

SOUTH AFRICA / JUDGMENT

S v Mokwena (30/2023) [2024]

ZANWHC 28 (6 February 2024)

[2024] ZANWHC 28

COURT

North West High Court, Mafikeng

BEFORE

Hendricks JP, Petersen J

CASE / FILE NUMBER

30/2023

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IN

THE HIGH COURT OF SOUTH AFRICA

NORTH

WEST DIVISION, MAHIKENG

HIGH

COURT REFERENCE NUMBER: 30/2023

MAGISTRATE'S

CASE NUMBER: K86/2017

Reportable:	NO Circulate
to Judges:	YES Circulate
to Magistrates:	YES Circulate
to Regional Magistrates:	YES In

the review matter
between:

THE
STATE
and
THABANG
MOKWENA
Accused

CORAM:

HENDRICKS JP; PETERSEN J
DATE
BROUGHT BEFORE AND QUERIED BY PETERSEN J: 11 DECEMBER 2023
DATE
RECEIVED BACK FROM REGIONAL MAGISTRATE: 09 JANUARY 2024
DATE
RECEIVED FROM JUDGE REID: 24 JANUARY 2024
DATE
OF JUDGMENT: 06 FEBRUARY 2024
ORDER
1.
The proceedings in this matter are not
in accordance with justice.
2.
The conviction and sentence are set aside.
3.
The child offender is to be released from
detention with immediate effect.
4.
A copy of
this judgment must be brought to the attention of the Magistrates'
Commission and the Regional Court President, North-West
Division by
the Registrar of this Court as a matter of urgency.
5.
A copy of
this judgment must also be brought to the attention of the Director
of Public Prosecutions, North West.
REVIEW

JUDGMENT

PETERSEN J

Introduction

[1] This matter came before me as a special review on 11 December 2023, during the administrative recess of the High Court. A letter was forwarded to the Regional Court President to assist in securing a memorandum from the Regional Magistrate at Ga-Rankuwa Magistrates' Court who transmitted the matter on special review, to appreciate the reasons for such transmittal. The reasons are dealt with later.

- [2] The accused (a child offender), born on 09 October 1999, was fifteen (15) years old when he was arrested on 14 January 2015 on charges of contravening section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 - rape (counts 1 and 3); robbery (count 2); and attempted murder (count 4). For purposes of this judgment only the convictions and sentences on counts 3 and 4 are relevant, as the child offender was acquitted on counts 1 and 2.
- [3] It is not clear from the record when he made his first appearance in the District Court, Ga-Rankuwa, where the child offender would have appeared for a Preliminary Enquiry in terms of the Child Justice Act 75 of 2008 (“the CJA”). According to the charge sheet in the Regional Court, the child offender first appeared in the Regional Court on 15 September 2016. The record indicates that the guardian of the child offender was present at court at all the appearances of the child offender in the Regional Court.
- [4] No meticulous attention was paid to the drafting of the charges in the Regional Court as two distinct handwritings appear on the charges. The rape charge (count 3) was drafted to be read with the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997 (“the CLAA”). The trial of the child offender commenced on 14 September 2018, with the child offender duly represented by a legal practitioner (advocate), Adv Manzini from Legal Aid South Africa (“LASA”). The child offender pleaded not guilty to the charges before Mr Motsoai. More than two years later, on 17 November 2020, the child offender was convicted on counts 3 and 4 and acquitted on counts 1 and 2. A psycho-social (probation officer’s) report and victim impact report were subsequently obtained.
- [5] On 22 April 2021, the child offender was sentenced to twenty-five (25) years imprisonment on count 3 (rape), which the Regional Magistrate antedated to 15 September 2016; and three (3) years imprisonment on count 4 (attempted murder), with no order of concurrency. The sentence is therefore an effective twenty-eight (28) years imprisonment.

The failure to submit the matter on automatic review

- [6] Section 85 of the CJA provides that:

“85 Automatic review in certain cases

The provisions of Chapter 30 of the Criminal Procedure Act dealing with the review of criminal proceedings in the lower courts apply in respect of all children convicted in terms of this Act: Provided that if a child has been sentenced to any form of imprisonment or any sentence of compulsory residence in a child and youth care centre providing a programme provided for in section 191(2)(j) of the Children’s Act, the sentence is subject to review in terms of section 304 of the Criminal Procedure Act by a judge of the High Court having jurisdiction, irrespective of—

- (a) the duration of the sentence;
- (b) the period the judicial officer who sentenced the child in question has held the substantive rank of magistrate or regional magistrate;

- (c) whether the child in question was represented by a legal representative; or
- (d) whether the child in question appeared before a district court or a regional court sitting as a child justice court.”

