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

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

APPEAL CASE NO: CA28/2022

MAGISTRATES CASE NO: RC 2/107/18

In the matter between:

TSHEPISO LOLWANE **APPELLANT**

AND

THE STATE **RESPONDENT**

Coram: Petersen J & Reddy AJ

Date heard: 26 January 2024

Date handed down: 16 February 2024

ORDER

1.

2. (i) The proceedings before **Regional Magistrate, Mr Foso** are set aside.

3.

4. (ii) The conviction and sentence imposed by **Regional Magistrate, Mr Foso**, vitiated by a failure of justice is by implication set aside.

5. (iii) The appellant must be brought before a Regional Magistrate, other than **Mr Foso**, for the matter to commence *de novo*.

6.

7. (iv) A copy of this judgment must be forwarded by the Registrar of this Court, to the Magistrates' Commission and the Regional Court President, North West Division.

8. (v) A copy of this judgment must also be forwarded to the Director of Public Prosecutions North West Division and the Provincial Director

9. Legal Aid South Africa: North West Province.

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JUDGMENT

PETERSEN J

Introduction

[1] The appellant, duly represented, was charged in the Regional Court Klerksdorp, before Acting Regional Magistrate, **Mr Foso** (as he then was – now permanently appointed), with one count of rape of a minor girl child, in contravention of the provisions of section 3, 50, 56(1) 56A, 58, 59 and 61 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007, committed during the period 2017 to 28 April 2018. The charge was further read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended ("the CLAA"). The present appeal and the circumstances relevant thereto are analogous to *Diniso v S* (CA14/22) [2023] ZANWHC 11 (7 February 2023). The format adopted in the judgment of *Diniso* is therefore replicated in the present appeal, with the necessary changes.

[2] The appellant pleaded guilty to the charge on **10 May 2021** and submitted a statement drafted in terms of section 112(2) of the Criminal Procedure Act 51 of 1977 ("the CPA"), which was accepted by the prosecution. On the

strength of the admissions made by the appellant, he was duly convicted and on even date, the appellant was sentenced to life imprisonment. The appellant was declared unfit to possess a firearm in terms of section 103(1) of the Firearms Control Act 60 of 2000, and an order made that his personal particulars, be entered in the National Register of Sex Offenders in terms of section 50(2) of the Act 32 of 2007.

[3] The appeal lies only against the sentence of life imprisonment pursuant to the right to an automatic appeal in terms of section 309(1) of the CPA.

The appellant's plea of guilty in terms of section 112(2) of the CPA

[4] The appellant pleaded guilty to the charge proffered against him. To appreciate the appeal against sentence, it would be apposite to repeat the facts on which the plea of guilty was based. In the statement prepared in terms of section 112(2) of the CPA, the appellant sets out the facts on which his plea of guilty was based, as follows:

> "2.
>
> 2.1 I confirm that my legal representative explained to me the seriousness of the offence on which I elect to plead guilty to. I further confirm that the provisions of section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 was explained to me.
>
> 2.2 I further confirm that I am aware that the Court are bound by the said provisions and upon conviction to sentence me to life Imprisonment unless the Court is of the view that substantial and compelling circumstances exist to deviate from the minimum sentence of life Imprisonment.

2.3 I was in no way forced or coerced to tender a plea of guilty on the charge preferred against me and plead guilty on the count out of my own free will.

3.

3.1 On 27 April 2018 I was at my place of residence at […] Street, Stilfontein. I reside with my aunt, … and her minor daughter, …, the complainant in this matter.

3.2 My aunt was not at home since she had to visit her husband who was working in Rustenburg at that stage.

3.3 I was left alone with the complainant at Stilfontein. The complainant was in her bed when I entered her room and got under the blankets with her.

3.4 I then pulled down her panty and my underwear and started to penetrate her vaginally with my penis.

4.

I confirm that I am guilty of contravening the provisions of section 3 (rape) read with sections 1, 56(1), 57 to 61 of the Criminal Law Amendment Act 32 of 2007 as amended. Further read with sections 94, 256 and 261 of the Criminal Procedure Act 51 of 1977. Further read with section 51(1) and Schedule 2 of the Criminal Law Amendment Act 105 of 1997 as amended. Further read with section 120 of the Children's Act 38 of 2005.

On or about 27 April 2018 and at or near Kobie Street, Stilfontein in the Regional Division of North West I did unlawfully and intentionally commit an act of sexual penetration with the complainant to wit, …, a minor child born on […] 2009, by penetrating her vaginally with my penis.

5.

I further confirm that the complainant was examined by Dr Tennenbaum on 01 May 2018 and that a **medico-legal** report (J88) was completed by Dr Tennenbaum on the

same day. The contents of the said report are admitted and I have no objection if the said report forms part of the record.

6.

I have remorse for my actions and deeply regret my conduct."

The approach to sentence on appeal

[5] In S v *De Jager* 1965 (2) SA 616 (A) at 629, Holmes JA stated as follows regarding the discretion of a court of appeal to interfere with the sentence imposed by a lower court:

"It would not appear to be sufficiently recognized that a Court of appeal does not have a general discretion to ameliorate the sentences of trial Courts. The matter is governed by principle. It is the trial Court which hosts the discretion, and a Court of appeal cannot interfere unless the discretion was not judicially exercised, that is to say unless the sentence is vitiated by an irregularity or misdirection or is so severe that no reasonable court could have imposed it. In this latter regard an accepted test is whether the sentence induces a sense of shock that is to say if there is a striking disparity between the sentence passed and that which the Court of appeal would have imposed. It should therefore be recognized that appellate jurisdiction to interfere with punishment is not discretionary but, on the contrary, is very limited."

(our emphasis)

[6] In *S v Malgas* 2001 (2) SA 1222 Marais JA said the following:

"[12] …A court excising appellant jurisdiction cannot, in the absence of material misdirection by the trial court, approach the question of sentence as if it were the trial court and then substitute the sentence arrived at by it simply because it prefers it. To do

so would be to usurp the sentencing discretion of the trial court. Where material misdirection by the trial court vitiates its exercise of that discretion, an appellant court is of course entitled to consider the question of sentence afresh. In doing so, it assesses sentence as if it were a court of first instance and the sentence imposed by the trial court has no relevance. As it is said, an appellate court is large. However, even in the absence of material misdirection, an appellant court may yet be justified in interfering with the sentence imposed by the trial court. It may do so when the disparity between the sentence of the trial court and the sentence which the appellant court would have imposed had it been the trial court is so marked that it can properly be described as "shocking", "startling" or "disturbingly inappropriate..."

(emphasis added)

[7] The approach adopted to an appeal against sentence in the authorities as aforesaid has been endorsed by the Constitutional Court in *S v Bogaards* 2013 (1) SACR 1 (CC), where the following is stated:

"[14] Ordinarily, sentence is within the discretion of the trial court. An appellate court's power to interfere with sentence imposed by courts below is circumscribed. ***It can only do so where there has been an irregularity that results in a failure of justice; the court below misdirected itself to such an extent that its decision on sentence is vitiated****; or the sentence is so disproportionate or shocking that no reasonable court could have imposed it. A court of appeal can also impose a different sentence when it sets aside a conviction in relation to one charge and convicts the accused of another."*

(emphasis added).

The grounds of appeal

[8] The appellant challenges the sentence of the court *a quo* as follows:

"(1) The Honourable court erred in imposing life imprisonment as the sentence was not proportionate to the crime, the criminal and the interest of society.

(2) The trial court misdirected itself in holding that pleading guilty or being in custody for 3 years may be mitigatory but does not constitute substantial and compelling circumstances. Appellant humbly submits that the term of life imprisonment over emphasizes the public interest and negates the personal circumstances of the appellant.

(3) The Regional court erred in failing to take into account the pre-sentence duration of appellant in coming to an appropriate period of imprisonment to be served.

(4) The Honourable trial court erred in failing to take into account the fact that complainant did not sustain any physical injuries and that appellant had apologized to both complainant and her mother.

(5) The trial court erred in sentencing appellant to life imprisonment in circumstances where it did not have sufficient information at its disposal to properly exercise its sentencing discretion."

