



**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

Case No.: A49/2024

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED: YES
<u>11 AUGUST 2026</u>	
DATE	SIGNATURE

In the matter between:

ALBERT SIBUSISO TSHABALALA

APPELLANT

and

THE STATE

RESPONDENT

JUDGMENT

CORAM: RATSHIBVUMO AJP, MALANGENI *et* FOURIE AJJ

Order:

1. The appeal is dismissed.
2. The order of the court *a quo* is confirmed.
3. The case is remitted to the Regional Court for further hearing and conclusion of the sentence proceedings before a different Magistrate.

Criminal Appeal and Review. Criminal Law and Procedure.

Difference between Special Reviews in terms of Sec 304A of the Criminal Procedure Act No. 51 of 1977 and Review Applications in terms of Rule 53 of the Uniform Rules of the High Court.

The appropriate procedure to adopt when an accused wishes to have the conviction set aside.

Recusal after conviction, but before sentencing of the accused: Mero motu recusal by the Magistrate following attempts to bribe him.

Application of section 275 of the Criminal Procedure Act

Accused preferring the trial to start de novo. Application for special review at the accused's request. Complaints against the Magistrate filed after his recusal.

Submission of reasons for special review referral by the Magistrate.

Summary:

The Appellant was convicted by the Regional Magistrate on several charges. While the sentencing was still pending, the Magistrate placed on record that he was approached with bribe attempts. He was, as such, considering having the trial proceed on sentencing before a different Magistrate in terms of section 275 of the Criminal Procedure Act. Before making the necessary order, as he awaited the transcribed record, the Appellant raised complaints of bias against him through an affidavit urging him to submit the matter to the High Court on special review for consideration and for the conviction to be set aside. The Magistrate indicated that the Appellant should bring a review and then he would respond thereto, and he continued to recuse himself for reasons he had indicated earlier, referred the matter to a new Magistrate for continuation with the sentence, and made no comment about the complaints.

The Appellant's application was repeated before the new Magistrate with wrong (misrepresented) facts to those contained in the initial application, and the new Magistrate agreed to send the matter on special review. On review, the Review Court refused to set aside the conviction and ordered that the trial should proceed on sentencing before another Magistrate.

Leave to appeal was refused but granted on petition to the SCA.

The full court of this Division found irregularities in the manner the matter was sent for special review and dismissed the appeal, thereby confirming the Review Court's order.

THE COURT:

Introduction.

[1] This is an appeal against the judgment and Order of Moleleki AJ of this Division dated 10 March 2025 (court *a quo*) in which she presided over a review brought in terms of Section 304A of the Criminal Procedure Act, No. 51 of 1977 (the Act), and ordered that the trial should proceed before a different Magistrate.

[2] Leave to appeal having been refused in the court *a quo*, it was subsequently granted to this Court by the Supreme Court of Appeal on petition. The appeal is opposed by the State represented by the Director of Public Prosecutions, Mpumalanga.

Background.

[3] The Appellant stood trial before the Specialised Commercial Crimes Court sitting in the Regional Court at Mbombela. The trial commenced over five years ago, when he pleaded to the charges levelled against him on 11 March 2021. To date, it remains incomplete.

- [4] After several appearances, the Appellant was convicted on some of the charges; after which, the matter was postponed for sentencing purposes.
- [5] On a date following the conviction, the Presiding Officer (the trial Magistrate) placed on record that he had been approached by a person known to him, who attempted to bribe him to impose a non-custodial sentence on the Appellant. At that stage, he intimated to both parties his desire to have the proceedings finalised before a different Magistrate to the extent that such is permissible in terms of section 275 of the Act. Both the State and the defence made it clear that they would prefer that he should recuse himself and that the trial should proceed before a different Magistrate. Importantly, the defence also indicated that they would research whether only the sentencing should proceed before another Magistrate, or whether the whole trial should start afresh.¹ Before the formal recusal could be done, the trial Magistrate postponed the matter to 01 December 2022, to oversee the transcription of the record that would be laid before another Magistrate.
- [6] When the matter was called on 01 December 2022, and prior to the trial Magistrate expressing any sentiment or making any ruling, the defence requested to read an affidavit into the record wherein the Appellant raised certain concerns against the trial Magistrate, regarding the manner in which he conducted the trial and highlighting incidents that he claimed created a perception of bias on his part. Amongst them were the following incidents:

¹ See p. 010-5 to 010-8 of the paginated bundle on CaseLines.

[6.1] On 11 October 2021, after the matter had been adjourned, following his conviction, the complainant in the trial was seen attending the office of the trial Magistrate alone.²

[6.2] On 13 March 2021, the trial Magistrate informally indicated to the Appellant's erstwhile attorneys and the prosecutor that he had been attacked by unknown perpetrators after the previous adjournment whilst driving home. This gave the Appellant the impression that the trial Magistrate thought he was the person behind that incident.

[6.3] On 05 November 2021, the Appellant's legal representatives attended the Chambers of the trial Magistrate, indicating their intention to seek a postponement of the matter, where he allegedly indicated that the delay would upset the complainant.

[7] With the above, the Appellant requested that the matter be sent on special review in terms of section 304A of the Act "for consideration by the High Court, and for the conviction to be set aside." The Magistrate thereafter recused himself and referred the matter under the auspices of Section 275 of the Act to a different Magistrate to deal with the sentencing of the Appellant, as he had intimated before. He did indicate, though before his recusal, in apparent reference to the earlier expressed intention by the Appellant to take the matter to the High Court on review, that he would not just respond to the review application from the bench, but would await the initiation of that review, whereafter he would make a statement in response.

² See p. 010-21 of the paginated bundle on CaseLines.

- [8] The trial Magistrate must have been referring to review proceedings as provided in Rule 53 of the Uniform Rules of the High Court, as this is the only manner in which the High Court can review criminal trial proceedings at the behest of an accused person. The accused did not bring a review application, and the trial Magistrate did not accede to sending the matter on special review in terms of section 304A.
- [9] The trial record was thereafter placed before another Magistrate (the new Magistrate) for continuation in terms of section 275 of the Act. At this stage, the Appellant filed with the new Magistrate an application for him to send the matter on special review in terms of section 304A of the Act on the same grounds previously raised with the trial Magistrate. Although the grounds and facts were the same, it is important to note that they were slightly, but very importantly, changed in respect of the alleged visitation of the trial Magistrate by the complainant in his chambers. Before the new Magistrate, the Appellant alleged that this visitation took place before he was convicted.³ These shall be referred to as misrepresented facts.
- [10] After hearing the Appellant's submissions, the new Magistrate acceded to the request and referred the trial proceedings for a special review in terms of section 304A of the Act.
- [11] On review, the Appellant and the Respondent were both requested to make submissions, after which, the Review Court refused to set aside the Appellant's conviction, but instead, it directed that the trial should proceed before a different Magistrate.

Rule 53 Review Application versus section 304A Special Review.

³ See p. 006-1382 of the paginated bundle on CaseLines.

[12] The referral from the Lower Court to this Court was in terms of Section 304A of the Act. This section provides:

- (a) 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 proceeding, to the registrar of the Provincial Division having jurisdiction, and such registrar shall, as soon as is 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.

[13] In the matter at hand, the record reflects that the Appellant made an application in terms of Section 304A to the new Magistrate after the trial Magistrate had recused himself.

[14] The procedure followed by the Appellant seems strange under the circumstances. During the engagement between the respective parties, the trial Magistrate indicated to the respective parties that a review by the Appellant would lie with the High Court, and not with leave of the Magistrate's Court. Such a review would accordingly have to be brought under the auspices of Rule 53 of the Uniform Rules of the High Court.

[15] Rule 53 of the Uniform Rules reads as follows:

“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairperson of the court,

tribunal or board or to the officer, as the case may be, and to all other parties affected

- (a) calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and
- (b) calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to despatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.” [emphasis added].

[16] Section 304A was introduced into the Act by s 22 of Act No. 33 of 1986 in response to a call for legislative intervention by Malherbe AJ in *S v Seloke & Ander*,⁴ 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).”

[17] If evaluation is accordingly made of what the Court enunciated in *S v Seloke supra*, it is in essence that the incorporation of Section 304A should be premised on the new Magistrate evaluating a matter and, of his own reason, deciding that he would not have convicted the Appellant, and that, in his view, the conviction of the Appellant was not in accordance with justice.

⁴ 1983 (2) SA 455 (O) at 457 B - C.

[18] This Court, however, takes note that when section 304A was finally introduced, it did not limit the source of the magistrate's reasoning. It suffices to state for purposes of this appeal that this section is not available for utilisation by an accused person, but by the Magistrate who, either *mero motu* or after he is so convinced by any of the parties, is able to make a mind of his or her own in which doubt exists as to whether the proceedings are in accordance with justice.

[19] Section 304A of the Act caters for a Magistrate who, after the accused's conviction, but before the sentence is imposed, harbours doubts on whether the proceedings were conducted in accordance with justice. Understanding that once a Magistrate pronounces him/herself in respect of the merits of the case, he/she becomes *functus officio*, this section allows the Magistrate to send the proceedings to the High Court for review. While this approach is permissible, it must be applied sparingly and, in those cases, where the continuation of a case to its conclusion will result in injustice. See *S v Ncube and Another*⁵ where the full bench remitted a trial to the Magistrate for sentence, where he had sent the matter on special review after expressing doubts about the conviction of the accused.

[20] In *S v Makhubele*,⁶ before remitting the matter back for sentencing in a matter where the magistrate had convicted an accused but later expressed doubt, saying the accused should have been acquitted, Kriegler J 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

⁵ (Review) (CA&R25/2024) [2025] ZANHC 40 (5 May 2025)

⁶ 1987 (2) SA 541 (T) at 545 A - B,

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, Section 304A is not to be invoked in the absence of such a failure of justice.”

- [21] In *S v Klaase*,⁷ the court confirmed the principles expressed in *Makhubele*,⁸ 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.

Irregular referral in terms of Section 304A.

- [22] A plethora of mishaps appear to have been at play, resulting in the referral of issues that were not before the new Magistrate, making their way through the backdoor and resulting in the matter being sent on special review. First, section 304A expressly provides that the Magistrate or Regional Magistrate, as the case may be, “shall, without sentencing the accused, record the reasons for his opinion and transmit them, together with the record of the proceedings” [own emphasis]. No reasons were furnished by the new Magistrate upon which his opinion could be read. The closest he furnished to the “reasons” is a letter in which he “agrees with the defence.”

- [23] The statement to the effect that the new Magistrate agreed with the defence is too wide in the circumstances of this case. In so doing, sight was lost of the fact that the issues being raised had been raised before another court

⁷ 1998 (1) SACR 317 (C) at 322 C - F.

⁸ *Supra*.

of equal status for adjudication, in which it was agreed that the defence would bring a review application in which the trial Magistrate would be cited and would make a statement responding to all the allegations was not given any weight.

[24] At no stage during the trial did the Appellant apply for the trial Magistrate to recuse himself. Had this been done, there would be a basis to appeal against the ruling, in which case the appeal court would have the privilege to understand the reasons for the decision. The Appellant's complaints were treated as a fact, thereby denying the trial Magistrate the *audi alteram partem* – the right to be heard, due to no fault of his own.

[25] For the reason that the trial Magistrate was not heard, this Court remains in the dark as to what he would have said in respect of the following: The two incidents complained about (involving informal discussion in chambers, with the legal representatives) are alleged to have taken place while the trial was still going on, long before the conviction. Would he confirm the veracity thereof and, if so, why was there no recusal application brought at that stage?

[26] The incident in which it is alleged that the complainant entered the trial Magistrate's chambers is said to have taken place on the date the Appellant was convicted. Would he confirm the veracity thereof? Did he know this complainant prior to the commencement of the trial? Did he have an appointment with the complainant, or did he simply walk into the office unarranged? Upon entering his chambers, if he did, did he find him (the trial Magistrate)? If he did, did he tell him why he was there and what was his response? Did he talk about the case, and if he did, what was it about now that there was a verdict already?

- [27] The witness who is alleged to have seen this incident claims to have told the Appellant, who was with his family members. The case was postponed several times thereafter, and this incident (as is the case with all others) was not mentioned on any of the subsequent appearances. No reasons were furnished or sought over this.
- [28] At the time the Appellant raised his complaints before the trial Magistrate, he did not ask him to recuse himself, for he had essentially done so already on his own, for reasons that he disclosed, but was waiting for the record to be transcribed in order to invoke section 275 of the Act. As a result, the Appellant knew that there was no need for the recusal application. The aim of raising all the complaints was to help create doubt in the mind of the trial Magistrate that the proceedings may not have been in accordance with justice. In so doing, the trial Magistrate could then act in accordance with section 304A of the Act.
- [29] That attempt failed in that the trial Magistrate did not accede to this. Since he was recusing himself anyway, albeit for different reasons, he believed, and rightly so in our view, that the proper approach was for the Appellant to launch a review application in the High Court and then he would have an opportunity to respond.
- [30] The choice on whether to make use of a special review or a review application is not a complicated one. The difficulty could be in the costs involved. In choosing a special review, the costs will be less for the parties in that they piggyback on the Magistrate who will have the record transcribed at State's expense, and no matter the outcome, there shall be no costs order against any of the parties. While this may seem efficient and cost-friendly, the disadvantage is that a party wishing to utilise it has to create an opinion in the mind of the Magistrate and gets through his/her

views through him as his/her mouthpiece. The disadvantage is that, as happened in this case, once an opinion is fed into the mind of the respective Magistrate through misrepresented fact, the whole referral for special review becomes irregular.⁹

[31] A review application, on the other hand, is the opposite of the above in that it is initiated as motion proceedings by an aggrieved party, at his/her cost. Those costs include the legal, transcription and the opponent's legal costs in case the application is lost. The advantages are obvious, as one presents his/her argument first-hand and on equal footing, and everyone is granted a right to be heard. These advantages are missing in the choice made by the Appellant here.

[32] The Appellant complains continually that the trial Magistrate did not address any of the concerns raised or allegations levelled against him. He portrays a picture of a Magistrate who knew of the allegations against him and chose not to address them. In so doing, credence is given to the allegations, and an impression is created that perhaps he chose not to respond because they were true. But the Appellant knows that the trial Magistrate indicated what he believed was the proper approach rather than simply making allegations in a vacuum.

[33] After he was told to launch a review in the High Court by the trial Magistrate, the Appellant's counsel responded, "we will make the necessary arrangements pertaining to the review."¹⁰ The trial Magistrate is still waiting for the review so that he could make a statement. Instead, the Appellant went to present the same complaints before another Magistrate with the hope of achieving what he failed to achieve before the

⁹ See para 39-42 hereunder.

¹⁰ See p.010-58 of the paginated bundle on CaseLines.

trial Magistrate. It would be amiss, therefore, to suggest that the trial Magistrate chose not to address the issues raised and for this Court to draw any negative inference from this.

Grave injustice.

- [34] The common denominator in both forms of review in respect of un-terminated proceedings is that the High Courts will be slow to intervene, except in rare and limited instances, to avoid grave injustice. In the words of Ogilvie Thomson, “[w]hile a Superior Court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the un-terminated course of criminal proceedings in a court below, it certainly has the power to do so and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. In general, however, it will hesitate to intervene; especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below and to the fact that redress by means of review or appeal will ordinarily be available.”¹¹

- [35] In *Ismail and Others v Additional Magistrate, Wynberg and Another*,¹² Steyn CJ said,

“Although there is no sharply defined distinction between illegalities which will be restrained by review before conviction on the ground of gross irregularity, on the one hand, and irregularities or errors which are to be dealt with on appeal after conviction, on the other hand, the distinction is a real one and should be maintained. A Superior Court should be slow to intervene in un-terminated proceedings in a court below and should generally speaking confine the exercise

¹¹ *Wahlhaus and Others v Additional Magistrate, Johannesburg and Another* 1959 (3) SA 113 (A) at p. 120B –C. See also *Jojwana v Regional Court Magistrate and Another* 2019 (6) SA 524 (ECM) para 8

¹² 1963 (1) SA 1 (A) at p. 5G-H.

of its powers to ‘rare cases where grave injustice might otherwise result or where justice might not by other means be attained.’”

[36] The High Courts have maintained a firm stance when it comes to interference in the middle of the lower court’s proceedings. It is an obvious result that interference results in piecemeal adjudication. In *Motata v Nair No and Another*¹³, it was stated that:

“[9] It is trite that as a general rule a High Court will not by way of entertaining an application for review, interfere with incomplete proceedings in a lower court. As stated in *Wahlhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 119G, the High Court will not ordinarily interfere whether by way of appeal or review before a conviction has taken place in the lower court even if the point decided against the accused by a magistrate is fundamental to the accused’s guilt....”