[emphasis added]

[7] Mr Motsoai explains the failure to submit the record on review timeously as follows:

“2. CONDONATION FOR THE LATE TRANSMISSION

I am taking this opportunity to profusely and genuinely apologize to the Learned Honourable Judge for having transmitted this case to the High Court for the review proceedings, reasons being that I have inadvertently omitted to ascertain that the case was given the required attention by the Registrar of the Regional Court having noted the direction with regard to the revision of sentence. That was an oversight on my part that could have been avoided at all costs in order to ascertain that the accused was not prejudiced hereby. Further that I have had an honest yet misconceived belief and

optimism that since the sentencing attracts automatic review as envisaged by the Child Justice Act 75 of 2008, I was not obliged or required to present the matter accompanied by the covering Memorandum with full reasons for transmission, which is regrettable.”

[8] The explanation proffered by Mr Motsoai regarding the late transmission of the matter on review raises serious concerns. It is disconcerting that the charge sheet reflects that he marked the matter with the acronym ‘N/R’ which informs the Clerk of the Court that the matter is ‘Not

Reviewable’. He further recorded a disposal instruction for the destruction of the record after two (2) years with the acronym (D.2). The disposal instruction itself is incorrect considering the effective sentence of 28 years imprisonment. It should have been recorded as D.28, meaning destroy after 28 years.

[9] What is particularly disconcerting is that the face of the Charge Sheet (J15) was altered to reflect that the matter was automatically reviewable in the words ‘AUTOMATIC REVIEW’, seemingly written by Mr Motsoai. It is not clear when this change was recorded. In any event, it materially contradicts the manuscript (handwritten) notes of Mr Motsoai recorded as part of the charge sheet on 23 April 2021 and the transcribed record of even date and does not accord with the explanation at paragraph 2 of his memorandum. No explanation

regarding the matter being automatically reviewable was brought to the attention of the child offender through a recordal thereof on the charge sheet or in the transcribed record. The Regional Magistrate was therefore clearly at fault for not recording at the time of sentencing on 23 April 2021, that the matter was Automatically Reviewable.

[10] One thing remains clear, the matter was not transmitted on automatic review timeously. The late submission of the matter on review more than 3 years after the child offender was sentenced, with an explanation by Mr Motsoai that he honestly but on a misconceived notion did not believe a memorandum explaining why the matter has been sent on review is necessary, as the matter was automatically reviewable, is regrettable. It follows axiomatically that the matter having been transmitted late on review, requires an explanation from the Regional Magistrate. The obiter remark by this Court in S v PM 2024

(1) SACR 1 (NWM) at paragraph [13] are apposite in the present review and deserves repetition:

“[13] In passing, it is not clear if any oversight is exercised to achieve Judicial Quality Assurance, by the Regional Court President or her delegate, the Regional Court Co-Ordinator in respect of the case records of Regional Magistrates in the North West Regional Division. Similarly, it is not clear if the Judicial Quality Assurance Component of the Magistrates Commission has attended to an inspection at the Klerksdorp Magistrates Court in the last four years.” -

(In this review the concerns apply to the Ga-Rankuwa Magistrates Court).

The failure to give effect to the appeal rights of the child offender

[11] The entry in the charge sheet for 23 April 2021 refers to section 309B of the Criminal Procedure Act 51 of 1977 (‘the CPA’). Section 309B was never explained to the child offender when regard is had to the transcribed record where reference is made only to section 309 of the CPA. The transcribed record reads as follows:

“In terms of section 309 of the Criminal Procedure Act 51, 1977 should the accused feel aggrieved by the conviction and/or sentence and which (sic) is to note an appeal in respect of the particular outcome he must apply to his (sic) court for leave to appeal against his conviction and sentence within a period of 14 days after the passing of sentence following on the conviction or within such an extended period as such as the court may [indistinct] application and for good cause shown.”

[12] Bearing in mind that the child offender was 15 years old at the time of the commission of the offences, a specific appeal dispensation is applicable. Section 309 of the CPA read with section 84 of the CJA and section 309B of the CPA provide in this regard, that:

“309 Appeal from lower court by person convicted

(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any person convicted of any offence by any lower court (including a person discharged after conviction) may, subject to leave to appeal being granted in terms of section 309B or 309C, appeal against such conviction and against any resultant

sentence or order to the High Court having jurisdiction: Provided that if that person was sentenced to imprisonment for life by a regional court under section 51(1) of the Criminal Law Amendment Act, 1997 (Act 105 of 1997), he or she may note such an appeal without having to apply for leave in terms of section 309B: Provided further that the provisions of section 302(1)(b) shall apply in respect of a person who duly notes an appeal against a conviction, sentence or order as contemplated in section 302(1)(a).

“309B Application for leave to appeal

(1)(a) Subject to section 84 of the Child Justice Act, 2008 (Act 75 of 2008), any accused, other than a person referred to in the first proviso to section 309(1)(a), who wishes to note an appeal against any conviction or against any resultant sentence or order of a lower court, must apply to that court for leave to appeal against that conviction, sentence or order.

(b) An application referred to in paragraph (a) must be made—

- (i) within 14 days after the passing of the sentence or order following on the conviction; or
- (ii) within such extended period as the court may on application and for good cause shown, allow.

‘84 Appeals

(1) An appeal by a child against a conviction, sentence or order as provided for in this Act must be noted and dealt with in terms of the provisions of Chapters 30 and 31 of the Criminal Procedure Act: Provided that if that child was, at the time of the commission of the alleged offence —

(a) under the age of 16 years;

or

(b) 16 years or older but under the age of 18 years and has been sentenced to any form of imprisonment that was not wholly suspended, he or she may note the appeal without having to apply for leave in terms of section 309B of that Act in the case of an appeal from a lower court and in terms of section 316 of that Act in the case of an appeal from a High Court: Provided further that the provisions of section 302(1)(b) of that Act apply in respect of a child who duly notes an appeal against a conviction, sentence or order as provided for in section 302(1)(a) of that Act.

(2) A child referred to in subsection (1) must be informed by the presiding officer of his or her rights in respect of appeal and legal representation and of the correct procedures to give effect to these rights.’

(emphasis added)

[13] It is clear from the transcribed record that the explanation of the appeal rights of the child offender were not explained correctly to give effect to these rights. There was no need for the child offender to apply for leave to appeal as, with the automatic reviewability of the matter, he had an automatic right of appeal, which is made plain by section 309B of the CPA read with section 84 (1) of the CJA. The Regional Magistrate failed in his duty to comply with the peremptory provisions of section 84 (2) of the CJA.

The effect of the failure to submit the matter on automatic review and to give effect of the appeal rights

[14] Section 22 of the Superior Courts Act 10 of 2013 provides that:

“22 Grounds for review of proceedings of Magistrates' Court

- (1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are-
 - (a) absence of jurisdiction on the part of the court;
 - (b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
 - (c) gross irregularity in the proceedings; and
 - (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.
- (2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.”

(emphasis added)

[15] This review was submitted two (2) years and eight (8) months late, with no cogent explanation. The appeal rights of the child offender were not explained. This constitutes gross irregularities in the proceedings. In *S v PM*, which is equally applicable in this matter, this Court stated that:

“[35] The failure by Mr Foso to transmit the matter on review, immediately upon finalisation thereof on 27 February 2019, and the submission of the matter more than four years later when it was fortuitously discovered that he imposed an incompetent sentence, are travesties of justice and constitute gross irregularities in the proceedings. The right to a fair trial enunciated in s 35 of the Constitution of the Republic of South Africa, 1996, includes the right to review provided in s 85 of the CJA. The incompetent sentence imposed, and the basis of the present review, without derogating from the seriousness thereof, pales in comparison to the dereliction of the duty to transmit the matter on review.”

[16] Aside from the aforesaid irregularities, the proceedings are marred by a failure to give effect to the tenets of the CJA, both as to the procedure and the incompetent sentence imposed. Section 85 of the CJA was amended by section 39 of the Judicial Matters Amendment Act 42 of 2013 and has been operational since 22 January 2014, seven (7) years before the child

offender in the present matter was sentenced on 23 April 2021. The amendment draws no distinction between children under the age of 16 and those aged 16 or 17 at the time of the commission of an offence. There can be no excuse for Mr Motsoai not being aware of this provision. At the level of the Regional Court, it is in fact inexcusable.

The proceedings in the Regional Court

The misapplication of the provisions of the Criminal Law Amendment Act

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