The applicant must show that it is in the interest of justice for him to be released pending trial. The difference however is that the record of the bail application forms part of the trial record of the accused. Although any admissions made during a bail application are not formally recorded as such, they can result in a lack of credibility if the accused testifies

differently at trial. If a child offender is diverted at the trial phase and fails to complete the diversion programme, his acknowledgement of responsibility is held against him when he is brought before the court for trial. The acknowledgement is then determined as an admission under sec 220 of the CPA. The position for an adult offender who pleads guilty under sec 112 of the CPA and whose plea is thereafter amended to not guilty by the court under sec 113 is the same as a child who fails to comply with a diversion order – his admissions are taken as proof. The difference however is that sec 58(4)(c) of the CJA stipulates that the court may decide to refrain from prosecuting when the child fails to comply with the diversion plan ordered at trial and simply institute a more onerous diversion option. The CJA appears to present a ‘get out of jail free card’ with regard to the admission of responsibility even when the failure to complete the original diversion programme was the wilful fault of the child, which appears to conflict sec 220 of the CPA.

4. Conclusion

The CJA requires a uniform, coordinated approach by the criminal justice system and all role-players involved in the process of trying a child. Although the CJA holds itself as a restorative justice document, the reality of the situation is that many children will still be referred for trial in a child justice court. The implementation of procedural mechanisms drafted for adult offenders in terms of the CPA being applied where there is a procedural discrepancy in the CJA does not ensure uniformity of law or a restorative approach. Although the implementation of the CJA can be lauded, it remains to be seen if the trial process in the child justice court actually manages to soften the criminal process for children. The legislation pertaining to child justice speaks directly to a separate criminal justice system for children but assumes the position that any ordinary court can sit as a child justice court and that a child accused need not be separated from an adult co-accused. Whilst the pre-trial measures and diversion options available to children in conflict with the law bring a definite inquisitorial and child friendly approach to justice, it would appear that the trial process itself remains a harsh reality for a child offender. Specialized training for presiding officers, prosecutors and defence attorneys will go a long way in softening the process but claiming a separate trial system for children is far from the reality. Given the daunting nature of the physical court arena, the notion of ‘fair trial’ will often be different for adults and children. The CJA seems to have taken due notice of this fact at the pre-trial phase but the trial phase seems still to dwell in the ‘six of one half a dozen of the other approach’ which still places the child in a court environment. If the statistics are reliable, 19 487 children were arrested in South Africa between the period 1 April 2010 to 30 June 2010, then the desperate need for a system which truly seeks to rehabilitate child offenders becomes pertinently obvious. A restorative approach to child justice should however mean what it purports to support – a completely separate approach to child justice in South Africa, which at present is not evident in the trial phase of a child offender. When one factors in the shortage of probation officers in South Africa (484 at the time of writing) and the need for serious training in the judicial process applicable to children, one wonders if the commendable objectives of the CJA are truly attainable.

‘A truly principled child-centred approach requires a close and individualized examination of the precise real-life situation of the particular child involved. To apply a predetermined formula...would in fact be contrary to the best interest of the child concerned’^{iv} Cameron J

The approach expounded by Cameron J above forms the basis of a restorative approach to child justice however the inconsistencies in the system as legislated create, however unintended, an absurdity in procedure.

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ii *Supra*.

iii See Ballard C. *Terre'Blanch murder accused tests Child Justice Act*. Mail and Guardian May 13-19 2011; pp 31.

iv See endnote i *supra*.