

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



**IN THE HIGH COURT OF SOUTH AFRICA
(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case number: CA&R 25/2024

In the matter between:

THE STATE

and

SIMPHIWE EPHRIAN NCUBE

ANDILE ALVIN NTSHWELA

Neutral citation: *The State v Ncube and Another* (CA&R 25/2024) 09 May 2025.

Coram: Tlaletsi JP et Stanton J

Delivered: 05 May 2025

Summary: Special review in terms of s 304A of the Criminal Procedure Act 51 of 1977 – accused convicted of rape – prior to sentencing the magistrate expressed doubts on the conviction of the accused as not being in accordance with justice following the evidence of the complainant after conviction – s 304A to be applied sparingly and in those cases where the continuation of a case to its conclusion will result in injustice – matter remitted to magistrate for sentence.

JUDGMENT

- [1] This matter came before us in the form of a special review referred by the Chief Magistrate: Northern Cape in terms of s 304A(a) of the Criminal Procedure Act 51 of 1977 ("the Act").
- [2] Mr SE Ncube ("the first accused") was charged with four counts of rape and one count of sexual assault. Mr AA Ntshwela ("the second accused") was charged with one count of rape and one count of sexual assault. The charges were in respect of the same complainant.
- [3] Both accused pleaded not guilty to all the charges preferred against them, and neither proffered a plea explanation.
- [4] The state called the complainant and four further witnesses to testify. Both accused testified in their own defence.
- [5] After hearing evidence, both accused were convicted of one count of rape, read with the provisions of s 51(2) of the Criminal Law Amendment Act 105 of 1997 ("the CLAA"), as the magistrate determined that counts one to five were one continuous act of rape. The second accused was acquitted on the charge of sexual assault.
- [6] The matter was subsequently postponed for the submission of a pre-sentence report. The pre-sentencing report in respect of the second accused, compiled by Mr. Booysen, the probation officer, *inter alia* mentioned that after the accused were convicted, the complainant met the second accused during July 2023, and she apologised for implicating the second accused in the rape. This conversation took place in public.

- [7] The prosecution recalled the complainant to rebut this evidence. According to the record, the complainant:
- 7.1 Confirmed that she did not personally consult with Mr Booysen, but that she responded to her questions *via* email;
 - 7.2 Explained that subsequent to the conviction, she met up with both accused at a tavern. While at the tavern, she saw Nosipho, her friend Wendy's daughter, whom she assisted to purchase alcohol. When she was standing at the bar, the second accused and she had a conversation, and she asked him to meet her outside where they could speak privately as she was very emotional, and she was crying. They exited the tavern, and she asked the second accused why he and the first accused had raped her as she wanted closure. The second accused apologised to her. She replied that she knew that they had been found guilty and that they would be going to prison for a very long time. She told him that she would never forgive him for what he did to her; and
 - 7.3 Wendy informed her that Nosipho took a video of her interacting with the second accused. Nosipho informed the complainant that she took the video as the complainant was very emotional and she wanted to show it to her mother. The complainant requested her to delete the video as she did not want any rumours to spread, which she did after numerous requests.
- [8] When cross-examined, the complainant denied that (a) she told the second accused that she did not anticipate that the accused would be convicted or that she apologised to him; (b) she leaned on the second accused's chest while she was crying; (c) the second accused hugged her. In addition, she confirmed that she wanted Nosipho to delete the video as she did not want people to know that she spoke to him.

- [9] After hearing the complainant's further evidence, the magistrate sent the matter for this special review. According to the magistrate, she is doubtful if both accused were correctly convicted or that the conviction was in accordance with justice. The magistrate opined that the conduct of the complainant has shown "her to be a very dishonest character, it has shown her to be a witness that can easily manipulate and fabricate a story". This caused her to reflect on the verdict as well as her evaluation of her evidence, which created "very serious doubt that the complainant's evidence is true beyond reasonable doubt". The magistrate explained that she has concerns in view of the following:

'What prompted the complainant to want to talk to the accused who was standing on a queue?

This was an accused who just been convicted of a rape case against the complainant.

She asked why he was standing close to her and further asked if he was fine. When asked about this she said she was just being sarcastic.

As if that was not enough, she asked to talk to him outside in camera. She led the accused and they both went outside the tavern. Leaving her friends who were at the tavern and everybody who was there. Talking to the accused outside at night for whatever reason is very strange.

Talking to a person who had just been convicted of raping her and talking to him in private at night to get closure. If she wanted to confront accused 2 or if she felt the urge to confront him, one would have expected that she would have done it in the presence of people inside the tavern.

During her testimony she said, when talking to the accused outside the tavern, one of her friends told her that Nosipho took a video of her and the accused. However, when the court asked prosecution if that was not hearsay evidence, the witness interjected and said Nosipho had told her that she took a video.

It is strange that complainant demanded for the video to be deleted instead of asking for it to be forwarded for future use in the pending court case.

It is clear that the fact that there was a video taken troubled the complainant because even though Nosipho had told her that she has deleted the video but that did not stop the complainant from going to Nosipho's mother the next day pleading with her to instruct Nosipho to have the video deleted.

To me, it is as if this video had captured the negative as alleged by accused 2 in the pre-sentence report. Had this video captured something that would suit the narrative of the complainant surely, she was not going to demand that it be immediately deleted and to make sure that it was deleted, to go to the extent of going to Nosipho's house the following day.

What was in the video that could have negatively affected the complainant or this case? Unsettling her to an extent, that she did not believe that Nosipho deleted the video but went to her mother asking her to instruct Nosipho to delete it.

I am now left with very strong feeling that I may have convicted innocent people as a result of complainant's ability to pass whatever may have been lies as if it were the truth.' [My emphasis]

Applicable law:

[10] Section 304A(a) of the Act, pertaining to a review of proceedings before sentence, stipulates:

'If a magistrate or regional magistrate after conviction but before sentence is of the opinion that the proceedings in respect of which he brought in a conviction are not in accordance with justice, or that doubt exists whether the proceedings are in accordance with justice, he shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings, to the registrar of the provincial division having jurisdiction, and such registrar shall, as soon as practicable, lay the same for review in chambers before a judge, who shall have the same powers in respect of such proceedings as if the record thereof had been laid before him in terms of section 303.'

[11] Section 304(4) of the Act therefore regulates the procedure for review after a sentence has been imposed. S 304A provides for a review of proceedings after conviction, but before sentence is imposed.

[12] Section 304A was introduced into the Act by s 22 of Act 33 of 1986 ("Act 33 of 1986") during 1986 in response to a call for legislative intervention by Malherbe AJ in *S v Seloke & andere*¹ when he remarked:

'Die gevolge van hierdie stand van ons regspraak is onbevredigend omdat dit daarop neerkom dat 'n landdros verplig is om vonnis op te lê op 'n beskuldigde aan wie se skuld hy ernstige twyfel het en wat hy, as 'eerste landdros', nie skuldig sou bevind het nie. Dit is egter 'n geval waar die Wetgewer moontlik kan oorweeg om in 'n geval waarop art. 275 van die Strafproseswet van toepassing is, dieselfde voorsiening te maak vir hersiening voor vonnis as wat daar bestaan in die geval van streeklanddroste ingevolge art. 116(3).'

[13] However, before this Court can intervene in terms of those provisions, it must form an opinion that the *proceedings* in respect of which the convictions were brought are not in accordance with justice. The learned authors Du Toit *et al*² confirm that the test for intervention on review before the case is finalised is whether it would be unfair, and would lead to irreparable prejudice to the accused, to permit the case to proceed. The learned authors emphasised that 's 304A should not be invoked merely to eliminate any doubt on the part of the trial court. Similarly, s 304A should not be relied upon to dispose prematurely of a case that might equally well and without prejudice to the accused be dealt with on appeal or review *after* the imposition of sentence'.³

[14] Examples of irregularities that could result in a review in terms of s 304A *inter alia* include (a) bias, malice or corruption on the part of the presiding officer, (b) the admission of inadmissible or incompetent evidence or the rejection of admissible and competent evidence;⁴ (c) the failure by a magistrate to

¹ 1983 (2) SA 455 (O) at 457 B – C.

² *Commentary on the Criminal Procedure Act*, — RS 72, 2024 ch30-p24A (and the Authorities cited therein).

³ *Ibid.*

⁴ See generally, section 22 of the Superior Courts Act 10 of 2013.

administer the oath;⁵ (d) a violation of an accused's fundamental right to legal representation;⁶ (e) when an accused was charged with the same offence of which he had previously been convicted of, and failing to raise the plea of *autrefois convict*, is found guilty of the same offence;⁷ and (f) where a magistrate dealt incorrectly and inappropriately with an incomplete record of the plea proceedings.⁸

[15] In *S v Makhubele* ("Makhubele")⁹, the court confirmed that s 304A of the Act should not be applied so sparingly that it is reduced to a dead letter, but that it is the bounden duty of judicial officers to give effect to it in those rare cases where the continuation of a case to its conclusion will result in injustice.

[16] Kriegler J (as he then was), however, warned that:

' . . . Section 304A is to be interpreted in the context of the automatic review procedure created by ss 302 - 306 and 309(3) of Act 51 of 1977. In particular it is to be noted that the test throughout is whether the relevant proceedings were or were not in accordance with justice. Trivial irregularities or procedural imperfections are immaterial; only where there has been a failure of justice, real and substantial prejudice to the accused, are the proceedings liable to interference. By the same token s 304A is not to be invoked in the absence of such a failure of justice.'¹⁰

And further:¹¹

'Indeed, in the case of a review *in medias res* such as is envisaged by s 304A, the test, if anything, is to be applied with even greater caution. For this there are a number of reasons. First and foremost, piecemeal litigation is inherently undesirable - *interest rei publicae ut sit finis litium*. The divergence of views evident in the cases referred to in the above quoted passage from *Hiemstra* is largely ascribable to judicial

⁵ *S v Anthony* (SHF 27/14) [2015] ZAWCHC 30 (20 March 2015) ;2015 JDR 0542 (WCC); [2015] JOL 32994 (WCC).)

⁶ *S v Mafika* 2016 (1) SACR 623 (FB) paras 9 – 10.

⁷ *S v Msomi* 2009 (1) SACR 441 (N) para 7.

⁸ *S v Mentoer* 2020 (1) SACR 104 (WCC) paras 15 and 21.

⁹ 1987 (2) SA 541 (T) at 546 A - C.

¹⁰ *Makhubele* (*Supra*) at 545 A - B.

¹¹ *Makhubele* (*Supra*) at p 545 B - H.

disapproval of untimely intervention and consequent prolongation and proliferation of proceedings. Hence, also, the formulation of strict criteria even in those cases where there was intervention before the conclusion of the case. . . . Furthermore, well-intentioned but ill-considered referral for review in terms of s 304A may well redound to the detriment of the accused, he whom the presiding officer intended to protect against injustice. For instance, weak-kneed second thoughts about the soundness of a conviction may not be shared by the reviewing Judge acting, of course, after consultation with the Attorney-General and with the advantageous perspective of hindsight. In the result the matter may be fruitlessly prolonged to the prejudice of the accused. Yet another consideration militates against an over-ready resort to the procedure permitted by s 304A. It is founded in experience and common sense. If a material irregularity has been committed, or a genuine and considered reappraisal has been made resulting in a change of mind as to the accused's guilt, any resultant injustice can always be remedied once the case is transmitted for review at the usual stage, ie after sentence. After all, no irreversible finality is reached before then. Such prejudice as may be caused to the accused by prolonging the proceedings may well be exacerbated by the to-ing and fro-ing of a precipitate submission for review. Finally, the dictates of justice, in contradistinction to legal niceties, are often, if not virtually invariably, better served if the case as a whole is submitted to scrutiny on review. At that stage one has a proper overview of the totality of the facts.'

- [17] The court in *S v Klaase* ("*Klaase*")¹², confirmed the principles expressed in *Makhubele*, and emphasised that s 304A of the Act was not to be invoked merely to eliminate any hesitation on the part of the trial court, or to dispose prematurely of a case which might equally well, and without unfair prejudice to the accused, be considered on appeal or review after the imposition of sentence.
- [18] In preparation of this judgment, we came across two pre-constitutional cases with comparable facts to the matter at hand. In *S v Taylor* ("*Taylor*")¹³, despite his plea of not guilty, the accused had been convicted of the crime of theft. His daughter later testified in mitigation of sentence and, in her evidence, had disclosed facts which established, beyond doubt, that the accused had not intended to steal. The accused had, thereafter, addressed the court and

¹² 1998 (1) SACR 317 (C) at 322 C – F.

¹³ 1976 (4) SA 185 (T).

confirmed the facts as stated by his daughter. The Magistrate was of a view that had the daughter testified before the closing of the defence case, he would not have convicted the accused.

[19] In *S v Shezi* (“*Shezi*”) ¹⁴ on a charge of rape, the accused had admitted sexual intercourse but advanced the defence of consent. He was nevertheless convicted of the crime of rape and, on a fair reading of the record, the conviction appeared to be in order. In mitigation of sentence, he called his uncle who testified that the incident had been reported to the council of the township within which both the complainant and accused resided and that, at the meeting of that council, a letter which had been written by the complainant had been discussed. When the complainant was recalled and confronted with the allegations about the letter, in response, though not conceding the authorship thereof, she became extremely evasive in her answers to questions put to her by the court. Besides, the prosecutor disclosed to the court that she had confessed to one of the members of the prosecuting staff that she had not been a virgin at the time of the incident, which apparently departed from a previous confession to the contrary, which assertion had been essential in supporting the conviction.

[20] *Taylor* and *Shezi* are of particular significance—not only because they are “pre-constitutional” cases, but also because they were decided before the current Act or the insertion of section 304A into the Act by section 22 of Act 33 of 1986. In both cases, the courts reviewed and set aside convictions before sentencing by relying on their inherent powers to prevent illegalities or gross injustice arising from the lower courts. Kriegler J in *Makhubele* stated that *Taylor* is an illustration of exactly what the Legislature had in mind with the introduction of s 304A into the Act.¹⁵

[21] In *Taylor*, the daughter’s subsequent evidence in mitigation introduced facts that unequivocally established that the accused lacked the intention to steal –

¹⁴ 1984 (2) SA 577 (N).

¹⁵ *Makhubele* (*Supra*) at p 546 C.

an essential element of the offence. These facts were also confirmed by the accused himself. The State in *Taylor* also expressed the view that it would be fair and just to set aside the conviction before sentence in light of the new evidence. Importantly, this occurred at a time when no statutory provision empowered a superior court to do so on review prior to sentence, and the court had to invoke its inherent powers to avert an illegality or grave injustice. *Shezi*, similarly, predates the incorporation of s 304A into the Act, and the court there was also urged to exercise its inherent powers to avert an illegality or serious injustice by reviewing and setting aside a conviction before sentence. Following the evidence of the accused's uncle in mitigation and the subsequent investigations surrounding a letter, the prosecutor indicated that the State no longer had confidence in its case. An affidavit obtained from a councillor confirmed that the complainant had admitted to writing the letter, and it was further revealed that the complainant had told a member of the prosecuting staff that she had not been a virgin at the time of the incident - an important point which had previously supported the conviction. Thus, in *Shezi*, serious doubt emerged as to the credibility of the complainant and, consequently, the correctness of the conviction. There, as in *Taylor*, the new evidence cast the conviction in an entirely different light, and the request to set it aside was not only initiated by the magistrate but also supported by the State. Importantly, in both matters, the subsequent evidence warranted the setting aside of the conviction before sentence, with the support of the prosecution in light of what had emerged.

- [22] That said, it does not seem like the nature of the subsequent "allegations" or "new evidence" that prompted the referral of this case to this Court for review before sentence was in the nature of the subsequent evidence that prompted the referral in both *Shezi* and *Taylor*. In our view, the review was referred to assuage the unease of the magistrate and does not warrant the invocation of s 304A of the Act. The magistrate in this case referred the matter for review because "I am now left with a very strong feeling that I may have convicted innocent people." What transpired during sentencing seems to have no bearing or connection with the pre-conviction evidence and the reasoning by the magistrate. The magistrate has not pointed us to any irregularity that may

have occurred during the proceedings to warrant a review of the proceedings before completion. Neither was it alleged that inadmissible or incompetent evidence was relied upon. This is one of those matters where piecemeal adjudication is discouraged. We, at this stage, do not express an opinion on the correctness or otherwise of the conviction. That is the matter to be considered by the appellate or review court in appropriate proceedings. We do, however, caution against relying on matters extraneous to the proceedings to refer proceedings that are incomplete to this Court for review.

[23] In the result, the record is referred back to the magistrate to finalise the proceedings.

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TLALETSI JP

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STANTON J