IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)
[*REPORTABLE*]

In the matters of:

S v JACOBS	**CASE NO: C1191/13**
and	
S v SWART	**CASE NO: B927/14**
and	
S v DAMON	**CASE NO: 526/14**
and	
S v JAS	**CASE NO: 14/17**
and	
S v KLAASEN	**CASE NO: 682/16**
and	
S v SWANEPOEL	**CASE NO: 1907/16**
and	
S v XHANTIBE	**CASE NO: 310/17**

JUDGMENT DELIVERED ON 16 AUGUST 2017

SHER AJ (HENNEY J concurring):

[1] We have before us 7 matters which were sent to this Court for so-called 'automatic' review from the Caledon, Montagu, Vredendal, and Ceres magistrates' courts in terms of ss 302 and 303 of the Criminal Procedure Act 51 of 1977("*the CPA"*), which provide that the record of the proceedings in which a reviewable sentence has been imposed by a magistrate shall be forwarded to the registrar of the High Court within 7 days, in order that such proceedings may be reviewed by a judge in chambers. In all these matters the records were sent for review well outside the requisite period. The breach is particularly egregious in the case of the 2 matters from Caledon and the matter from Montagu.

[2] In *S v Jacobs,*[1] where the accused was convicted of house-breaking and theft of an electric grasscutter and was sentenced to 2 years' imprisonment in terms of the provisions of s 276(1)(i) of the CPA on 7 March 2014, the record was only received on review more than 3 years after the sentence was imposed and a year after it would have been served, that is, on the supposition that the accused served the full term. In the other matter from the Caledon court (*S v Swart*),[2] the record of proceedings was sent for review 2 years after the sentence was imposed. The accused was convicted of house-breaking with intent to steal and theft of a small amount of cash and a cell phone and was given a sentence of 2 years' imprisonment which was suspended for 4 years. As will be apparent, not only was the conviction unsound for the reasons we

[1] Caledon case no. C 1191/13.

[2] Case no. B 927/14.

set out herein, but the terms of the suspended sentence were so widely framed that it could have been put into operation since then in the event that the accused sustained a subsequent conviction for any offence involving dishonesty committed in the period of suspension, no matter how trivial.

[3] In the Montagu matter of *S v Damon*[3] the accused was convicted of theft of a music system for which he was sentenced to 2 years' imprisonment on 19 November 2015. On 17 June 2016, after he had served 7 months he was released on parole, but he was re-admitted for violating his parole conditions on 16 August 2016 and by now he too will long since have served the remainder of his sentence. The record in his matter was only sent to this Court in June 2017, a year and 8 months late.

[4] The delay in the submission of the record in respect of the 2 matters from the Vredendal court is in the order of 4 months from the date when the sentence was imposed. In one of these matters the accused, who was convicted of assault with intent to cause grievous bodily harm, was sentenced to 18 months' imprisonment which was suspended for 5 years on standard conditions.[4] In the other matter[5] the accused was sentenced to a fine of R2 000.00 or 18 months' imprisonment half of which was suspended for 5 years, after he was convicted of being in possession of certain prohibited dependence-producing substances.

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[3] Case no. 526/14.

[4] *S v Jas* Vredendal 14/17.

[5] *S v Klaasen* Vredendal 682/16.

[5] In the case of the 2 matters from the Ceres magistrate's court the delay between the date of sentence and receipt of the record by the Registrar is in the order of 2 months. In one of these matters[6] the accused received a suspended sentence of 6 months' imprisonment after he pleaded guilty to a charge of common assault and in the other matter[7] the accused was sentenced to a term of 6 months' imprisonment after he was convicted on a charge of theft.

[6] From these and other cases which have come before judges of this division recently on automatic review it is apparent that non-compliance with the provisions of ss 302 and 303 and lengthy delay in the submission of the records of reviewable matters is fairly endemic throughout the outlying magisterial districts of the Western Cape and this judgment constitutes an attempt, on our part, to put forward certain remedial measures in order to correct this situation. In the circumstances, given the nature of the recommendations we make at the end of this judgment and the terms of the Order which we impose, we direct that a copy of this judgment should be sent to the Director-General of the Department of Justice, the Regional Heads of the Department of Justice and the Office of the Chief Justice for the Western Cape, the Director of Public Prosecutions for the Western Cape, the Magistrates' Commission, the Regional Court President (Western Cape) and the Chief Magistrates and judicial administrative/'cluster' heads for the various courts referred to as well as the Head of Court of each of the magistrates' courts concerned.

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[6] *S v Swanepoel* Ceres 1907/16.

[7] *S v Xhantibe* Ceres 310/17.

