REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

30/11/2017
DATE

SIGNATURE

CASE NUMBER: A204/2017

In the matter between:

MOYO: JUSTICE **APPELLANT**

versus

THE STATE **RESPONDENT**

Summary – Matter before Court in respect of sentencing only, appellant having been granted leave to appeal on petition – non-compliance with section 93*ter*(1) of the Magistrate's Court Act raised for the first time in heads of argument – whether Court of appeal can consider such new ground which relates to the jurisdiction of the court *a quo* (and thus conviction and not only sentence) – appeal and review procedures compared – lack of jurisdiction not a new ground of appeal but rather a ground of review – held that appeal and review procedures run parallel - Court can consider non-compliance with section 93t*er*(1) of the Magistrate's Court Act in terms of section 304(4) of the Criminal Procedure Act without offending doctrine of *res judicata* – convictions and sentences reviewed and set aside

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JUDGMENT

OPPERMAN J

[1] The Appellant appeared in the Regional Court sitting in Germiston, on charges of murder (count 1) and intimidation (count 2). He was legally represented, pleaded not guilty but was found guilty and sentenced to 20 years imprisonment in respect of count 1, and 3 years in respect of count 2. He was declared unfit to possess a firearm in terms of section 103 (1) of Act 60 of 2000.

[2] His application for leave to appeal against both his conviction and sentence was refused, but on 12 May 2017, having petitioned the Judge President, was granted leave to appeal his sentence.

[3] At the hearing of this matter, the appellant contended that, in respect of count 1 (the murder charge), the court *a quo* was not properly constituted in terms of section 93*ter*(1) of the Magistrates Courts Act 32 of 1944 ('*the Magistrates Courts Act*') and referred us to *Gayiya v S* (1018/15) [2016] ZASCA 65 (19 May 2016) at para [8] in which it was held that:

> "The section [section 93*ter*(1)] is peremptory. It ordains that the judicial officer presiding in a regional court before which an accused is charged with murder....*shall* be assisted by two assessors at the trial, unless the accused requests that the trial proceed without assessors. It is only where the accused makes such a request that the judicial officer becomes clothed with a discretion either to summon one or two assessors to assist him or to sit without an assessor. The starting point, therefore, is for the regional magistrate to inform the accused before the commencement of the trial, that it is a requirement of the law that he or she must be assisted by two assessors, unless he (the accused) requests that the trial proceed without assessors."

[4] The record does not reflect the starting point envisaged by the section nor does it reflect that the learned magistrate had advised the appellant of the requirement contained in the subsection.

[5] In light of this failure *('the section 93 issue')*, the appellant requested this court to set aside the conviction and sentence.

[6] The matter is before us on appeal in respect of sentencing only. The question which falls for consideration is whether this court has jursidiction to entertain the appeal in respect of the section 93 issue in circumstances where leave to appeal was granted in respect of the sentence imposed only and the petition was dismissed in respect of the conviction.

[7] In *Sefatsa and Others v Attorney-General, Transvaal, and Another* 1989 (1) SA 821 (A) it was held that a Superior Court - including the Appellate Division - was a creature of statute and such other relevant statutory provisions as there may be, and that it was incorrect to state, as a general proposition, that it has a jurisdiction which is general and unlimited unless forbidden by law. Rabie ACJ stated that:

> "It seems to me that it is to be inferred from what is said in this passage, and from the decision at which the Court arrived, that it was the view of this Court that its jurisdiction relating to appeals and the reopening of a criminal trial is governed entirely by the provisions of the Criminal Procedure Act, and that consequently, when it has dismissed an appeal, it has no further jurisdiction in the matter. If this Court had at all thought that it had, after its dismissal of an appeal, an inherent jurisdiction to order the reopening of a trial, it would, I think, have made mention thereof and would not, as it did, have recommended to the authorities the adoption of a procedure as suggested in the last paragraph of its judgment." (At 838-839)

[8] *Sefatsa* (supra) was, of course, decided before our Constitutional era. In *Hansen v The Regional Magistrate, Cape Town, and Another,* 1999 (2) SACR 430 (C) Davis J held that the judgment in *Sefatsa* now has to be considered in the light of provisions of the Constitution which has broadened the inherent jurisdiction of the court in that it provides that the Constitutional Court, Supreme Court of Appeal and High Courts have inherent power to protect and regulate their own processes, and to develop the common law, taking into account the interests of justice. Section 173 of the Constitution confirms a concept of inherent jurisdiction, which promotes the interests of justice within the context of the values of the Constitution. This is a wider concept than that provided for in s 19(1)(a) and s 19(3) of the Supreme Court Act 59 of 1959 which formed the basis of the analysis of inherent jurisdiction in *Sefatsa* (supra).

[9] We were urged to invoke the provisions of section 304(4) of the Criminal Procedure Act 51 of 1977 ('*CPA*') which provides:

> "(4) If in any criminal case in which a magistrate's court has imposed a sentence which is not subject to review in the ordinary course in terms of section 302 or in which a regional court has imposed any sentence, it is brought to the notice of the provincial or local division having jurisdiction or any judge thereof that the proceedings in which the sentence was imposed were not in accordance with justice, such court or judge shall have the same powers in respect of such proceedings as if the record thereof had been laid before such court or judge in terms of section 303 or this section."

[10] In *S v Van der Merwe*, 2009 (1) SACR 673 (C) the appellant was convicted and sentenced in a regional court. He petitioned the High Court in terms of s 309C for leave to appeal against his conviction and sentence but the High

Court in terms of s 309C(7)(a), granted leave to appeal against sentence only. When the appeal came before the High Court, both judges had reservations regarding the conviction. Accordingly, the question arose as to whether the court had the necessary jurisdiction to interfere with the conviction, given that two other judges of the division had already decided that leave to appeal should be granted against sentence only. It was contended for the appellant that the court did indeed have jurisdiction: firstly, by way of its inherent jurisdiction; secondly, because the court had statutory and inherent review jurisdiction; and thirdly, because it could rely on its expanded jurisdiction in terms of s 173 of the Constitution. Steyn AJ (Moosa J concurring,) pointed out that the courts had always dealt with appeals within the four corners of existing legislation. A court had no jurisdiction to act contrary to the powers under which it operated, and the power of the High Court did not include the power to hear a matter which was not the proper subject of an appeal. Steyn AJ also referred to authority which had reaffirmed that the court's appellate jurisdiction was not an inherent jurisdiction, and that once an application for leave to appeal had been refused, a subsequent new application for leave to appeal could not be entertained by the court which had refused the original application. Accordingly, jurisdiction in the present matter could not be assumed by virtue of the court's inherent powers. (Paragraphs [13]–[17] at 678f–679g.)

[11] With regard to section 304(4), Steyn AJ stated that the section was designed to provide for intervention by a court where a failure of justice in respect of the judgment of a lower court was brought to its attention. There was ample

authority for the proposition that real and substantive justice should always prevail over strict adherence to legal principle. However, if the decision taken by the judges who had dealt with the petition was considered to have been judicial in nature, the court would not have jurisdiction to exercise its review powers, since the proceedings of the High Court were not reviewable. And, according to authority of the Supreme Court of Appeal, a decision in terms of s 309C of the Act was indeed judicial in nature. Consequently, the court could not employ its review powers to entertain an appeal against conviction. (Paragraphs [20]–[22] at 681b–682a.)

[12] Regarding the court's powers in terms of the Constitution, Steyn AJ held that while section 173 of the Constitution did expand the jurisdiction of the High Court, it was not clear that this provision conferred additional rights on the High Court to grant leave to appeal over and above the clear provisions and processes created by the statutes and the various Rules of Court. It was not the case that no reasonable procedure existed to address any error that may have been made by the regional magistrate at the trial. In addition, it was not a question of legislative shortcomings having resulted in the appellant's present dilemma, but rather his failure to appeal against the ruling of the two judges who had considered his petition. Consequently, there was no need for the court to look to section 173 of the Constitution to find an expanded jurisdiction in order to correct any error. (Paragraphs [24]–[29] at 682g–684a.)

[13] Steyn AJ further pointed out that these findings did not close the door to the appellant seeking relief from a higher tribunal. If he was dissatisfied with the

decision to grant him leave to appeal only against sentence, his proper recourse was to petition the President of the Supreme Court of Appeal. (Paragraph [31] at 684c.)

[14] In *S v Pieterse* 2017 JDR 0748 (GJ) Sutherland J referred with approval to *Van der Merwe* (supra):

> "It was there held by a full bench that it was not open to an appeal court to interfere with a suspect conviction when that question was not before it. The only way in which the question of either conviction or sentence imposed by a magistrates' court can come before an appeal court is upon leave being granted, or if leave is refused, on petition to the high court exercising appeal jurisdiction, and if leave is refused by that court, on petition to the Supreme Court of appeal. Logically, the constitutional Court must have the last word. This finding in Van der Merwe is premised on the paramountcy in these matters of procedures prescribed in sections 309(1), 309 B, and 309C of the Criminal Procedure Act 51 of 1977, which regulate access to an appeal court. As the whole of the procedure to access an appeal court on the question of conviction and of sentence is regulated by the statute, there is no room for nor any need to invoke the courts inherent power in such matters. (see too: State v Sefatsa 1989 (1) SA 821 (AD) at 834E) The proper approach is to defer the hearing on the appeal against sentence to afford the appellant an opportunity to obtain leave from the appropriate court in the hierarchy."

[15] It is not entirely clear from the Judgment in *Van der Merwe (*supra), why the Court had reservations about the conviction. In *Pieterse (*supra) the grounds raised in respect of the conviction related to the court *a quo's* factual findings regarding the evidence:

> "The case advanced on behalf of the appellant is based on two points. First, a major conflict in the evidence about where and how the stabbing of the deceased occurred, and second, whether the appellant's version that it was not he, but his companion, Olifant that stabbed the deceased was properly disbelieved." (At paragraph [5])

[16] In *S v Sawman* 2001 (1) SACR 649 (E) after a regional court magistrate had granted leave to appeal against the sentence imposed by him, he sent the case on special review because his sentence was not competent. On review, the sentence was set aside and another sentence was substituted for it. The fact that leave to appeal had been granted, was not brought to the attention of the reviewing judges. When the matter came on appeal, the court considered whether it had jurisdiction to hear the matter after it had already been dealt with on review. The court reasoned that s 304(2)(a) of the CPA provides that when a case together with the magistrate's reasons comes before a judge on review, the High Court with jurisdiction considers that case *'as a court of appeal'*. Accordingly it was held that when a Court interferes with a sentence, that interference amounts to a judgment by a Court on appeal and the Court will thereafter have no further jurisdiction to deal with the same case on appeal. The court accordingly held that it had no jurisdiction to reconsider the decision already given by two other judges on review. However, Jansen J (Jones JA concurring), was of the view that, in spite of the fact that the court had no appeal jurisdiction, the Court's own process and the common law ought to be developed in terms of section 173 of the Constitution in order to avoid an injustice. Jansen J took into account that the magistrate had been negligent in not bringing to the attention of the reviewing judges that an appeal was pending, that an appeal to the Supreme Court of Appeal would involve a delay and further costs, and that certainty about his situation was important to the appellant. These considerations led

Jansen J to conclude that there was a justifiable reason to entertain the appeal.

[17] Mr Guerneri, who replaced Ms Cozyn and requested leave to present further argument after judgment had been reserved, submitted that because the section 93 issue had not been raised before i.e. during either the application for leave to appeal before the learned magistrate in the Court *a quo* or on petition to the Judge President, the issue had not been decided at all and *Van der Merwe* (supra) was thus not applicable.

[18] In *Molaudzi v S* [2015] ZACC 20, Mr Molaudzi had also previously applied for leave to appeal in respect of both his conviction and his sentence which had been refused. His second application for leave to appeal raised a point not previously raised and accordingly argued that the second application for leave to appeal was not *res judicata*. Theron AJ (in a unanimous judgment) said the following about this argument at para [44]:

> "[44] Mr Molaudzi's second application, as indicated earlier, raises issues that are in fact *res judicata*, despite different grounds of appeal having been raised in the first application. To find otherwise would place too great a burden on the administration of justice as an appeal court would then have to consider each new ground brought on appeal (particularly in criminal convictions) to be a fresh appeal. This would jeopardise legal certainty to an unacceptable degree."

[19] In this matter, the appellant applied for leave to appeal in respect of both his conviction and the sentences imposed. This was refused. He then petitioned the Judge President, who granted him leave to appeal against the sentence imposed only. *Prima facie*, it would appear that the appellant in this case is in the same position as Mr Molaudzi (save that the appellant here, has not

exhausted his remedies provided for in section 16(1)(b) of the High Court Act, in respect of grounds dealing with conviction and sentence and not procedural issues).

[20] Mr Guerneri argued that the case under consideration is distinguishable from both *Van der Merwe* (supra) and *Molaudzi* (supra). He argued that a distinction should be drawn between review and appeal procedures and what these procedures are to address. In this regard he referred to *S v Khumalo* 2009 (1) SACR 503 (T) a full court decision in which Preller J (Ledwaba J and Vilakazi AJ concurring) held that:

> "As far as I could establish, the meaning of the words 'as a court of appeal' in s 304(2)(a) nor the effect of the wording of its predecessor, s 96 of the Magistrates' Courts Act 32 of 1944, has ever been judicially considered. It could, however, hardly have been the intention of the legislature to abolish the right of a convicted person to be heard on appeal in such an offhand manner. If the reasoning in *Sawman's* case is correct, the result would be that once a judgment or sentence has been interfered with on review, that would be the end of the right of appeal that the convicted person had. **Review and appeal are two very distinct procedures and whatever may have happened in a case on review (except perhaps if there had been an acquittal) does not affect the accused's right of appeal.** That must be so because, save for the right in terms of s 303 of the Criminal Procedure Act to have his representations forwarded to the registrar together with the record of the proceedings, the accused is normally not heard during the review process. The result of the reasoning in the *Sawman* case is that the accused's right of appeal simply disappears. This same concern seems to have been the reason behind the decisions in *R v Mokwena* 1953 (4) SA 133 (T); and *S v Scout* 1969 (1) SA 545 (E). Keeping in mind the clear distinction between the two procedures there is no 'skynbare teenstelling' (Sawman at 653h - i) between the latter two judgments and the judgment by Centlivres CJ in *R v D and Another* 1953 (4) SA 384 (A). The principle considered and confirmed in the first two cases was that a judgment given on review does not affect the

accused's right of appeal, whereas in the latter the question was whether the accused can have a second bite at the cherry by way of a further appeal after the first one had been disposed of.

At 657 in the *Sawman* case the court went on to consider whether it should in terms of s 173 of the Constitution expand the inherent powers of a court in terms of the common law to overturn a conviction on the grounds of a *iustus error* or *iusta causa*. It was argued that that principle had already been approved as far as the civil law is concerned in the matter of *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1033 (W). (The reference should be either 1977 (2) SA 1033 (W) or 1979 (2) SA C 1031 (A).) Both the full court of the WLD and the SCA considered inter alia, the common-law power of a court, beyond that contained in Rules 31 and 42, to rescind judgments, and found it to be unimpaired. It seems to me that as far as the criminal law is concerned, the question has been disposed of in the judgment of *Sefatsa* referred to above.

In the result I regretfully find myself unable to agree with the reasoning in the *Sawman* judgment." (At 507F-508D) (My emphasis)

[21] In *R v Beck* 1958 (4) SA 250 (C) it was held that when an appeal is noted in a case which is not sent for automatic review and the appeal is not proceeded with but the court nevertheless has the record, it can exercise its powers of review in terms of the then legislation, and set the conviction aside.

[22] Perhaps most significant is the recent decision of the Supreme Court of Appeal of *S v De Villiers* 2016 JDR 0550 (SCA) which was an appeal against a decision taken by a High Court on review. The appellant had pleaded guilty to theft. He was represented by an attorney. After his written plea explanation in terms of s 112(2) of the CPA was read into the record by his counsel, the appellant confirmed to the regional magistrate that the plea and explanation were correct. In the plea explanation itself the appellant stated

that the instruction given to his legal representatives to plead guilty to theft was given without anyone having unduly influenced him in that regard and was made freely and voluntarily with full knowledge of the implications thereof. After the imposition of sentence, the appellant sought leave to appeal against his sentence only, but this was refused by the regional magistrate. The appellant appointed a new legal team and, on their advice, he applied for leave to appeal against his conviction, but this too was unsuccessful in the regional court. A subsequent petition to the High Court for leave to appeal against his conviction and sentence met with a similar fate. On petition to the Supreme Court of Appeal the appellant was granted leave to appeal against his sentence, but leave was refused in respect of his conviction. The appeal against sentence was still pending, awaiting the outcome of his review application which he had brought in terms of rule 53 of the High Court rules. (At Paragraph [5].)

[23] The review was sought on the basis of an alleged irregularity *ex facie curiae* which vitiated the entire proceedings in the regional court as, so it was contended, it infringed the appellant's fair trial rights under the Constitution. In essence the main thrust of the appellant's argument was that he had pleaded guilty under duress, his previous legal team having cajoled him into tendering such a plea of guilty. (At Paragraph [6].)

[24] The Court *a quo* who had been seized with the appellant's review application had dismissed it. One of the grounds for dismissing the application were that:

> "(I)n pursuing leave to appeal against conviction to its ultimate (unsuccessful) conclusion, the appellant had exhausted his remedies inasmuch as once a

prospective appeal on the merits had been considered and dismissed, the proceedings could not be reopened by way of a review of the proceedings in the trial court..." (At Paragraph [13](b))

[25] Majiedt JA (Fourie and Baartman AJJA concurring) held (at Paragraph [14]) that:

> "As far as the latter (argument) is concerned, I am of the view that the appellant had not, on the facts of this case, been precluded from bringing a review application after his unsuccessful pursuit of leave to appeal against his conviction. It is not as if he is seeking the proverbial second bite at the cherry. Or, in civil law parlance, it cannot be said that the matter is *res judicata*."

[26] Further on Majiedt JA (Fourie and Baartman AJJA concurring) held (at Paragraph [18]) that:

> "In this instance there is an allegation that the guilty plea was improperly obtained, thus vitiating the proceedings in its entirety. There has been a gross violation of the appellant's constitutional fair trial rights, so it is contended. **As I have said, the appellant is not seeking a second bite at the cherry. No court has as yet considered the correctness of the proceedings as opposed to the correctness of the conviction. I am therefore of the view that the court below erred in holding that the pursuit of the leave to appeal against conviction precluded the appellant from seeking the review and setting aside of the proceedings in the regional court."** (emphasis added)

[27] If the fact that review proceedings have been instituted by an accused does not preclude him or her from also appealing the same decision (as was held in *Khumalo* (supra) and *de Villiers* (supra)), then, by parity of reasoning, the fact that the appellant in the present matter had noted an appeal in the present matter should not preclude him from being able to approach this Court to review the proceedings. Based on these authorities I conclude that,

review proceedings are available despite the fact that an appellant was refused leave to appeal.

[28] In Du Toit et al's Commentary to the Criminal Procedure Act (*Du Toit*) at Chapter 30 p1, the distinction between appeals and reviews is explained as follows:

> "Parties dissatisfied with the outcome of a criminal trial in a lower court may bring the matter before the provincial or local divisions of the High Court either by way of review or by way of appeal. However, appeal and review are no alternatives to each other. **They serve different purposes.** See *S v Khumalo* 2009 (1) SACR 503 (T). **Where the accused complains about his conviction or sentence he should approach the High Court by way of appeal. But where his complaint is about the methods of a trial, about an irregularity involved in arriving at the conviction, the best procedure is to bring his complaint by way of review** (*Ebrahim v Minister of Justice* 2000 (2) SACR 173 (W) 174h–j); *S v Mpunga* (unreported, GP case no 14/1211/2012, 28 January 2016) at [5]). **Where a magistrate has allegedly made a mistake of law, the accused should follow the appeal procedure** (*Mendes & another v Kitching NO & another* 1995 (2) SACR 634 (E))." (own emphasis)

[29] The section 93 issue (relating to the appointment of assessors) relates to an irregularity committed in arriving at the conviction and the review procedure is thus the preferred procedure for dealing with his complaint. Section 304(4) of the CPA entitles a court to interfere in respect of both errors of fact and of law (those which classically resort under the appeal procedure) and errors of procedure (those which resort under the review procedure) in assessing whether the proceedings were in accordance with justice.

[30] Du Toit points out (Chapter 30 – p18A) that Section 304(4) of the CPA will generally be used by a magistrate or his superior (*S v Rautenbach* 1991 (2) SACR 700 (T) at 701h) who doubts the correctness of a conviction or sentence but is *functus officio* in regard to its correction (*S v Botha* 1978 (4) SA 543 (T); *S v Hoema* 1978 (2) SA 703 (T); *S v Khubeka* 1999 (1) SACR 65 (W); *S v P* (unreported, FB case no 322/2013, 5 June 2014) at [2]–[4]; *S v Alfred* 2014 JDR 0117 (GNP); *S v Mohlala* 2014 JDR 0116 (GNP)).

[31] It need not necessarily be the trial magistrate who discovers the miscarriage of justice and submits the matter to a reviewing judge for correction (*S v Anderson* 1962 (2) SA 286 (O) at 288B; *S v Olyn* 1984 (2) SA 75 (NC)). Du Toit also points out (Chapter 30 - p19) that although s 304(4) is particularly aimed at bringing about justice in those cases in which magistrates initiate the review procedures of s 304(4) in order to have erroneous convictions and sentences that have come to their notice corrected, the Courts have always been prepared to exercise their powers in terms of this section where a defect is brought to their attention by a prosecutor (*R v Mtembu* 1961 (3) SA 60 (O)), a Director of Public Prosecutions (*S v Monchanyana* 1968 (1) SA 56 (O)) or even an attorney (*S v Eli* 1978 (1) SA 451 (E)).

[32] In the present matter the appellant was granted leave to appeal against sentence only. He was refused leave to appeal against his conviction. Having regard to *Van der Merwe* (supra) and *Pieterse* (supra), the refusal to grant leave to appeal against conviction was a *judicial decision* and the only way to raise a new argument in respect of the conviction would be to apply to

a court higher up in the hierarchy for leave to appeal, as provided for in section 16(1)(b) of the Superior Courts Act which provides:

> " (1) Subject to section 15(1), the Constitution and any other law—
>
> *(b)* an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal upon special leave having been granted by the Supreme Court of Appeal"

[33] The present matter however relates purely to an irregularity involved in arriving at the conviction. It is a ground, which could be pursued independently of the appeal procedure. It is one the appellant could have pursued by employing rule 53 of the Superior Courts Act (without seeking any permission to do so from this court or any other).

[34] The grounds upon which the appellant *in casu* are relying are distinguishable from the grounds that were raised by the appellant in *Pieterse (*supra) and *Molaudzi* (supra). In *Pieterse* the attack on the conviction was based on the trial court's evaluation of the evidence and in *Molaudzi*, the admissibility of certain evidence. In the present matter, the attack on the conviction is based on the fact that the trial Court lacked jurisdiction because of the section 93 irregularity.

[35] This court (or any other) has not considered the correctness of the proceedings, as opposed to the correctness of the conviction, *De Villiers (*supra) at Paragraph [18]. In other words, the section 93 issue can not be said to have been the subject of a judicial decision or that reliance on such issue is hit by the doctrine of *res judicata (Molaudzi* (supra) at para [44]).

[36] Section 304(4) does not prescribe the manner in which notice must be given to this Division. The appellant's heads of argument contained the section 93

issue for the first time. Although the matter serves before this Court as an appeal, the *de facto* position is that the appellant's counsel has brought '*to the notice*' (within the meaning of section 304(4) of the CPA) of this court (which has jurisdiction) '*that the proceedings in which the sentence was imposed were not in accordance with justice*'.

[37] Although the matter was set down as an appeal against sentence, we intend to no longer treat it as such, but to deal with it purely as a review in terms of section 304(4) of the CPA.

[38] To summarize the procedures in respect of conviction and sentence of the one hand (appeal procedures) and irregularities in the procedures arriving at the conviction and sentence (review):

38.1. The whole of the procedure to access an appeal court (High Court) on the question of conviction and of sentence, is regulated by statute.

38.2. Where a ground on conviction and on sentence was not raised in the application for leave to appeal before the magistrate, or not in the petition to the Judge President where leave was refused, leave to appeal that new ground must be sought. The new ground raises issues that are in fact *res judicata*, despite such new ground of appeal not having been raised previously. Each new ground is not a fresh appeal, see *Molaudzi* para [44]. The proper approach under such circumstances would be to defer the hearing on the appeal, to afford the appellant an opportunity to obtain leave from the proper court in the hierarchy, see *Pieterse v the State*, A332/2016

(assuming of course the new ground were meritorious). Whether or not the doctrine of *res judicata* should be relaxed as contemplated in *Molaudzi* (supra), would be for such courts to decide having regard to the particular circumstances of the case.

38.3. Where a point of procedure is raised, the appellant can raise such point in the appeal. Where, however, this did not occur, the review procedure should, as a general rule, be followed, imploying rule 53 of the rules of the Superior Court, for this purpose. There is no reason in prinicple, in my view, why the provisions of section 304(4) of the CPA could not come to the assistance of an appellant in appropriate circumstances.

[39] In this case the point raised was clear and both parties were in agreement that the matter should not be postponed to commence the rule 53 proceedings as the provisions of section 93*ter*(1) of the Magistrate's Courts Act are peremptory and *in casu* there has not been compliance with it.

[40] We intend referring this judgment to the Chairperson of the Magistrate's Commission to investigate the circumstances surrounding the failure of the Court *a quo* to have acted in accordance with section 93*ter*(1) of the Magistrate's Courts Act.

[41] A further troubling feature of the matter has been that in the judgment of the learned magistrate in the court *a quo*, when dealing with sentencing, the failure to use assessors was justified on the basis of a *'lack of human resources'*.

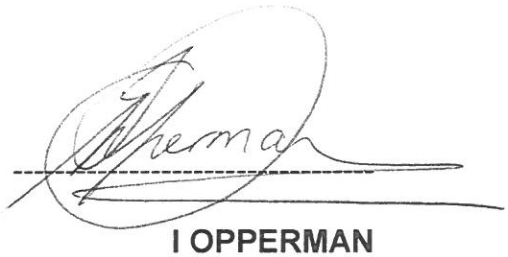
[42] The comment by the learned regional magistrate about a lack of human resources is of great concern. If it is to be inferred that the reason for the failure to invoke section 93*ter*(1) of the Magistrate's Court Act may be attributed to a failure on the part of the Department of Justice and Constitutional Development to provide such resources, it follows that the proper functioning of the Courts and the efficient administration of justice, is being compromised by an organ of State. We also deem it appropriate for a copy of this judgment to be forwarded to the Office of the Minister to investigate the position.

[43] The Court that tried and convicted the appellant was not properly constituted. That defect affects all the convictions ie both counts 1 and 2. This was also the approach adopted in *Gayiya* (supra).

[44] I accordingly grant the following order:

44.1. In terms of sections 304(4), read with section 303 of the Criminal Procedure Act 51 of 1977, as amended, the proceedings in which the sentences were imposed are declared not to be in accordance with justice, and the convictions and sentences are reviewed and set aside.

44.2. The Registrar is to make a copy of this judgment available to both the Office of the Minister of the Department of Justice and Constitutional Development and the Chairperson of the Magistrate's Commission and to draw their attention to paragraphs [40] to [43] of this judgment.



I OPPERMAN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

I agree

D NAIR

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Heard: 6 November 2017
Further heads of argument: 9 & 10 November 2017
Further argument: 13 November 2017
Judgment delivered: 30 November 2017
Appearances:
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Legal Aid SA
For the Respondent: Adv KT Ngubane
National Prosecuting Authority