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

High Court Ref No: 19754 Case No: B/RC/38
Magistrate's Serial No: 10/2019

In the matter between:

THE STATE

V

S V

REVIEW JUDGMENT

THULARE AJ

[1] This is an automatic review of criminal proceedings in the regional court, in terms of section 85 of the Child Justice Act, 2008 (Act No. 75 of 2008) (the CJA) read with section 304 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) (the CPA). The accused was seventeen (17) years at the time of sentencing, and sixteen (16) years at the time of the commission of the offences. He pleaded guilty and was convicted of a charge of murder and a charge of attempt to commit a sexual offence. The accused was legally represented.

[2] The issue is whether the proceedings appear to me to be in accordance with justice.

[3] The accused made a statement upon which his plea was based. The facts were that he was at Cameron's Yard, a tavern in Beaufort West with friends drinking beer on the evening of 23 December 2018. The deceased bumped into him as he walked past. As a result, the beer that the accused had in his hand slipped, dropped and broke. The accused demanded that the deceased buy him another beer. The deceased refused and an argument broke out. They grabbed each other and began fighting. Other patrons intervened and the fight stopped.

[4] Later that night, they were both walking home when the argument started again. The accused was still angry at the deceased for refusing to buy him beer. He pushed the deceased and the deceased fell down. He kicked the deceased as the deceased lay on the ground. He kicked the deceased on his body and head. The accused picked up a stone and hit the deceased on the head with it a few times. He then picked up a large stone and threw it on the deceased's head.

[5] The deceased was lying on his stomach on the ground and it appeared to the accused that he had passed out. The accused decided to have sex with him. He pulled the deceased's pants down. He pulled his own pants' down. He tried to penetrate the deceased's anus with his erect penis. He could not achieve it as the deceased lay on an awkward angle. Some of the accused's friends approached the scene and the accused got up and pulled up his pants. The ambulance arrived. He heard that the deceased was taken to hospital and also heard that the deceased died a week later.

[6] The accused admitted that the sole cause of death was his assault on the deceased. He was to some extent under the influence of alcohol on the day and was also angry but was fully aware of what he was doing, foresaw the possibility that he may kill the deceased but proceeded and knew that he was committing offences. The accused and his guardian confirmed the statement. The admitted post mortem report indicated lacerations on the face and scalp, abrasions of the body, consolidation of the lungs and a fracture of the left orbit with haemorrhage in and around the brain. The State accepted the plea explanation upon which the accused was convicted.

[7] A probation officer, Mrs Daveline Abrahams complied a pre-sentence report. The accused was a first offender. Accused was conceived when both his parents were teenagers, but have been together since for eighteen (18) years. They initially stayed with his paternal grandfather. The parents left to co-habitate but the accused remained and was raised by his grandfather. At thirteen (13) he associated with older friends who used drugs. He started abusing dagga at that age whilst still at school. His behavioural problems also began then. His drug abuse worsened as he started using stronger drugs incrementally. From dagga, he used mandrax, tik and occasionally alcohol over weekends. He dropped out of school in grade ten (10) in 2017.

[8] The accused had been in a Child and Youth Care Centre (CYCC), Outeniekwa. He was exposed to educational, vocational and life skills programmes. As a first offender and a young person, he was a candidate for a CYCC. However, because of the seriousness of the offence and the failure of the accused to take responsibility, the probation officer recommended imprisonment at Mossel Bay Youth Prison, as it also had programmes in place where the accused could further his studies and be exposed to other types of skills development. According to the probation officer, once accused was sentenced to Mossel Bay as recommended, he may be able to continue his education at Brandvlei Prison, which was an option once he was in Mossel Bay. The accused has no dependents.

[9] The deceased's family was still broken, in shock and sadness. The deceased suffered from mental illness. He also took chronic medication for epilepsy since he was young. The deceased did not have control over some of his bodily functions. However, he was a father of a twenty one (21) year old child who was in her second year of BA Social Work degree. The deceased's family members are very aggrieved that the accused took advantage of their family member's illness. Although the deceased had his challenges, he was reliable and trustworthy, assisting with chores in and around the house. Although some community members took advantage of him, treating him like a child to run errands, the family valued him.

[10] The magistrate pronounced as follows on sentence:

"... But because the circumstances are different than normal, I will take, for the purposes of sentences, both offences together.