The legislative provisions

[7] S 302(1)(a) of the CPA provides that proceedings in which a sentence has been imposed by a judicial officer who has not held the rank of magistrate[8] for a period of more than 7 years and which exceeds 3 months' imprisonment (or R6 000.00) or in the case of magistrates who have held the rank for longer exceeds a term of imprisonment of 6 months (or R12 000.00), are automatically reviewable by this Court. In addition, s 85 of the Child Justice Act[9] provides that[10] any matter in which a child[11] has been sentenced to any form of imprisonment[12] (or any sentence of compulsory residence in a child and youth care centre) is also subject to automatic review, irrespective of the length of the sentence or the period the judicial officer concerned has held the substantive rank of magistrate or regional magistrate,[13] or whether the child appeared before a district or regional court.[14] Automatic review is not available to an adult accused who was legally represented at the time[15] or who has noted an appeal.[16]

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[8] The definition of *"magistrate"* in s 1 of Act 51 of 1977 only refers to a so-called district court magistrate and not an additional or regional magistrate.

[9] Act 75 of 2008.

[10] Unless an appeal has been noted (s 85(2)).

[11] Whether legally represented or not (s 85(2)(c)).

[12] This will include a suspended sentence of imprisonment *vide S v LM* 2013 (1) SACR 188 (WCC) at paras [50]-[51].

[13] S 85(1)(b).

[14] S 85(1)(d).

[15] S 302(3)(a) of the CPA.

[16] S 302(1)(b)(i) – (iii) of the CPA.

[8] Although s 302(1)(a) is couched in terms of a review of the sentence which was imposed, and although review powers are ordinarily confined to considering whether there was any irregularity in the proceedings, because s 303 requires certification that the proceedings are in accordance with justice the reviewing judge is required to evaluate whether the entire proceedings ie those pertaining both to the sentence as well as the merits of the conviction are not only formally in order and regular, but also whether they are fair, and in doing so it has long been accepted that the reviewing judge exercises a function akin to that ordinarily exercised by an appellate court. As such, the process of automatic review is aimed at ensuring both the validity as well as the fairness of the underlying conviction and sentence[17] and the powers of the reviewing judge are extremely wide [18] and include not only the power to alter or reduce the sentence imposed[19] but also the power to quash the conviction[20] or to set aside or "*correct"* the proceedings,[21] or to make any other order which may promote the ends of justice.[22]

[9] Automatic review was not derived from Roman-Dutch or English sources and is a unique creation of our law. In the oftcited decision of *Letsin*,[23] it was described as an institution of vital importance to the administration of justice in

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[17] *S v Mokubung; S v Lesibo* 1983 (2) SA 710 (O) 714H.

[18] As set out in s 304.

[19] S 304(c)(ii).

[20] S 303(c)(i).

[21] S 304(c)(iii).

[22] S 304(c)(vi).

[23] 1963(1) SA 60 (O) at 61A-B.

this country as the great majority of accused who come before the magistrates' courts are legally unrepresented and criminal proceedings in these courts are not considered to be properly concluded until the reviewing judge has certified that they were in accordance with justice.[24] It was also said that it was part of the *"higher calling"* of the magistrates' courts to see to it that any process in terms of which a person is deprived of his personal liberty by means of a sentence of incarceration receives the *imprimatur* of a reviewing judge as speedily as possible.[25]

[10] In *Manyonyo*[26] it was held that the reason for the statutory insistence on the expeditious forwarding of records for review in terms of s 303 is to promote the speedy and efficient administration of justice,[27] which should not be compromised by administrative incompetency, and in *Joors*[28] this Court[29] described automatic review[30] as a measure intended to lend substance to the constitutional right which an accused has to review by a higher court[31] and the constitutional right of every detained person to challenge the lawfulness of their detention.[32]

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[24] *Id* 61F.

[25] *Id* 61G.

[26] *S v Manyonyo* 1997 (1) SACR 298 (E).

[27] *Id* at 300f.

[28] *S v Joors* 2004 (1) SACR 494 (C).

[29] Per Binns-Ward AJ *et* Thring J.

[30] At 497d.

[31] In terms of s 35(3)(o) of the Constitution.

[32] In terms of s 35(2)(d) of the Constitution.

The effect of delay

[11] Even before the introduction of the Bill of Rights it was an accepted principle of common law that a gross irregularity during the course of a criminal trial could result in a conviction or sentence being set aside, if it caused a failure of justice. In *S v Moodie*[33] it was accepted that a failure of justice could occur where there was an irregularity which was so gross a departure from established rules of procedure that it could be said that the accused had not been properly tried[34] and in like vein in *S v Mushimba and Ors*[35] it was accepted that if an irregularity resulted in an accused not receiving a fair trial, the conviction or sentence, as the case might be, could be set aside.[36]

[12] In regard to the effect that gross delay may have on the integrity and validity of criminal proceedings, we have sought guidance from reported cases that have dealt with this issue in both pre- and post-conviction proceedings.

[13] In regard to pre-conviction delay, the cases must be considered in the context of s 342A of the CPA which was introduced as an attempt on the part of the legislature to provide certain remedies where there has been excessive delay in respect of bringing an accused to trial. Amongst these remedies is that of a stay of proceedings and the most important cases dealing with pre-conviction delay are those that concern applications in this regard. In summary, the

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[33] 1961 (4) SA 752 (A).

[34] At 758F-G; 759C-D.

[35] 1977 (2) SA 829 (A).

[36] See also *S v Lubbe* 1981 (2) SA 854 (C) 860F-G.

outcome of these cases[37] is that a permanent stay will only be granted in exceptional circumstances or where there is significant prejudice to an accused were the matter to proceed. Thus, it could fairly be said, the tendency in regard to pre-conviction delay is not to upset the applecart save in exceptional circumstances, and the courts will generally be disposed towards leniency.

[14] In *Sanderson*,[38] the Constitutional Court identified the principle factors which need to be taken into account by a court in deciding whether or not to grant a permanent stay of prosecution on the grounds of undue delay.

[15] It reiterated what was said in 1963 in *Letsin*[39] viz that the vast majority of accused in South Africa are unrepresented and thus to deny them a stay because they have not asserted their right to a speedy trial would be to *"strike a pen"* through the rights of the most vulnerable members of society.[40] At the same time, the Court also pointed out that it would be equally unrealistic not to recognise that the administration of the criminal justice system in this country was under severe stress. These remarks are still apposite some 9 years later.

[16] The Court was of the view that the greater the prejudice to an accused because of delay (be it in the form of continued incarceration, restrictive bail conditions or trial prejudice), the shorter should be the pre-conviction period within which

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[37] *McCarthy v Additional Magistrate, Johannesburg* 2000 (2) SACR 524 (SCA); *Wild and Ano v Hoffert & Ors* 1998 (3) SA 695 (CC).

[38] *Sanderson v Attorney-General Eastern Cape* 1998 (1) SACR 227 (CC).

[39] Note 23.

[40] Note 32, para [26].

the accused was to be tried.[41] Consequently, cases involving incarceration or serious *"occupational disruption or social stigma"* should be prioritised and expedited.[42] However, the Court held that delay in itself was not necessarily determinative and in each case the nature and cause thereof and the role of the parties responsible therefor needed to be taken into account.

[17] So, for example, where an accused was to blame for a number of postponements or delays in trial proceedings, he or she should not be allowed to rely thereon in order to vindicate his constitutional right to a speedy trial.[43] The Court also recognised that there was a distinction between a simple and a complex matter which required more time to prepare, such as cases where scientific or other analyses or the obtaining of technical, medical or other expert reports was awaited.[44] The Court also expressed the view that systemic delays caused by limitations in resources were probably more excusable than individual instances involving a dereliction of duty. But, at the same time, it recognised that there had to be some proportionality between the sentence which could ultimately be imposed and the prejudice to an accused caused by delay. So, in matters where the period of pre-trial incarceration caused by delay exceeded the maximum possible period of incarceration which might be imposed on sentence, the delay would be considered to be unreasonable.[45]

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[41] *Id* para [31].

[42] *Id.*

[43] At para [33].

[44] Para [34].

[45] *Id*.

And the Court also warned that notwithstanding resource limitations *"there must come a time when systemic causes can no longer be regarded as exculpatory"*[46] as the Bill of Rights was not a set of aspirational principles of State policy, and the State should make whatever arrangements were necessary to avoid a violation of an accused's constitutional rights. The Court further cautioned that delay should not be allowed to debase the presumption of innocence and thereby in itself become a form of extra-curial punishment.[47]

[18] In *Bothma*[48] the Constitutional Court added a further factor (to those set out in *Sanderson)*, which needed to be weighed in the scale ie the nature of the offence concerned. It held that:

> *"The less grave the breach of the law the less fair will it be to require the accused to bear the consequences of the delay. The more serious the offence the greater the need for fairness to the public and the complainant by ensuring that the matter goes to trial"*.[49]

[19] It pointed out that the factors referred to in *Sanderson* should not be dealt with as though they constituted a definitive checklist and in each case the court was required to carry out a balancing exercise depending on the facts before it.[50] In *Bothma* the issue was whether a 37-year delay in bringing an accused to trial

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[46] Para [35].

[47] Para [36].

[48] *Bothma v Els* 2010 (1) SACR 184 (CC).

[49] Para [77].

[50] *Id*.

on a charge of rape and sexual abuse merited a permanent stay of the prosecution. The Court pointed out that local and international jurisprudence recognized that the trauma and shame suffered by youthful victims of sexual offences often resulted in criminal complaints only being lodged many years afterwards, and public policy therefore required that delays in regard to prosecuting such offences should be treated differently. It drew attention to the fact that although the CPA provided that the right to institute a criminal prosecution ordinarily lapsed after the expiry of a period of 20 years, such a prescriptive bar did not apply in the case of serious offences such as rape, murder, genocide, and trafficking for sexual purposes. This was a consideration which was also taken into account by the Supreme Court of Appeal in *Zanner*,[51] where the Court held that the societal demand to bring an accused to trial in the case of a serious offence such as murder was *"that much greater"* and the Court should accordingly be that much slower in granting a permanent stay[52] as the right to a fair trial required fairness not only to the accused, but also to the public, as represented by the State.[53]

[20] That then, as far as the treatment of pre-conviction delay is concerned. As far as post-conviction delay is concerned, and appellate delay in particular, the approach of the Courts has been equally wary. In *Pennington*[54] the Constitutional Court referred to the decision of the Supreme Court of Canada

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[51] *Zanner v Director of Public Prosecutions Johannesburg* 2006 (2) SACR 45 (SCA).

[52] At para [21].

[53] *Id.*

[54] *S v Pennington and Ors* 1997 (4) SA 1076 (CC).

in *R v Potvin*,[55] where it was held that a delay in the appeal process did not infringe the constitutional right to be tried within a reasonable time. But the decision in *Potvin* must be seen in the context of the particular wording of the relevant Canadian Charter right[56] which provided that any person *"charged"* with an offence had the right to be tried within a reasonable time. The majority of the Supreme Court held that the reference to being 'charged' did not allow for this right to be extended beyond conviction, to appeals. The Court adopted the approach that the remedy for appellate delay was not the reversal of a conviction as this would be disproportionate to the interest that had been harmed by the infringement, but gross delay might possibly give rise to a right of action for damages, or some other form of relief.

[21] There are two *caveats* that must be noted in respect of the decision in *Potvin*. Firstly, the Supreme Court of Canada subsequently held in *R v MacDougall*[57] that the phrase *"charged with an offence"* should not be restricted to a particular phase of criminal proceedings and required an expansive interpretation which covered both pre- and post-conviction proccedings. In *MacDougall* the delay had occurred in sentencing proceedings and the Supreme Court took account not only of the length thereof and the causes for it, but also the prejudice suffered by the accused, and it also considered whether by his conduct he might have waived any of his rights. It held that an accused who entered a plea

[55] *R v Potvin* (1993) 16 CRR (2d) 260.

[56] S 11(b) of the Charter of Human Rights.

[57] [1998] 3 SCR 45; [1998] 56 CRR (2d) 189.

of guilty did not waive his right to be sentenced within a reasonable period of time thereafter.

[22] In the second place, the corresponding right in our Bill of Rights is phrased differently. It is a right to have a criminal trial begin and conclude without unreasonable delay[58] and although our general right to a fair trial[59] includes as a subspecies the right of appeal to or review by a higher court,[60] this right is not expressly phrased in the context of time, reasonable or otherwise.

[23] In *Pennington* the Constitutional Court remarked that although undue delay in the prosecution of a criminal appeal was undesirable, to say that guilty persons were to be excused from serving sentences imposed on them because of delays associated with an unsuccessful appeal would not be consistent with fairness or justice.[61] But these remarks were *obiter* and the Court expressly left open the question of whether undue delay might constitute an infringement of the constitutional right to a fair trial.[62]

[24] In *Sochop*[63] this Court raised the question of whether an accused's constitutional right to have their trial begin and conclude without unreasonable delay extended to appeal proceedings and, if so, whether unnecessary delay could in and of itself result in an acquittal. Blignaut J referred to a number of

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[58] S 35(3)(d).

[59] In terms of s 35(3).

[60] S 35(3)(o).

[61] Para [43].

[62] Para [41].

[63] 2008 (1) SACR 553 (C).

judgments in international jurisdictions where the issue had been raised but not decided conclusively, one way or the other. In *Sochop* there had been a 5-year delay between the noting of an appeal and the hearing of it, which was largely attributable to problems in the provision of Legal Aid. The Court pointed out that delays of this kind prejudiced not only an appellant, but brought the whole criminal justice system into disrepute and the Court found it especially disturbing that there were insufficient control mechanisms in place in the provision of Legal Aid to ensure that lengthy delays could be avoided.[64] But, as the conviction was found to be unsound in any event, the appeal was upheld on this ground and as far as the delay was concerned the Court simply directed that the judgment be brought to the attention of the Director of Public Prosecutions and the Legal Aid Board.

[25] The way in which appellate courts have dealt with the issue of delay may be contrasted with how it has been dealt with by courts before whom matters have come on automatic review. Already in 1963 in *Letsin* the Court sought to place an obligation on presiding magistrates to see to it that criminal trials were properly concluded by ensuring that the record of proceedings were placed before the High Court for review as speedily as possible.[65] In *Letsin* the delay was minimal: the record was sent on review 9 days after sentence instead of 7 and when reasons for the delay were requested from the magistrate these were supplied a month later.

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[64] At para [30].

[65] Note 23 at 61G.

[26] In *Raphatle*[66] a 2-month delay in submitting the record was described as a matter of *"great concern"*.[67] But the conviction was set aside on the grounds of another irregularity, to wit that the presiding officer had failed to inform the accused of his right to cross-examine.

[27] In *Manyonyo*[68] the remedy which the Court adopted for a (5 month) delay in submitting the record was to direct that the magistrate should provide a full explanation to the Court, and since then this has come to be expected practice[69] in the case of lengthy delay, but sadly, it is a practice which is often not adhered to. The Court pointed out that the reason for the statutory insistence on the expeditious transmission of records on review was to promote the speedy and efficient administration of justice, and to ensure that an accused was not detained unnecessarily in matters where the reviewing Court might set aside a conviction or sentence. It raised the question whether lengthy delay did not *per se* constitute a failure of justice which would preclude certification that the proceedings were in accordance with justice,[70] but ultimately it held the delay in *casu* was not a sufficient ground to set aside the conviction.[71]

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[66] 1995 (2) SACR 452 (T).

[67] *Id* at 453h.

[68] Note 26.

[69] Reaffirmed in *S v Mekula* 2012 (2) SACR 521 (ECG) at para [13].

[70] In terms of s 304(1).

[71] *Id* at 300g-h.

[28] In 1998 this Court[72] reaffirmed in *S v Lewies*[73] that the whole purpose of automatic review was to ensure that an accused had a fair trial and one of the essential elements thereof was to obtain finality in the proceedings as soon as was feasible. Consequently, a delay of 3 months was held to have resulted in a serious miscarriage of justice for which the Court expressed the strongest disapproval.[74] But, once again the Court stopped short of setting aside the conviction on this ground and the review succeeded on the basis that the accused had been wrongly convicted, as his version had been reasonably possibly true.

[29] Six years later, in *Maluleke*[75] a delay of more than 3 months was described as 'certainly' constituting an infringement of the accused's rights to a fair trial, but the Court also stopped short of finding that it constituted sufficient grounds for setting aside the conviction.[76] With reference no doubt to the approach adopted by the Canadian courts (as referred to in *Pennington*) it pointed out that there were 3 possible ways one could deal with the issue of undue delay in automatic reviews. One approach was to only allow for a claim in damages, whilst another was to adopt the attitude that as the accused still had a right to appeal or institute his own review, delay should not in itself ever result in the proceedings being set aside. The third approach was to hold that where the

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[72] Per Traverso DJP *et* Conradie J.

[73] 1998 (1) SACR 101 (C).

[74] At 104c.

[75] 2004 (2) SACR 577 (T).

[76] At para [12].

delay was serious and no cogent and convincing reasons therefor had been provided, the proceedings could, in certain instances, be set aside. But the Court held that it was not necessary for it to make a determination in regard to which approach was to prevail, and as in the previous matters we have referred to it held that the matter was capable of being disposed of on other grounds.[77]

[30] In the same year, this Court took the view in *Joors*[78] that the extent to which the statutory provisions may have been ignored to the resultant prejudice of an accused might, in itself, constitute a factor material enough to exclude confirmation by the reviewing judge of the proceedings *a quo.* The Court held that the relevant provisions *"certainly bear closely enough on the concept of what is included in a fair trial to beg the question as to what the result should be of so material an infringement of the right"*.[79] However, ultimately it too was loath to express a definitive view, one way or the other, as to whether an egregious breach of the provisions in question could, of its own, result in a conviction being set aside. In this regard the Court referred[80] to the 'dubious' consequence of completely absolving a person of liability where there had been undue delay, but it too left the question open and was content with simply directing that a copy of the judgment be referred to the Director of the Legal Resources Centre for consideration as to what assistance should be given to the accused in order to achieve appropriate redress. But, in doing so, the Court

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[77] *Id*.

[78] Note 28 at 498i-499a.

[79] *Id.*

[80] With reference to the commentary by Chaskalson *et al* in *Constitutional Law of South Africa.*

expressed the view that there was no reason why judicial pro-activism should be limited when it came to the act of fostering respect for the rule of law and an individual's constitutional rights.[81]

[31] In 2013 in the matter of *S v VC*,[82] there had been a delay of 7 months from the time when the accused was sentenced to the date when the record was forwarded for review. The Court found that the delay had impacted on the fairness of the trial, but its findings in respect of the consequences thereof were contradictory. It held, in one and the self-same paragraph,[83] that the failure to comply with the provisions of ss 302 and 303 constituted a failure of justice as a young offender had been deprived of recourse to the review process and had already served 10 months of the sentence which was imposed on him by the time the matter came under review, but it also found that the delay did not constitute an irregularity, and ultimately it interfered with the sentence on the basis that it was unduly harsh.

An evaluation: some guiding principles

[32] The Constitutional Court held in *Zuma*[84] that the right to a fair trial embraced a concept of substantive fairness which was not to be equated with what might have passed muster in our criminal courts prior to the advent of the

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[81] *Id* at 499f-500a.

[82] 2013 (2) SACR 146 (KZP).

[83] Para [5] at 149b.

[84] 1995 (2) SA 642 (CC) at para [16].

Constitution. An accused's right of review and appeal is a subsidiary part of this overall right to a fair trial.

