



**THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Reportable

High Court Ref No: 227/26

Review Case No: 6/217/2026

In the matter between:

THE STATE

and

CANDICE DANIELS

ACCUSED

AND

High Court Ref No: 228/26

Review Case No: 6/230/2026

In the matter between:

THE STATE

and

NOHESI THEMBA TEMPLERN

ACCUSED

Neutral Citation: *S v Daniels; S v Templern* (Case No. 227/26; and 228/26)
[2026] ZAWCHC.... (4 August 2026)

Coram: Thulare J et YAKE AJ

Delivered: 4 August 2026

Summary: Criminal Procedure – Automatic Review - Magistrate pronouncing sentence without hearing mitigating and aggravating circumstances - violates section 35(3)(a) of the Constitution of the Republic of South Africa Act, 1996 and this constitutes a gross irregularity in the proceedings – doctrine of separation of powers – judiciary must refrain from encroaching upon the terrain reserved for the executive - sentence reviewed and set aside – both cases remitted back to the presiding magistrate to conduct sentencing proceedings afresh.

ORDER

1. The conviction in respect of both matters, is confirmed.
2. The sentences in respect of both proceedings are reviewed and set aside.
3. In terms of section 304 (2) (c) (v) of the CPA, the matters are remitted back to the same presiding magistrate to sentencing proceedings to be conducted afresh on both cases, with instructions that the presiding magistrate had regard in compliance with the principles articulated in *S v Zinn*, the safeguards of section 302(3)(a) of the CPA, and the constitutional right to a fair trial.
4. The State is ordered to bring both accused before court within 10 days of receipt of this judgment for purposes of sentence proceedings.

5. A copy of this judgment must be brought to the attention of the Chief Magistrates, Mitchell's Plain.
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REVIEW JUDGMENT

YAKE AJ (THULARE J CONCURRING)

Introduction

[1] Two separate matters were placed before me in chambers for automatic review. They were transmitted by the Acting Senior Magistrate ("the senior magistrate") of the Mitchell's Plain Magistrate's Court after it was discovered that the Acting Magistrate ("the magistrate") had committed certain irregularities in the proceedings.

[2] Although the precise statutory provision under which these matters were referred is not expressly stated, it is trite that they fall within the ambit of section 302 of the Criminal Procedure Act ("the CPA").¹ That section empowers a reviewing court to consider proceedings of the magistrate's court where a material irregularity has been committed. This Court's intervention is aimed at ensuring the validity and fairness of both the conviction and the sentence

[3] The two matters under review are *S v Daniels* ("the *Daniels* matter") and *S v Templern* ("the *Templern* matter"). Both were adjudicated upon by the same magistrate and involve substantially similar charges and issues. For the sake of brevity, I shall first set out the factual background of each case individually. Thereafter, I will address the legal issues raised in these matters in a consolidated

¹ Section 304(4) of the Criminal Procedure Act 51 of 1977.

fashion, as they are materially identical and lend themselves to simultaneous consideration.

Factual Background

[4] In the *Daniels* matter, the accused was charged with theft. It was alleged that on 19 April 2026, at Pick n Pay, Promenade, situated within the district of Mitchell's Plain, the accused did unlawfully and intentionally steal two Dairy Milk slabs of 150g each, with a total value of R93.98, being the property, or in the lawful possession, of Sibulele Fikizolo and/or Pick n Pay Promenade.

[5] In the *Templern* matter, the accused was charged with theft. It was alleged that on 24 April 2026, within the district of Mitchell's Plain, the accused did unlawfully and intentionally steal one bottle of Uzzi perfume, valued at R420.00, being the property, or in the lawful possession, of Athi Tase and/or Truworths, Promenade Mall.

[6] On 19 May 2026, the charges of theft were duly put to both accused. Each tendered a plea of guilty. The magistrate invoked the provisions of section 112(1)(b) of the CPA, and after questioning the accused in terms of that section, returned verdicts of guilty on the respective charges. The accused were accordingly convicted on the strength of their guilty pleas and sentenced on the same day.

[7] In the *Daniels* matter, the accused was sentenced to undergo 24 months' direct imprisonment, alternatively to pay a fine of R3 000. In the *Templern* matter, the accused was sentenced to undergo 36 months' direct imprisonment, alternatively to pay a fine of R5 000.

[8] Following the imposition of sentence, both matters came to the attention of the senior magistrate, who thereafter transmitted them to this Court for automatic review. The referral was prompted by the fact that the proceedings were not digitally recorded, owing to the malfunction of the recording machine, and that the accused in both matters are presently incarcerated. The referral rests upon two distinct grounds. First, the plea proceedings were defective in that not all the essential elements of the offence were canvassed with the accused. Secondly, the sentencing procedure is marred by material irregularities. The written record fails to reflect that the accused's previous convictions were formally proved and admitted; and that the accused's rights prior to sentence were explained. Both the accused and the prosecutor were afforded an opportunity to address the court before sentence.

[9] I did not deem it necessary to direct any queries to the magistrate in terms of section 304(2)(a) of the CPA. The Court has already been apprised that no digital recordings exist, owing to the malfunction of the recording equipment, and that the accused in both matters are presently incarcerated.

[10] It is axiomatic that the magistrates' court is a court of record. Section 4(1) of the Magistrates' Courts Act² expressly provides that a magistrates' court is a court of record, thereby imposing upon the presiding officer a duty to ensure that all proceedings are accurately and comprehensively recorded. Where the recording equipment malfunctioned, it was incumbent upon the magistrate to record the proceedings manually. The absence of a proper record constitutes a deficiency of such gravity that it may amount to a fatal irregularity, with the consequence that both conviction and sentence are liable to be set aside in their entirety.

² Section 4(1) of the Magistrates' Courts Act 32 of 1944

[11] This obligation is not a mere administrative formality; it is an essential safeguard of the constitutional right to a fair trial and underpins the proper functioning of both the appeal and review processes. Its purpose is to ensure that an appellate or review court is not left hamstrung in the discharge of its duties by the absence of court recordings. In light of these facts, I am satisfied that further enquiry of the magistrate would serve no practical purpose and would not advance the resolution of the issues before this Court.

[12] In order to determine whether the accused were correctly convicted, it is incumbent upon this Court to scrutinise the record of proceedings. The enquiry must be directed at the manner in which the magistrate conducted the questioning of the accused during the plea stage in each matter. Only by reference to the verbatim exchanges can it be ascertained whether the magistrate adequately canvassed the factual substratum so as to establish all the essential elements of the offences to which the accused purported to plead guilty. The record will accordingly be quoted *in extenso*, with particular regard to the nature, scope, and sufficiency of the questions posed and the answers elicited. This exercise is indispensable to determine whether the plea was properly taken and whether the conviction can safely stand.

[13] In *Daniels* matter the questioning and answers by the court in terms of section 112(1)(b) that led to her conviction reveals the following:

‘Court:	Do you plead guilty freely, voluntarily and without undue influence?
Accused:	Yes.
Court:	On what facts do you base your plea of guilty? In other words, why are you pleading guilty?
Accused:	Because I stole the items.
Court:	Why did you act in the way you did? Why did you do the things you describe?

Accused: I was gonna sell the items and buy electricity at home.

Court: What were you going to do with the items mentioned in the charge sheet if anything?

Accused: I was gonna sell them and buy electricity.

Court: Did you at the time realised that your conduct was wrong and unlawful and punishable in a court of Law?

Accused: Yes

Court: Did you have any excuse or reason to act in the manner you described?

Accused: No

Court: According to the charge sheet the value of the item was R93.98. Do you dispute the value?

Accused: No

Court: Do you admit that on 19 April 2026 at Mitchell's Plain in the district of Cape Town the goods or items in the charge sheet were 2x dairy milk 150g slabs?

Accused: Yes'

[14] The court's questions and answers that led to the conviction of the accused in *Templern* matter reveals the following:

'Court: Do you plead guilty freely, voluntarily and without undue influence?

Accused: Yes.

Court: On what facts do you base your plea of guilty? In other words, why are you pleading guilty?

Accused: Because I steal and took the item.

Court: Why did you act in the way you did? Why did you do the things you describe?

Accused: So, I steal to clean myself because my girlfriend said I will end up a bergie.

Court: What were you going to do with the items mentioned in the charge sheet if anything?

Accused: I was gonna use for myself.

Court: Did you at the time realised that your conduct was wrong and unlawful and punishable in a court of Law?

Accused: Yes

Court: Did you have any excuse or reason to act in the manner you described?

Accused: No

Court: According to the charge sheet the value of the item was R420.00. Do you dispute the value?

Accused: No

Court: Do you admit that on 24 April 2026 at Mitchell's Plain in the district of Cape Town the goods or items in the charge sheet were Uzzi perfume at R420.00?