[37] When asked to demonstrate grave injustice that the Appellant would suffer without interference in uninterminated proceedings by this or the Review Court, the Appellant argued that he could be given direct imprisonment. But that is a risk every accused person faces when charged with a crime in a criminal trial. In fact, that risk would still exist even if the trial starts *de novo*. This, however, does not mean that this Court accepts that the possible imposition can be regarded as irreparable harm or substantial prejudice for which there shall be no recourse. The authorities referred to above¹⁴ make it clear that more is required than just the looming sentence.

[38] In *Swart v Regional Magistrate Jonker and Another*¹⁵ it was held in this Division that the question should be whether justice could not by other means be attained if the trial was to be allowed to run its course. The court

¹³ 2009 (1) SACR 263 (T) at paragraph 9.

¹⁴ See para 19-21 above.

¹⁵ (2881/2018) [2022] ZAMPMBHC 53 (14 July 2022) para 9 & 12.

concluded in that matter that for as long as the appeal avenue remains open, it cannot be said that an accused would suffer grave injustice where justice might not by other means be attained.

Magistrate's opinion based on misrepresentations.

- [39] What appears to be persuasive in the submissions made before the new Magistrate is the misrepresented facts regarding the visitation of the trial Magistrate by the complainant. This meeting or visitation was not witnessed by the Appellant personally, but by a person whose affidavit was read earlier before the trial Magistrate.¹⁶ In the affidavit, it was alleged that the visitation took place after the Appellant's conviction. For some unexplained reason, the Public Prosecutor who represented the State before the new Magistrate did not correct the true allegation regarding this visit. It will be noted, though, that the misrepresented facts were made by the counsel for the defence, in reply to the submissions made by the Public Prosecutor, thereby denying him a right to reply since, procedurally, it would be irregular to reply to a reply. Whether this was deliberate is not an issue for determination by this Court.
- [40] If anyone thought the misrepresented facts were made in error, it is common cause that they were repeated several months later, when the Appellant presented a supplementary affidavit dated 23 July 2025, in support of the petition before the Supreme Court of Appeal, which was later granted. In essence, the new Magistrate (and later the Supreme Court of Appeal) were therefore informed that the trial Magistrate had a private meeting with the complainant (minutes) before he handed down the verdict.

¹⁶ See p. 010-25 to 010-27 of the paginated bundle on CaseLines.

- [41] Section 304A requires a Magistrate to form an opinion of his own to the effect that the proceedings were not in accordance with justice and record the reasons for consideration by the High Court on review. Now that the new Magistrate did not furnish the reasons, these misrepresented facts are part of his reasons in forming the opinion required in terms of section 304A of the Act when he wrote that he agreed with the defence.
- [42] With an opinion made from the misrepresented facts, the new Magistrate referred this matter for special review. This makes the whole transfer irregular as it was based on misrepresented facts. It is trite that a judgment procured by the fraud committed by one of the parties, or by fraudulently withholding material information, cannot be allowed to stand.¹⁷ The legal principle *ex turpi causa non oritur actio* rings true throughout the foundation of the South African Legal regime, and indicates that from a dishonourable cause an action does not arise.

Recusal and the applicable legal principles.

- [43] It is unwarranted for this Court to deal with the recusal application that never took place, especially when not only the ruling would be missing, but the reasons thereof, for consideration by the Court. Whereas this Court is satisfied that a decision can be made based on the misrepresented facts dealt with above, for the sake of completion and in the interest of totality consideration of facts, it will delve into the principles applicable regarding recusal and the perception of bias. It is common cause that, after the trial Magistrate recused himself, the proceedings were governed by Section 275 of the Act, which provides that:

¹⁷ *Schuerhout v Union Government* 1927 AD 94 at 98.

(1) If Sentence is not passed upon an accused forthwith upon conviction in a lower court, or if, by reason of any decision or order of a superior court on appeal, review or otherwise, it is necessary to add to or vary any sentence passed in a lower court or to pass sentence afresh in such court, any judicial officer of that court may, in the absence of the judicial officer who convicted the accused or passed the sentence, as the case may be, and after consideration of the evidence recorded and in the presence of the accused, pass sentence on the accused or take such other steps as the judicial officer who is absent, could lawfully have taken in the proceedings in question if he or she had not been absent.

[44] The essence of the appeal as raised by the Appellant is premised on a perception of bias on the part of the trial Magistrate. The test for recusal was clarified in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*¹⁸ that:

“the question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel”

[45] The main purpose of recusal is to secure a fair trial. In *Bennett and Another v The State; In re: S v Porritt*¹⁹ it was held that:

“recusal of a presiding officer, whether it be a magistrate or a judge, should not become standard equipment in a litigant’s arsenal, but should be exercised for its true intended objective, which is to secure a fair trial in the interests of justice in order to maintain both the integrity of the courts and the position they ought to hold in the minds of the people whom they serve”

[46] The concern that arises is when the courts would invoke reliance on Section 304A of the Act to intervene in pending proceedings. It is trite

¹⁸ 1999 (4) SA 147 (CC) at para 48.

¹⁹ 2021 (1) SACR 195 (GJ) at para 113.

that the phrase ‘gross irregularity in the proceedings’ envisages an irregularity in the conduct of the proceedings, not the result thereof. The irregularity must have been of such a nature that it resulted in the aggrieved party not having his case fully and fairly determined.²⁰

[47] The fundamental question, then, is whether the irregularity complained of prevented a fair hearing for the appellant. The question at hand is simply whether any irregularities existed that precluded the Appellant from having a fair trial leading to his conviction, and whether extraordinary circumstances exist for the Court to intervene pending the finalisation of the matter; alternatively, whether those issues should stand over for later adjudication when the matter is possibly brought on appeal.

[48] The approach to fair trial rights was dealt with fully by the Constitutional Court in *S v Jaipal*²¹, where it concluded that the right of an accused to a fair trial requires fairness to the accused, as well as fairness to the public as represented by the state. It has to instil confidence in the criminal justice system with the public, including those close to the accused, as well as those distressed by the audacity and horror of crime. In the context of the irregularity alleged to have occurred in this case, the right to a fair trial must be understood in conjunction with the constitutional imperatives that the courts are independent and that they must apply the law impartially and without fear, favour or prejudice.

[49] *In casu*, the Appellant has not indicated in what way the proceedings were tainted, or in what way a different judicial officer would have attended to the proceedings in a manner that would lead to ultimate justice to him.

²⁰ *Bester v Easygas (Pty) Ltd* 1993 (1) SA 30 (C) at 42G-43C, citing *Ellis v Desai* 1909 TS 576 at 591.

²¹ 2005 (1) SACR 215 (CC) (18 February 2005) para 26-29.

Absent the aforesaid, the Court needs to be guided by the fact that the court of appeal, should there be a need to appeal at a later stage, would just as easily and perhaps even be in a better position to evaluate the full record of proceedings to evaluate whether the grievances complained of, are sound in that the proceedings ought not to have culminated in the conviction of the Appellant. For now, a case has not been made to interfere in any manner. Put differently, a case has not been made suggesting that the order by the court *a quo* was misguided.

Conclusion and Order.

[50] The Court *a quo* found that the current matter is not one of those rare instances that warrant interference. There is no misdirection in this regard. This Court aligns itself with that view. The referral of a matter for special review was also irregular for lack of reasons that are required in terms of the statute, and for being based on misrepresentations.

[51] For the aforesaid reasons the following order is made:

[57.1] The appeal is dismissed.

[57.2] The order of the court *a quo* is confirmed.

[57.3] The case is remitted to the Regional Court for further hearing and conclusion of the sentence proceedings before a different Magistrate.



TV RATSHIBVUMO

ACTING JUDGE PRESIDENT

MPUMALANGA DIVISION OF THE HIGH COURT



M MALANGENI

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION



HF FOURIE

ACTING JUDGE OF THE HIGH COURT

MPUMALANGA DIVISION

DATE OF HEARING: 31 JULY 2026

DATE OF JUDGMENT: 11 AUGUST 2026

FOR THE APPELLANT: ADV MMW VAN ZYL SC

INSTRUCTED BY:

BARNARD INCORPORATED

C/O:

J TERBLANCHE ATTORNEYS

NELSPRUIT

FOR THE RESPONDENT:

ADV H NXUMALO

INSTRUCTED BY:

**DIRECTOR OF PUBLIC
PROSECUTIONS**

MPUMALANGA