[33] Although the cases pertaining to pre-conviction delay are useful and the principles set out therein offer some guidance, in our view there are a number of important distinctions between pre-conviction and post-conviction proceedings which must be borne in mind.

[34] The principle consideration pre-conviction is that offenders should be brought to justice, and with a view to realising this objective courts have leaned in favour of tolerating delay provided no other irregularity is discernible in the proceedings. This approach has as much to do with the aim and purpose of bringing offenders to book as it has with the realities of the constraints upon the criminal justice system in regard to limited resources, congested court rolls and over-burdened courts. However, it occurs to us that post-conviction there is a somewhat inverse relationship with delay inasmuch as the aim of the proceedings is to obtain the court's confirmation of the integrity of the conviction and the fairness of the sentence which was imposed as soon as possible and generally, at the post-conviction stage of criminal proceedings which originated from the magistrates' courts, there is much less congestion in the criminal justice system and a lack of resources will not ordinarily constitute a factor of substance. As such, there is much less room for delay to be tolerated post-conviction than pre- and the objective should surely be to process appeals and reviews as expeditiously as possible.

[35] In the second place, whereas the enquiry into pre-conviction delay is generally more complex, and involves a number of elements and factors which are to be put into the scale such as the conduct of the prosecution, possible motives for laying false charges, the loss or dissipation of evidence through the death of witnesses and the disintegration of evidentiary material, the enquiry in respect of post-conviction appeal or review delay is generally a much simpler one and the causes are usually much easier to ascertain.

[36] Thirdly, whilst it is so that in the context of delay the seriousness of an offence is highly relevant pre-conviction ie the more serious the offence the greater the need for fairness to the public and the complainant by ensuring that a matter proceeds to trial and therefore the greater the tolerance for delay,[85] in post-conviction proceedings the converse may often be applicable ie the more trivial an offence for which a person has been sentenced to a term of incarceration or a sizeable fine, the more urgent and compelling the need to have a speedy review or appeal. The contrast between the vantage points from which the courts approach pre- and post-conviction proceedings, is aptly illustrated by the remarks of Sachs J in *S v Coetzee and Ors:* [86]

> *"The starting point of any balancing enquiry where constitutional rights are concerned must be that the public interest in ensuring that innocent people are not convicted and subjected to ignominy and heavy sentences massively outweighs the public interest in ensuring that a particular criminal is brought to book"*.

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[85] *Bothma* n 42 para [77].

[86] 1997 (3) SA 527 (CC) at para [220].

[37] In our view, in order to maintain the integrity of the criminal justice system and public confidence therein it is important that the system of automatic review which is supposed to provide for a free, far-ranging and expeditious review by the High Court of proceedings in the lower courts, should be an effective process, otherwise, quite frankly, there is no point to it. Even though the provision of Legal Aid has been expanded dramatically in the urban metropoles, it has still not effectively been extended to outlying areas where poverty and crime are often at their worst. We have frequently noted, when considering records in automatic reviews and criminal appeals which emanate from magistrates' courts which are located in outlying and under-resourced areas, that whilst many accused indicate on the occasion of their first appearance that they would like to avail themselves of legal aid assistance, when it does not materialise and they face the prospect of further extended delay whilst in custody awaiting trial, they often subsequently elect to conduct their own defence in order to expedite the proceedings. The system of automatic review therefore still fulfils an extremely important function in the administration of justice, at a time when great poverty and rampant crime combined with a lack of legal aid resources often coincide and are common features of our daily experience in the criminal justice system. And it serves as an important check on criminal proceedings involving children.

[38] In addition, in our view it would be unfair and fallacious to adopt the attitude that if a conviction is sound, any post-conviction delay in the automatic review process is inconsequential and should always be condoned. That would mean that only the innocent are entitled to an expeditious review. Apart from the arch

cynicism inherent in such a proposition and the fact that it goes against the fundamental grain that all are entitled to be treated equally before the law, it also suffers from a failure to appreciate that it is only if one has an expeditious system of review that we can identify those unrepresented persons who have been wrongly convicted or sentenced, and thereby prevent them from serving sentences that they should not.

[39] Thus, if we are to be consistent and true in our application, where an irregularity pertaining to delay in an automatic review matter is egregious and has resulted in prejudice to an accused, and such irregularity has not been brought about through any act or fault of the accused, it should be treated in no lesser fashion than it would ordinarily be treated in the context of the general principles applicable to a criminal trial ie that if there is a failure of justice, this could, depending on the circumstances, result in a vitiation of the proceedings as a whole. Without the lower courts being at risk in this regard there will be no incentive for them to ensure that the peremptory requirements of the statutory review provisions are complied with and that there is due and proper adherence to the time periods and the procedures prescribed. The very fact that from 1963 to date the law reports are littered with cases in which judges have regularly lambasted magistrates for failing to comply with the provisions in question (either by sending through records well outside the time limits provided or by failing to ensure that the records are complete), illustrates that the system is not working and that it is high time that effective measures be put in place to rectify this.

[40] In our view, if an accused's constitutional right of review is effectively stymied and rendered nugatory because of egregious delay, for example where, by the time the matter is reviewed he has already served the sentence that was imposed upon him, his constitutional right to a fair trial has been infringed and this may constitute a failure of justice and a ground for the Court not only to decline to certify that the proceedings are in accordance with justice, but also to set aside or correct the proceedings[87] or to make any other order in connection with the proceedings as will, to the Court, seem likely to promote the ends of justice.[88] Judicial pro-activism requires that this Court move beyond being a passive bystander lamenting lengthy and unnecessary delays in the automatic review process without doing something practical in order to attempt to remedy systemic deficiencies and indeed, in the interests of justice the Court has a duty not only to the accused in the matter before it but also to other unrepresented accused who may have been sentenced at a particular magistrate's court where there is a clear problem, to ensure that effecitive measures are taken to resolve such deficiencies.[89]

[41] Why the legislature saw fit to stipulate in s 303 that proceedings subject to review must be sent to the High Court within 7 days from the date when the sentence is imposed, is not clear when, as a matter of practicality, particularly

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[87] in terms of s 304(c)(iii).

[88] In terms of s 304(c)(vi).

[89] In *Wild* n 31 at paras [11]-[12] the Con Court held that where there is an infringement of the right to a 'speedy trial' the court has a duty to devise and implement an appropriate remedy or combination of remedies, depending on the circumstances.

where evidence is led, it will almost always be impossible for a magistrate to comply with this time period. The reviewing judge must be alive to this in-built difficulty which almost in itself sets the system up to fail and it should not be understood that this judgment in any way seeks to lay down a general principle or rule of law that mere non-compliance with the peremptory period will in itself constitute an irregularity, or that if it constitutes an irregularity it will be of such a nature as to necessarily and inevitably vitiate the entire proceedings. Each matter will have to be decided on its own facts.

Towards some remedial measures

[42] Already 7 years ago on 15 February 2010 the Chief Magistrates' (Heads of Court) Forum noted[90] that it had been brought to their attention by judges of the High Court and via judicial quality assurance reports that problems were being experienced with review and appeal matters not being processed timeously and that *"serious prejudice"* was being caused thereby to the administration of justice. In the interests of accountability and with a view to ensuring that such matters were attended to timeously and effectively the Forum accordingly resolved that all magistrates were to keep personal review and appeal registers which were to be checked, monthly, by the magistrate of the district or the responsible senior magistrate concerned. A specimen template datasheet was attached to the resolution which set out the information which magistrates were required to record in respect of reviewable sentences. This information

[90] In Circular 14/2010 which was circulated to all magistrates on 8 March 2010.

includes particulars as to the relevant dates when the sentence was imposed and when the record was sent for typing and transcribing, as well as the date when the matter was despatched to the High Court. The datasheet also makes provision for recordal of the dates when any query was raised by the reviewing judge and when the matter was returned to the High Court and finally, it makes provision for insertion of the date when the matter is returned from the High Court, and the outcome of the review.

[43] This resolution has been adopted by the magistracy as a performance standard. Laudable as its contents may be, it appears that as each magistrate is required to keep their own personal register of automatic reviews, control and supervision of these matters still lies largely in the hands of the individual magistrate and it does not appear that the Heads of Court exercise effective oversight over these registers. Administratively, the registers resort primarily under the control of the clerk of the relevant court who accounts, insofar as office statistics and records are concerned, to the Office and Court Managers, who in turn account to the Regional Head of the Department of Justice. As we understand it, although the clerk is also required to report monthly to the Head of Office, outstanding reviews are not included in the monthly reporting by the Head of Office to the respective Chief Magistrates and the judicial (or so-called “cluster”) heads for the administrative regions nor is a record of outstanding

reviews included in the reporting which is rendered by these Heads of Court and the Regional Court President to the Judge-President of this Division.[91]

[44] As a result, because control over automatic reviews is still largely a matter for the individual presiding magistrates concerned and is not regulated as part of a systemic uniform practice applicable throughout the Western Cape magistracy the mechanisms in place to ensure that automatic review records are prepared and sent to the High Court as soon as possible are fragmented and inadequate.

(i) *The introduction of an outstanding automatic reviews list*

[45] It has occurred to us that one of the possible mechanisms which might be instituted as a remedial measure in this regard is the introduction of an outstanding automatic review list, modelled along the lines of the reserved judgment list which certain divisions of the High Court now keep,[92] in which the particulars of all outstanding judgments with reference to the case number and names of the parties and the judicial officer concerned is recorded. Inasmuch as this list is circulated not only internally amongst judges, but also amongst members of the profession and the Office of the Chief Justice it has a salutary effect in pressuring judges to ensure that their judgments are handed down

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[91] In terms of cl 4 of the Norms and Standards for the Performance of Judicial Functions (the "*Norms and Standards*"), issued by the Chief Justice by way of GN 147 on 28 February 2014.

