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

Editorial note: Certain information has been redacted from this judgment in compliance with the law.

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

HIGH COURT REFERENCE NUMBER: 30/2023

MAGISTRATE'S CASE NUMBER: K86/2017

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 **[…] 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).

and

"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.

and

'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 105 of 1997

[17] In the memorandum of ***Mr Motsoai*** the following reasons are furnished for the sentence imposed:

> "3. SENTENCE THAT STANDS TO BE REVIEWED
>
> The accused was convicted in respect of count 3 of Rape in contravention of section 3 read with section 1, 19(a), (b) and or (c), 57, 58, 59, 60 ad 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, IN THAT the said accused Thabang Mokoena and upon or about the 7th day of December 2014 and at or near Hebron in the Regional Division of Madibeng, the accused did unlawfully and intentionally commit an act of sexual penetration by inserting his penis with a person to wit Z[…] N[…] without her consent. And that in the event of a conviction the accused should be dealt with in accordance with the provisions of section 51(1) of Act 105 of 1997 and the offence falls under

Part 1 of Schedule 2 of the Act as it constitute; the victim was twelve (12) years old at the time of the offence.

The accused was accordingly sentenced to twenty-five (25) years imprisonment. The accused was thereby excluded by the provisions of subsection (6) of section 51 of the Criminal Law Amendment Act 105 of 1997 (herein after referred to as Act 105 of 1997) in that the discretionary minimum sentence was not applicable in respect of the accused person who was under the age of 18 years at the time of the commission of the offence contemplated in subsection (1).

As a young offender, three provisions of the Act deal with offenders under the age of 18 years old or 'children' in terms of the Constitution. Section 51(6) declares that the Act does not apply to '….a child who was under the age of 16 years at the time of the commission of the act which constituted the offence in question' thus introducing an escape clause.

In the case of such an offender, therefore, the court decides on an appropriate or condign sentence 'unencumbered on unimpeded by the legislative prescripts'. The court should probably keep in mind the legislature's stipulation that the specified offences should be punished more severely.

Section 53(1)(b) of Act 105 of 1997 provides that if any court referred to in subsections (1) or (2) decides to impose a sentence prescribed in those subsections upon a child who was 16 years of age or older but under the age of 18 years, at the time of the commission of the act which constituted the offence in question, it shall enter the reasons for its decisions on the record of the proceedings. The aforesaid refers to the second provisions relevant to young offenders and it creates a second category of young offenders of 17 and 17 years old when the offence was committed. However, the general approach to the sentencing of this category is practically the same the children under the age of 16."

[18] Section 51(6) of the CLAA, specifically provides that *"**This section does not apply in respect of an accused person who was under the age of 18 years at the time of the commission of an offence contemplated in subsection (1) or (2).**"* I hasten to add that the age of the child offender at the time of the commission of the offences (15 years) was not placed in issue at the trial. He therefore could not have been sentenced in terms of the provisions of the CLAA. This constitutes a material misdirection and a further gross irregularity in the proceedings. The sentence, on this basis alone is vitiated by the misapprehension under which **Mr Motsoai** laboured in respect of the sentence.

[19] As in *S v PM*, the apparent lack of knowledge of the CLAA and by implication the sentencing jurisdiction as provided for in the CLAA in respect of children under the age of 18 years, is very disconcerting. I re-iterate that section 51(6) of the CLAA has been in operation since **22 January 2014**.

The sentence provisions of the CJA

[20] Section 68 of the CJA provides, in peremptory terms, that:

> *"**68 Child to be sentenced in terms of this Chapter***
>
> ***A child justice court must, after convicting a child, impose a sentence in accordance with this Chapter.**"*
>
> *(emphasis added)*

[21] Section 69 of the CJA further makes it plain regarding the objectives of sentencing and factors to be considered in general and specifically in relation to direct imprisonment, that:

"(1) In addition to any other considerations relating to sentencing, the objectives of sentencing in terms of this Act are to —

(a) encourage the child to understand the implications of and be accountable for the harm caused;

(b) promote an individualised response which strikes a balance between the circumstances of the child, the nature of the offence and the interests of society;

(c) promote the reintegration of the child into the family and community;

(d) ensure that any necessary supervision, guidance, treatment or services which form part of the sentence assist the child in the process of reintegration; and

***(e) use imprisonment only as a measure of last resort and only for the shortest appropriate period of time**.*

…

(4) ***When considering the imposition of a sentence involving imprisonment in terms of section 77, the child justice court must take the following factors into account:***

(a) The seriousness of the offence, with due regard to —

(i) the amount of harm done or risked through the offence; and

(ii) the culpability of the child in causing or risking the harm;

(b) the protection of the community;

(c) the severity of the impact of the offence on the victim;

***(d) the previous failure of the child to respond to non-residential alternatives, if applicable**;*

and

***(e) the desirability of keeping the child out of prison**."*

(emphasis added)

[22] Regarding a sentence of imprisonment, section 77 of the CJA unequivocally provides that:

"77 Sentence of imprisonment

(1) A child justice court –

(a) …

(b) ***when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time****.*

…

(3) A child who is 14 years or older at the time of being sentenced for the offence may only be sentenced to imprisonment, if the child is convicted of an offence referred to in-

(a) Schedule 3;

(b) Schedule 2, if substantial and compelling reasons exist for imposing a sentence of imprisonment;

(c) Schedule 1, if the child has a record of relevant previous convictions and substantial and compelling reasons exist for imposing a sentence of imprisonment.

(4) A child referred to in subsection (3) may be sentenced to a sentence of imprisonment-

(a) for a period not exceeding 25 years; or

(b) envisaged in section 276(1)(i) of the Criminal Procedure Act*.*

….

(5) ***In compliance with the Republic's international obligations, no law, or sentence of imprisonment imposed on a child, including a sentence of imprisonment for life, may, directly or indirectly, deny, restrict or limit the possibility of earlier release of a child sentenced to any term of imprisonment****."*

[23] The Regional Magistrate having misdirected himself on the applicability of the sentence provisions envisaged in the CLAA, clearly failed to heed the provisions of section 77 of the CJA. The Pre-Sentence Report in respect of the child offender, adduced as evidence, alludes in the conclusion to section 77(4)(b) of the CJA. The Regional Magistrate should have been alive to this. The Probation Officer recommended in accordance with the tenets of section 77, with due regard to the seriousness of the charges, a sentence in terms of section 276(1)(i) of the CPA.

[24] The conduct of the proceedings by ***Mr Motsoai***, as in *S v PM*, very regrettably has led to a serious miscarriage of justice, which impacts not only on the administration of justice, but more importantly it has failed the child offender and the family of those affected by the rape and attempted murder of the child complainant. I re-iterate in order to emphasize what this Court said in *S v PM:*

"[53] Section 28 of the Constitution of the Republic of South Africa, Act 108 of 1996 ("the Constitution") was not given effect to by ***Mr Foso***, in so far as it provides that:

*"28 **Children***

(1) Every child has the right-

…

(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –

(i) kept separately from detained persons over the age of 18 years; and

(ii) treated in a manner, and kept in conditions, that take account of the child's age;"

[25] It is further regrettable that the child offender was denied his automatic right of review and appeal, which is entrenched in section 35(3)(o) of the Constitution of the Republic of South Africa Act 108 of 1996, as amended, and emphasized in section 84 of the CJA. If effect was given to this right at the time of sentencing, the sentence imposed would undoubtedly have been set aside on review. The travesty of justice to the extent it manifests in this matter, would have been averted or ameliorated.

Conclusion

[26] The approach I propose in this review is the same approach adopted in *S v PM,* where this Court stated:

> "[55] In *S v Mthembu* 2012 (1) SACR 517 (SCA) at paragraph [17], Ponnan JA and Petse AJA (writing for the Court) with due reference to two earlier SCA decisions, namely *Legoa* and *Ndlovu*, stated that 'a fair trial enquiry does not occur *in vacuo*, but . . . is first and foremost a fact-based enquiry' (at [17]). Having embarked on the fact-based enquiry enunciated in *Mthembu*, the entire proceedings demonstrate a myriad of misdirections in the conduct of the matter, which all either individually or cumulatively, constitute gross irregularities. The entire proceedings accordingly stand to be reviewed and aside.

[27] It is a matter of grave concern that this, being the second matter of its kind, has proverbially emerged from the woodwork. It would be prudent that the Regional Court President investigate whether similar matters have been filed as finalised in the courts under her administrative jurisdiction. A copy

of this judgment should also be brought to the attention of the Magistrates' Commission and the Director of Public Prosecutions, North-West for any intervention she may deem necessary.

Order

[28] Consequently, the following order is made:

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 be brought to the attention of the Director of Public Prosecutions, North-West.

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A H PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA,

NORTH WEST DIVISION, MAHIKENG

I agree.

_____

R D HENDRICKS

JUDGE PRESIDENT OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG