



**IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

Review Case No: HC23/2026

Magistrate's Serial No: 02/2026

Lichtenburg Case No: A22/2026

In the matter between:

THE STATE

and

TSHEPO MOLEFE

CORAM: PETERSEN J, et REDDY J

REVIEW LAID BEFORE REDDY J: 4 August 2026

DELIVERED: 11 August 2026

Summary: Automatic review - The magistrate presided at the accused's first appearance, where his previous criminal history was disclosed - She thereafter convicted and sentenced him - Following *S v Twai*, *Nkuna v S*, *S v Booysen* and *S v S M N*, that prior knowledge is a fatal, objective irregularity vitiating the proceedings, irrespective of a guilty plea - Conviction and sentence set aside. Accused to be brought before another magistrate.

REVIEW JUDGMENT

REDDY J:

Introduction

[1] What serves before this Court is a review, as evinced by the provisions of section 302 of the Criminal Procedure Act 51 of 1977 (the CPA). The accused electing to conduct his own defence pleaded guilty in the Magistrate's Court, to a charge of housebreaking with intent to steal and theft. He was convicted on 5 June 2026 and sentenced on 3 July 2026 to 24 months' direct imprisonment.

[2] On perusal of the review record, a query was directed to the Magistrate on 4 August 2026 in terms of section 304(2)(a) of the CPA. The Magistrate responded on 7 August 2026 and abides the decision of this court on each point raised. The query and the response are reproduced for convenience of reference.

The query

[3] The query, dated 4 August 2026, reads:

‘1. These proceedings have been submitted for the purposes of review. Prior to a full consideration of the review record the Magistrate is requested to comment on the following as evinced in terms section 304(2)(a) of the Criminal Procedure Act 51 of 1977, (the CPA).

Substantive shortcomings

2. At the first appearance on 16 February 2026, before the same Magistrate who ultimately convicted and sentenced the accused, the prosecutor disclosed an antecedent recorded only as “2022 Trespassing”, under a section 60(11B) note. This does not appear on the SAP 69 and was never proved, admitted, or put to the accused as a previous conviction at any later stage, including at sentencing. Sections 271 and 271A of the Act contemplate that previous convictions are placed before a court only after

conviction, precisely so that a trial officer's assessment of guilt is not influenced by an accused's previous conviction. In this regard, the Magistrate is referred to *S v Twai* (Review) (HC22/2026) [2026] ZANWHC 199 (3 August 2026).

3. The authority cited for the proposition that a guilty plea does not of itself establish genuine remorse is recorded as “*Michelle v S*”. No such case could be located; the principle corresponds to *S v Matyityi* 2011 (1) SACR 40 (SCA) at para 13, and this appears to be a transcription error. The magistrate is asked to confirm the correct citation.

Procedural shortcomings

4. The record was not forwarded for review within one week of sentencing, as required by the certification on the J4 and by section 303 of the Act. Sentence was imposed on 3 July 2026. The Magistrate's certification on the J4 is dated 24 July 2026. The record was received by this Court on 28 July 2026. The Court Clerk's covering letter of 23 July 2026 attributes the delay to printing difficulties. As the accused has remained in custody throughout, the Magistrate is asked to comment on the reasons for the delay.

5. The record does not reflect that the period the accused spent in custody awaiting trial and sentence, from his arrest on 12 February 2026 to sentencing on 3 July 2026, roughly four months and three weeks, without bail, was considered as a factor relevant to sentence. The magistrate is asked to confirm whether it was considered and, if not, to comment on its bearing on the sentence imposed.

6. In her *ex tempore* reasons the Magistrate appears to have treated the accused as having three previous convictions rather than two, referring to matters “in 2019 ... in 2018 ... and in 2022”. The SAP 69 (Exhibit A) reflects a single date, 2018-10-22, for both counts making up the first previous conviction; the “2019” reference appears to derive from a typographical error in the correctional supervision report (Exhibit C). The Magistrate is asked to confirm that sentence was based on two previous convictions only.

7. It is requested that the Magistrate response be emailed to the Registrar of this Court on or before 7 August 2026.’

The Magistrate's response

[4] The magistrate's response, dated 7 August 2026, reads:

'I respectfully acknowledge receipt of the query by the Honourable Reviewing Judge and respond as follows:

Ad paragraph 2

At the accused's first appearance on 16 February 2026, the prosecutor, in purported compliance with section 60(11B) of the Criminal Procedure Act 51 of 1977, disclosed that the accused had a "2022 Trespassing" antecedent, no pending matters, had abandoned bail, was not on parole and that there were no orders against him.

The said antecedent was never proved or admitted as a previous conviction during the trial or sentencing proceedings, nor did it appear on the SAP 69 placed before the Court for purposes of sentence.

I acknowledge the concern raised by the Honourable Reviewing Judge regarding the disclosure of this information before conviction, as well as the principles referred to in *S v Twai* (Review). I respectfully abide the decision of the Honourable Reviewing Court regarding the effect, if any, of this disclosure on the fairness of the proceedings.

Ad paragraph 3

The reference in my *ex tempore* judgment to "*Michelle v S*" was incorrect.

The authority I intended to refer to was *S v Matyityi* 2011 (1) SACR 40 (SCA), where the Supreme Court of Appeal held that a plea of guilty does not, without more, establish genuine remorse.

I regret the incorrect citation.

Ad paragraph 4

I acknowledge that the review record was not forwarded within the prescribed period.

Immediately after sentence was imposed on 3 July 2026, the court file was handed to the Clerk of the Court for preparation of the review record.

According to the information furnished to me by the Clerk of the Court, the stenographer only submitted the request for transcription of the mechanically recorded proceedings on 14 July 2026.

During this period I made numerous follow-up enquiries with the Clerk of the Court regarding the outstanding review record. As the delay persisted, I escalated the matter to the Court Manager in an effort to expedite the preparation of the record.

Once the transcribed proceedings became available, I requested the Clerk of the Court to prepare an addendum explaining the administrative delay.

I respectfully submit that I took all reasonable steps within my control to ensure that the review record was finalised and transmitted as expeditiously as possible. I nevertheless regret the delay, particularly as the accused remained in custody throughout.

Ad paragraph 5

The accused remained in custody from his arrest until sentence.

Upon reconsideration of the record, I am unable to state that I expressly considered the period spent in custody awaiting trial and sentence as a separate mitigating factor during sentencing. I acknowledge that this constituted a relevant consideration and respectfully defer to the Honourable Reviewing Court regarding the effect, if any, of this omission on the sentence imposed.

Ad paragraph 6

I confirm that sentence was imposed on the basis of two previous convictions reflected on the SAP 69.

The reference during my ex tempore reasons to matters in 2018, 2019 and 2022 was inadvertent. The reference to 2019 was an error and was not intended to indicate a separate previous conviction.

I confirm that the accused was sentenced on the basis of the two previous convictions properly proved before the Court.

Conclusion

I respectfully thank the Honourable Reviewing Judge for the opportunity to comment on the issues raised.

I regret the errors and omissions identified and respectfully submit these comments for consideration by the Honourable Reviewing Court. I abide the decision of the Court.’

Factual background

[5] The accused was arrested on 12 February 2026. At his first appearance on 16 February 2026, before the same magistrate who later convicted and sentenced him, the prosecutor addressed the court in terms of section 60(11B) of the CPA. In purported compliance with that provision, he disclosed that the accused had previous criminal history recorded as “2022 Trespassing”, no pending matters, had abandoned bail, was not on parole, and that there were no orders against him. That previous criminal history was never proved or admitted as a previous conviction, and it does not appear on the SAP 69 placed before the court for purposes of sentence.

[6] The accused was questioned in terms of section 112(1)(b) of the CPA and was convicted on 5 June 2026. He was sentenced on 3 July 2026 to 24 months’ direct imprisonment, on the basis of two previous convictions reflected on the SAP 69. The sentencing court also directed the Department of Correctional Services to attend to the accused's medical condition.

The law

The disclosure of previous convictions before conviction

[7] The applicable principles were restated by this Division only days before the query in this matter was raised, in *S v Twai*¹. It is apposite to restate these principles in some detail:

¹*S v Twai* (Review) (HC22/2026) [2026] ZANWHC 199 (3 August 2026).

