IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: ***YES***
(2) OF INTEREST TO OTHER JUDGES: ***YES***
(3) REVISED: ***Yes***

Date: ***10th December 2019*** Signature: _____

REVIEW CASE NO: 53/2019

COURT *A QUO* CASE NO: SH985/2007

DATE: 10th December 2019

In the matter between:

MAINGA: JOSE CASTEGO Applicant

and

THE STATE Respondent

Coram: Meyer *et* Adams JJ

Heard: No oral hearing

Delivered: 10 December 2019

Summary: Criminal law – multiple sentences – various periods of direct imprisonment – portions of finite imprisonment periods to run concurrently with other sentences – error made in calculation resulting in an effective sentence for a period less than the intended period of imprisonment –
Criminal Procedure – patent error reviewable in terms of s 304(4) of the CPA
Error in concurrence of sentences corrected

REVIEW ORDER

On review from: The Roodepoort Regional Court (Regional Magistrate D Smith sitting as Court of first instance):

(1) In terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977, the order relating to the concurrency of the individual sentences imposed on the 17th of September 2008 by the Roodepoort Regional Court in *S v Mainga & Another*, under case number: SH985/2007 is reviewed and set aside.

(2) That part of the sentence of the Regional Court Order of the 17th of September 2008 in terms of which it was ordered that the five years of the sentence imposed in respect of count two (attempted murder) should run concurrently with the fifteen year sentence imposed on count one (housebreaking) be and is hereby set aside, and in its stead is substituted with an order that:

'Five years of the ten years direct imprisonment sentence imposed in respect of count two (attempted murder), as well as the five years direct imprisonment imposed in respect of counts 8 and 9 (unlawful possession of a firearm and unlawful possession of ammunition), should run concurrently with the fifteen year direct imprisonment sentence imposed on count one (housebreaking with intent to rob and robbery with aggravating circumstances)'

(3) The sentence imposed by the Regional Court is therefore as follows:

'The accused is sentenced as follows:

(1) Count 1 (Housebreaking with intent to rob and robbery with aggravating circumstances): fifteen years direct imprisonment.

(2) Count 2 (Attempted murder): ten years direct imprisonment.

(3) Count 3 (Housebreaking with intent to rob and robbery with aggravating circumstances): fifteen years direct imprisonment.

(4) Count 4 (Attempted murder): ten years direct imprisonment.

(5) Count 8 (Unlawful possession of a firearm) and count 9 (Unlawful possession of ammunition) – taken together for purposes of sentence: five years direct imprisonment.

(6) Five years of the ten years' direct imprisonment sentence imposed in respect of count two (attempted murder), as well as the five years direct imprisonment imposed in respect of counts 8 and 9 (unlawful possession of a firearm and unlawful possession of ammunition), should run concurrently with the fifteen year direct imprisonment sentence imposed on count one (housebreaking). Simirlarly, five years of the sentence imposed in respect of count four (attempted murder) shall run concurrently with the fifteen year direct imprisonment sentence imposed on count three (housebreaking).

(7) The accused is therefore sentenced to an effective sentence of forty years direct imprisonment.'

(4) The sentence is antedated to the 17th of September 2008.

(5) The same order is made in relation to the sentence imposed by the Regional Court on the applicant's co-accused, Mr Simone Matosse.

REVIEW JUDGMENT

Adams J (Meyer J concurring):

[1]. This matter was referred to this court on review by Roodepoort Regional Magistrate D Smith, who presided over the trial of the accused, Mr Jose Castego Mainga, who on the 17th of September 2008 was convicted on two counts of housebreaking with intent to rob and robbery with aggravating circumstances; two counts of attempted murder; one count of unlawful possession of a firearm; and one count of unlawful possession of ammunition. On the same day, the accused was sentenced as follows:

(1). On count 1 – Housebreaking with intent to rob and robbery with aggravating circumstances – fifteen years direct imprisonment;

(2). On count 2 – Attempted murder – ten years direct imprisonment;

(3). On count 3 – Housebreaking with intent to rob and robbery with aggravating circumstances – fifteen years direct imprisonment;

(4). On count 4 – Attempted murder – ten years direct imprisonment;

(5). On counts 8 and 9 – Unlawful possession of a firearm and Unlawful possession of ammunition were taken together for purposes of sentencing – five years direct imprisonment.

(6). It was ordered that five years of the sentence imposed in respect of count two (attempted murder) should run concurrently with the fifteen year sentence imposed on count one (housebreaking). Simirlarly, five years of the sentence imposed in respect of count four (attempted murder) was ordered to run concurrently with the fifteen year sentence imposed on count three (housebreaking).

[2]. As the saying goes, so far so good. The problems started when the Regional Magistrate right at the end of her *ex tempore* judgment on the sentence in a one-liner remarked as follows: '... it makes it forty years' imprisonment for each'. This made reference to the identical sentences imposed on the applicant and his co-accused. The difficulty with the aforegoing is that, if regard is had to the sentence imposed, the effective sentence was: 15 years (count 1, inclusive of 5 years i r o count 2) + 5 years (the remainder of count 2) + 15 years (count 3, inclusive of 5 years of count 4) + 5 years (the remainder of count 4) + 5 years (counts 8 & 9) = 45 years. Factually, the regional Magistrate had sentenced the accused to an effective forty five years direct imprisonment. However, she made an error when remarking in conclusion that the effective sentence is forty years. Alternatively, it can be said that the error was made by the Magistrate in the alignment of the sentences and the order relating to portions of the sentences running concurrently.

[3]. Subsequently, the accused unsuccessfully appealed his convictions and sentences in this Court. The appeal by the accused and his co-accused, Simone Matosse, against their sentences and convictions were in fact dismissed by this Court on the 12th of March 2009 under appeal court case number A614/2008. A subsequent petition to the Supreme Court of Appeal for special leave to appeal their convictions and sentences was likewise unsuccessful. On the 12th of March 2019, the Supreme Court of Appeal dismissed the application on the grounds that there were no special

circumstances meriting a further appeal. In both his appeal to the High Court and the petition for leave to appeal to the SCA the accused made it abundantly clear that he was appealing his effective sentence of forty years direct imprisonment. The accused therefore was always under the impression that he had been sentenced to forty years direct imprisonment, and the High Court and the SCA had probably turned down his appeals on the basis that his sentence, that being forty years direct imprisonment, should stand. Who knows what the appeal courts would have done had they known that the accused had in fact been sentenced effectively to forty five years direct imprisonment.

[4]. On the other hand, the learned Regional Magistrate indicated in her referral of the matter for review that it had always been her intention to sentence the accused to an effective forty five years direct imprisonment, as is evidenced by the actual sentences imposed in respect of the individual convictions. Furthermore, shortly after she had handed down her judgment on sentence, she had indicated in the warrant of detention of the accused, issued and signed by the Regional Magistrate on the same day on which she sentenced the accused and his co-conspirator, that the accused had been sentenced to forty five years direct imprisonment.

[5]. The question in this review is this: What is the effective sentence which the Regional Court imposed on the accused in respect of all of his convictions? In view of what is stated above, I am of the view that the accused was sentenced to an effective forty years direct imprisonment. The Regional Court probably had this in mind as an appropriate sentence to be imposed. In my judgment, the error was committed in the detail relating to the periods which were to run concurrently and not in the declaration relating to the imposition of the effective sentence of forty years direct imprisonment. It is more likely, from a common sense point of view, that the Magistrate made a mistake in calculating the concurrency of the sentences rather than in her declaration relating to the effective sentence. She probably always had in mind an effective sentence of forty years imprisonment and how she got to that she probably would have worked out whilst handing down sentence.

[6]. The point is that, as far as the Regional Court, the accused and the appeal courts were concerned, the sentence imposed was one effectively of forty years direct imprisonment. The error that needs to be rectified is to re-align the concurrency of the sentences imposed so as to add up to forty years. As I said, this is probably the appropriate sentence the Regional Court had in mind, all things considered. The question is if the error was to be corrected, would that mean that the proceedings in this case have been in accordance with justice? I now turn to deal with that question.

[7]. This review is before us in terms of the provisions of section 304 (4) of the Criminal Procedure Act, Act 51 of 1977 ('the CPA'), which provides as follows:

'(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.'

[8]. This provision in the Act should be read in conjunction with s 22 of the Superior Courts Act, Act 10 of 2013 ('the Superior Courts Act'), which provides thus:

'22 **Grounds for review of proceedings of Magistrates' Court**

(1) The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are—

(a) absence of jurisdiction on the part of the court;

(b) interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;

(c) gross irregularity in the proceedings; and

(d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

(2) This section does not affect the provisions of any other law relating to the review of proceedings in Magistrates' Courts.'

[9]. Even when the requirements of s 22 are not met, the High Courts have frequently noted their inherent powers of review, based on common-law principles. These principles have been bolstered to some extent by s 173 of the Constitution, which reads as follows:

'The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.'

[10]. However, for purposes of this judgment the provisions of s 304 (4) of the CPA are important and find application. This section provides for a special or exceptional review process in the case of criminal matters concluded before the Magistrates Court. The section states that this court has the power to review the proceedings of a lower Court if it is brought to the attention of this court that the proceedings were not in accordance with justice.

[11]. As I indicated above, this case was referred for review by the Regional Magistrate, who presided over the trial. In her referral letter of April 2019 she confirms that her remark that the effective sentence is one of forty years direct imprisonment was a calculations error. In light of the advices from the presiding Regional Magistrate and her referral of this matter for review, the provisions of s 304(2)(a) of the CPA are rendered inapplicable. This subsection prescribes a procedure which requires this court, when it believes that the proceedings in the Regional Court were not in accordance with justice, to obtain from the judicial officer who presided at the trial a statement setting forth her or his reasons for convicting the accused and for the sentence imposed. In any event, as will be elaborated on later on in this judgment, I was of the opinion that the imposition of an effective sentence of forty five years direct imprisonment, if indeed such a sentence was imposed, by the sentencing court would clearly not have been in accordance with justice and that the accused would be severely prejudiced if the record of the proceedings was not forthwith placed before this court, being the Full Bench of this Division.

[12]. As far as representation by the accused in these review proceedings is concerned, on the 1st of March 2019 he filed a 'Notice to Compel' the regional magistrate to correct her sentence to reflect that he had been sentenced to an

effective forty years direct imprisonment. This 'application to compel' was filed under regional court case number 0002/2018 and the accused applied for a rectification of the warrant of detention issued by the Regional Magistrate pursuant to the sentence imposed by her on the 17th of September 2008. The accused contended that the judgment on sentence handed down by the presiding magistrate clearly indicates that he was sentenced to an effective period of direct imprisonment for forty years, while the warrant of detention erroneously indicated that he had been sentenced to an effective period of forty five years direct imprisonment. This, so the accused contended, is wrong as it was contrary to the judgment on sentence, and stands to be set aside and rectified. The accused further averred that the magistrate acknowledged the mistake in the warrant of detention, but indicated that she could not do anything to rectify the mistake.

[13]. He appeared before the Regional Court on the 5th of April 2019, and presumably requested the court to amend her judgment as per his 'Notice to Compel'. We therefore know what his stance is relative to this review application.

[14]. As regards the National Prosecuting Authority, in terms of the provisions of s 304(3) of the CPA, this court (Meyer J), when this review initially came before him, directed the Deputy Director of Public Prosecutions, Gauteng, to make submissions in relation to questions of law or of fact arising in this case. On the 4th of July 2019 written submissions were received from the Deputy Director of Public Prosecutions, Gauteng, which were very helpful and for which we are grateful. I now proceed to deal with those submissions.

