THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

High Court Ref No: 14658

In the matter between:

STATE

And

TNS

Coram: SALDANHA & ROGERS JJ

Delivered: 29 OCTOBER 2014

JUDGMENT

ROGERS J:

[1] This matter came before me on automatic review. The circumstances of the case appear from the enquiry I directed to the magistrate on 2 July 2014, from which I quote:

'Introduction

1. I have queries in this matter regarding both conviction and sentence. In order to expedite matters, this query is being sent simultaneously to the magistrate and to the DPP's office for comment.

2. The accused's date of birth is 5 November 1999. She was charged on one count of culpable homicide by causing the death of her biological father by stabbing. The alleged offence occurred on 6 December 2012. On that date the child had just reached her 13th birthday.

3. The accused was represented by a legal aid attorney. A report by a child psychiatrist and clinical psychologist was procured, pursuant to which the magistrate on 10 December 2014 found that the child had criminal capacity.

4. The accused proceeded to plead guilty, providing, in her s 112(2) statement, a full account of the incident leading to the stabbing of her father. She was convicted on the basis of this plea and statement.

5. No previous convictions were proved. The matter was postponed for a probation officer's report.

6. On 28 March 2014 the probation report was presented at court. The accused was sentenced to five years' compulsory residence in a Child Youth Centre, the sentence being ante-dated to 6 December 2012 (the date of the alleged offence) purportedly in terms of s 77(5) [of the Child Justice Act 75 of 2008]. The five years' compulsory residence will thus expire on 6 December 2017, just after the accused's 18th birthday.

Criminal capacity

7. In terms of s 7(2) of the Child Justice Act read with s 11, the accused was rebuttably presumed to lack criminal capacity as at 6 December 2012, and the onus was on the State to rebut this presumption beyond reasonable doubt. This was also the common law (Snyman *Criminal Law* 5th Ed at 178-181). In the latter work it is said that the presumption is not rebutted merely by proof that the child could distinguish between right and wrong; it must be clear that the child knew that what she was doing was wrong within the context of the facts of the particular case.

8. The report of the psychiatrist and psychologist appears to me had to have been insufficient to rebut the onus. The accused suffered from a severe stutter and was said to suffer from "Borderline Mental Retardation". Her Full Scale IQ fell on the Borderline range of intellectual disability. There was likely to be "specific cognitive deficiency". Her score on the Verbal Scale was "weak"; her verbal abstract reasoning was "poor". Importantly, the expert said that she was "likely to have

difficulty predicting the consequences of her actions". Her "social judgment, mental agility and mental alertness" were "very poor", meaning that she was "likely to be slow to think (sluggish) and likely to make poor social judgment decisions". In the context of a criminal offence, the experts said it was "highly likely that [the accused] did not consider the consequences of her actions nor is she likely to have the capacity to do so independently".

9. The experts' specific assessment on criminal capacity was that the accused did "understand the difference between right and wrong, and, within the limitations of her intellectual and developmental level, generally has the capacity to act in accordance with that knowledge" [*my underlining*]. Her ability to control her impulses, however, would have been "profoundly affected" by the sense of danger provoked by her father's verbal and physical attacks. In addition, "her impaired verbal reasoning and poor processing is likely to have prevented her from considering anything other than self-protection in that moment. It could thus be "argued" that the accused's "criminal capacity was temporarily diminished".

10. The experts were not called to explain these matters. Not only was the accused rebuttably presumed to lack capacity but she appears to have had specific cognitive difficulties which put her capabilities below that of the average child of her age.

11. Please comment.

The guilty verdict

12. On the assumption that the accused was proved beyond reasonable doubt to have had criminal capacity at the date of the alleged crime, I have reservations as to whether the s 112(2) statement was, in the particular circumstances of the case, sufficient to satisfy the court beyond reasonable doubt that the accused was guilty of the crime of culpable homicide. As noted, her account was one of persistent verbal and physical abuse during the day in question. She said she later armed herself with a knife in order to deter her father. When she encountered her father and he made to attack her with a half-brick, she reacted quickly, striking him once in the chest. She fled to her home and locked herself inside, fearing that her father would pursue her.

13. In the expert assessment of criminal capacity, her version to the medical experts was that there was a scuffle in which her father threateningly raised a half-brick. As a result, 'she stabbed at him, intending to inflict a minor wound on his arm to show him how much he had hurt her'.

14. Where a child is charged with culpable homicide, and the child has criminal capacity, the test for negligence is that of the reasonable child in the same circumstances (Snyman *op cit* 217). A reasonable adult should have been aware that the use of the knife constituted disproportionate force in self-defence, but why is the same true of a 13-year-old girl facing a physical attack from her father?

Sentence

15. Given the circumstances in which the offence occurred and the child's tender age and mental and social circumstances, a sentence of five years compulsory residence in a youth centre appears to be very harsh.

16. I appreciate that the magistrate may have thought that the child would be better off in a youth centre than at her home. However, compulsory detention in a youth centre is a significant inroad on freedom. There are procedures, outside of the criminal justice system, for ensuring that children receive adequate care. Unless the crime in itself warrants lengthy compulsory detention, such detention should not be used to achieve extraneous social aims.

17. Might it not have been appropriate to consider postponing the imposition of sentence?

18. I note in passing that this does not appear to have been a case where, as the magistrate supposed, the sentence had to be ante-dated in terms of s 77(5); the child was not in prison or in a youth centre while she waited trial.'

[2] The magistrate, who satisfactorily explained at an early stage why there would be some delay in dealing with my query, furnished her reply on 27 August 2014. The DPP's office submitted its comments on 13 October 2014.

[3] The magistrate says that the accused was throughout represented by a senior and extremely competent and thorough attorney. While the expert assessment was being awaited, the accused appeared before the magistrate on four occasions. The accused's attorney told the magistrate that her client was becoming increasingly confident and less stressed in the court environment and that she was satisfied regarding the criminal capacity of the child. The child's mother described her as helpful and able to take the initiative in household functions. She was at normal school though she had repeated grade 2.

[4] As appears from my query, the expert assessment (performed by a child psychiatrist, Dr Hawkridge, and a clinical psychologist, Ms Martin) described the accused as suffering from 'borderline mental retardation'. The magistrate, being unable to reconcile this description with what she had heard and observed during the court appearances, contacted Dr Hawkridge. (The exchange between the magistrate and Dr Hawkridge is not part of the recorded proceedings.) Dr Hawkridge described the accused as 'not a bright 13-year-old'; she would regard her as having

the IQ of a 12-year-old. I quote further from the magistrate's letter as to her discussion with Dr Hawkridge:

'Her verbal scale is weak. She had a significant higher score on the vocabulary test indicating her long-term memory, inductive reasoning and education level are stronger than her verbal concept information. She is likely to have difficulty predicting the consequences of her actions. In the context of a criminal offence (murder at that time), it is not highly likely that [the accused] did not consider the consequences of her actions, nor is she likely to have the capacity to do so independently [*sic*].'

I pause here to mention that the last sentence in this passage is unclear and may suffer from an error in formulation. Continuing:

'Dr Hawkridge also agreed that she did not have the ability to form intention to murder. [She] explained her diminished ability to act as a mitigating factor. Dr Hawkridge confirmed her assessment of criminal capacity that the child does understand the difference between right and wrong and within the limitations of her intellect and developmental level (12-year-old). [She] generally has the capacity to act in accordance with that knowledge.'

[5] The magistrate says that in the light of this information she did not deem it necessary to call Dr Hawkridge. She adds that the authors of the assessment did not have the benefit of the content of the docket, which was available to the accused's attorney when formulating the guilty plea. The magistrate says that, at the time, she attached some significance to the fact that there were material differences between the version the accused offered to the experts and the one she gave to the court. The former version placed most of the blame for the incident on her father. The other version, given to the court, indicated that the accused did not fear her father to such an extent that she tried to avoid meeting him again. The magistrate comments in this regard as follows (underlining in the original):

'On the contrary, after the first encounter and once safe at home… she [the accused] states, "Ek het toe die mes vanaf die kombuis tafel geneem and <u>weer</u> uitgegaan na buite. Op daardie stadium het ek nie my pa buite gesien nie… Ek het <u>weer</u> besluit om parkie toe te loop en het die mes steeds in my besit gehad." She goes on to explain, "Ek het die mes saamgeneem as afskrik middel vir my pa." This was a case where she acted on her own initiative. She went back to the park to find her father. Not to protect herself, but to deter her father.'

[6] On the merits, the magistrate says that the accused's explanation did not cause her to believe that the accused thought she was entitled to do what she did. There were no grounds of justification for her actions. The magistrate was of the view 'that she was not honest when the assessment was done'.

[7] In regard to sentence, the magistrate observes that, while there may in theory be procedures outside the criminal justice system for ensuring that children receive adequate care, 'in practice it is almost non-existent in the rural area such as the Overberg'. There are, she says, no counselling facilities. The magistrate has dealt with several cases of children placed under home-based supervision to whom, so it later transpired, no services were rendered. Those children subsequently appeared before her again, having reoffended. She expresses alarm at the prevalence of serious crime committed in her area by juveniles. She has reported the dire need for basic and adequate social services at the highest level but there has been no improvement as yet.

[8] The magistrate considers that the accused required strict discipline and guidance in order to undergo rehabilitation. A youth detention centre provides the necessary access to treatment, the opportunity to continue her education, acquire valuable skills and attend programs.

[9] The magistrate adds that, pursuant to my query, she has ascertained from the accused's attorney that the child has adapted well and has continued her schooling. Her family visits her regularly. There is in general considerable coordination between the youth centre and the court, as the magistrate usually requests feedback on an informal basis. She concludes:

'Given my obligation to act in the best interests of the child I found it necessary to tailor my decision to the unique circumstances of this child and to be sensitive to her needs. I respectfully submit that the sentence imposed for committing a serious offence is a fair and suitable sentence.'

[10] The DPP's office expressed reservations about the manner in which the court *a quo* dealt with the accused's criminal capacity. The DPP's office also expressed the view that the accused's plea explanation indicated self-defence. The DPP's

conclusion is that the magistrate should have entered a plea of not guilty and directed that the criminal capacity of the accused be determined. In regard to sentence, the DPP's office agreed that it seemed harsh.

[11] Part 2 of Chapter 2 of the Child Justice Act (ss 7-11) is concerned with the 'criminal capacity' of a child. From s 11(1) of the Child Justice Act it is apparent that criminal capacity here has the meaning now well-established in our criminal law, namely the capacity, at the time of the commission of the alleged offence, to appreciate the difference between right and wrong (the cognitive element) and to act in accordance with that appreciation (the conative element): see *S v Laubscher* 1988 (1) SA 163 (A) at 166G—167E; Burchell *Principles of Criminal Law* 3rd Ed at 147 and 358-359. A person may lack criminal capacity for reasons other than youthfulness. In the case of mental illness or mental defect, s 78(1) of the Criminal Procedure Act 51 of 1977 provides that a person is not criminally responsible for an act or omission if, at the time of such commission or omission, he or she suffered from a mental illness or mental defect which made him or her incapable of appreciating the wrongfulness of his or her act or omission or of acting in accordance with such appreciation. Although the phraseology is not identical to s 11(1) of the Child Justice Act, one is in each case concerned with an enquiry into the same cognitive and conative abilities of the accused person.

[12] To the extent that the DPP's memorandum implies that there should in the present case have been an enquiry into the accused's criminal capacity in terms of s 78 of the Criminal Procedure Act, I disagree. In terms of s 78(2) a person is presumed not to suffer from a mental illness or mental defect resulting in his or her lacking criminal capacity. Lack of criminal capacity on grounds of mental illness or defect must be alleged by the accused and proved by him or her on a balance of probability. The accused did not raise a s 78 defence. Furthermore, although the expert assessment of the accused indicated some mental deficits, there was no diagnosis of a mental illness or mental defect.

[13] The question in the present case is whether the accused lacked criminal capacity on account of youthfulness. Section 78 in general, and the presumption in s 78(2) in particular, are not relevant to that question. On the contrary, s 11(1) of the

Child Justice Act expressly provides that the onus rests on the State to prove beyond reasonable doubt that a child between the ages of 10 and 14 has criminal capacity. Section 7(2) creates a presumption that such a child lacks criminal capacity. This accords with the common law position (*Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 434; *Boberg's Law of Persons* 2nd Ed at 217-218 and 855-864).[1]

[14] There are relatively few reported judgments dealing with the criminal capacity of children and some of them were decided before the cognitive and conative elements which together comprise criminal capacity were clearly formulated and recognised. The focus has often been on whether the child as a fact appreciated the wrongfulness of his act (which carries the danger of eliding the enquiry into criminal capacity with a determination of *mens rea*) without separate consideration as to whether the child had the capacity to act in accordance with his or her appreciation of the wrongfulness of the act (see, for example *R v K* 1956 (3) SA 353 (A) at 356F-358F; *S v M & Others* 1978 (3) SA 557 (Tk Sc) at 558E-559B).

[15] It appears from the cases that, at least in relation to children, criminal capacity is relative rather than absolute, in the sense that a child could notionally be criminally capable in respect of one particular crime but not criminally capable in respect of another. The question is not whether the child had the capacity to distinguish between right and wrong in the abstract and to act in accordance with that appreciation but whether the child had the capacity to appreciate the wrongfulness of the particular act with which he or she is charged in the circumstances in which it occurred and to act in accordance with that particular appreciation. One will thus find *dicta* that a child will more readily be found to have criminal capacity in relation to obviously heinous crimes - offences *malum in se* (see

[1] In Snyman *Criminal Law* 5th Ed at 179 the learned author refers to this age group as encompassing children 'after completion of their seventh year but before completion of their fourteenth year (in other words, till just before their fifteenth birthday)' and proceeds to consider the test for determining whether a child 'between the ages of eight and fifteen' has criminal capacity. This formulation is erroneous. A child turns 14 when he or she has completed 14 years of life (ie including the 14th year itself). At that point the child, having turned 14, commences his or her 15th year (but is aged 14 until the 15th year is completed). On my reading of the cases and the old authorities, the presumption of lack of criminal capacity terminates when the child turns 14, not 15. This is certainly the effect of s 7(2) of the Child Justice Act.

the survey of cases in *S v Pietersen & Others* 1983 (4) SA 904 (E) at 909C-G; see also *S v Ngobese & Others* 2002 (1) SACR 562 (W) at 564g).

