

SOUTH AFRICA / JUDGMENT

S v Joubert (03/2023) [2024] ZANWHC 198 (16 July 2024)

[2024] ZANWHC 198

COURT

North West High Court, Mafikeng

BEFORE

Petersen, Reddy

CASE / FILE NUMBER

03/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

HIGH

COURT REFERENCE NUMBER: 03/2023

MAGISTRATES'

SERIAL NUMBER: 02/2023

MAGISTRATE'S

CASE NUMBER: R/CC09/2023

Reportable:

NO

Circulate

to Judges: NO

Circulate

to Magistrates: YES

Circulate

to Regional Magistrates: YES

In

the review of:

THE

STATE

and

LYNETTE

MARTHA

JOUBERT

Accused

CORAM:	PETERSEN ADJP; REDDY J
	DATE
	HEARD: 21 JUNE 2024
	DATE
	OF JUDGMENT: 16 JULY 2024
	ORDER
	1.
	The sentence proceedings in this matter are not in accordance with justice.
	2.
	The sentence imposed on 10 January 2024
is reviewed and corrected as follows:	“Five
	(5) years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977.”
	3.
	A copy of the judgment must be brought to the attention to the Regional Court President and the Magistrates Commission, by the Registrar of this Honourable Court.
	4.
	A copy of the judgment must also be brought to the attention of the Director of Public Prosecutions, North West Province.
	REVIEW

JUDGMENT

PETERSEN ADJP

[1] This matter has an unfortunate history spanning close on a decade. This is the third occasion it has been transmitted on review from the Regional Court. On the first two occasions, it was transmitted for procedural reasons (See: S v Joubert (Review) (04/2017, RC150/16) [2018] ZANWHC 3 (8 March 2018); S v Joubert (Review) (03/2023) [2023] ZANWHC 180 (2 October 2023). The matter now comes before this Court on review, on an issue which can only be described as elementary and undoubtedly not expected of a Regional Magistrate.

[2] The matter was transmitted by the presiding Acting Regional Magistrate (Mr T R Boase), sitting at Mmabatho with a covering letter dated 11 January 2024, which reads verbatim as follows:

“Dear Honourable Reviewing Judge

Please note that I address this memo to you with subheadings to give a clear and coherent sequence of events regarding the above matter.

1.

INTRODUCTION

1.1 Kindly note that I hereby write this memo for purposes of reviewing sentence imposed on the above named accused on the 10 January 2024.

2. FACTUAL BACKGROUND

2.1 The above matter was brought before me on the 08 and 10 January 2024 for purposes of section 112(2) of Act 51 of 1977 proceedings. After hearing both legal practitioners on mitigation and aggravation of sentence I then imposed the following sentence:

- a. Count one (1) to sixty-four (64) are taken as one for purpose of sentencing.
- b. The accused is sentenced to Ten (10) years imprisonment in terms of section 276(1)(i) of the Criminal Procedure Act 51 of 1977
- c. The accused is declared unfit to possess a firearm in terms of section 103 of the Firearms Control Act 60 of 2000.

2.2 ...

3. APPLICABLE LEGISLATION

3.1 Section 276(1)(i) provides that:-

- (1) Subject to the provisions of this Act and any other law and of the common law, the following sentences may be passed upon a person convicted of any offence, namely –
 - (i) Imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.

3.2 Section 276A(2)(a) & (b) provides that punishment shall, subject to the provisions of section 77 of the Child Justice Act, 2008, only be imposed under section 276(1)(i).

- (a) If the court is of the opinion that the offence justifies he imposing of imprisonment, with or without the option of a fine, for the period not exceeding five years; and
- (b) For a fixed period not exceeding five years.

4. In *S v Motingwe* (311/2017) [2017] ZAGPPHC 884 (1 November 2017), the matter was placed before the High Court for special review after the Regional Magistrate had exceeded his jurisdiction on section 276(1)(i) of the Criminal Procedure Act by imposing eight years' imprisonment.

5. The Court held at paragraph 7 that "it is clear that the maximum sentence that may be imposed in terms of section 276(1)(i) of the Criminal Procedure Act is 5 years. The sentence of 8 years is thus not a competent sentence and should be set aside, as it is not in accordance with justice."

6. It is therefore humble (sic) my submission having considered the decision of *S v Motingwa* and the relevant provisions of section 276A(2)(a) & (b) of the Criminal Procedure Act that the sentence I imposed on the above named accused person is not competent and not in accordance with justice as I misdirected.
7. I also refer the Honourable reviewing Judge to the following authorities which shows I misdirected myself.
 - a. *S v Slabbert* 1998 (1) SACR (A).
 - b. *S v Mofokeng* (R08/2022) [2022] FSHC 84 (29 April 2022).

I thank you.”

- [3] The matter falls within the purview of section 304(4) of the Criminal Procedure Act, Act 51 of 1977 (“the CPA”) which provides that:

“(4) If in any criminal case in which a magistrate’s court has imposed a sentence which is not subject to review in the ordinary

course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section.”

- [4] On 12 March 2024, I consequently issued a directive in the following terms:

1. It is doubtful whether the proceedings in respect of the sentence imposed is in accordance with justice.
2. The Regional Magistrate has provided a statement explaining the reasons why the sentence imposed is not a competent sentence.
3. In terms of section 304(2)(a) of the Criminal Procedure Act 51 of 1977, the record of proceedings and statement of the Regional Magistrate are to be laid before a Full Bench of this Division for consideration, sitting as a Court of Appeal.
4. The matter is set down for hearing on 17 May 2024.
5. The legal representative of the accused, of if the accused cannot afford a private legal representative, Legal Aid South Africa and a representative of the Office of the Director of Public Prosecutions are to appear at the hearing of the matter to address the Full Bench on the issue of sentence, which is to be considered de novo in terms of section 304(2)(c)(ii) of the Criminal Procedure Act 51 of 1977.
6. Heads of argument shall be filed in accordance with the Rules and Practice Directives of this Division.”

- [5] As Adv Zwiegelaar, acting pro deo for the accused was unavailable on 17 May 2024, the Judge President allocated an alternative date for 21 June 2024. Adv September for the State and Adv Zwiegelaar for the accused provided heads of argument in support of, inter alia, their arguments on sentence. On 21 June 2024, oral submissions were entertained by me and Judge Reddy. Judgment on sentence was consequently reserved.
- [6] The sentence imposed by Mr Boase is an incompetent sentence by virtue of the provisions of section 276A(2)(a) and (b) of the CPA which limits the maximum term of imprisonment in terms of section 276(1)(i) of the CPA to five (5) years. See *S v PM 2024 (1) SACR (NWM)* paragraph [6], [7], [36] and [42].
- [7] It should therefore follow axiomatically from paragraph 6 of the directive of 12 March 2024, that in terms of section 304(2)(c)(ii) of the CPA that this Court whether or not it has heard evidence, may subject to the provisions of section 312 of the CPA confirm, reduce, alter or set aside the sentence or any order of the Regional Court. Adv Zwiegelaar in her heads of argument and in oral argument submitted that this Court is precluded from increasing a sentence, irrespective of how inadequate or inappropriate such sentence may be. The basis for this submission so the argument goes is that the wording of section 304(2)(c) of the CPA precludes this Court from doing so; and because “the power to increase a sentence on appeal is specifically and expressly added in section 309(3) of the CPA to the powers which the review court in terms of section 304(2)(c) of the Criminal Procedure Act have.” Reliance is placed on the decisions in *S v Msindo 1980 (4) SA 263 (BH)* at 264G to 266B; and *Attorney General, Venda v Maraga 1992 (2) SACR 594 (V)* at 596F.
- [8] In *Msindo*, Steenkamp J, was requested by the Magistrate, by way of special review to set aside a sentence imposed by the Magistrate which could not be executed to allow the Magistrate to impose an appropriate (heavier) sentence. Steenkamp J considered whether the High Court has the power to set aside the Magistrate’s sentence to increase the sentence or to set aside the sentence and refer it back to the magistrate to impose a heavier sentence. As per the Headnote and Semble of the judgment, which succinctly captures the ratio decidendi of the judgment, it was held that:

“In terms of s 304 (2) of the Criminal Procedure Act 51 of 1977 the reviewing Court does not have the power to increase the sentence imposed by the magistrate, which is a competent sentence, and/or to refer the case back to the magistrate's court for that purpose.

Semble: It remains, however, an anomaly in our law of criminal procedure that a Court of appeal has all the powers which a reviewing Court has, but in addition has the power to increase the imposed sentence in suitable cases while the reviewing Court does not have it. It is in the interests of justice that a reviewing Court should also have the power to increase the sentence in suitable cases. It is, however, a matter which should be considered by the Legislature in its wisdom.”

- [9] In Maraga, Etienne Du Toit AJ, stated as follows in respect of the powers of a review court to increase a sentence on review:

“Increase of sentence on review

It is firstly necessary to deal briefly with the lack of competence of the review Court to increase a sentence on review. It has been held frequently that a competent, but inadequate or too lenient, sentence cannot be increased on review in South Africa. Where a sentence falls squarely within the penal provisions and is therefore regular, the review Court is powerless to interfere, even where it was inadequate. On the face of things, South African review Courts, and the Venda review Court, could be argued to possess the power to increase an improperly light sentence on review. I am referring to the following indicators:

- (i) Section 304(2)(c)(ii), which empowers the review Court to confirm, reduce, alter or set aside the sentence or any order of the magistrate's court; the word ‘alter’ on the face of it would include ‘increase’.
- (ii) Section 304(2)(c)(iv), which affords review Courts the discretion generally to give such judgment or impose such sentence as the magistrate's court ought to have given and, again, on the face of it the review Court is afforded the power to impose, generally speaking, the sentence which the trial court should have imposed.
- (iii) The principles applicable to review are the same as against the respondent and the State (see *S v Smit* 1967
SA 235 (C) at 237H; *S v Zulu* 1967
SA 499 (T) at 501F-G *S v Du Toit* 1966
SA 627 (A); *S v Mokoena* 1975
SA 295 (O); *S v Mbayi* 1976
SA 638 (Tk); *S v Ngobo* 1980
SA 579 (B)); it is also the task of the review Court to see to it that justice is done as against both the parties to the criminal matter.
- (iv) The inherent review powers of the Supreme Court would, at first blush, include the increase of sentence where justice demands it, but in *S v Haasbroek*; *S v November* 1969
SA 356 (E) at 359D-E it was correctly decided that the increase of sentence is not included in such powers.

It is clear that s 304 does not entitle the review Court to increase a sentence and that such action is only legally possible on appeal. This fact appears clearly from the relevant provisions of the Criminal Procedure Act 51 of 1977, namely s 309(3), s 322(6) and especially s 309(3) wherein the power to increase a sentence on appeal is specifically and expressly added to the powers which the review Court would have enjoyed. See also *S v Haasbroek* (supra at 358-9).

In several decisions, other Courts pointed at this anomaly in the law of criminal procedure and expressed the view that the review Court should possess such power. See, for example, *S v Msindo* 1980

(4) SA 263 (B); *S v Haasbroek*; *S v November* (supra). In the latter judgment, Addleson J stated as follows at 361C:

‘The conclusion to which the Court is forced, namely that it cannot redress the injustice which is so strikingly revealed in the

judgment

of my Brother Eksteen, underlines in my view the necessity for legislation to remedy this unsatisfactory state of affairs. It is not uncommon for a reviewing Judge, because he has no power to interfere with a patently inadequate sentence, to be obliged to put his signature to an equivocal statement that the proceedings in question appear to him “to be in accordance with justice”.’

White J, in *S v Mzingeli and Another*; *S v Renge and Others* 1992

(1) SACR 615 (Tk) at 617g also complains of a gap in the Court's powers in this respect:

‘When one considers the purpose of automatic review, it is not surprising that from time to time the cry has gone up for amending legislation to fill the gap in the Court’s powers in this respect. Automatic review, which is unique to South African law, was introduced into our law during 1856 to enable Judges to satisfy themselves that certain criminal cases had been conducted in “accordance with real and substantial justice”... It seems to me that, although it is trite that our law, as it presently exists, does not empower a Court to increase a sentence on automatic review, much can be said for granting a reviewing Court, especially in Transkei, this power. Although I am impressed by the general high standard of the judicial duties performed by magistrates in Transkei, there are undoubtedly occasions when sentences imposed are unreasonably excessive or unreasonably lenient. Many magistrates in the rural areas of Transkei have no contact with other qualified members of the legal profession and rely heavily on the guidance they receive from the judgments given by this Court on, inter alia, automatic review. This is a further reason why Judges of this Court should be empowered to correct both excessive and inadequate sentences.’

After expressing the clear view that amendment of legislation was necessary, White J referred to s 310A of Act 51 of 1977 in which South African Attorneys-General were given the right to apply for leave to appeal against sentences imposed by lower courts. After quoting s 310A of Act 51 of 1977, White J indicated that if a similar section were enacted in the Transkei Criminal Procedure Act the miscarriages of justice occasioned by inadequate sentences which come to the notice of Judges on automatic review could be remedied.

At 620a White J finds as follows:

‘Although the envisaged amendment will not empower a Court to increase a sentence on automatic review, it will authorise it to bring the inadequate sentence to the notice of the Attorney-General, in whose decision the Court will generally abide. The Attorney-General will undoubtedly then proceed in terms of a section similar to the South African s 310A, with a view to remedying grossly inadequate sentences. The amendments will, therefore, not only provide a procedure whereby such miscarriages of justice, which have come to the Court's notice on automatic review, can be remedied, but will also meet all the problems raised in argument before us. An accused will be entitled to address the Court and the Attorney-General will be able, if he deems it necessary, to also proceed against any accused whose case was not sent on automatic review.’”

(my underlining and emphasis added)

- [10] The overwhelming body of authority reflects that a court of review, unlike a court of appeal, is not enjoined with the power to increase an incompetent or inadequate sentence on review. I cannot, however, agree with Adv Zwegelaar that this Court is empowered to summarily reduce the sentence or impose a totally different sentence, which as suggested would include correctional supervision in terms of section 276(1)(h) of the CPA. As with the absence of a power to increase a sentence on review, section 304(2)(c)(ii) cannot be interpreted to favour an accused with a reduced or completely different sentence. The peculiar facts of each matter must be considered. As stated in Maraga: “The principles applicable to review are the same as against the respondent and the State ...; it is also the task of the review Court to see to it that justice is done as against both the parties to the criminal matter.
- [11] In the absence of any convincing argument to the contrary, it appears clear that the Regional Magistrate had imprisonment in mind when he imposed the incompetent sentence. It is further clear that he had imprisonment in mind from which the accused could be released on correctional supervision within the ambit of section 276(1)(i) of the CPA. Where he dismally erred though was in fixing the term of imprisonment at ten (10) years rather than the maximum legislated period of five (5) years.
- [12] In my view, therefore, all that is necessitated on review is for this Court to correct/amend the sentence to give effect to the provisions of section 276(1)(i) read with section 276A(2)(a) and (b) of the CPA. I remain mindful of the period of time spent by the accused serving the initial sentence imposed under *S v Joubert (Review)* (04/2017, RC150/16) [2018] ZANWHC 3 (8

March 2018) and the time served to date in the present matter. Within the purview of the Correctional Services Act 111 of 1998 and the powers given to the Commissioner of Correctional Services or any parole board, the time already served is an issue for consideration by those functionaries. I accept the period of incarceration is well documented by the relevant Correctional Centre where the accused is detained.