Contentions by the Deputy DPP

[15]. The State submitted that the learned Regional Magistrate considered and had due regard to the cumulative effect of the sentences. In her judgment on sentence, the trial court had this to say:

'However, because of the cumulative effect of the sentences, the Court, although not finding compelling and substantial circumstances regarding count 1 and count 3, will make an order that a portion of the sentences on counts 2 and 4 run concurrently with

the sentences on counts 1 and 4, thereby recognizing first of all the fact that you are still young and the fact that you have been in custody for a year and the cumulative effect of the sentences'.

[16]. In the exercise of its discretion, so the State submits, the trial court ordered some portions of the sentences to run concurrently. This is not a case in which full concurrence of sentences should have been considered. There was no close link between the offences. The crimes in this matter were not committed on the same date. They were completely separate. Counts 1 and 2 were committed on 15 September 2007. Counts 3 and 4 were committed on 11 October 2007. Counts 8 and 9 were committed on 12 October 2007.

[17]. In sum, as regards the appropriateness of the effective sentence imposed and the cumulative effect thereof, the State contends that the Regional Magistrate's approach cannot be faulted. We find ourselves in agreement with this contention. Courts are duty bound to protect the community from the types of crimes of which the accused was convicted. It is therefore not surprising that this court dismissed the appeals by the accused and his accomplice and that the Supreme Court of Appeal dismissed the application for special leave to appeal.

[18]. The Deputy DPP referred us to *S v Mohlala* 2014 JDR 0116 (GNP), in which it was held that where a Magistrate erred in the formulation of a sentence on the charge sheet to incorrectly read eighteen months imprisonment instead of eighteen months correctional supervision, the case had to be remitted to the Magistrate to correct the formulation of the sentence in the charge sheet. The point is made by the State that *in casu* if the miscalculation of the cumulative effect of the sentence of forty years imprisonment is corrected, this would amount to an increase in the effective sentence by five years.

[19]. In *S v Lottering* 2009 (2) SACR 560 (ECG) the accused had been convicted of fraud in the Regional Court. He was sentenced to correctional supervision and three years' imprisonment, wholly suspended for three years on condition *inter alia* that she refunds to the complainant his loss in instalments of R1500 per month. It later transpired that the monthly instalments should have

been in the region of approximately R4000 per month. It was held that an amendment of the condition of suspension by the court of review, increasing the amount of the instalments, would amount to an increase in sentence. The condition of suspension had to be set aside and the matter remitted to the regional magistrate for the condition to be reconsidered, after the accused had been afforded an opportunity to make representations on the repayment of the amount.

[20]. On the basis of the aforegoing authority, the Deputy DPP argues, rightly so, in our view, that in this matter if the judgment on sentence was to be corrected, as requested by the Regional Magistrate, it would result effectively in in an increase in the sentence of the accused. This would also amount to an increase in the sentence, which had already been considered by two appeal courts and found to be appropriate and fair. We found ourselves in agreement with the State that to comply with the Regional Magistrate's request to correct her sentence would be innately unfair and inherently unjust.

[21]. They also submit that setting aside the effective sentence of forty years direct imprisonment and remitting this case to the trial court to reconsider the effective sentence after giving the accused an opportunity to make representations, would also not be suitable. We agree. Either one of these possible remedies would be prejudicial to the accused.

[22]. The State also submits that this review is not competent. They say so on the basis of s 302(1)(b)(iii) of the CPA, which provides that the provisions of s 302(1)(a) shall cease to apply in respect of an accused when judgment in an appeal by him against his conviction and sentence is given. We cannot agree with this submission. Section 302(1)(a) expressly relates to an 'automatic review' and has no bearing on a special review as envisaged in s 304(4). The jurisdictional requirements for a special review are simply that: the Regional Court had imposed a sentence (any sentence) and it had been brought to our attention that the proceedings in which the sentence was imposed were not in accordance with justice. In my judgment, *in casu* both these requirements are met. The sentence therefore stands to be reviewed by us.

[23]. It is therefore not necessary for me to consider the submission by the State that this matter should be dealt with and a remedy granted in terms of the provisions of s 17(2)(f) of the Superior Court Act, Act 10 of 2013. As I indicated above, this review application resides squarely within the ambit of s 304(4) of the CPA. It may very well be, as submitted by the Deputy DPP, that s 17(2)(f) affords a further remedy available to the accused in this matter. With reference to an application for leave to appeal to the SCA, that section provides as follows:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

[24]. In *S v Liesching and Others* 2019 (1) SACR 178 (CC) at paras 134 and 135 the Constitutional Court interpreted s 17(2)(f) as follows:

'[134] In *Liesching I* this court carefully scrutinised the meaning of s 17(2)(f) and concluded that the proviso in that section is very broad, and that:

"It keeps the door of justice ajar in order to cure errors or mistakes, and for the consideration of a circumstance, which, if it were known at the time of the consideration of the petition, might have yielded a different outcome. It is therefore a means of preventing an injustice. This would include new or further evidence that has come to light or that became known after the petition had been considered and determined."

[25]. The State also submits that the interest of justice dictates that the accused, as well as his co-accused, should be afforded certainty. They need to know whether their effective sentence is for a period of imprisonment for forty years or for forty five years. We agree, but we are of the view that that certainty can be achieved with reference to the provisions of s 304(4).

Analysis

[26]. Section 298 of the CPA provides as follows

'298 **Sentence may be corrected**

When by mistake a wrong sentence is passed, the court may, before or immediately after it is recorded, amend the sentence.'

[27]. Therefore, on the basis of s 298 a trial court may, when it by mistake had imposed a wrong sentence, before or immediately after it is recorded, amend the sentence. However, *in casu* s 298 is not applicable. The Regional Magistrate on record imposed an effective sentence of forty years' direct imprisonment. It cannot be said that the Regional Magistrate unintentionally made an incorrect order even if the sentence is at variance with the mathematical calculations in support of the effective sentence. If the calculations were incorrect and unintentionally so, it would have been incumbent on the Regional Magistrate to correct it immediately. She did not do so, which brings us back to the the sentence factually imposed by the court *a quo*. In that regard, see *S v Swartz* 1991 (2) SACR 502 (NC) at 504b.

[28]. The Regional Magistrate was *functus officio* once the sentence was handed down and the court adjourned. She was not empowered to correct her miscalculations in chambers or in court for that matter. If she had returned to Court shortly after imposing the effective sentence of forty years' direct imprisonment and in the presence of the accused, his legal representative and the prosecutor, noted the miscalculation and corrected the sentence, it can be argued that s 298 finds application. However, in my judgment, as I indicated above, the Magistrate intended to impose an effective sentence of forty years direct imprisonment. There cannot be any possible talk of a wrong sentence having been passed by mistake.

[29]. As was said by Hiemstra CJ in *S v Moabi* 1979 (2) SA 648 (B) at 648H-649A:

'It is elementary that a magistrate is not entitled to alter either his verdict or his sentence after it has been pronounced. He can, in terms of s 176 of the Criminal Procedure Act 51 of 1977, correct a verdict which has been given in error, but then only "before or immediately after it is recorded". Section 298 gives him the same power in regard to a wrong sentence. But then it is a sentence or verdict delivered "by mistake" as both these sections provide. That implies a misunderstanding or an inadvertency

resulting in an order not intended, or also a wrong calculation. A verdict or sentence, however much open to criticism, cannot be altered if it was deliberately given or imposed. To exceed punitive jurisdiction is probably included under "mistake". But then the correction must be done immediately, on the same day, preferable before the magistrate leaves the bench. This sentence was neither imposed by mistake nor was it altered immediately. The subsequent proceedings were a complete nullity.'

[30]. I reiterate that the Regional Magistrate, having imposed the effective sentence of forty years direct imprisonment, could not amend her sentence. She was *functus officio*. This court does however have the power to do so.

[31]. There is no doubt in my mind that any order which amends or attempts to amend the actual sentence imposed by the Regional Magistrate, which is prejudicial to the accused, should be set aside. The only question is whether the matter should be remitted to the Regional Court for it to re-sentence the accused. As far as that relief is concerned, I am of the view that an important consideration is the fact that the High Court and the Supreme Court of Appeal have already had an opportunity to consider the appropriateness of the sentence imposed. Also, the accused and his co-accused were sentenced as far back as 2008, that is over eleven years ago, and it would seem innately unjust and unfair to delay giving the accused a definitive answer as to whether he had been sentenced to forty years or forty five years imprisonments.

[32]. If we accept that the sentence imposed was effectively forty five years direct imprisonment, there can be no doubt that the proceedings in the Regional Court were not in accordance with justice. On this basis alone it should be set aside in terms of s 304(4).

[33]. For these reasons, that part of the judgment relating to the concurrence of the individual sentences is invalid and falls to be set aside. The trial court committed a serious misdirection by *ex post facto* imposing a harsher sentence ostensibly on the basis of there had been a mistake in the calculations of the cumulative effect of the sentences and its concurrence.

[34]. The prejudice to the accused if that part of the sentence is allowed to stand is self-evident. Furthermore, as I indicated above, all things considered,

the actual effective sentence does not strike me as shockingly inappropriate, whereas forty five years' direct imprisonment may very well be so harsh, despite the severity and the seriousness of the crimes committed, that it may be interfered with by an appeal court.

[35]. The sentence therefore stands to be reviewed in terms of the provisions of s 304 (4) of the CPA.

[36]. The next question is whether the matter should be referred back to the trial court for it to rectify its mistake. In this regard I am of the view that it is fair and equitable that the matter be finalised and that the accused definitively be told what the sentence is which was imposed on him. I do not think it necessary to remit the matter to the Regional Court.

[37]. The mistake by the trial court may be argued to have infringed the accused's right to a fair trial. It seems evident that an accused person is entitled to know the sentences which were imposed on him. Even more so, he is entitled to know exactly what the effect of the sentences is. His effective sentence should also not be arbitrarily amended to increase the effective sentence.

[38]. As noted earlier, the Regional Magistrate had in mind an effective sentence of forty years direct imprisonment. In the course of her judgment on sentence, she dealt extensively with the factors which she took into consideration in imposing a fair sentence, not the least of which was the fact that a minimum sentence of fifteen years' direct imprisonment applies to the convictions on the charges of armed robbery. The circumstances surrounding the robberies and the manner in which they were perpetrated, notably that the victims were attacked in the dead of night in what should have been the sanctity of their homes and the fact that during both robberies, which were not linked in time, space and victims, the accused and his co-perpetrator were trigger happy and indiscriminately fired shots at the victims in circumstances confirming that the intention was to kill, justified a long prison sentence. Importantly, the appropriateness of these sentences has been confirmed on appeal by the High Court and the Supreme Court of Appeal.

[39]. It therefore cannot be said that the accused's right to a fair trial would be infringed if we were to confirm the effective sentence of forty years direct imprisonment. The same can obviously not be said should we confirm the sentence of forty five years direct imprisonment. However, that is not our intention. On appeal, the High Court would no doubt have paid careful consideration, before confirming the effective sentence, to the appropriateness of the sentence. It is therefore not for us to rehash those considerations. Two appeal courts have confirmed that effective sentences of forty years' direct imprisonment for the two accused are appropriate. In our judgment, there is no ground for faulting the approach in terms of which the effective sentence was confirmed, and it is therefore not necessary to refer the matter back to the Regional Court. Therefore, in this case it would not be in the interests of justice to do so. Provided the sentence of forty years imprisonment is confirmed, it makes no difference that the Regional Magistrate erroneously pronounced that the effective sentence is forty five years direct imprisonment.