[8] It is well established that ss 89, 197, 211 and 271 of the CPA are all directed against the disclosure of previous convictions at any stage before the conviction of an accused person. Where a judicial officer acquires knowledge of an accused's previous convictions before conviction, and thereafter proceeds to convict the accused, an irregularity arises which, in the ordinary course, nullifies the proceedings as a whole.

[9] In *Nkuna*², the magistrate's knowledge of the appellant's previous convictions was obtained during a bail application over which the same magistrate presided. That knowledge, obtained before conviction, was held to constitute an irregularity nullifying the subsequent trial notwithstanding that the appellant had pleaded guilty and that the evidence against him was cogent.

[10] This Division has applied the same principle on materially indistinguishable facts. In *S v S M N*³, the magistrate's prior knowledge of the accused's previous conviction and a pending matter, obtained before conviction, was held to have created a reasonable apprehension on the part of the accused that the magistrate would not be impartial. It was not necessary to show that the magistrate was in fact biased. The reasonable apprehension of bias, without more, rendered the proceedings a nullity.

[11] The Eastern Cape Division has engaged the contrary view, sometimes advanced or postulated, that presiding officers can simply be trusted to disabuse their minds of prejudicial information obtained at an earlier stage of the same proceedings. In *S v Booysen*⁴ the court declined to follow *S v Thusi and Others* and *S v Hlati*⁵, both of which had held that a magistrate's prior knowledge of an accused's previous convictions, disclosed under s 60(11B), did not vitiate a subsequent conviction unless actual bias was shown. The court aligned itself instead with *S v Bruinders* and *Nkuna v S*, holding that where a bail application involving formal consideration of the factors in s 60 of the CPA has been heard, the presiding officer will ordinarily be disqualified from presiding at the accused's subsequent trial, subject only to narrow exceptions.

[12] The rationale underlying this line of authority is one of principle rather than outcome. The prejudice lies in the taint to the fairness of the process itself, once a judicial officer's mind has been exposed to an accused's criminal history before guilt

² *Nkuna v S* (A62/2012) [2013] ZAGPPHC 111; 2013 (2) SACR 541 (GNP) paras 3 and 10.

³ *S v S M N* (HC28/2025) [2025] ZANWHC 178 (28 August 2025) paras 8–9.

⁴ *S v Booysen* 2016 (1) SACR 521 (ECG) para 25.

⁵ *S v Thusi and Others* 2001 (2) SACR 353 (N) and *S v Hlati* 2000 (2) SACR 325 (N).

has been determined. The enquiry is objective. It does not turn on whether the presiding officer subjectively recalls or was consciously alive to the disclosure at the moment of conviction. It turns on whether a reasonable, objective and informed observer, aware that the disclosure was made to the same officer who thereafter convicted the accused, would apprehend a risk to impartiality. A guilty plea does not cure that irregularity, since the concern is not whether the correct result was in fact reached, but whether justice was seen to be done.’

The disclosure of previous criminal history

[8] Sections 271 and 271A of the CPA envisage that previous convictions are placed before a court only after conviction, precisely so that a trial officer’s assessment of guilt is not influenced by an accused’s previous criminal history. The concern raised in the query was that the disclosure of the accused’s previous criminal history, recorded as “2022 Trespassing”, to the same magistrate at the accused’s first appearance, well before conviction, although sanctioned by section 60(11B)(a) of the CPA, was inconsistent with that scheme.

[9] The Magistrate, in her response, acknowledges the concern and respectfully abides the decision of this Court on the effect, if any, of the disclosure on the fairness of the proceedings.

[10] Applying the extant principle the review proceedings in the present matter before this Court, are indistinguishable from *Twai*. The same Magistrate presided at the accused's first appearance, where the accused's previous criminal history, recorded as “2022 Trespassing”, was disclosed, and thereafter accepted his plea, convicted him, and sentenced him.

[11] The fact that the previous criminal history disclosed here was a single, undefined item, rather than a list of proved previous convictions, and that it was never proved or admitted, does not take the matter outside the principle in *Twai*. This turns on the fact of prior disclosure to the trial officer and its effect on the objective appearance of impartiality. Nor is it relevant, for the same reason, that

conviction followed only some three and a half months later, or that the accused pleaded guilty and was questioned under section 112(1)(b).

[12] The law of this Division must be applied consistently. The disclosure vitiated the proceedings, and the conviction cannot stand. This is unassailably dispositive of the review proceedings. In the interest of completeness, some of the outstanding procedural nuances are addressed.

The citation of authority on genuine remorse

[13] The Magistrate confirms, in her response, that the reference to “*Michelle v S*” was a transcription error, and that the authority intended was *Matyityi*⁶. This point does not impact on the review and requires no further consideration. The importance of confirming the correctness of a record transmitted on review is, however, underscored.

The delay in transmission of the record

[14] This Division has previously deprecated this very practice, in materially indistinguishable circumstances, in *S v Du Preez*⁷, where a review record was laid before the court more than four months after sentencing, without any explanation for the delay. In *Du Preez* the effect of a delay in the transmission of the review record was underscored as follows:

‘[20] As alluded to *supra*, the accused was sentenced on 7 June 2023. The review record was laid before me on 19 October 2023, more than four months after the accused had been sentenced. The circumstances attributing to the delay are unknown. No attempt has been made by the Magistrate to explicate the reasons for the delay. The record was unaccompanied by an apology. This reflects poorly on the administrative component of the District Court concerned and on the Magistrate who to my mind ought to have some oversight on ensuring the timeous dispatch of the record to the Registrar.

⁶*S v Matyityi* 2011 (1) SACR 40 (SCA) at para 13.

⁷ *S v Du Preez* (HC 05/2023) [2023] ZANWHC 197 (1 November 2023) paras 20–21.

[21] The review process is an integral component in the attainment of an accused's right to a fair trial. Section 303 of the CPA is peremptory and prescribes the timeframe in which review proceedings must be dispatched to the Registrar of the High Court having jurisdiction. Matters that fall within the purview of the automatic review procedure are inherently urgent. The urgency of the automatic review procedure is inextricably linked, amongst others, to a trial without unreasonable delay, the right to dignity, freedom and access to the court, and the right to appeal and review. This practice must be deprecated.'

[15] The delay is regrettable. It is apposite to record that an accused held in custody is entitled to expect that a review record will be prepared and forwarded without avoidable delay. It is evident, however, from the Magistrate's response, that the delay is attributable to administrative causes beyond her control, and that she took reasonable steps to expedite the record once the delay became apparent. This appears to be a chronic systemic occurrence and requires intervention and judicial oversight at the highest echelons.

The period spent in custody awaiting trial and sentence

[16] The Magistrate confirms, in her response, that she did not expressly consider this period as a mitigating factor. The Magistrate is cautioned that the imposition of a suitable sentence requires proper consideration of the triad⁸ which includes the pretrial incarceration⁹.

The number of previous convictions

[17] The Magistrate confirms, in her response, that sentence was imposed on the basis of two previous convictions properly reflected on the SAP 69, and that the reference to 2019 was inadvertent. This consideration has become academic.

⁸ *S v Zinn* 1969 (2) SA 537 (A) at 540G.

⁹ *Loyiso Ludidi and Others v S* (983/2022; 056/2024) [2024] ZASCA 162; 2025 (1) SACR 225 (SCA) (29 November 2024) paras 12 – 15.

Conclusion

[18] The disclosure of the accused's previous criminal history to the Magistrate at his first appearance, before he was convicted and sentenced, was a fatal irregularity analogous with *Twai*. It vitiated the proceedings. The conviction and sentence cannot stand and must be set aside. It follows that the findings regarding several peripheral issues are of no moment given the primary finding on conviction.

Order

[19] In the premises, the following order is made:

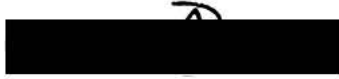
1. The conviction and sentence imposed on the accused are reviewed and set aside.
2. Pursuant to the conviction and sentence being set aside, the Clerk of the Court, Lichtenburg, in consultation with the Senior Public Prosecutor, is directed to take the steps necessary to secure the attendance of the accused before a magistrate, other than Magistrate C L Wessels, and to report to the Registrar of this Court when the accused has appeared before court.
3. The judgment must be brought to the attention of the Chief Magistrate.

A handwritten signature in black ink, appearing to be 'A Reddy', is written over a solid black rectangular redaction box.

A REDDY

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**

I agree.

A black rectangular box redacting a signature, with a small handwritten mark above it.

A H PETERSEN

**JUDGE OF THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG**