



IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

REV NO: 34/2017

MAGISTRATE NKOWANKOWA CASE NO: B391/2016

(1)	REPORTABLE: NO /YES
(2)	OF INTEREST TO OTHER JUDGES: NO /YES
(3)	REVISED.
	22/05/2017
	SIGNATURE

In the matter of:

THE STATE

APPELLANT

And

MOLATE PETER MAKWALA

RESPONDENT

SPECIAL REVIEW JUDGMENT

KGANYAGO J

- [1] The accused is facing a charge of assault with intend to do grievous bodily harm. It is alleged that he had assaulted a complainant who was aged 15 years at the time of the alleged assault. It is further alleged that he had used a panga to assault the complainant.

- [2] The accused appeared before the district magistrate at Nkowankowa. He tendered a plea of not guilty to the charge. At the time when the court was administering oath on the complainant, the court realised that the complainant was below the age of 16 years at the time of the alleged assault.
- [3] The trial court immediately stopped the proceedings as it was of the view that since the offence was perpetrated against a minor who was under the age of 16 years at the time of the commission of the alleged offence, and that an alleged dangerous weapon was used, namely, a panga, therefore, the provisions of **section 51(2)(b) of Act 105 of 1997** were applicable. The trial court is of the view that the district court does not have the requisite jurisdiction to adjudicate on this matter, and the proceedings be set aside and it start to *de novo* before the Regional Court having jurisdiction.
- [4] The comments of the magistrate were sent to the Deputy Director of Public Prosecutions Polokwane for their comments. The Deputy Director of Public Prosecutions has submitted a detailed response of which I am indebted to them. In their view, the proceeding should be proceeded with at the district court.
- [5] This is a review in terms of **section 304(4) of the Criminal Procedure Act 51 of 1977** (“the CPA”). Review under **section 304(4) of the CPA** is generally initiated by the trial Magistrate who doubts the correctness of a conviction or sentence. The aim of the section is to correct erroneous convictions and sentences.

- [6] **In S v Steyn 2001(1) SA 1146 (CC) in paragraph 20 at 1158F-1159A** the court observed:

“Indeed, it is an integral function of a superior Court to exercise an entirely different kind of review jurisdiction over the proceedings in the lower courts. High courts have the power to review and correct the proceedings of lower courts on a variety of grounds.”

- [7] **In Magistrate, Stutterheim v Mashiya 2004(5) SA 209(SCA) in paragraph 13 and 14 at 214F-215 D** the court observed:

“[13].That the higher courts have supervisory power over the conduct of proceedings in Magistrates’ courts in both civil and criminal matters is beyond doubt. This includes the power to intervene in unconcluded proceedings. This court confirmed more than four decades ago that the jurisdiction exists at common law. It subsists under the Constitution, which create a hierarchical court structure that distinguishes between superior and inferior court by giving the former but not the latter jurisdiction to rule on the constitutionality of legislation and presidential conduct as well as inherent power. The constitutional court has emphasised the role of the higher courts in ensuring quality control in the magistrates’ courts, and the importance of the high courts’ judicial supervision of the lower court in reviewing and correcting mistakes. This entails, as Chaskalson CJ has observed, that the higher courts can supervise the manner in which the lower courts discharge their functions. His general formulation echoes the provision of the Criminal Procedure Act, which provides that in criminal proceedings subject to review in the ordinary course the high court may amongst many ample powers, remit the case to the magistrate’s court with instructions to deal with any matter in such manner as it may think fit.

[14] *The higher courts, have however emphasised repeatedly that the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity-where grave injustice threatens, and where intervention is necessary to attain justice. The same approach has been followed under the Constitution”*

- [8] As I have already pointed out in paragraph 5 supra, section 304(4) regulates reviews where the accused has already been convicted or sentenced. In this case the accused has neither been convicted nor sentenced.
- [9] Even though the accused has not yet been convicted or sentenced, that does not take away the supervisory powers of the higher courts to intervene in unconcluded matters of which is the case in the present matter before me. However, as stated in the case of **Magistrate, Stutterheim vs Mashiya** supra, the power to intervene in unconcluded proceedings in lower courts will be exercised only in cases of great rarity, where grave injustice threatens, and where intervention is necessary to attain justice. It is not given that the higher courts will intervene in each and every unconcluded matter in the lower courts.
- [10] In the present case, the accused has been charged with assault with intend to do grievous bodily harm. **Section 51(2)(b) of Act 105 of 1997**, relates to discretionary minimum sentences for certain serious offences that can be imposed by either a regional court or high court. The district court does not have jurisdiction to impose a sentence that falls within the ambit of **section 51(2)(b) of Act 105 of 1997**.
- [11] However, the lower courts have jurisdiction to try matters where the accused is facing a charge of assault with intend to do grievous bodily harm. In my view, that will include also assault with intend to do grievous bodily harm committed on a person under the age of 16 years. It

will be only after conviction that the lower courts will not have jurisdiction to pass a sentence that falls within the purview of **section 51(2) of Act 105 of 1997**. In that situation the remedy lies in **section 116(1)(a) of CPA**.

[12] Section 116(1)(a) of the CPA provides as follows:

“If a magistrate’s court, after conviction following on a plea of not guilty but before sentence, is of the opinion-

(a) That the offence in respect of which the accused has been convicted is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of the magistrate court;

(b) ...

(c) ...

The court shall stop the proceedings and commit the accused for sentence by regional court having jurisdiction”.

[13] It is clear that there is nothing preventing the lower courts in trying matters of assault with intent to do grievous bodily harm on a person under the age of 16 years. It is only at the sentencing stage that the proceedings will be stopped, and the accused committed to the regional court having jurisdiction to sentence him/her accordingly.

[14] In this case what the trial court took into consideration in arriving at the conclusion that it does not have the requisite jurisdiction to try this matter, is the fact that the offence was perpetrated against a minor under the age of 16 years, and also that a dangerous weapon, namely, a panga was used. The essential requirements for intervention are where grave injustice threatens, and also where intervention is necessary to attain justice. The trial magistrate has failed to show that this is one of those

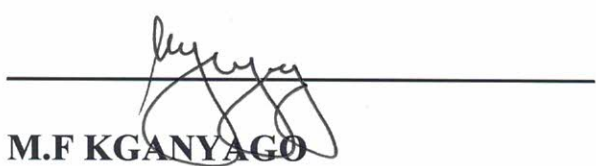
rare cases where intervention by the high court is necessary. The mere fact that the victim is still under the age of 16 years, and that a panga was used, in my view does not justify the district court from been excluded to try this matter. Therefore, in my view, the trial magistrate has followed a wrong test in stopping the proceedings.

[15] Under the circumstances, in my view, the district magistrate at Nkowankowa has jurisdiction to try the accused on a charge of assault with intend to do grievous bodily harm even though it was allegedly committed to a person under the age of 16 years.

[16] In the result, I make the following order:

16.1 The district magistrate court Nkowankowa has jurisdiction to try the accused in this matter.

16.2 The matter is remitted to the district magistrate court Nkowankowa to proceed with the trial where it has stopped.



M.F KGANYAGO

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE



M.V SEMENYA

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION, POLOKWANE