[9] From the aforesaid grounds of appeal it can be distilled that the sentence of life imprisonment is essentially challenged because of the alleged failure to consider the pre-conviction time spent in detention as an awaiting trial detainee, the failure to obtain a victim impact statement or report for the child victim; the absence of vaginal injuries and an apology which was tendered to the complainant and her mother.

[10] Aside from the grounds of appeal relied on, the Regional Magistrate patently misdirected himself, in circumstances where the fairness of the proceedings

are called into question. The Regional Magistrate unfortunately acquiesced with the public prosecutor, **Mrs Grassman**, in procedural and substantive irregularities, surprisingly to no objection from **Mr Neethling** who represented the appellant at the behest of Legal Aid South Africa. Whilst there is no attack against the conduct of the proceedings as part of the grounds of appeal, it is relevant to the fairness of the trial and impacts on the sentence process and conviction for that matter. It is to this aspect that I now turn.

The complicit conduct of the regional court magistrate, the public prosecutor and legal practitioner for the accused (appellant)

[11] As a point of departure, the conduct of **Mrs Grassman** as the conduit for the irregular plea proceedings which were perpetuated into the sentence proceedings merits attention, as it set the wheels in motion. It must at the outset be highlighted that the appellant was charged not with a single count of rape but with rape seemingly perpetuated from some time in an unknown month in 2017 to April 2018. The drafting of the charge itself is not a model of clarity. **Mrs Grassman**, faced with the prospect of a guilty plea, lost sight of the seriousness of the allegations against the appellant, where the sexual violation of the child was over a protracted period. The impact on the child appears from the sentence proceedings, not to have been considered by obtaining a victim impact report.

[12] Before turning to the record, an observation is made regarding the Regional Magistrate who very selectively elected to read the contents of a medico-legio report (J88) into the record. This procedure is not countenanced by the CPA. The J88 is ordinarily a document adduced under cover of an affidavit

in terms of section 212(4)(a) of the CPA by the doctor or medical officer responsible for its compilation, and may by its mere production be admitted as evidence unless the accused is in possession of a copy thereof or dispenses with its reading. Therefore, section 150(2)(b) of the CPA makes it plain that, if such document is to be read into the record, it is the peremptory duty of the prosecutor and not the Magistrate:

"150(2)(b)

Where any document may be received in evidence before any court upon its mere production, **the prosecutor shall read out such document in court unless the accused is in possession of a copy of such document or dispenses with the reading out thereof**."

[13] The record regarding the conduct of **Mrs Grassman** (who, appears to have a penchant for the American salutation '*Your Honour'*, which is generally not employed in our Courts and more so not in the Magistrates' Court), as the conduit for the irregular proceedings which followed, reads as follows:

"PROSECUTOR: As the Court pleases. ***Your Honour with regards to the accused's plea the State is eager to accept the accused's plea as tendered. Whereas it differs from the charge sheet I can just indicate and I will address the Court on a later stage that we might have had jurisdictional problems so the State will at this stage accept the plea. One vaginal penetration on the 27 April 2018****.*

As the Court pleases.

COURT: Thank you.

(emphasis added)

[14] It is not clear from the record, what informed the eagerness on the part of Mrs Grassman, as the representative of the State, to accept the facts on which the plea of the accused was based, on a **single incident of vaginal penetration on 27 April 2018**, which clearly did not accord with the charge

as formulated. Mrs Grassman essentially accepted a plea on a lesser charge. The law in this regard is clear. In *S v Kekana* 2019 (1) SACR 1 (SCA) at paragraphs [16]–[17], the Court confirmed the decisions in *S v Ngubane* 1985 (3) SA 677 (A) 683) and *Tshilidzi v S* [2013] ZASCA 78 (unreported, SCA case no 650/12, 30 May 2013), that the acceptance of a plea on a lesser charge by the prosecution, constitutes an act which limits the ambit of the *lis* between the State and an accused.

[15] **Mrs Grassman** in accepting the plea on the facts tendered by the appellant, limited the *lis* between the State and the appellant to those facts. The Regional Magistrate in the circumstances was bound thereby and could not go beyond the facts as so accepted by Mrs Grassman. It further did not behove Mrs Grassman to state to the Regional Magistrate that she would address the court at a later stage about a jurisdictional problem; and for the Regional Magistrate to accept this without interrogating Mrs Grassman on the reasons which informed this intimation about jurisdiction. This conduct by Mrs Grassman in which the Regional Magistrate acquiesced, set the basis for the "injustice" which would follow in the judgment on the merits, the engagement of the Regional Magistrate with the accused when he testified and in his judgment on sentence, as demonstrated below.

[16] In his judgment on the plea of guilty, the Regional Magistrate, states as follows:

"The State alleges that **the incident** happened over a period of time. That will be from the year from 2017 up until the 28 April 2018 at B[…] Street Stilfontein. It is the same address provided by the accused on the charge sheet in the Regional Division of the North West **where the accused unlawfully and intentionally committed an act of**

sexual penetration with the complainant C[…] L[…] who was 7 years turning 8 at the time by penetrating her anally and vaginally in circumstances where the incident of the rape happened more than once over a period of time.

In the accused's plea the accused admitted to only one act of sexual intercourse with the complainant that would have happened on the 27 April. The State indicated that it would accept the plea as tendered by the accused person **indicating that there could be issues with relation to jurisdiction**. It is clear to me that then it will be alleged maybe later because the Prosecutor said I will hear when she addresses the Court, it says to me that the other incident starting in 2017 could have happened outside the North west which is not our jurisdiction."

(emphasis added)

[17] The Regional Magistrate constrained by **Mrs Grassman** accepting the single charge of rape on 27 April 2018, was not at liberty during his judgment on the plea to speculate about what Mrs Grassman would later say about a jurisdictional issue.

[18] That **Mr Foso** was pre-occupied with the jurisdictional issue and the charge which alluded to rape over a period of time, and both vaginal and anal penetration, is evident from the record. The curiosity of Mr Foso got the better of him, which resulted in him impermissibly questioning the appellant when he testified whether this was the first time this happened. The appellant revealed that at least two more pre-schoolers were in the care of the appellant at times, in the absence of his aunt. What Mr Foso clearly was oblivious to was that the factual matrix and the collateral facts that formed the conviction had been disposed of by the prosecution on accepting the facts as set out in the section 112(2) of the CPA as made by the appellant. The intentional traversing of facts outside his sentencing discretion clearly clouded the exercise of this discretion. This is evident from the record which reads as follows:

"COURT: **Mr Neethling can I ask him something? I am afraid but there is this urge in me to ask him. Can I ask him? Was it the first time? --- It was my first time and [indistinct].**

Normally J[…] will leave you with this small one when she goes somewhere? --- Your Worship she is not an only child, she has other siblings but then when J[…] leaves I will be the only one looking after the children.

How many? --- Five. Your Worship it is three small preschool toddlers and then it will be U[…] the complainant and her older brother.

So U[…] is the only girl? --- When I am looking after them it is three girls.

So U[…] is the eldest? --- Yes because when they see U[… they call her aunt as well. U[…] is the aunt to the two younger once.

Okay, it is okay Mr Neethling. I ,"

(emphasis added)

[19] **Mrs Grassman** subsequent to evidence from the appellant in mitigation of sentence, and Mr Neethling addressing the Court, addressed the court as follows:

"PROSECUTOR: **As the Court pleases. Your Honour first with regards to the charge sheet. As the Defence indicated there are possibilities of other incidents. The one that came to our knowledge was on that, during that same weekend and that was indicated as being at Swartklip. Now we discussed it at lengths and googled and this is a place on the other side of Ellisras where they visited during the weekend. Ja that is far out of the province of the North West. I am not sure what, whether it is the Limpopo province, or one of the other Northern provinces but it is quite a distance form Klerksdorp and the North west. Your Honour therefore**.

COURT: **So every time he goes somewhere with the aunt and these children he will, then the child wherever they are?**

PROSECUTOR: **There was this incident according to the child on the date the State accepted 27 April. They then visited an older sister at Swartklip and J[…]**

went to Rustenburg to visit her husband, he was working there at the time. So they actually split for the weekend. Now one of the reasons we did not or could not incorporate that is mainly because of the accused's wish to plead guilty as charged as soon as possible after the evaluation has been completed and to safe time to go through all of that. So that was part of the negotiations that the State and the Defence entered into. Your Honour the fact of the matter is as I also asked the accused after this weekend this little girl wrote her mother a letter indicating of what she called the accused Boetie Tsepiso and then the mother took it from here where they had discussions and then went to the police to report the matter on the 1 May."

(emphasis added)

[20] Whatever negotiations Mrs Grassman concluded with Mr Neethling in respect of the "jurisdiction issue" should not have been mentioned by her and elaborated upon before the Regional Magistrate. Whilst the negotiations were informal negotiations, outside of the provisions of section 105A of the CPA, such negotiations too, should not be revealed to a judicial officer. Mr Foso, from the record, went as far as intimating sexual violation of **the children** just falling short of stating it when he said: "**So every time he goes somewhere with the aunt and these children he will, then the child wherever they are?"**

[21] Mr Foso in his judgment on sentence states as follows:

"…**could have been premeditated**. He is the aunt of the, sorry one would say the cousin to the complainant whom at the time of the incident was around 8 years. He was in a position of trust. The aunt trusted him to leave the small ones in his care. It was not only the complainant there were other children as well. And he took advantage I could imagine what other options the complainant who was 8 at the time had. She could not run, she could not scream. There was no one who would have came to her assistance.
It is a situation of letting a wolf taking care of a sheep. The accused acted as a, as a predator. The mother of the child see you as a, as a predator. The mother of the child see you as, trusted him he was brought in. in his own evidence he says he was taken

care of by this aunt as if he is the aunt's child. He was shown love and **it appears as well from the address from the prosecution that this was not the first time**. **There were other incidents that happened whilst they had visited and one wonders how many times it happened to such an extent that at one stage this child decided to reduce this in writing and handed a letter to the aunt**.

To the mother, for the mother to see, to read. Obviously the child could not talk and the only way to express herself was to put it in writing and let the mother read, read this letter. And it is clear from the accused's own evidence that he told the child to keep quite. **It is in this circumstances that the Court must decide which sentence will be appropriate to best serve the interest of the community**."

[22] The aforesaid paragraph indicates that **Mr Foso** approached the imposition of sentence with a mind poisoned by the knowledge of the charge as originally proffered against the appellant, the presence of other minor girls who were under the care of the appellant in the absence of his aunt, and in his acceptance that there were other incidents when visits were made outside the North West Province. The sentence on these circumstances alone is vitiated by misdirection.

[23] The sentiments expressed by this Court in *Daniso* at paragraphs [13] to [25] remain apposite in respect of this matter. The sentiments expressed in *Xaba v S* (CA78/2019) 2022 (2) SACR 240 (NWM), where Hendricks JP (Petersen J) concurring, said the following are similarly apposite in this regard:

> *"[9] The regional magistrate found that there are no substantial and compelling circumstances present in this matter that warrant imposing a lesser sentence than the prescribed sentence of life imprisonment. The grounds of appeal are that the regional magistrate erred in this regard and that life imprisonment 'over emphasizes the public interest and negates the personal circumstances of the appellant'. That s 51(1) read with sch 2 to*

the CLAA is applicable behoves no argument, in that in committing the rape, grievous bodily harm was inflicted on the complainant, who was stabbed with a knife in her thigh, arm and breast. The following statement by the regional magistrate in passing judgment on sentence can, however, not be overlooked:

'Unfortunately, the complainant could not outrun you, you took her to what I may call a lion's den where you preyed on her by raping her. It is not that you just raped her in order to subdue her you inflicted serious injuries on her body. You were just callous when you rape her I assume she was bleeding and you did not care. Furthermore, if one looks at Exhibit E where you rape her besides her dignity being taken away that place is filthy you just drag her also there. I wonder how many people have been raped in that place. It could be that there are many it is only that you have been detected.' [Sic.] [Emphasis added.]

[10] *This in my view amounts to a gross misdirection on the part of the regional magistrate, as it illustrates that his mind was clouded by the notion that this was not the first and only rape that the appellant perpetrated at the dilapidated house where the complainant was dragged against her will. There was no evidence presented to substantiate this unfortunate remark, which is akin to a finding. No previous conviction or convictions for rape were proven by the state. The appellant is in fact a first offender for purposes of sentence.*

…

[13] ***As alluded to earlier, this misdirection is material, and it vitiates the entire sentencing procedure. That being the case, the sentence ought to be set aside and this court is at liberty to impose a suitable sentence****…*"

Discussion

[24] The sentiments expressed by the Supreme Court of Appeal in *S v Vilakazi* 2009 (1) SACR 552 (SCA) are very relevant to the present appeal:

> "[21] **The prosecution of rape presents peculiar difficulties that always call for the greatest care to be taken, and even more so where the complainant is young. From prosecutors it calls for thoughtful preparation, patient and sensitive presentation of all the available evidence, and meticulous attention to detail. From judicial officers who try such cases it calls for accurate understanding and careful analysis of all the evidence. For it is in the nature of such cases that the available evidence is often scant and many prosecutions fail for that reason alone. In those circumstances each detail can be vitally important. From those who are called upon to sentence convicted offenders such cases call for considerable reflection. Custodial sentences are not merely numbers. And familiarity with the sentence of life imprisonment must never blunt one to the fact that its consequences are profound**.
>
> …
>
> [55] I have given a full account earlier in this judgment of the material facts that emerge from the record and will only highlight some of them in weighing whether the maximum sentence will indeed be proportionate in this case. In this case there was no extraneous violence and no physical injury was caused other than physical injury inherent in the offence. There was also no threat of extraneous violence of any kind. The appellant at least minimized the risk of pregnancy and the transmission of disease by using a condom. The complainant's evidence that she was raped twice is curious bearing in mind that the appellant was charged with only one count. Once more the evidence on that issue is scant and in the absence of evidence to the contrary I think we are bound to accept that if two acts indeed occurred they might have been so closely linked as to amount in substance to the continuation of a single event and ought not to be given undue weight. Indeed, all who are concerned in this case placed no weight on that aspect of the evidence.

[56] **In this case there is very little upon which to measure the emotional impact of the offence upon the complainant. It would not be possible to encapsulate in this judgment the range of emotional responses that rape might evoke as it is described in the considerable literature on the topic and I make no attempt to do so. It is sufficient to say that it is evident from the literature that emotional distress and damage that accompanies rape might be extensive even if it is not manifested overtly and even more is that so in the case of young girls. What also needs to be borne in mind is that the literature shows that emotional responses vary as is demonstrated by a revealing empirical study of the impact of violence (including sexual violence) against women in the metropolitan areas of this country. But while a court must inform itself sufficiently to be alive to the range of possibilities that present themselves in such cases ultimately it must assess the particular individual that is before it and not a statistical sample**."

[25] Since **Mr Foso** traversed issues outside the facts tendered in the plea of guilty, during the evidence of the appellant, and in his judgment on sentence, his conduct, as in *Daniso* falls squarely, within what is described, in *Bogaards supra*, as "***an irregularity that results in a failure of justice***". In the present appeal, the conduct of **Mr Foso** and that of **Mrs Grassman** vitiates not only the entire sentence proceedings but impacts the integrity of the conviction with the potential of vitiating the entire proceedings. Can this Court set aside the conviction of the appellant in circumstances where the appeal lies only against sentence?

[26] Section 309(3) read with section 304(2) of the CPA provides as follows:

"**309 Appeal from lower court by person convicted**

(3) **The provincial or local division concerned shall thereupon have the powers referred to in section 304(2),** and, unless the appeal is based solely upon a

question of law, the provincial or local division shall, in addition to such powers, have the power to increase any sentence imposed upon the appellant or to impose any other form of sentence in lieu of or in addition to such sentence: Provided that, notwithstanding that the provincial or local division is of the opinion that any point raised might be decided in favour of the appellant, **no conviction or sentence shall be reversed or altered by reason of any irregularity of or defect in the record or proceedings, unless it appears to such division that a failure of justice has in fact resulted from such irregularity or defect."**

(emphasis added)

[27] Section 304(2) of the CPA vests this Court with the following powers on appeal:

"304(2) *(a)* If, upon considering the said proceedings, it appears to the judge that the proceedings are not in accordance with justice or that doubt exists whether the proceedings are in accordance with justice, he shall obtain from the judicial officer who presided at the trial a statement setting forth his reasons for convicting the accused and for the sentence imposed, and shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court as a court of appeal: Provided that where the judge concerned is of the opinion that the conviction of sentence imposed is clearly not in accordance with justice and that the person convicted may be prejudiced if the record of the proceedings is not forthwith placed before the provincial or local division having jurisdiction the judge may lay the record of the proceedings before that court without obtaining the statement of the judicial officer who presided at the trial.

(b) Such court may at any sitting thereof hear any evidence and for that purpose summon any person to appear and to give evidence or to produce any document or other article.

(c) Such court, whether or not it has heard evidence, may, subject to the provisions of section 312—

(i) confirm, alter or quash the conviction, and in the event of the conviction being quashed where the accused was convicted on one of two or more alternative

charges, convict the accused on the other alternative charge or on one or other of the alternative charges;

(ii) confirm, reduce, alter or set aside the sentence or any order of the magistrate's court;

(iii) **set aside or correct the proceedings of the magistrate's court**;

(iv) generally give such judgment or impose such sentence or make such order as the magistrate's court ought to have given, imposed or made on any matter which was before it at the trial of the case in question; or

(v) remit the case to the magistrate's court with instructions to deal with any matter in such manner as the provincial or local division may think fit; and

(vi) make any such order in regard to the suspension of the execution of any sentence against the person convicted or the admission of such person to bail, or, generally, in regard to any matter or thing connected with such person or the proceedings in regard to such person as to the court seems likely to promote the ends of justice."

[28] This Court is therefore empowered to set aside the proceedings of a magistrates' court in terms of section 309(3) read with section 304(2)(c)(iii) of the CPA in circumstances where "doubt exists whether the proceedings are in accordance with justice."

Conclusion

[29] The irregularities in the plea and sentence proceedings tainted the proceedings as a whole and such, the entire proceedings stand to be set aside. Justice would be done to the child complainant and the appellant, through the granting of an order that the proceedings commence *de novo* before a differently constituted court, which excludes Mr Foso, Mrs Grassman and Mr Neethling the legal aid practitioner.

[30] The issues in this matter being of grave concern, merits an order that a copy of the judgment be brought to the attention of the Magistrates' Commission and the Regional Court President, North West Division. This is mindful of the sentiments expressed in *Daniso*. This Court, however, notes that the proceedings in the present appeal precede those in *Daniso*. What this appeal does, however, confirm are the concerns expressed in *Daniso* about the conduct of Mr Foso in dealing with sensitive gender-based violence matters.

[31] A copy of the judgment must also be forwarded to the attention of the Director of Public Prosecutions, North West Province in light of the concerns raised about the conduct of Mrs Grassman. A copy of the judgment should also be brought to the attention of the Provincial Director: Legal Aid South Africa: North West Province.

19. **Order**

20.

21. [32] In the result, the following order is made:

22. (i) The proceedings before Regional Magistrate, **Mr Foso** are set aside.

23.

24. (ii) The conviction and sentence imposed by **Regional Magistrate, Mr Foso**, vitiated by a failure of justice is by implication set aside.

25. (iii) The appellant must be brought before a Regional Magistrate, other than **Mr Foso**, for the matter to commence *de novo*.

26.

27. (iv) A copy of this judgment must be forwarded by the Registrar of this Court, to the Magistrates' Commission and the Regional Court President, North West Division.

28. (v) A copy of this judgment must also be forwarded to the Director of Public Prosecutions North West Division and the Provincial Director

29. Legal Aid South Africa: North West Province.

_____

AH PETERSEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

I agree.

30.

31.

32.

33. _____

34. **A REDDY**

35. **ACTING JUDGE OF THE HIGH OF SOUTH AFRICA**

36. **NORTH WEST DIVISION, MAHIKENG**

Appearances:

For the Appellant:	Mr M V Kekana
Instructed by:	Legal Aid South Africa Mafikeng Justice Centre No. 742 Dr. James Moroka Drive MMABATHO
For the Respondent:	Adv KE Mampo
Instructed by:	Director of Public Prosecutions Megacity Building East Gallery 3139 Sekame Street MMABATHO