[16] One must also remember that where a person who was between the ages of seven and fourteen at the time of the alleged offence is put on trial and called upon to plead, criminal capacity is not determined (or certainly does not have to be determined) in advance of other issues. It follows that, by the time the trial court is called upon to determine the accused's guilt (including criminal capacity), it will have heard evidence on all the circumstances of the alleged crime. The Child Justice Act contains provisions for a preliminary enquiry into various matters, including the child's criminal capacity, but these procedures are aimed at assisting those involved in the criminal justice system to determine whether the child should be charged. Once the child is charged (which would reflect a view on the part of the prosecution that there is a reasonable case for regarding the child as having had criminal capacity at the relevant time), the ordinary rules of criminal procedure apply. These entail *inter alia* that the State must prove beyond reasonable doubt that the accused had criminal capacity at the relevant time.

[17] Where the form of *mens rea* required by the offence is *dolus* (for example, murder), the State would need to prove, among other things, that the child performed the relevant act intentionally and with the knowledge of its unlawfulness. Strictly speaking, if a child lacks criminal capacity in relation to the charged offence, *mens rea* falls away, because fault cannot be attributed without criminal capacity. In practice, though, evidence which shows that the child acted intentionally and with knowledge of unlawfulness is likely at the same time to show that the cognitive component of criminal capacity was present (namely, the capacity to appreciate the wrongfulness of the act). However, the State would still need to prove that the conative element of criminal capacity was present, namely the ability to act in accordance with the appreciation of wrongfulness.

[18] Where the form of *mens rea* required by the offence is *culpa* (for example, culpable homicide, as here), the correlation between *mens rea* and the cognitive element of criminal capacity is absent because *ex hypothesi* the accused did not as a fact act intentionally with knowledge of unlawfulness. Hardly any of the cases

dealing with the criminal capacity of children are concerned with crimes of negligence. In one of the few cases I have found, *R v Tsutso* 1962 (2) SA 666 (SR) (a case of culpable homicide), Maisels J said that the prosecution had been required to show affirmatively that a person in the position of the accused, who was 10 years old at the time, had sufficient capacity to know that the act he was doing was wrong (at 668F). I have no quarrel with that proposition insofar as it concerns the cognitive component of criminal capacity but the important conative component is omitted. The judge continued by posing the question whether the prosecution had proved beyond reasonable doubt 'that the accused's mind was sufficiently mature to understand, and that he did understand, the wrongful character of the conduct in question' (at 668 *in fine*). The first part of the quoted sentence repeats the cognitive element of criminal capacity. The second part of the quoted sentence, with respect, concerns the element of *mens rea*, not criminal capacity, and is, furthermore, irrelevant where the charge is culpable homicide rather than murder.

[19] I think one can legitimately have regard to delictual cases concerning whether a child is *culpae capax*. The concept is the same though the standard of proof differs. In *Weber v Santam Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) the court was called upon to decide whether a seven-year-old child who had dashed into the road was contributorily negligent in relation to the resultant motor vehicle accident. Jansen JA undertook a detailed analysis of the judgment in *Jones NO v Santam Bpk* 1965 (2) SA 542 (A) and of the common law, concluding that *Jones* was in general consistent with the common law. A child between the ages of seven and fourteen was rebuttably presumed not to have delictual capacity. In *Jones* the cognitive and conative elements of capacity were expressed thus by Williamson JA (at 554A-C):

'If it be decided in any particular case that a child under puberty is old enough to have and does have the intelligence to appreciate a particular danger to be avoided, that he has a knowledge of how to avoid it or of the precautions to be taken against it, and further that he is sufficiently matured or developed so as to be able to control irrational or impulsive acts, then it would be proper to hold that a failure to control himself or to take the ordinary precautions against the danger in question is negligent conduct on his part; in other words that child in relation to the particular acts or omissions complained of in the particular circumstances, was *culpae capax*.'

[20] Jansen JA observed that this passage set a subjective test, namely whether the child had the knowledge and mental ability to appreciate that the relevant act or omission was wrongful and to refrain from committing the wrong (at 390H-391A). For purposes of determining whether the child had this capacity, it is necessary to know what the act or omission is, ie the particular deviation from the norm of the reasonable person, which is an objective test (at 391A-D). If it is proved that the child had delictual capacity in relation to that wrongful act (a subjective test), the question whether the child was negligent is an objective one measured with reference to the standard of the reasonable person. There is no special test for negligence in relation to children (400A).