Accused: Yes...'

Evaluation

[15] Before determining whether the magistrate correctly applied the provisions of section 112(1)(b) of the CPA and properly convicted the accused, certain broad observations regarding the section are apposite. The procedure contemplated therein is designed to ensure that the factual substratum of the plea is adequately canvassed through questions and answers elicited directly from the accused at the plea stage. As it was observed in *S v Naidoo*,³ that the section was enacted to shield accused persons from the consequences of an ill-considered plea of guilty. It ensures that a conviction will not follow unless the factual basis for criminal liability is properly established through the accused's own admissions. In this

³ *S v Naidoo* 1989 (2) SA 114 (A) at 121E-G

way, the provision serves both a protective and a corrective function, safeguarding the fairness of the proceedings and ensuring that criminal liability rests upon a clear and unequivocal factual foundation.

[16] The Full bench of this Division in *S v Samuels*,⁴ dealt with an analogous situation. I align myself with the sentiments expressed at paragraph 21 of that judgment where the court emphasised:

“Perhaps it is of paramount importance to mention as well that the purpose of questioning in terms of s 112 of the CPA is to protect an accused person, who, as in the instant case, is not only undefended but is clearly uneducated and exhibits no sophistication, from the adverse consequences of an ill-considered plea of guilty. At the risk of repeating what I have stated earlier in this judgment, *I reiterate that the questioning and answers must cover all the essential elements of the offence which the state in the absence of a plea of guilty would be required to prove.*” (my emphasis)

[17] The application of section 112 (1)(b) must be considered within the framework of the right to a fair trial enshrined in section 35(3) of the Constitution⁵. That right serves as the guiding principle for determining the ambit and depth of the questions to be posed by the presiding officer⁶.

[18] The judicial enquiry must accordingly be sufficiently probing to safeguard fairness, particularly where the accused is unrepresented, and to ensure that the plea rests upon a clear and informed admission of all the essential elements of the offence which are established through the accused’s own words thereby furnishing a factual basis for each element of the offence. Only when the admissions are clear, comprehensive, and unequivocal can they properly sustain

⁴ *S v Samuels* 2016 (2) SACR 298 (WCC) para 21

⁵ Section 35(3) of the Constitution of the Republic of South Africa, 1996

⁶ See *Commentary on the Criminal Procedure Act*, Service 54, 17-15.

a conviction. Anything less would undermine the protective purpose of section 112(1)(b) and compromise the fairness of the proceedings.

[19] Proceedings from that premise, the court must consider whether the explanation discloses a possible defence in law to the charge which the plea of guilty has been tendered. Should any doubt arise, the provisions of section 113 must be invoked, and the State will be required to prove its case in the ordinary course.

[20] I return to the facts of the present case. The senior magistrate has expressed the view that the magistrate failed to canvass all the elements of the offence during the plea proceedings. In order to determine whether such elements were indeed canvassed; it is instructive to first deal with requirements of the offence. The offence of theft comprises the following constituent elements: (a) an act of appropriation which includes the unlawful taking or assumption of control over property; (b) in respect of a certain type of property; (c) which takes place unlawfully and (d) intentionally.⁷

[21] For the element of intention to be satisfied, the accused must be aware that the item appropriated does not belong to him, must recognise that the owner would not have consented to its removal, and must harbour the resolve to permanently deprive the owner of such property.

[22] In *Riba v S*,⁸ Mthiyane JA reiterated the elements of theft as follows:

‘[t]heft, in substance, consists of the unlawful and intentional appropriation of the property of another (*S v Visagie* [1990] ZASCA 124; 1991 (1) SA 177 (A) at 1811). The intent to steal (*animus furandi*) is present where a person (1) intentionally effects an appropriation (2) intending to deprive the owner permanently of his property or control over his property, (3) knowing that the property is capable of being stolen, (4) knowing that he is acting unlawfully

⁷ CR Snyman, Criminal Law, Sixth Edition page 476

⁸ *Riba v S* [2009] ZASCA 111; [2010] 1 All SA 331 (SCA) para 8

in taking it (Milton *South African Criminal Law and Procedure* vol II 3rd ed at 616).’ (*S v Boesak* [2000] ZASCA 112; 2000 (1) SACR 633 (SCA) at para 97.)’

[23] The Appellate Division in *R v Sibiya*⁹ held that the accused cannot be convicted of theft unless he intended to deprive the owner permanently of the whole benefit of his ownership.

