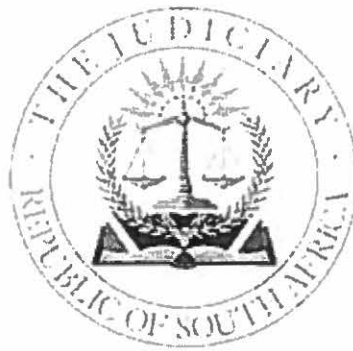




IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: R156/2017

In the matter between:

THE STATE

and

LEFA ABEDNIGO NDWENDWE

CORAM: RAMPAL, J *et* DANISO, AJ

JUDGMENT BY: RAMPAL, AJ

DELIVERED ON: 26 OCTOBER 2017

SPECIAL REVIEW IN TERMS OF SECTION 304(4)
OF THE CPA NO 51/1977

- [1] The matter came to court by way of a special review in terms of section 304(4) Act No 51/1977. The accused has been convicted and sentenced.
- [2] An incident took place in Bloemfontein on 16 December 2015. The actual crime scene was at Freedom Square Mangaung. It was reported to the police. The police investigation led to the arrest of the accused. He was arrested on 22 December 2015.
- [3] The accused was subsequently charged with rape. The prosecution alleged that he committed an act of sexual penetration with the complainant a minor child of eleven years of age on 16/17 September 2015. By so doing the accused contravened specific statutory provisions of section 3 of the Sexual Offences and Related Matters Amendment Act 32/2007 and related provisions. It was also alleged that he contravened the provisions of section 51(1) of the Criminal Law Amendment Act 105 of 1997, as well as section 1 of the Children's Act, Act No 38/2005.
- [4] The trial commenced in the Bloemfontein Regional Court on 24 August 2017. The proceedings were held in camera in terms of section 153(3) Act No 51/1977. The accused was required to plead. He pleaded not guilty to the charge. He gave an explanation in terms of section 115 Act No 51/1977. I deem it unnecessary to give details of his explanation.
- [5] All in all the court heard the evidence of four witnesses. Of the four, two were prosecution witnesses. They were the complainant and her mother.

- [6] The court gave its verdict on 25 August 2017. It found the accused guilty of rape. It then imposed a sentence on the same day. I shall revert to the finer details of the actual sentence later on.
- [7] Aggrieved by the conviction, the accused applied for leave to appeal. His application was successful. The regional magistrate granted him leave to appeal against his conviction on 30 August 2017. Moreover, the accused successfully applied for the extension of his bail pending the outcome of his appeal.
- [8] On 4 October 2017 the regional magistrate penned down a memorandum in terms of section 304 Act No 51/1977 for the special review of the sentence imposed on the accused. The registrar received the memorandum on 11 October 2017. On the same day the matter was allocated to me.
- [9] The regional magistrate's motivation for his special request was worded as follows:

"The accused person, who was legally represented during the trial, was convicted and sentenced in the regional court on a charge of rape. The accuse was sentenced to twelve years imprisonment in terms of the provisions or section 276(1)(i) of the criminal procedure Act 51/1977. After adjournment on the same day it came to my attention that I erroneously sentenced the accused in terms of the provisions of section 276(1)(i) whilst it was the intention to sentence the accused in terms of the provisions of section 276(1)(b). The sentence of twelve years imprisonment is not competent in terms of the provisions of section 276(1)(i) of the Criminal Procedure Act (*supra*) but it would be in terms of the provisions of section 276(1)(b) of the same act."

- [10] In the first place the provisions of section 276(1)(b) Act No 51/1977. The section reads:

“(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 an offence, namely—

(b)

imprisonment, including imprisonment for life or imprisonment for an indefinite period as referred to in section 286B (1);”

- [11] In the second place the provisions of section 276(1)(i) Act No 51/1977. The section reads:

“imprisonment from which such a person may be placed under correctional supervision in the discretion of the Commissioner or a parole board.”

- [12] In the third place the provisions of 298 Act No 51 of 1977. The section reads:

“When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence”.

- [13] In the fourth place the provisions of section 51(1) Act No 105/1997 reads:

“ - Notwithstanding any other law, but subject to subsections (3) and (6), a regional court or a high court shall sentence a person it has convicted of an offence referred to in Part I of Schedule 2 to imprisonment for life”.

- [14] The custodial sentence of twelve years imprisonment imposed by the regional court on the accused offends the provisions of sec 276(1)(i). A custodial sentence imposed in terms of the section is not supposed to exceed five years in order to be compliant and appropriate. Consequently the sentence of 12 years imprisonment imposed on the accused was an incompetent sentence.
- [15] Indeed the magistrate erroneously sentenced the accused. By saying that he erroneously sentenced the accused he meant that he intended punishing the accused in terms of subsection 1(b) and not subsection 1(i). Obviously the sentence imposed in terms of the latter was irregular an incompetent. Consequently I consider the trial magistrates reference to the latter as an inadvertency resulting in a sentence not actually intended.
- [16] There are recognised ways in which similar errors can be corrected. They can be corrected in three ways. Firstly by the trial magistrate in terms of section 298 or by the review judge in terms of section 304(4) or by the appeal judges in terms of section 309.
- [17] As regards the first method, the corrective procedure is laid down in section 298. The section requires a magistrate or a judge to take swift action to correct his or her own mistake. In this instance no swift corrective action was taken. He did not immediately realise his mistake. He imposed the sentence, recorded it and stepped down from the bench. He explained that he first became aware of the mistake after an adjournment. By then it was too late. The trial

magistrate was *functus officio*. The matter was out of his hands. He was precluded from correcting his own mistake by invoking sec 298. This much he appreciated which was why he did not invoke the provisions of the section to correct the error.

[18] As regards the second method, I am of the view that given the circumstances of this particular case it would not be appropriate for us as a court of review to correct the error in terms of section 304(4). The regional magistrate did not act swiftly to bring the mistake to this court on review. According to him, he discovered the mistake on 25 August 2017. He signed his special request in terms of sec 304 on 4 October 2017, some 40 days after he had discovered the mistake and some 35 days after he had granted leave to appeal on 30 August 2017.

[19] It will be readily appreciated that the special request was belated. It was overtaken by events. The accused applied for leave to appeal against the conviction. The regional magistrate granted leave to appeal. The appeal process was thereby set in motion. The juristic act took place before the special request. The current review process was initiated much later.

[20] I am of the firm view that it is undesirable to have the two processes running parallel to each other. Ultimately the essence of the corrective relief sought by the regional magistrate would necessarily entail an increase in the sentence imposed by the

regional magistrate. At the moment the accused expects to serve $\frac{1}{6}$ of the sentence if his appeal fails and his conviction is confirmed.

[21] In the State v Qothela [2017] ZAFHC at [12], a matter almost similar to the current review, this court nullified the sentence which was impermissible in terms of sec 276(1)(i) and remitted the case to the regional court for the trial magistrate to deal with the case in accordance with the law and the guidelines as outlined in the judgment.

[22] All things been equal I would be inclined to grant a similar relief in the instant matter. However, all things are not equal between the two matters. In the instant matter, unlike in **Qothela's** decision, the chapter is not yet closed. The accused was sentenced on 25 August 2017. He instantly signalled his intention to appeal against his conviction. However, his application could not be entertained on that day. It was then postponed to 30 August 2017. On that day leave to appeal was granted. Therefore, things has been set in motion for the hearing of the appeal in this matter. The regional magistrates request to correct his error was made six weeks after leave to appeal had been granted.

[23] I have already expressed the view that it would be undesirable to have two parallel processes simultaneously running. That is a material consideration. The matter is already coming this way on appeal. The state is at liberty to appeal against the sentence, if it wishes to do so. Besides, the high court has inherent powers to

consider the question of sentence as well *mero motu*. Naturally, if the appeal against conviction is upheld, the inappropriate sentence we are now asked to review will automatically fall away. This is the second material consideration.

[24] The accused was legally represented at his trial. It would appear that he made use of the services of a private legal representative. Should the matter be referred to the regional court to sentence him afresh as it was done in **Qothela**, *supra*, the accuse may suffer financial prejudice by having to return to the regional to challenge the alteration of the sentence where there is a real possibility of being more severely punished which is something he can do later in the high court anyway. He has apparently engaged the services of his previous legal representative to take the matter on appeal. It is by no means certain whether he would afford to engage his services to represent him yet again in the regional court for the reconsideration of the sentence.

[25] Given these peculiar circumstances of this particular case, I am of the view that the second method by way of special review would not be an appropriate relief in this instance. I would, therefore, decline to grant the relief as requested by the regional magistrate.

[26] As regards the third method, I cannot foresee any prejudice to any of the parties. The matter has already been channelled to the high court to hear the appeal. Although the accused has not appealed against the sentence imposed on him, for very obvious reasons, it

will not financially prejudice him if the issue of sentence is also considered by the high court on appeal. The high court has inherent jurisdiction to consider the appropriateness or otherwise of the sentence we are now called upon to set aside on special review. Obviously the state is at liberty to take the sentence on appeal, if it wishes to do so. On appeal the state and the accused will be afforded an opportunity of dealing with the error committed by the regional magistrate.

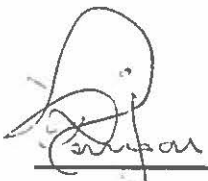
[27] In State v Qothela *supra* at paragraph [9] the court held:

"[9] Since the trial magistrate was *functus officio*, she was entitled to sent the case on special review, as she has done. The interests of justice dictate that offenders should be appropriately punished according to the letter of the law. In my view, the interests of justice would be seriously undermined if a sentence grounded on an erroneous premise is allowed to stand."

[28] Those considerations are apposite to the instant matter. For these reasons, I am not inclined to grant the relief sought by the regional magistrate. There exists an alternative and satisfactory corrective procedure. The appeal procedure has already been set in motion. The issue of the sentence must, therefore, be held in abeyance for consideration by the appeal court.

[29] Accordingly I make the following order:

- 29.1 The special request by the regional magistrate for the special review of the sentence imposed on the accused is refused.
- 29.2 The issue of the sentence is, left as it is for the time being, for consideration by this court on appeal.



MH RAMPAI, J

I concur



NS DANISO, AJ