[21] In regard to delictual capacity, Jansen JA observed that one should have regard not only to the intelligence and schooling of the child; proper account must be taken of the frailties of youth. A child might have sufficient intelligence and schooling to know that a particular act is wrong but youthfulness may nevertheless hinder the child's ability to act in accordance with such knowledge. Because of the impulsiveness of youth, the child might on the spur of the moment forget his or her knowledge and schooling. One must not put an old head on young shoulders. If the child is – when it comes to fault – to be held to the standard of the reasonable person, one must be satisfied that the child was mature enough to comply with that standard (400B-H).

[22] *Jones* and *Weber* were followed in *Eskom Holdings Ltd v Hendricks* 2005 (5) SA 503 (SCA) paras 15-17. Scott JA said that the force of subsequent criticism of *Weber* in its use of an adult standard in judging the negligence of a child was to some extent overcome by the emphasis placed on the subjective nature of the enquiry into the element of capacity.

[23] These decisions in the sphere of delict are relevant to criminal capacity but also call into doubt what I said in para 14 of my query to the magistrate, namely that the test for negligence is that of a reasonable child in the same circumstances. In my query I cited Snyman *op cit* 217. The learned author there references, as authority for his proposition, the judgment of MT Steyn J in *S v T* 1986 (2) SA 112 (O) at 127C-F. However, the two authorities which the learned judge cited in that

passage were judgments dealing with the effect of youthfulness in the assessment of extenuating circumstances, not on the test for negligence. I have not found any South African authority (apart from *S v T)* to the effect that, where a child is charged with culpable homicide, the *mens rea* element (negligence) must be tested with reference to the reasonable child. While we do not need finally to decide the issue in this case, there is much to be said for the view that the subjective frailties of the child find their proper place in the assessment of criminal capacity. If the child has criminal capacity (ie can be held accountable as an adult would), negligence is tested objectively with reference to the standard of the reasonable person. (This appears to be the view of Burchell *op cit* at p 366 fn 16.)

[24] When one tests the negligence of an adult, one does not subjectivise the test by postulating the standard of a reasonable person of the same age (20-year-old, 80-year-old and so forth). Nor could one sensibly use a test of the 'reasonable child', because children differ significantly in their abilities depending *inter alia* on their ages. So the test of the reasonable child would have to be subdivided further into the test of the reasonable 10-year-old, 11-year-old and so forth. And does one individualise the test further by positing a child with the same upbringing, education and intelligence? *Jones*, *Weber* and *Eskom* suggest that such an approach is not in accordance with the law. Once the particular child is found to have the cognitive and conative abilities necessary for criminal capacity, ie the capacity to be judged by the same standard as adults, the test for negligence is the ordinary one. If on that basis the child is convicted, youthfulness will again come into consideration in the context of sentence.

[25] In other Commonwealth jurisdictions the courts have, though not without some dissenting voices, employed the test of a reasonable child of the same age (in England, see *Mullin v Richards* [1998] 1 WLR 1304; *Honnor v Lewis* [2005] EWHC 747 paras 54-56; *Orchard v Lee* [2009] EWCA Civ 295 paras 6-12; in Australia, see *McHale v Watson* [1966] HCA 13; 115 CLR 199 (Menzies J dissenting); *DPP v TY* [2006] VSC 494 paras 6-10; in Canada, see *McEllistrum v Etches* 1956 CanLII 103 (SCC); [1956] SCR 787 at 793; *Gande v Pricthett* 2001 NFCA 40 (CanLII) paras 33-39; *Chiassan et al v Baird et al* 2005 NBQB 102 (CanLII) paras 87-106 and 118-122). In the English and Australian cases there is no indication that capacity for fault

was regarded as an independent requirement; the test of the reasonable child appears to have addressed the concerns which in our law are accommodated in the enquiry into capacity (accountability). In some of the Canadian cases capacity for fault is mentioned as a threshold requirement but only, as far as I can discern, for the purposes of eliminating those cases where it would be absurd to have an enquiry into fault (ie in the case of very young children). The Canadian cases reflect that contributory negligence is sometimes found in relation to children as young as six or seven because they are regarded as old enough to be held to some standard of responsibility, even though it be the standard of a reasonable child of the same age rather than the adult standard.

[26] It is of interest to note that in England (though not Scotland) there was, as in this country, a presumption that in criminal matters a child between the ages of ten and fourteen was *doli incapax* but the presumption could be rebutted by the prosecution. The concept of presumed incapacity was not necessarily the same as in this country because the presumption could be rebutted upon evidence that the child knew that what he or she was doing was seriously wrong. Be that as it may, the burden resting on the prosecution gave rise to growing public dissatisfaction, particularly in an era where children began formal education at the age of five. The presumption was abolished by s 34 of the Crime and Disorder Act 1998, a statutory measure which has been authoritatively held not merely to shift the burden of proof but to preclude altogether a defence of *doli incapax* in the case of persons above the age of ten (*R v JTB* [2009] UKHC 20; [2009] 1 AC 1310). (Children younger than ten are irrebuttably presumed not to have criminal capacity.) One can understand that, in a jurisdiction where children over the age of ten cannot raise the defence of *doli incapax*, the question of negligence should be assessed by a modified standard.

[27] If in our law we were, in cases involving children, to judge negligence by the standard of the reasonable child of the same age, it appears inevitable that the threshold enquiry into delictual or criminal capacity would also have to be adapted. If the child is only to be judged by the standards of the reasonable child of the same age, capacity would logically have to be directed at the question whether the child in question had the same capacities for appreciating wrongfulness and acting in accordance with such appreciation as the reasonable child of the same age.

[28] I have thus far considered legal aspects relating to culpability, ie criminal capacity and *mens rea*. Another relevant question in the present case is the justification ground of private defence. This is part of the enquiry into the *actus reus*. A child who lacks criminal capacity may nevertheless perpetrate an *actus reus*. The killing of another human being may be justified (ie not unlawful) if the requirements for private defence are present. Where private defence is an issue, the prosecution must show beyond reasonable doubt that the elements for private defence were not satisfied (Burchell *op cit* p 229).

[29] Snyman *op cit* at 107-113 lists the requirements for private defence as being (I summarise) that (i) the accused's act was in response to an uncompleted unlawful attack on an interest deserving of legal protection, the response being directed at the attacker; (ii) the defensive act was necessary to protect the interest in question; (iii) there was a reasonable relationship between the attack and the defensive act; (iv) that the accused was aware of the fact that he or she was acting in private defence. To avoid overlap and contradiction, element (ii) should be understood in my view as meaning that some defensive act was necessary (not necessarily of the nature and extent which the accused actually used), while element (iii) tests whether the extent and nature of the accused's response stood in a reasonable relationship to the attack.

[30] In regard to the reasonable relationship aspect, Snyman points out that one should not confuse this enquiry with the test for negligence. In regard to private defence, one is concerned with whether the response was lawful as judged by societal norms. The court must not adopt the position of an armchair critic but put itself in the shoes of the attacked person at the critical moment, asking whether a reasonable person would have acted in that way in those circumstances. In *Ntanjana v Vorster & Minister of Justice* 1950 (4) SA 398 (C) Van Winsen AJ (as he then was) said (at 406A) that the court must consider all the surrounding factors operating on the accused's mind at the time he or she acted. See also *S v T supra* at 128D-130E and 131F-132G as applied to a 16-year-old schoolboy charged with murder, and *S v Ndlovu* [2002] ZANCHC 5 paras 6-8. In the latter case, Madjiet J (as he then was) said that among the surrounding circumstances to which a court should have regard in assessing the lawfulness of a defensive act are the relative

strength of the parties, their relationship, gender differences, age, the means at the accused's disposal, the nature of the attack, the interest protected and the persistence of the attack.

[31] If, judged by these standards, the accused person is found to have exceeded the bounds of lawful private defence, it would still be necessary to determine culpability. Where the charge is one of murder, a person who subjectively but incorrectly believed he was acting in lawful private defence would not have *dolus* but could be convicted of culpable homicide. For *dolus* to be present there must be the intention to kill and knowledge of unlawfulness (see *S v Ntuli* 1975 (1) SA 429 (A) at 435H—437G; *S v Motleleni* 1976 (1) SA 403 (A) at 407C-D). A person who reacts in self-defence often intends to cause physical harm to the aggressor; such person may even foresee that his act of self-defence will or may have fatal consequences for the aggressor. But unless such person also knows that he is exceeding the bounds of self-defence and thus acting unlawfully, a necessary component for *dolus* is lacking. This is sometimes referred to as putative self-defence (Snyman *op cit* at 113-114). Nevertheless, if a reasonable person in the position of the accused would have realised that such conduct was beyond the bounds of reasonable self-defence, a conviction of culpable homicide is the appropriate and competent verdict (*Ntuli supra* at 436F-437D*; S v De Oliveira* 1993 (2) SACR 59 (A) at 63g-64a).

[32] Where the charge is one of culpable homicide, a finding that the accused had criminal capacity and exceeded the bounds of reasonable private defence would in most if not all circumstances lead to a conclusion that the accused had the necessary *culpa*.

[33] Returning to the facts of the present case, the accused was arraigned for trial in the regional court and the usual rules of criminal procedure applied save to the extent modified by the Child Justice Act. The accused was convicted on the basis of s 112(2) read with s 112(1)(b) of the Criminal Procedure Act. The magistrate could only convict the accused if satisfied that she admitted all the elements of the offence and was guilty of the offence. In view of the written statement, the court was not obliged but remained entitled to question the accused.

[34] One of the elements of the crime was that the accused had criminal capacity at the relevant time. In para 17 of the plea statement the accused admitted that, although she was a minor, she knew at all times what she was doing, could distinguish between right and wrong, appreciated the seriousness and consequences of her conduct and was criminally responsible ('toerekeningsvatbaar').

[35] Despite the plea statement, s 11(2) of the Child Justice Act required the regional magistrate, in determining whether the accused had criminal capacity, to consider *inter alia* the report of the probation officer in the preliminary enquiry and the expert assessment of the child. Of course, the magistrate also needed to take into account the facts of the matter as they appeared from the plea statement.

[36] For good reasons which will be apparent from the aspects of the expert assessment highlighted in my query, the regional magistrate herself entertained doubt as to whether the expert assessment was consistent with a conclusion of criminal capacity. It is not clear at what point in the process the magistrate spoke informally with Dr Hawkridge. Be that as it may, the discussion between them does not form part of the record nor was there evidence from Dr Hawkridge to elucidate the expert assessment. In *S v Dyk & Others* 1969 (1) SA 601 (C) Corbett (as he then was) said, with reference to informal discussions between a magistrate and a youthful accused, that, if the exchanges had been regarded by the magistrate as important in rebutting the presumption that the accused was *doli incapax*, they ought to have been recorded (at 603B-C). Unless such information is placed on record, a review court cannot properly perform its function of certifying the proceedings as being in accordance with justice. I must say, furthermore, that the informal exchange between the magistrate and Dr Hawkridge as summarised in the magistrate's response to my query does not lay my concerns to rest.

[37] In the light of the expert assessment and the circumstances of the case in general, I do not consider that the 'admission' in para 17 was a sufficient basis for the magistrate, without more, to conclude that the accused had criminal capacity. A generalised statement of her ability to distinguish between right and wrong, apart from not carrying very much weight, did not focus on the important question whether

she had the capacity to determine the extent to which she was entitled to use force against her father in the particular circumstances of the case and to act in accordance with that appreciation.

[38] If the accused's admissions in para 17 were correct, they seem to indicate that the State could have persisted with the charge of murder yet according to the regional magistrate it was Dr Hawkridge's view that the accused lacked the capacity to form the intention to murder, for which reason the charge was reduced to culpable homicide. It does not appear from the record or from the magistrate's response in what respects the accused lacked the capacity to form the intention to murder. One would think that a 13-year-old child, even with the deficits from which the accused suffered, would have the capacity to know that it is wrong to kill a person without reason and could thus in general form the intention to murder someone. The question of criminal capacity, in relation to the unlawful killing by a child in circumstances such as those of the present case, would require one to focus on the further question whether the child had the capacity to determine the circumstances in which killing another would be justified and, if so, whether the child had the capacity, in the specific circumstances which arose, to act in accordance with her cognitive capacity.

[39] There seems to me to be no material difference between the criminal capacity required for murder and for culpable homicide. If the accused lacked criminal capacity in relation to murder (because she lacked the capacity to understand the bounds of private defence and/or lacked the capacity, in the circumstances which confronted her, to act in accordance with her appreciation of these matters), she would also have lacked criminal capacity in relation to culpable homicide. If she had the necessary criminal capacity, the question whether she was guilty of murder or culpable homicide would depend on whether she actually knew she was acting wrongly or whether, although she did not, a reasonable person would have known.

[40] Because the magistrate could not properly have been satisfied that the accused had criminal capacity, she should not have convicted the accused on the basis of her guilty plea.

[41] Even if one concluded that the accused's criminal capacity was satisfactorily established, the plea explanation, read in the context of the expert assessment, raised doubt as to whether the accused's killing of her father was unlawful. My query to the magistrate summarises the features suggestive of private defence. It appears from the magistrate's response that she understood para 9 of the plea explanation as meaning that the accused deliberately took the knife with a view to seeking out and harming her father. In the absence of further questioning, that inference was not justified. The plea explanation is consistent with a version that, after her father's initial assault on her, she locked herself in the house for protection, that later she went out to play in the park, arming herself with a knife in order to deter the father if she again came across him, that she then did encounter him as she was walking to the park, that he approached her and made to throw two half-bricks at her and to hit her, and that it was at this point that in a quick reflex action she struck him once in the chest with the knife. Thereafter she ran home and again locked herself in the house. She waited there until the police arrived.

[42] In order to assess the possible existence of private defence in the present case, it was necessary for the regional magistrate to place herself in the child's position. All the factors mentioned by Madjiet J in *Ndlovu* were of potential relevance: the accused would not have been as strong as her attacker; there was a father/daughter relationship between them; the attacker was a man and the victim of the attack a female; she was 13 while he was an adult; apart from such physical strength as she possessed, the only means at her disposal (apart perhaps from flight) was the knife she was carrying as a deterrent; the attack was directed at her body and quite possibly posed a threat to her life; the attack which was imminent involved blunt instruments and the attacker's physical strength and were a repetition of attacks which had occurred earlier in the day.

[43] The question of flight might have warranted further investigation. Our law does not always require the victim of an attack to flee (Snyman *op cit* at 107-109; Burchell *op cit* p 238-239). Assuming the existence in general of a duty of flight, it should be remembered that the accused had been attacked earlier in the day, that when on the previous occasion she ran away her father chased after her, threw stones at her, grabbed her and thrust his knee into her stomach three times. She

freed herself on this occasion by biting his thigh. She said that when she encountered her father again on the fateful occasion, she thought he might again chase after her and hit her. The place where a child is ordinarily entitled to find refuge, namely her home, was not safe, given the relationship between her and her attacker.

[44] I do not say that on full examination a prosecution would fail on grounds of private defence. However, the plea explanation was not sufficient to satisfy the magistrate on that question.

[45] In view of these conclusions, it is unnecessary to comment on the sentence imposed by the magistrate, save to record that I adhere to the view indicated by my query, namely that a court's sentencing jurisdiction should not be used to impose a penalty, otherwise inappropriately harsh, because of failings in social services.

[46] The appropriate course, in my view, would be to set aside the conviction and sentence and to remit the matter to the court *a quo* to act in accordance with s 113 of the Criminal Procedure Act, ie to enter a plea of not guilty, whereupon the State, if it wishes in the light of all the circumstances to continue with the prosecution, must lead evidence in the usual way (see s 312(1); *Pietersen supra* at 911A-912B).

[47] Because the accused has apparently responded well to her detention in the youth care centre and because we cannot be confident that it would be in her best interests to be released forthwith to the care of her family, our order will provide that she remain at the youth care centre until her position is further assessed. There are various statutory provisions in terms of which her further detention or residence in the youth care centre might be ordered. If the prosecution continues, s 29 of the Child Justice Act might apply.[2] If the accused is in due course found to have lacked criminal capacity, s 11(5) read with s 9(3)(a)(i) of the Child Justice Act might be applied, and this might in turn lead to an investigation, pursuant to s 50 of the Child Justice Act read with Chapter 9 of the Children's Act 38 of 2005, into whether the

[2] Section 29(1) provides that a presiding officer may order the detention of a child who is alleged to have committed any offence in a specified child and youth care centre. The factors to which the presiding officer must give consideration are listed in s 29(2).

accused is a child in need of care and protection. Furthermore, any court in the course of proceedings involving a child who appears to be in need of care and protection may, in terms of s 47(1) of the Children's Act, order that the child be referred to a social worker for investigation contemplated in s 155(2) of that Act. One of the orders which a children's court may make in relation to a child in need of care and protection is placement in a child and youth care centre (see s 156(1)(h)).

[48] Finally, and despite the fact that this court will be setting aside the conviction and sentence as not being in accordance with justice, we have no doubt that the magistrate dealt with this matter conscientiously and in accordance with what she believed to be the best interests of the child.

SALDANHA J:

[49] I concur. The following order is made:

(a) The conviction and sentence are set aside.

(b) The matter is remitted to the court *a quo* in order to act in accordance with s 113 of the Criminal Procedure Act 51 of 1977.

(c) The accused must be brought before the court *a quo* within two months of the date of this order for the purpose of giving effect to (b) above and for the further purpose of determining what orders, if any, should be made in the best interests of the accused pursuant to the Child Justice Act 75 of 2008 and the Children's Act 38 of 2005, including her possible further detention or placement in a child and youth care centre.

(d) Pending the accused's appearance before the court *a quo* as aforesaid and pending the further order, if any, of that court as contemplated in (c), the accused shall remain in the care of the Youth Care Centre at Vredelust.

(e) The Registrar must cause a copy of this judgment, together with a copy of the memorandum dated 13 October 2014 submitted by the office of the Director of Public Prosecutions, Cape Town, to be delivered to (i) the Legal Aid Board for the attention of Ms Cuttings and Mr van Loggerenberg (who appeared for the accused

in the court *a quo*); and to (ii) the accused's mother, […] (who, as at March 2014, resided at […]).

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SALDANHA J

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ROGERS J