[40]. Thus remittal will be an exercise in futility. This matter has been outstanding for a long time. Interests of justice dictate that it is brought to finality now.

[41]. That said, though, it must be reiterated and emphasised that sentences imposed must be clear and unambiguous, as should be the reasons for the imposition of the sentences. This is vital for the administration of justice not to fall into disrepute.

[42]. In conclusion, the error by the Regional Court stands to be corrected. The most judicious way to do that would be to order that the sentence of five years direct imprisonment imposed in respect of the convictions on the charges of possession of a firearm and possession of ammunition should also run concurrently with the fifteen year sentence imposed in respect of the housebreaking conviction, as is the case in respect of five years of the ten year sentence on the attempted murder conviction.

[43]. Although the accused's co-accused, Mr Simone Matosse, has not formally applied for a review of the proceedings, there is no reason why, if

regard is had to the wording of s 304(4) of the CPA, that part of his sentence should also not be rectified. To do so, would be in full compliance of the provisions of the said section since the injustice in the proceedings in the Regional Court has come to our attention.

Order

Accordingly, I make the following order:-

(1) In terms of section 304(4) of the Criminal Procedure Act, Act 51 of 1977, the order relating to the concurrency of the individual sentences imposed on the 17th of September 2008 by the Roodepoort Regional Court in *S v Mainga & Another*, under case number: SH985/2007 is reviewed and set aside.

(2) That part of the sentence of the Regional Court Order of the 17th of September 2008 in terms of which it was ordered that five years of the ten years direct imprisonment sentence imposed in respect of count two (attempted murder) should run concurrently with the fifteen year sentence imposed on count one (housebreaking) be and is hereby set aside, and in its stead is substituted with an order that:

'Five years of the ten years direct imprisonment sentence imposed in respect of count two (attempted murder), as well as the five years direct imprisonment imposed in respect of counts 8 and 9 (unlawful possession of a firearm and unlawful possession of ammunition), should run concurrently with the fifteen year sentence imposed on count one (housebreaking with intent to rob and robbery with aggravating circumstances)'

(3) The sentence imposed by the Regional Court is therefore as follows:

'The accused is sentenced as follows:

(1) Count 1 (Housebreaking with intent to rob and robbery with aggravating circumstances): fifteen years direct imprisonment.

(2) Count 2 (Attempted murder): ten years direct imprisonment.

(3) Count 3 (Housebreaking with intent to rob and robbery with aggravating circumstances): fifteen years direct imprisonment.

(4) Count 4 (Attempted murder): ten years direct imprisonment.

(5) Count 8 (Unlawful possession of a firearm) and count 9 (Unlawful possession of ammunition) – taken together for purposes of sentence: five years direct imprisonment.

(6) Five years of the ten years' direct imprisonment sentence imposed in respect of count two (attempted murder), as well as the five years direct imprisonment imposed in respect of counts 8 and 9 (unlawful possession of a firearm and unlawful possession of ammunition), should run concurrently with the fifteen year sentence imposed on count one (housebreaking). Simirlarly, five years of the sentence imposed in respect of count four (attempted murder) shall run concurrently with the fifteen year sentence imposed on count three (housebreaking).

(7) The accused is therefore sentenced to an effective sentence of forty years direct imprisonment.'

(4) The sentence is antedated to the 17th of September 2008.

(5) The same order is made in relation to the sentence imposed by the Regional Court on the applicant's co-accused, Mr Simone Matosse.

L R ADAMS
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

I agree,

pp:

P MEYER
Judge of the High Court of South Africa
Gauteng Local Division, Johannesburg

HEARD ON:	No oral hearing – section 304(2)(a) of the CPA
JUDGMENT DATE:	10th December 2019
FOR THE APPLICANT:	Not applicable
FOR THE RESPONDENT:	Not applicable