[23] In *Daniels* matter, the question posed to her by the magistrate was, “*on what facts to you base your plea of guilty? In other words, why are you pleading guilty?*” Her response was that “*because I stole the items*”. Similarly, with *Templern* matter, the same questioned of what facts did he based his plea of guilty was posed to the accused. His response was, “*because I steal and took the item*”.

[24] Notably, in both matters the magistrate failed to invite the accused to narrate the circumstances leading to their admissions of theft, nor did he probe the precise meaning they ascribed to the assertion that they had “stolen” the items. Instead, he appears to have subjective assumption that the accused must necessarily comprehend the legal import of the term “steal”. Such an approach is problematic, for it presupposes knowledge of the juridical elements of theft without eliciting from the accused a factual narrative that demonstrates their appreciation of the conduct constituting the offence.

[25] The judicial officer is not entitled to presume that an unrepresented accused appreciates the juridical content of legal terminology. Rather, the court must ensure that the accused’s admissions are grounded in a factual exposition demonstrating awareness of the conduct constituting the offence. The failure to interrogate the accused’s understanding of their admissions undermines the safeguards contemplated in section 112(1) (b) of the CPA, which requires the court to ensure that the plea of guilty is both informed and unequivocal.

⁹ *R v Sibiya* 1955 (4) SA 247 (A) 246

[26] On this score, it bears mentioning that in determining whether the accused's answers in response to the magistrate's questions are adequate for purposes of section 112(1)(b), the magistrate is not required to evaluate such answers as if it were weighing evidence to decide on the guilt or innocence of the accused. Rather, its task is simply to interpret them "to see whether they substantiate the guilty plea". As Didcott J aptly put it in *S v Mkhize*¹⁰ "The test, in short, is what the accused person said, not what the court thinks of it."

[27] Although the magistrate did not obtain a narrative account from the accused detailing the manner in which the offence was committed, the questioning and answers nonetheless yielded material admissions. In particular, the accused in *Daniels* matter expressly acknowledged that she stole the chocolates belonging to Pick n Pay, with the specific purpose of selling them. Her responses unequivocally confirm that she appreciated her conduct to be wrongful, unlawful, and punishable by a court of law. Had she not recognised the wrongfulness and unlawfulness of her conduct, such admissions would not have been forthcoming. The admissions accordingly, suffice to establish the essential elements of theft, namely appropriation, unlawfulness, and the intention to permanently deprive the lawful owner.

[28] Similarly, in the case of *Templern*, the accused admitted to stealing the perfume which did not belong to him, with the intention of permanently depriving Truworths of its property, as he indicated that he intended to use the item for himself. His admissions further demonstrate that he was fully cognisant that his conduct was unlawful and punishable by a court of law. These concessions adequately traverse the essential elements of theft, namely appropriation, unlawfulness, and the requisite intent to permanently deprive the lawful owner.

¹⁰ *S v Mkhize* 1978 (1) SA 264 (NPD) At 268 A-B.

[29] In light of the admissions made by both accused, and notwithstanding the shortcomings evident in the questioning conducted by the magistrate, I am satisfied that each accused admitted all the essential elements of the offence. The magistrate accordingly acted correctly in convicting them. The record reflects that the factual basis for the pleas was adequately established, and the convictions are in accordance with justice. The magistrate's approach was consistent with the requirements of section 112(1)(b) of the CPA, and the resultant convictions cannot be faulted.

The Sentence

[30] The procedure and powers of a review court are set out in section 304(2)(c) of the CPA. In relation to sentence, section 304(2)(c)(ii) empowers a review court to confirm, reduce, alter, or set aside the sentence or any order imposed by the magistrate's court. Further, section 304(2)(c)(v) provides that a review court is empowered to *remit the case to the magistrate's court with appropriate instructions* (my emphasis). The provision expressly authorises the review court to direct the magistrate's court to deal with any matter in such manner as the provincial or local division may deem fit. These provisions underscore the wide remedial powers vested in a review court to ensure that justice is achieved and that irregularities in sentencing or orders are appropriately corrected.

[31] In both matters, the magistrate imposed sentences of direct imprisonment coupled with an option of a fine. Upon perusal of the record, the proceedings of 19 May 2026 in relation to the *Daniels* reflect that the accused was present in court, and the following was recorded:

‘PP – request the court to proceed with the plea and that the accused has 19 previous convictions; 17 of theft and two of assault and drugs.

Court – sentenced to 24 months direct imprisonment or R3000, 00 fine.
Accused remains in custody until sentence is complied with in full.’

[32] Similarly, in *Templern* matter, the record of proceedings on 19 May 2026 reflects that the accused was present in court, and the following was recorded:

‘PP – request the court to proceed with the plea in terms of section 112(1)(b) of the CPA and that the accused has 26 previous convictions of theft. Latest was October 2020.

Court – sentenced to 36 months direct imprisonment or R5000, 00 fine because there is no element of stopping theft but propensity for theft. Accused is in in custody and will only be released if he complied with the sentence in full.’

[33] It is prudent that, before embarking upon the sentencing stage, the prosecution be afforded an opportunity to prove previous convictions of the accused, if any. In turn, the accused must be given a fair opportunity either to admit or to deny the existence of such convictions. This procedure is integral to ensuring that sentencing is informed by a complete and accurate record, and that the accused’s rights are safeguarded.

[34] In the present matters, notwithstanding that the presiding magistrate was informed that both accused had previous convictions, the record is silent as to whether those convictions were formally proved or admitted. In the *Daniels* matter, save for the prosecutor informing the magistrate that the accused had 19 previous convictions, the record is devoid of any indication that such convictions were formally proved or that the accused admitted them.

[35] Similarly, in the *Templern* matter, the record merely reflects that the prosecutor advised the presiding magistrate that the accused had 26 previous

convictions, the most recent being in October. Again, there is no indication that these convictions were proved or admitted in accordance with proper procedure.

[36] I am inclined to conclude that the prior convictions were the decisive factor that persuaded the presiding magistrate to impose the sentences ultimately handed down, particularly when viewed against the relatively minor nature of the offences committed. If this inclination is correct, then it was unfortunately premised on a fundamental error. In the absence of proof or admission of the previous convictions, the magistrate was not entitled to rely upon them in determining sentence. To do so constitutes a material irregularity, as it undermines both the fairness and the transparency of the sentencing process. The reliance on unproven convictions compromises the integrity of the proceedings and renders the sentences imposed susceptible to being set aside on review.

[37] Not only does the record omit any reference to the proof or admission of the accused's previous convictions, but in both matters the record fails to reflect the sentencing proceedings themselves. There is no indication that the accused were afforded an opportunity to present mitigating factors, nor that the prosecution was invited to advance aggravating considerations. These omissions are fundamental. The principles of sentencing, commonly referred to as the triad in the well-known matter of *S v Zinn*,¹¹ require that the court balance (a) the nature and seriousness of the offence, (b) the interests of society, and (c) the personal circumstances of the offender. The magistrate was obliged to consider these factors before imposing sentence. This was plainly not done in the present matters. To sentence an accused without first hearing evidence or submissions in mitigation and aggravation constitutes a gross irregularity. Such conduct

¹¹ *S v Zinn* 1969 (2) SA 537 (A).

infringes upon the accused's constitutional right to a fair trial as enshrined in section 35(3) of the Constitution.¹²

[38] In *S v Calitz en 'n Ander*,¹³ the appellants pleaded guilty in the magistrate's court. The magistrate imposed sentence but his reasons for sentence did not appear from the record. In response to the notice of appeal, the magistrate requested that his '*ex tempore judgment*' be regarded as reasons for the purposes of appeal. It was held, inter alia "*that it had to be emphasised that the proper protection, on the one hand, of the appellant's constitutional right to an appeal and, on the other hand, the community's interests that offenders be properly punished, required of a judicial officer that thorough attention be paid to the formulation and furnishing of reasons for sentence. Without it sound criminal justice was hampered.*" (my emphasis) In the context of the present matter, the failure of the trial magistrate to furnish reasons for both the convictions and sentences, falls squarely within this admonition.

[39] In *S v Zwane*,¹⁴ Msimang J, (as he then was), in considering the origin and purpose of the provisions of sec 302(3)(a) of the CPA which governs sentences imposed upon an accused who was not assisted by a legal adviser, succinctly observed:

'In the ensuing legislation the sentiment expressed in the said passage was enacted into law in the form of the provisions of s 302(3)(a) of the Criminal Procedure Act, thus removing the system of automatic review from the benefit of the State and making it available solely for the benefit of the convicted person who had been unrepresented during his trial. It must accordingly follow that where, in terms of the provisions of s 304(1) of the Criminal Procedure Act, it must appear to a reviewing Judge "that the proceedings are in accordance with justice", what is meant is that those proceedings must be in accordance with real and substantial justice insofar as the interests of that convicted person are concerned. In my view, therefore, the system must

¹² Section 35(3) of the Constitution of the Republic of South Africa, 1996.

¹³ *S v Calitz en 'n Ander*¹³ 2003 (1) SACR 116 (SCA).

¹⁴ *S v Zwane* 2004 (2) SACR 291 (N) at 294C-G

always be utilised in favour of those interests. In *S v Madonda* 1979 (3) SA 795 (Tk) the automatic review in the ordinary course was being sought in the proceedings in which the accused had been wrongly acquitted. In declining to exercise such jurisdiction the Court made the following remarks: “The purpose of review in the ordinary course is to afford a safeguard against unjust convictions or sentences. It serves to protect accused persons from injustice due to errors or irregularities which may occur in the trial of the more serious cases heard by the lower courts. It was not intended that this court should on review correct mistakes which may occur in the lower courts, but which do not result in the conviction or sentence of the accused, nor is this court disposed to embark upon such a task which is not authorised by the Act.”

[40] The dictum in *Calitz and Zwane* underscores that review proceedings are designed to safeguard accused persons against unjust convictions or sentences, particularly where they are unrepresented. In both matters, not only were the sentencing proceedings irregular, but I further note that on the front of the J15, the magistrate failed to endorse the sentences in either case. This omission compounds the irregularities already identified. The protective rationale of section 302(3)(a) of the CPA is precisely to ensure that sentences imposed upon unrepresented accused are subjected to automatic review, thereby safeguarding their constitutional right to a fair trial. The absence of endorsement on the J15, coupled with the failure to properly record sentencing proceedings, undermines the integrity of the process and reinforces the necessity of review intervention.

[41] I further observe that, in both matters, the magistrate directed that the accused remain in custody until such time as the sentence imposed has been fully complied with. Although not expressly articulated in the record, it appears that the magistrate sought to invoke the provisions of section 276B (1) of the CPA.

[42] Section 276B (1) of the CPA empowers the court to impose a non-parole period. It stipulates that:

- (a) If a court sentences a person convicted of an offence to imprisonment for a period of two years or longer, the court may as part of the sentence, fix a period during which

the person shall not be placed on parole.
(b) Such period shall be referred to as the non-parole-period, and may not exceed two thirds of the term of imprisonment imposed or 25 years, whichever is the shorter.

[43] The section 276B non-parole order has been described as “an order which constitutes a determination in the present regarding the future conduct of the person affected thereby, directing that such person does not deserve release on parole in the future.”¹⁵ Such an order ought properly to be made only in exceptional circumstances, which must be established through investigation of salient facts, the presentation of legal argument, and, where necessary, the tendering of further evidence upon which the decision for non-parole rests. In determining a non-parole period following the imposition of punishment, the court is, in effect, required to make a prediction on what may well be inadequate information concerning the probable future behaviour of the accused. Accordingly, a need for circumspection arises, for a proper evidential foundation is indispensable before such an order may justifiably be made.¹⁶

[44] It is trite that the statute does not provide for any circumstance in which a court may order that an accused is not entitled to parole. Section 276B of the CPA authorises only the fixing of a non-parole period and does not empower the judiciary to extinguish parole eligibility altogether.

[45] It must be borne in mind that the determination of parole remains a matter falling squarely within the competence of the executive correctional authorities, subject to the applicable statutory regulation. Once a sentence has been imposed, the administration and execution thereof; including matters such as parole or remission; fall exclusively within the competence of the executive authorities. Courts are accordingly enjoined to respect this constitutional demarcation, lest they transgress into functions that the Constitution has deliberately entrusted to

¹⁵ *Strydom v S* [2015] ZASCA 29 at para 16

¹⁶ *S v Stander* [2011] ZASCA 211; 2012 (1) SACR 537 (SCA) para 20

another branch of government. This guiding principle of authority accords with the doctrine of separation of powers and ensures that each branch of government operates within its constitutionally assigned sphere. In *S v Stander*,¹⁷ the court held that:

‘Despite the fact that s 276B grants courts the power to venture onto the terrain traditionally reserved for the executive, it remains generally desirable for a court not to exercise that power. ... Ultimately, the case-management committee submits a report on each prisoner to the relevant Correctional Supervision and Parole Board. The report deals with the conduct, disciplinary record, adaptation, training, aptitude, industry, physical and mental state of the prisoner and the likelihood of his or her relapse into crime. In order to fulfil these functions the Department employs suitably skilled people. The Correctional Supervision and Parole Board considers the report submitted to it and also takes into account the views of the complainant in certain identified instances of serious crime. Such a complainant has the right in terms of s 299A of the Act to attend the meeting of the Correctional Supervision and Parole Board and make representations when the parole of the perpetrator is considered. This serves to illustrate that the consideration of the suitability of a prisoner to be released on parole requires the assessment of facts relevant to the conduct of the prisoner after the imposition of sentence. This short summary of the statutory procedure prescribed for the consideration of a prisoner’s release on parole illustrates why the Department, and not a sentencing court, is far better suited to make decisions about the release of a prisoner on parole and why it remains desirable to respect the principle of the separation of powers in this regard.’

[46] Accordingly, a court which imposes a sentence with the express provision that the prisoner shall undergo a specified period of direct imprisonment and is not entitled to remission or parole acts arbitrarily and in flagrant disregard of the constitutional rights to freedom of the prisoner, as such an order contravenes section 12 of the Constitution. Such an order also constitutes a violation of the

¹⁷ *S v Stander*¹⁷ 2012 (1) SACR 537 (SCA) at para 12 and 13

doctrine of separation of powers, the central objective of which is to secure a system of checks and balances.

[47] It is therefore imperative that, where a magistrate seeks to invoke the provisions of section 276B of the CPA, the court must determine whether exceptional circumstances exist and must articulate those circumstances with clarity in its judgment, so as to avoid encroachment upon the executive terrain. Absent such articulation, as is evident in the present matters, the order amounts to a usurpation of the executive function, which properly resides in the Department of Correctional Services, the entity vested by the legislature with the authority to regulate and determine the dynamics of parole. In my view, the magistrate ought not to have conditioned the sentence by directing that the accused were not to be released until they had fully complied with the sentence imposed.

[48] I note with concern that the date of appointment of the presiding magistrate was 4 May 2026, scarcely two weeks before these two cases came before him. This is disturbing, as the record reveals that the magistrate lacked even the most basic knowledge of how to properly conduct criminal proceedings. It is prudent that whenever a new magistrate is appointed—particularly an acting magistrate, who is not ordinarily afforded the benefit of formal training prior to assuming judicial office; such magistrates should receive proper inhouse training, guidance, and mentoring. The glaring errors committed in these two cases point not merely to inexperience but to a lack of adequate guidance and oversight.

[49] The irregularities evident in the present matters underscore the pressing need for systemic intervention in the appointment and oversight of newly appointed acting magistrates. It is imperative that the judiciary ensures that such appointees are adequately prepared to discharge their duties in accordance with constitutional and statutory requirements. It is my view that a structured

programme should be developed to assist the newly appointed acting magistrates which encompassing both formal induction training and ongoing mentorship as follows:

[50] *Firstly*, structured induction training should be mandatory for all newly appointed acting magistrates. Such training must be practical, case-based, and tailored to equip acting magistrates with the skills necessary to avoid fundamental irregularities. *Secondly*, a system of mentorship and guidance should be instituted, whereby experienced senior magistrates provide ongoing support and supervision to new appointees. This will ensure that errors arising from inexperience are identified and corrected at an early stage.

[51] *Thirdly*, continuous monitoring and evaluation of newly appointed acting magistrates should be regarded as a priority. Regular review of their court records, judgments and sentencing practices will serve both as a safeguard against irregularities and as a mechanism for professional development. And, *finally*, the judiciary should adopt a policy of progressive oversight, ensuring that acting magistrates, who may not have had the benefit of formal judicial training prior to appointment, are subject to closer scrutiny and support until they demonstrate competence and consistency in their judicial functions.

[52] These measures are essential to safeguard and uphold the integrity of the judicial process, to prevent irregularities of the kind encountered here. This will ensure that the constitutional rights of accused persons are not compromised by avoidable procedural missteps. In the end, public confidence in the administration of justice will be maintained.

Conclusion

[53] Upon consideration of the records transmitted for review, it is evident that the proceedings in both matters were marred by material irregularities. The central defect lies in the magistrate's failure to adhere to the established sentencing procedure. After conviction, the magistrate proceeded directly to the imposition of sentence without affording either the accused and the prosecution an opportunity to lead evidence or make submissions in respect of mitigating and aggravating circumstances.

[54] This omission constitutes a violation of the accused persons' constitutional rights under section 35(3)(a) of the Constitution, which guarantees the right to a fair trial. This right to a fair trial necessarily encompasses the right to be heard before sentence is passed, particularly on issues that may materially affect the nature and severity of the punishment imposed.

[55] The magistrate's conduct further contravenes the procedural safeguards entrenched in the CPA, which prescribes that sentencing must follow a balanced consideration of all relevant factors, including the personal circumstances of the accused, the interests of society, and the gravity of the offence. By failing to invite submissions on these aspects, the magistrate deprived the proceedings of the fairness and transparency required by law.

[56] Accordingly, the irregularities identified are not merely technical but amount to gross irregularities that vitiate the sentencing process in both matters. The sentences imposed therefore cannot stand and fall to be reviewed and set aside under section 304(4) of the CPA.

[57] However, I am mindful of the guidance of the Supreme Court of Appeal in *S v Mshengu*¹⁸, where the court observed that section 312 should not be invoked if compliance with the section would be unfair. To this end, I find the following except from that judgment apposite. The court stated:

‘The purpose of s 312 is to prevent an injustice which may occur if an accused person were to escape punishment for his or her crime only because his or her conviction was set aside on the ground that there was a failure to comply with s 112 of the Act. *But an injustice cannot occur where the accused has served the entire sentence by the time the conviction is set aside on appeal.* Nor can it occur where a fresh conviction cannot be achieved following a remittal to the trial court.... *There can be no justification for ordering that an accused person, who has already served the entire punishment, be subjected to a second trial. Such an order would be inconsistent with the right to a fair trial.* In my view it could never have been the intention of the legislature that a court is obliged to comply with the section irrespective of the injustice or unfairness that it may cause.’ (my emphasis)

[58] Notwithstanding that the offences may have been of a relatively minor nature, the accused were correctly convicted. It must be emphasised that it would constitute a failure of justice if both accused were to escape liability merely on the basis of technical irregularities. The jurisprudence is clear that review proceedings are intended to safeguard against unjust convictions or sentences, not to permit offenders to evade accountability through procedural lapses.

[59] The circumstances of these cases demonstrate that the accused would not suffer prejudice if the matters were remitted to the magistrate’s court for sentencing proceedings to properly commence. On the contrary, justice would be advanced by ensuring that the sentencing process is conducted in accordance with constitutional and statutory requirements, thereby vindicating both the rights of the accused and the interests of society.

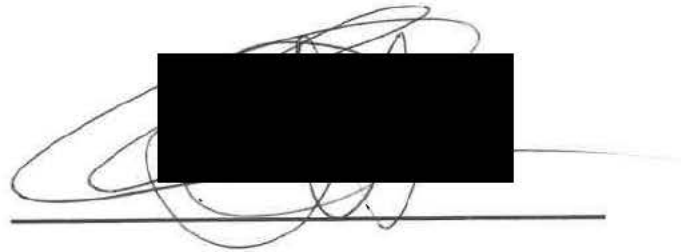
¹⁸ *S v Mshengu* 2009 (2) SACR 216 (SCA) para 17

[60] In view of these considerations, the sentence of the accused in both cases were in not accordance with justice. Accordingly, the appropriate course is to remit the matters to the trial court in terms of section 304 of the CPA, with instructions that sentencing proceedings be conducted afresh, in compliance with the principles articulated in *S v Zinn*, the safeguards of section 302(3)(a) of the CPA, and the constitutional right to a fair trial.

Order

[61] In the result, the following order is made:

- (a) The conviction in respect of both matters, is confirmed.
- (b) The sentences in respect of both proceedings are reviewed and set aside.
- (c) In terms of section 304 (2) (c) (v) of the CPA, the matters are remitted back to the same presiding magistrate to sentencing proceedings to be conducted afresh on both cases, with instructions that the presiding magistrate had regard in compliance with the principles articulated in *S v Zinn*, the safeguards of section 302(3)(a) of the CPA, and the constitutional right to a fair trial.
- (d) The State is ordered to bring both accused before court within 1 days of receipt of this judgment for purposes of sentence proceedings.
- (e) A copy of this judgment must be brought to the attention of the Chief Magistrates, Mitchell's Plain.



S. YAKE

ACTING JUDGE OF THE HIGH COURT

I agree and it is so ordered.



pp

D. THULARE

JUDGE OF THE HIGH COURT