

SNELLER VERBATIM JHB/LKS

IN THE HIGH COURT OF SOUTH AFRICA

(WITWATERSRAND LOCAL DIVISION)

JOHANNESBURG

CASE NO. 3284/00
2000.09.27

DATE:

In the matter of:

A. E. M. in his capacity as
legal guardian of G. R. M.

Applicant

And

THE SENIOR PUBLIC PROSECUTOR, RANDBURG
MAGISTRATE'S COURT

First Respondent

MR MOAGI in his capacity as a District
Court Public Prosecutor at Randburg
Magistrate's Court

Second Respondent

JUDGEMENT

FLEMMING, DJP: It is convenient at this stage to refer to the minor who is involved as the applicant although the proceedings are technically brought by her guardian for understandable reasons.

The applicant was convicted on a count of theft. She asked for review of the decision to prosecute and for the setting aside of the proceedings in terms of which she was convicted and sentenced.

Amongst other considerations the fact that the applicant is involved in examinations is a reason why there is no propriety in being expansive about the law in circumstances where the facts bring the answer. I will accordingly be very concise, I hope, about the view which I take of the matter.

In the proceedings in isolation, the decision to prosecute, the plea of guilty, the conviction, the sentence, there is nothing irregular. If it had not been for the presence

of the co-culprit, the person who participated in the same theft, there would have been no apparent grounds for interference in the ordinary course. Secondly, in this approach nothing turns from the Constitution. The court has always reviewed administrative decisions which are vitiated by *mala fides* or other considerations where that is appropriate and the court's involvement on review has not been altered in so far as this case is concerned.

Thirdly, if one considers the facts of this case, I think that the following reasoning applies. Before a notional prosecutor there was a picture of a child, a 16 year old, who is capable of theft and who can stand in for dishonesty and should bear the consequences, had committed a theft jointly with another party. It is a type of situation in which prosecutors have over many years, often and correctly, because of the human potential, the harm which prosecution does, decided not to prosecute. It is a traditionally settled response that young boys who steal peaches from neighbours are not prosecuted by handled differently e.g. by fathers or headmasters or heads of hostels and the like taking over the necessary discipline. Also that is nothing new. The point I make is that in deciding whether to prosecute or not, a prosecutor has a discretion. There are cases in which concerns about the future of the human being relative to the specific crime and its consequences, require and justify a decision not to formally prosecute.

In the fourth place, the picture which came forward from this specific incident was such that one prosecutor decided not to prosecute. I refer to the decision affecting the co-culprit. For those who want to call it a decision to "divert", the freedom is there to use that term. The picture was one of a girl coming to a shop, deciding there to steal clothing from the fitting room and in the fitting room, and trying to get away with it. The girl at that stage is a 16 years old, an age where irresponsibility, spontaneous action, being influenced by somebody else and the like are not unknown. When the theft was discovered she owned up. Despite the prevalence of shop theft there is also the reality that one is dealing with children. I am not approaching this on the basis of simple physical age but on the basis of people who are not ripe, who are immature and sometimes make the most peculiar decisions arising from their undeveloped state of mind. If on that total picture one prosecutor, the one which I have indicated, came to the view that non-prosecution, in other words "diversion", was realistic for L. T., if the facts in our legal system within the approach of the Director of Prosecutions says that L. T. be given diversion, then simply as a matter of fact it follows that if G. M. comes before the same prosecutor and the facts are identical, that prosecutor should have considered diversion instead of prosecution.

Turning to the facts of this case, the prosecutor was challenged in these papers to explain the decision to prosecute. The imputation, if not express at least clearly appears, that the prosecutor who dealt with the applicant's case did not consider diversion. If that prosecutor had come back with an affidavit to explain what he did and that he did consider this, the outcome may have been different. It is not for me to assess that because in this matter it is theoretical. The fact is that he has not explained his decision. That leaves the inference proper that on facts which require that the question of diversion should at least come into the equation, diversion was not considered. That implies that there was not a proper exercise of the discretion of the prosecutor. I say that as a matter of applying himself properly and fully to the content of what was before him and not as a question of *mala fides* which counsel claimed but which the papers do not even set out to make a case for. Nor as a question of special law. This has been the law all the years and the law, I may say, has been fair all the years.

If that decision is vitiated, it follows that the subsequent proceedings are tainted. What should happen is that the matter should be taken back to the stage where the prosecutor does bring the prospects of and the possibility of diversion into the consideration before him. To reach that position, the conviction and sentence have to be set aside. The prosecutor will have to decide afresh whether or not to prosecute. Obviously the applicant and her guardian are not prevented from putting their arguments before the prosecutor and informing him about the outcome of the case against the co-accused.

I would, therefore, suggest that the conviction and sentence be set aside and that the matter be referred back to the senior public prosecutor at Randburg Magistrate's Court to consider whether or not to prosecute or to divert or to follow such other procedure as may be legal and proper for this case.

Fevrier, AJ: I concur.

Court: That will be the order of the court.

ON BEHALF OF APPLICANT : ADV V L BRONSTEIN

Instructed by : H MILLER, ACKERMANN AND
BRONSTEIN

ON BEHALF OF RESPONDENTS : ADV M S HOOSEN

DATE OF JUDGEMENT : 27 SEPTEMBER 2000