You are hereby sentenced in terms of section 76, Act 75 of 2008, which is the passing of a sentence is postponed, for eight months. Salton is to be detained in compulsory residence at Outeniekwa House, which is a CYCC, for the eight months, and has to be assesses in different programmes, and have to be provided with counseling and drug rehabilitation if possible, in the centre.

The head of that institution is ordered to compile a report about his behavior and response to the programmes at the centre, and is ordered to present Salton and the report to this Court on 2 April, which will be in the first week, 2 April 2020. 2 April 2020 he will be brought back to this Court."

[11] I was of the opinion that the sentence was not in accordance with justice and that it should be set aside and altered. I held the view that the accused may suffer prejudice if the record was not placed before court for argument. I gave notice to the Magistrate, the Director of Public Prosecutions (the OPP) and Legal Aid South Africa (LASA), which acted on behalf of the accused, and called for arguments. The notice also gave that

(a) the court may alter the sentence to one of imprisonment in terms of section 77 of the Child Justice Act;

(b) the offences may be taken together for purposes of sentence;

(c) the accused be sentenced to eight (8) years imprisonment and

(d) that the sentence be antedated to the date of arrest in January 2019.

[12] The magistrate was requested to set forth reasons for the sentence and to transmit them to the Registrar of the High Court. The OPP and LASA were given an opportunity to file their Heads of Argument. I further indicated my desire that in hearing argument on the sentence of this child, the court should enjoy the benefit of the submissions from the Centre for Child Law both in respect of whether it is permissible for the court to impose a new sentence or preferably refer the matter back to the magistrate and also in relation to the use of the sentence provided for in section 76(3) of the CJA. I invited the Centre for Child Law to make submissions as *amicus curiae.*

[13] I have to record my appreciation for the helpful submissions made by the OPP, LASA and the Centre for Child Law *(the amicus).* I have always likened child law to eating a prickly pear. Kicking the ground before approaching its tree may seem useless. But unless you do, and know that you should inductively watch the fine dust and the direction to which the wind is blowing in order to determine the direction from which you should approach the tree, you risk serious health challenges. Once you have established your ground through the kick, watch and determination, you have to navigate the thorns to get to the fruit. The juicy are almost always perched on high, awkward and difficult to reach places. The ripe fruit is very fragile and needs care in handling. Ordinarily you also need some hook to reach out, patiently. Positioning yourself to hook, remove and grab require timing and adjustment. After enduring the pricks and stabs here and there, you should know the art of peeling the fruit. If you don't know, you will suffer from an itchy skin, allergic reaction or even serious damage to your eyes. Only after this labour and patience, can one actually be a disciple that preaches the joy of eating a prickle pear. The consumption should be measured as enjoying too much of the fruits lead to a clog. Sentencing a child is both a skill and an art mastered by study, patience, measurement, creativity and courage.

[14] The statement received from the magistrate read as follows:

> "The sentence is one on terms of section 76 Act 75/2008. The said offender was committed to compulsory residence in Youth Care Centre for a period of 8 months, as he would have turned 18 years on the return date. Though the Act prescribes a period not more than 5 years or until the offender is 21 years, in practice the CYCC only keeps them until the age of 18 years hence, he had to serve the 8 Months in the institution until age 18 after which the court has ordered the Head of the institution to return the offender and to submit a report to court (section 73(3) Act 75/2008) for further sentence to prison for the term between 8-10 years as he has committed a schedule 3 offence which if it was committed by an adult would been sentenced to more than 10 years imprisonment.
>
> I have noticed that I have erred in referring to the sentence or treating this sentence as a postponement of the passing of sentence, and further I erred in not mentioning further sentence before his return date as the intention was to

further sentence him to prison term.

I hope the honourable Judge will find the above in order."

[15] The magistrate was newly appointed to the regional court when the accused was sentenced. The administration of justice would benefit if Heads of Administrative Regions in the Magistracy as well as mentors assigned to them, would ensure that newly appointed magistrates, throughout the early stages of their careers, would write down their judgments. This is especially important where they deal with serious and/or complicated matters of fact and law like the present.

[16] There is much benefit to be derived from self-correcting. Written judgments for new appointees would also provide an opportunity for learning and continued development if their experienced mentors read and comment on the judgments before the newly appointed magistrate hands it down. In my view, this will not in interfere with judicial independence, as the magistrate still can proceed to pronounce themselves as they deem meet, despite the contrary views, training and guidance by the mentor. The magistrate in this case did not pay sufficient attention to the applicable law before sentencing the accused.

[17] There are a number of problems with the sentence imposed in this matter. The magistrate conflated the applicable provisions of the law, and misunderstood the processes which those provisions prescribe. Firstly, section 297 of the CPA, which provides for the conditional or unconditional postponement or suspension of a sentence, reads as follows:

"297 Conditional or unconditional postponement or suspension of sentence, and caution or reprimand

(1) Where a court convicts a person of any offence, other than an offence in respect of which any law prescribes a minimum punishment, the court may in its discretion-

(a) Postpone for a period not exceeding five years the passing of sentence and release the person concerned -

(i) On one or more conditions, whether as to - ...

(b) Pass sentence but order the operation of the whole or any part thereof to be suspended for a period not exceeding five years on any

condition referred to in paragraph (a)(i) which the court may specify in the order; or

(c) Discharge the person concerned with a caution or reprimand, and such discharge shall have the effect of an acquittal, except that the conviction shall be recorded as a previous conviction."

[18] Once the court was inclined to postpone the passing of sentence in terms of section 297, it had to introduce an additional comment expressing another reaction. The release of an accused is an especially critical part of the composite of a sentence provided for in section 297 (1) (a). Compulsory attendance or residence at a centre is competent as a condition to the postponement, but has to be for a specified purpose. This means residence for a generic assessment for different programmes is incompetent. The programmes should be identified and specified. The court did not postpone the passing of sentence and release the accused on condition of the compulsory attendance at Outeniekwa House for a specified purpose. The court sentenced the accused, to a sentence which is the postponement of the passing of sentence. The sentence that the court passed was not competent in terms of section 297 of the CPA. This means, in my view, is that no competent sentence was imposed on the accused [S *v Seedat* 2017 (1) SACR 141 (SCA) at para 36].

[19] The magistrate purported to sentence the accused in terms of section 76 of the CJA. This section does not provide for the postponement of the passing of a sentence. This is the second ground upon which, in my view, no competent sentence was imposed on the accused.

Section 76 (1) - (3) reads as follows:

"76 Sentence of compulsory residence in child and youth care centre

(1) A child justice court that convicts a child of an offence may sentence him or her to compulsory residence in a child and youth care centre providing a programme referred to in section 191(2)U) of the Children's Act.

(2) A sentence referred to in subsection (1) may, subject to subsection (3), be imposed for a period not exceeding five years or for a period which may not exceed the date on which the child in question

turns 21 years of age, whichever date is the earliest.

(3) (a) A child justice court that convicts a child of an offence-

(i) Referred to in Schedule 3; and

(ii) Which, if committed by an adult, would have justified a term of imprisonment exceeding ten years,

May, if substantial and compelling reasons exist, in addition to a sentence in terms of subsection (1), sentence the child to a period of imprisonment which is to be served after completion of the period determined in accordance with subsection (2).

(b) The head of the child and youth care centre to which the child has been sentenced in terms of subsection (1) must, on the child's completion of that sentence, submit a prescribed report to the child justice court which imposed that sentence, containing his or her views on the extent to which the relevant objectives of sentencing referred to in section 69 have been achieved and the possibility of the child's reintegration into society without serving the additional term of imprisonment.

(c) The child justice court, after consideration of the report and any other relevant factors, may, if satisfied that it would be in the interests of justice to do so-

(i) confirm the sentence and period of imprisonment originally imposed, upon which the child must immediately be transferred from the child and youth care centre to the specified prison;

(ii) substitute that sentence with any other sentence that the court considers to be appropriate in the circumstances; or

(iii) Order the release of the child, with or without conditions.

(d) If a sentence has been confirmed in accordance with paragraph (c)(i), the period served by the child in a child and youth care centre must be taken into account when consideration is given as to whether or not the child should be released on parole in accordance with Chapter VII of the Correctional Services Act, 1998 (Act 111 of 1998)."

[20] In terms of section 76, the magistrate could sentence the accused to compulsory residence in a CYCC providing a programme referred to in section

191(2) 0) of the Children's Act. A court cannot do so without hearing appropriate evidence. In my view, the court should at least hear evidence from the CYCC where the child is held at the time of the sentencing on reaction to programmes already provided if any, as well as the one where the child is to be placed not only on the programmes available but also on their effectiveness. Courts should bear in mind that evidence should guide their decision as to which of the varying degrees of restrictive care amongst the available institutions, is appropriate.

[21] The court should also be clear on its findings to ensure that the child receive appropriate attention at an appropriate facility. Some of the questions that must be answered are: Does the child need medical, psychological or other treatment and if so, which specifically? Does the facility have the appropriate resources to meet the level of risk that the child presented with? Is the accommodation, amenities and features readily available? The court should receive current and reliable information from the probation officer and/or the functionary responsible for the management of the intended center of placement.

[22] The *amicus* made the following remarks concerning a sentence imposed in terms of section 76(3):

> "9. Section 76(3) may be referred to as a hybrid sentence. It was added by Parliament to the original Child Justice Bill and was viewed by the Portfolio Committee on Justice and Constitutional Development as a 'tough' sentence. Gallinetti records that:
>
> > "[T]he Committee was at pains to ensure that children charged with serious offences are still held to account for their actions. As a result public confidence in the new child justice system would be enhanced. The manner in which this was achieved was, for instance, by stating explicitly in the legislation that children (other than those sentenced under minimum sentencing legislation) could still be sentenced for up to 25 years in prison **and creating a new type of sentence which consisted of a combination of detention in a child and youth care centre possibly followed by imprisonment"** (our emphasis).
>
> 10. The fact that it is considered a serious sentence is revealed by the requirement that it is only to be used in situations which, if committed by an

adult, would attract a sentence of at least 10 years - this in addition to it being available only for offences listed in schedule 3 to the CJA, which list the most serious offences. It, furthermore, is only to be used in situations where substantial and compelling circumstances are found to exist."

[23] The *amicus* deals with the problems of the magistrate's interpretation of section 76(3) in paragraphs 20-24 of its submissions in the following terms:

"20. The court a *quo* then went on to explain its interpretation of section 76(3). This was described as follows:

> "The provision provides that when the child has committed an offence, which according to that offence he cannot be released and be outside for instance, the Court may sill postpone the sentencing of the accused person and keep that offender in a compulsory residence, with the option that that offender has to undergo evaluation and some programmes which might assist him before he is even sentenced."

21. This paragraph reveals that the sentencing court misunderstood section 76(3) of the CJA to be a mechanism for the postponement of sentence. In fact, section 76(3) of the CJA is a sentence in and of itself, in which both the portion of the time to be spend in a CYCC and the portion to be spent in prison are to be set out clearly in the order.

22. Another concerning aspect of the court a *quo's* interpretation of section 76(3) of the CJA is made apparent where the sentencing court states as follows:

> "On the return of the accused person or juvenile back to court, then the Court may proceed, and at that time the child would be over the age of 18 years, and the Court will be able to sentence him for longer periods. which will still benefit." (our emphasis added)

23. This demonstrates the dangers of not setting the sentence of imprisonment out in the order. Not only is it a misreading of section 76(3) of the CJA but also breaches several principles of sentencing relating to child offenders - first and foremost that the relevant date for the purpose of sentencing is the date at which the offence was committed, not the date of sentence.

24. Using section 76(3) of the CJA in this way- to expand the scope of

sentencing with the passing of time which has been brought about through the court's own actions, is a breach of the rule of law principles relating to certainty and predictability in sentencing. The accused has a right to know the content of the sentence at the date of sentence."

[24] The *amicus* summarized the magistrate's misdirections in the following terms at para 28:

"28. In summary, it appears that the sentencing court misdirected itself with regard to its interpretation and application and interpretation of section 76(3) of the CJA:

28.1 One, the sentencing court misunderstood s 76(3) of the CJA to be a mechanism for postponement of sentence, with the sentence to be determined at a future date.

28.2 Two the sentencing court was incorrectly of the view that the age of the offender at the time of sentence was the relevant age for purpose of sentencing, rather than the age at the time of the offence, and was then of the view that the sentencing date could be manipulated to allow the child to be sentenced as an adult on the date when the 18 year- old would be brought back to court.

28.3 Three, the sentencing court failed to set a period of sentence in a CYCC, coupled with a period of sentence of imprisonment. This went against the principles of certainty and predictability in sentencing, leaving the child offender with no clear idea about what his sentence was or would be, nor that his behavior at the CYCC would be determinative of his future sentence. It in effect amounts to an indefinite sentence.

28.4 Four. the sentence does not convey the seriousness of the crime to the public, as it gives the impression that the child is only sentenced for eight months, and there is no indication of the possible prison term that may ensue."

[25] After convicting a child. a child justice court must impose a sentence in accordance with chapter 10 of the CJA [section 68 of the CJA]. A sentence as envisaged in section 76(3) of the CJA should be considered where it is an appropriate response to the nature of the offence committed. the child and the

interests of society. Such a sentence is preferable in deserving circumstances for it offers the following benefits:

(a) It ensures that a child is removed from society for a period not exceeding five years or until the child is 21, whichever date is the earliest.

(b) It allows the child to access child- oriented and problem- specific programmes that are specifically designed by the Department of Social Development and available at a CYCC to assist in the rehabilitation of offenders.

(c) It incentivises the child to be rehabilitated and reform their behavior against the background knowledge that the matter will return to court and a report from the Head of the CYCC will be placed before the court for consideration on a particular date.

(d) The additional period of imprisonment is known and sends a clear message about the seriousness of the offence, making clear the opportunity presented to the child but also the serious consequences of their action *[amicus* para 44 read with 48].

[26] When a sentence is due by law, an appropriate sentence should be imposed. The once-and-for-all rule is entrenched in our law. In general a sentence flowing from one conviction must prevent a multiplicity of sentences based on a single conviction. When a court has imposed a sentence, another sentence on the same conviction is not permissible. The object of the rule is to prevent repetition of sentencing, the harassment of a child and a multiplicity of sentences and the possibility of conflicting sentences. The magistrate was permitted to sentence the child for all the convictions, once. The rule is buttressed by the principle of *res judicata [MEG, Health and Social Development, Gauteng v DZ* [2017] ZACC 37 at para 15 and 16]. This rule is also applicable when the court imposes a sentence in terms of section 76(3) of the CJA. The imposition of the additional term of imprisonment must happen simultaneously with the imposition of the compulsory residence. This gives certainty to the offender as to what his sentence is. In this matter, the parties and especially the child, was left in the dark and uncertain as to his actual sentence.

[27] The prejudice to accused children if there were more than one opportunity for

a magistrate to sentence a child is immeasurable, as regards their interest in the result of the criminal proceedings. The doctrine of *functus officio* is necessary for procedural certainty. In terms of this principle, once the magistrate, had sentenced the child, the decision is deemed to be final and binding once made. The magistrate had no power to revoke the sentence as a decision maker [S *v Hoema* 1978 (2) SA 703 (T) at 704F-H]. The magistrate cannot correct or in any way alter a sentence in the light of facts which subsequently come to their knowledge and of which they were unaware at the time that they sentenced the child [S *v Cedras* 1992 (2) SACR 530 at 531g-h]. I do not understand section 76 to have done away with this principle totally.

[28] The hybrid sentence provided for in section 76(3) provides a regulated exception to the once-and-for-all rule as well as the *functus officio* principle. It may only be imposed if certain preconditions are met, one of which is that substantial and compelling circumstances exists warranting its utilisation. The CYCC bears the overall responsibility to ensure that the child receives appropriate therapeutic interventions necessary for the rehabilitation and integration and also to report to the court its views on the impact and effect of those therapeutic interventions on the child and the already imposed additional term of imprisonment *[Centre for Child Law* "Working for Rehabilitation? An account of the Implementation of section 76(3) of the Child Justice Act 75 of 2008 by Child and Youth Care Centres"]. The need for the child to be made aware of the nature, scope and content of the whole sentence imposed as well as the need for the identified CYCC to know the child and their therapeutic needs and the capability to administer those requisite therapeutic programmes cannot be underestimated. A court cannot competently impose a sentence which the presiding officer does not know or understand.

[29] A sentence needs to serve the public interest [S *v Seedat, supra* at para 39] where Tshiqi J said:

> "Criminal proceedings need to instill public 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'. (See *S v Jaipal* 2005 (1) SACR 215 (CC) (2005 (4) SA 581; 2005 (5) BCLR 423; [2005] ZACC 1) para 29.)"