[13] I would be remiss in my duty if I do not address a disconcerting aspect of the proceedings which relates to the conduct of the proceedings once leave to appeal against sentence was refused by Mr Boase. I do so as a reminder of to judicial officers and prosecutors of keeping abreast with the law in this very sensitive field of law.

[14] Immediately prior to and once leave to appeal was refused by Mr Boase with a ruling unsubstantiated with reasons, Adv Zwiegelaar addressed the court, with the following ensuing exchange, as follows:

“MS ZWIEGELAAR: Your Worship, that is in so far as the application for leave to appeal is concerned. I will address Your Worship later on the application for bail, pending the outcome of the appeal.

...

MS ZWIEGELAAR: As the Court pleases Your Worship. Your Worship, my instructions are further that the accused content (sic) to file a petition with the Judge President of the North West Division of the High Court of South Africa for leave to appeal and that in view thereof, I will ask that the Court grant the accused or extend, grant her bail.

She was up until now, on warning. She was all along on warning, but I respectfully submit that the accused will have [indistinct] prospect (sic) of success, regardless of what the Court finds and that in the circumstances, bail be granted to her.

The accused indicated to me that as she is standing here, she does not have any money to pay her bail, but she will try to make arrangements with her employer for bail money. As the Court pleases.

COURT: Ja, but I refused the application, you have to deal with the issue of bail.

Counsel, I have dismissed your application, do we have to deal with the issue of bail?

MS ZWIEGELAAR: I do not follow the Court. I have applied for bail [intervene].

COURT: You have applied, you made submission from the bar for leave to appeal.

MS ZWIEGELAAR: Yes.

COURT: There was a reply.

COURT: I have made a ruling, the application is dismissed. So, do we have to entertain the issue of bail appending appeal?

MS ZWIEGELAAR: Bail pending petition to the Judge President for leave to appeal Your Worship, that is the application.

COURT: Counsel, do you have any reply to the application?

PROSECUTOR: Your Worship, what I will conclude the Court (sic) that if in this instance the Court has, as the Court has dismissed the application,

it will be...it will not be procedural for the Court now after that, then grant bail (sic).

If maybe we are talking of an instance that this Court was on the view that another court might come to different decision, then that might have been entertained, but at this stage, then they will make the application for petition,

but however, the State opposes the issue of bail. As it pleases the Court.

COURT: Counsel Zwiegelaar, I am a bit puzzled about your application, but having said so, it (sic) my first time to hear that once the application for leave to appeal is dismissed then there is also an issue regarding bail pending appeal, but at this stage, that application, I do not think it is [indistinct] and I am dismissing your application. Thank you very much.

MS ZWIEGELAAR: Your Worship, as I have indicated to the Court, the accused attended (sic) to lodge an application , petition to the High Court for leave to appeal an the application for bail is pending the outcome of that application for leave to appeal to the High Court.

Once that is entertained, then we will deal with, if leave to appeal is granted, an obviously we will ask for bail pending the outcome of the appeal.

COURT: Ja, I have just dismissed your two applications, leave to appeal, I have just dismissed your application. Your application that you are bringing at this stage, after I dismissed your application, I am saying, I do not think it is procedural, but having heard you, I am dismissing your application, then you can proceed with your petition.

MS ZWIEGELAAR: As the Court pleases Your Worship, I apologise Your Worship.

I have problems to follow Your Worship, from time to time. And I did not hear that you have dismissed the application for bail.

COURT: Yes, okay, I dismissed your...if that application because procedural (sic), once I have dismissed to appeal (sic) and once you are going to lodge your petition, then you need to wait and deal with the record and then you can also...(rest of pages omitted from record)” (my underlining and emphasis added)

[15] In S v Potgieter 2000

- (1) SACR 578 (W) at 580A-B; 582G-585E, Cloete J (Borchers concurring) dealt, inter alia, with the question of bail pending petition where the appellant was convicted of theft in the magistrate’s court and sentenced to two years imprisonment. In that matter, the appellant “applied to the magistrate for leave to appeal against the sentence imposed, which was

refused. He then petitioned the Judge President for leave to appeal and subsequently applied to the magistrate for bail pending the outcome of the petition. The latter application was also refused by the magistrate.” Cloete J found that there was no good reason why in principle an appeal against a refusal of bail pending review should be dealt with differently to an appeal against a refusal of bail pending appeal. On the question when bail pending appeal can be granted, the following was said after a detailed consideration of section 309(4)(b) read with section 307, and Rule 67(1):

“The consequence of the foregoing is that once grounds of appeal have been filed, an appeal against conviction and/or sentence has been ‘noted’ and a magistrate is, in terms of s 309(4)(b) read with s 307, empowered to grant bail. Although it would not be necessary for him to do so, it would obviously be desirable for him to hear both the bail application and the application for leave to appeal at the same time.

If the magistrate refuses bail, then s 309(4)(b) read with s 307(6) provides that an appeal lies in terms of s 65. Obviously the bail would have to be pending the outcome of further proceedings. It could, conceivably, be pending the magistrate’s decision on the application for leave to appeal. More usually, the decision whether to grant leave to appeal will have been made by the magistrate by the time that the bail appeal is heard by the appeal Court, and that should be the norm. If the magistrate granted leave to appeal against the conviction and/or sentence, he might well grant an application for bail but if he did not, the High Court could do so on appeal in terms of s 65, pending the hearing of the appeal against the conviction and/or sentence. If the magistrate refused the application for leave to appeal against the conviction and/or sentence, a petition would be necessary.

In many if not most cases, of which the present is an example, the appeal against the refusal of bail would be lodged together with the petition. The petition can be dealt with in Chambers but the appeal in terms of s 65 cannot – it has to be dealt with in Court. The petition requires the attention of two Judges whereas the appeal does not. It is obviously desirable that the two Courts have at least one Judge in common and the appellant’s attorney and the Registrar should ensure, as was done in the present case, that this is so.

In some cases, it may be that the appeal against the refusal of bail is brought separately and in advance of the petition for leave to appeal against conviction and/or sentence, for example because in some Divisions only one Judge is on duty during recess (Prokureur-generaal Vrystaat v Ramakhosi (supra at 142c-d), or because it is necessary or desirable that the appeal should be considered before the petition is finally disposed of (as there can be delays – see for example s 309C(5)(ii)).

In such cases, I see no reason why bail should not be granted pending the outcome of the petition and subject to the appellant complying

with the provisions relating to petitions set out in s 309C and if the petition is granted, pending appeal provided that the appellant complies with the obligations incumbent upon him timeously

and properly to prosecute the appeal. That is the procedure adopted in the High Court where bail is granted pending a petition to the Chief Justice and, if the petition succeeds, pending the outcome of the appeal.”

(my underlining and emphasis added)

[16] It would have been prudent for Mr Boase to adjourn and research the authorities on an application for bail pending petition, rather than express his befuddlement by the application, and then to dismiss the application summarily because he doubted whether it was procedurally countenanced.

[17] For the reasons as aforesaid, the sentence imposed by Acting Regional Magistrate, Mr TR Boase, is reviewed and corrected to reflect the term of imprisonment imposed in terms of section 276(1)(i) of the CPA, as five (5) years.

[18] A copy of the judgment must be brought to the attention of the Regional Court President and the Director of Public Prosecutions, North West Province for their attention.

Order

[19] Consequently, the following order is made:

2. The sentence imposed on 10 January 2024 is reviewed and corrected as follows:
4. A copy of the judgment must also be brought to the attention of the Director of Public Prosecutions, North West Province.

A H PETERSEN

ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA, NORTH WEST DIVISION, MAHIKENG

I agree.

A REDDY

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

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