[30] In *Centre for Child Law v Minister of Justice* 200!:J (6) BA 632 (CC) at para 2!:J and 31 it was said:

> "[29] ... The children's rights provision itself envisages that child offenders may have to be detained. The Constitutional injunction that '(a) child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail. It means that the child's best interests are "more important than anything else', but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment."

[31] The Bill of Rights envisages that detention of child offenders may be appropriate, and it mitigates the circumstances. Detention must be the last, not a first, or even intermediate, resort; and when the child is detained, detention must be 'only for the shortest appropriate period of time'. The principles of 'last resort' and 'shortest appropriate period' bear not only on whether prison is a proper sentencing option, but also on the nature of the incarceration imposed. If there is an appropriate option other than imprisonment, the Bill of Rights requires that it be chosen. In this sense, incarceration must be the sole appropriate option. But if incarceration is unavoidable, its form and duration must also be tempered, so as to ensure detention for the shortest possible period of time."

[32] Whilst being a child is a mitigating factor and requires special attention, it is not a bar to a sentence of imprisonment. The accused is also a first offender and he pleaded guilty. He killed a vulnerable member of society. The deceased was a person who suffered from mental illness, epilepsy and did not have control over some of his bodily functions. The accused pushed him to the ground and kicked him throughout his body, hit his body with a stone several times, picked up a big rock and cracked his skull therewith and caused bleeding into the brain. Whilst the deceased lay defenseless and seriously wounded, the accused undressed him and attempted to penetrate the deceased's anus with his penis. This is an utterly odious and wicked conduct. The deceased was not only brutally killed but was humiliated and degraded whilst lying on the ground, seriously wounded. I have no doubt that committal for

eight (8) months compulsory residence at a CYCC is bound to cause indignation within a large portion of society.

[33] The probation officer recommended a sentence of imprisonment in terms of section 77 of the CJA. In her evaluation she referred to the accused's drug and alcohol abuse, the contribution by neighbourhood to his predisposition, negative peer association and general purposeless lifestyle prior to detention, identifying them as risk factors to recidivism. In her view, the accused might be in need of specific, goal directed services. She indicated that Mossel Bay Youth Centre, which is a prison for juveniles in the area, offers different interventions and programmes which are relevant for the accused's general development, including education.

[34] Whilst he pleaded guilty and gave a detailed plea explanation, some of the comments of the accused to the probation officer made it difficult for her to report on aspects such as remorse, victim and their family empathy and restorative justice. The seriousness of the offence, the circumstances of the accused, the risk factors to recidivism all made a case for a custodial sentence. These factors, seen against the background of the waiting periods for availability of accommodation in the sentenced unit of the Child and Youth Care Centres, in her view let to that it would be in the best interests of the accused the community and the deceased's family that the accused be sentenced to direct imprisonment.

[35] The magistrate did not follow the probation officer's recommendations. The magistrate's judgment does not discuss why this was not an appropriate sentence [section 71(4) of the CJA]. The probation officer's concern relating to availability of accommodation at CYCC, was acknowledged in the CJA. It is against that background that where a magistrate imposed a section 76 (1) sentence, such magistrate should postpone the matter for a month to his or her court and on the return date enquire whether the child had in fact been admitted [section 76 (4) (d)]. The magistrate disregarded this obligation, simply postponing the matter from 16 August 2019 to 2 April 2020. As things stand, we do not know whether the child fell in the crack between administrative bureaucracy and misguided judicial activism, finding himself between a sentence imposed and unavailability of resources to meet that sentence. This could have been avoided if the magistrate had listened to, and

heeded the probation officer's advice that there was no accommodation available, as it was her obligation to do so [section 76 (4) (c) read with section 71(3)].

[36] In my view, the sentence imposed by the magistrate is, not only inappropriate but it is also incompetent. In *S v Salzwedel and Others* 1999 (2) SACR 586 (SCA) at para 18 the court said:

> "[18] ... Imprisonment would undoubtedly be prejudicial to the respondents but regard must be had not only to the interests of the respondents, but the serious nature of the crime in the present case, its effect on others and the interests of the community at large. It cannot properly be said that a substantial term of imprisonment, in the circumstances of this case, 'would serve no purpose other than retribution'. It would also give expression to the legitimate feelings of outrage which must have been experienced by reasonable men and women in the community, when the circumstances of the offence were disclosed and appreciated. A lengthy term of imprisonment sanctioned by the court would also serve another important purpose. It would be a strong message to the country that the courts will not tolerate the commission of serious crimes in the country ... "

[37] I had received this record in November 2019 and remitted it back as the record was not complete. To date, I still do not have, amongst others, the charge sheet as part of the record before me. The result is that I know that the accused made his first appearance in the regional court on 23 April 2019. I know that he was already in custody and had appeared in the district court before he was referred for trial to the regional court but I do not know from which date was he in detention. I only know from the probation officer's report that it was in January 2019.

[38] The *amicus* submitted that the matter be referred back to the magistrate, which position was supported by LASA. The DPP submitted that any of the two, to wit, referral back or alteration of sentence, was appropriate under the circumstances. In my view, it is not desirable that I refer the matter back to the trial magistrate. After a new sentence is imposed, the matter will still need to be referred back to the High Court for reconsideration. It is unfair to place the child, who is already anxious, through a revolving door with the regional division on one side and the High Court on

the other. I recognise that this judgment could give direction to the magistrate as to the proper interpretation of section 76(3) of the CJA and may also assist other courts for future matters where the sentence in terms of the section is considered. It is also improper in my view to put the responsibility of a "technical review" of her sentence on the shoulders of one of another regional magistrate.

[39] In as much as the judgment indicate that I considered the views expressed by the *amicus,* I am unable to follow through with their conclusion that I refer the matter back to the magistrate, setting amongst others the period of compulsory residence at the CYCC and indicate that the Head of the CYCC will be required to report. For that to happen, one required, in my view, current and reliable information on the treatment necessary for the child and the availability of the appropriate programmes and accommodation at the CYCC. There is no countervailing evidence to that of the probation officer, before me, to sustain a departure from her well- considered and motivated report.

[40] The final matter that requires a comment arises from the following portion of the record:

> "PROSECUTOR PUTS CHARGES TO ACCUSED
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> PROSECUTOR: ...
>
> Count 2 is that of attempt to commit a sexual offence, read with section- or rather that you are guilty of contravening the provisions of section 55(a), read with Chapter 2, 3, 4 and sections 1, 2, 50, 55, 56, 56A, 57, 58, 59, 60 and 61 as well as 71(1), (2) and (6) of the Criminal Law (Sexual Offences and Related Matters Amendment Act 32 of 2007, and further read with section 49 and 270 of the Criminal Procedures Act 51 of 1977. In that on or about 23 December 2018 near Beaufort West, in the regional division of the Cape, you unlawfully and intentionally attempted to commit a sexual offence, to wit by pulling down the pants of Elmo van Rensburg and to li(k)e on top of him, without the consent of the said complainant. **Just one moment Your Worship, as the Court pleases** (my own emphasis).
>
> COURT: Do you understand the charges against you?
>
> ACCUSED: Yes Your Worship.
>
> COURT: Before I - okay (n)ow do you plead to the charges against you?

ACCUSED: Pleading guilty Your Worship.

ACCUSED PLEADS GUILTY TO BOTH CHARGES"

I understand the record to indicate that whilst the Public Prosecutor was still reading the charge on count 2, after reading the substantial part of it, the public prosecutor requested a moment from the court. It is clear that the court did not hear or understand what was being said by the prosecutor. The court did not grant the moment requested and it used that opportunity to ask the accused if he understood the charge and after his affirmation proceeded to ask him how he pleaded and the accused pleaded guilty. The legal representative confirmed the plea on both counts to be in accordance with their instructions and continued to read a statement prepared in terms of section 112(2) of the CPA into the record. Therein the accused set out the facts upon which the plea was based, which facts were accepted by the State and upon which the verdict was returned. The point taken on review, under the circumstances, that what was read out cannot be construed as a charge of attempted rape, is unfortunate and stands to be rejected.

[41] The interests of justice demand that I alter the sentence. For the reasons provided I would therefore make the following order:

1. The sentence imposed by the magistrate is set aside.
2. The sentence is altered as follows:
   2.1 The offences are taken together as one for purposes of sentence.
   2.2 The accused is sentenced to eight years imprisonment.
   2.3 The sentence is antedated to 23 December 2018.

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D. M. THULARE

Acting Judge of the High Court

I agree.

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B. MARTIN

Acting Judge of the High Court