[92] In terms of cl 5.2.6 of the Norms and Standards, which provides that save in exceptional circumstances every effort shall be made to hand down a judgment that has been reserved no later than 3 months after the date of the last hearing.

within the period prescribed, save in exceptional circumstances. It occurs to us that, were such a list to be kept in respect of outstanding automatic reviews from each magistrates' court within the Western Cape, and collated regionally, it would immediately be apparent to the Chief Magistrates and the Regional Head of the Department of Justice when difficulties are being experienced at a particular court, and the necessary resources could immediately be diverted thereto in order to address the problem.

[46] In our view what we are proposing will not constitute an additional burden on over-worked magistrates. In *Nyumbeka*[93] this Court previously held that even though the preparation of records for automatic review is primarily a function of the administrative component ie the clerk of each magistrate's court, it is ultimately the function of the magistrate concerned to see to it that a proper and complete record of the proceedings and sentence that has been rendered in a particular matter that the magistrate has presided in, is sent to the High Court.[94] As was pointed out in *Letsin* a criminal matter which commences in the magistrate's court is not completed until any outstanding review in respect thereof has been concluded in the High Court and, in our view, in the same way as it is the magistrate's duty to hand down a judgment timeously in respect of both the conviction as well as in respect of the sentence, in terms of *Nyumbeka* it is also accepted that post-sentence the magistrate's duties include ensuring that the record is properly prepared and timeously dispatched to the High Court.

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[93] 2012 (2) SACR 367 (WCC).

[94] *Id* para [22].

As such, (as was pointed out in *Letsin* and *Nyumbeka*) magistrates have duties and functions which go beyond merely adjudicating the matters before them. In terms of the Constitution and the law they have a duty to ensure that judgments of their Court and matters relating thereto are given effect to and they should not sit idly by and take it for granted that the administrative component of their courts will implement and give effect to their directives.[95] The introduction of an outstanding automatic review list might serve to spur magistrates on to take more responsibility for their duties in this regard and where there are deficiencies may also serve to ensure proper oversight and assistance with the provision of the necessary resources from the relevant Office and Court Managers, Heads of Court, Chief Magistrates and administrative region/cluster heads, as well as the Director-General and the Regional Head of the Department of Justice.

[47] The Heads of the Magistrates' Courts within this division, including the Regional Court President and the heads of the administrative regions are required to account to the Judge-President for the management of their courts[96] and the Judge-President is responsible[97] (subject to the over-arching authority and control of the Chief Justice as Head of the Judiciary) for the co-ordination of the judicial functions of all such courts. Those functions include the management of procedures to be followed in respect of case flow management[98] and the

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[95] *Id* para [20].

[96] Note 91.

[97] In terms of S 8(4)(c) of the Superior Courts Act 10 of 2013 and cl 4 of the Norms and Standards.

[98] Cl 4 (v)(a) of the Norms and Standards.

finalisation of any matter before a judicial officer including any outstanding judgment, decision or order.[99] Case flow management is directed at enhancing service delivery and access to justice through the speedy finalization of matters and is co-ordinated via the Provincial Efficiency Enhancement Committee, which is led by the Judge-President.[100] In the circumstances, whether the introduction of an outstanding automatic review list is feasible and whether it will be an appropriate measure which will serve to assist in ensuring that automatic reviews are processed and finalised efficiently, effectively and expeditiously[101] is a matter that should be taken up by the relevant stake-holders and Heads of Court with the Judge-President and the Provincial Efficiency Enhancement Committee, in conjunction with the Regional Head of the Office of the Chief Justice.

(ii) *Audits and report-back*

[48] Given the particular problems experienced at the Caledon and Montagu magistrates' courts we are of the view that the heads of those courts should account to us (and the responsible Chief Magistrates and administrative/cluster heads as well as the Regional Head of the Department of Justice and the Magistrates' Commission), retrospectively in respect of all matters involving reviewable sentences which were imposed by their courts within a period of 3 years from date hereof, in terms of the order which is set out hereunder. This

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[99] Cl 4 (v)(b).

[100] Cl 5.2.4 (ii).

[101] Which are amongst the principal objectives set out in the Norms and Standards (*vide* cl 2).

will enable us to determine whether there are other accused who are in custody who are awaiting but unable to exercise their constitutional right of review, as well as accused whose right of review has been rendered nugatory because of undue delay, and will also reveal the extent of the problem at these courts. The Heads of Office of the Caledon and Montagu magistrates' courts are accordingly directed to furnish this Court within 30 days of the date of this judgment with a record of all reviewable sentences which were imposed within this period, which record should be in the format and should contain the information as per the template datasheet attached to the resolution of the Chief Magistrates' Forum of 15 February 2010.[102]

[49] In addition, given the endemic nature of the delays experienced at all the magistrates' courts from whom we have matters before us, we direct that the Regional Head of the Department of Justice (with the assistance of the relevant administrative/cluster heads and Chief Magistrates) should conduct an audit in respect of administrative deficiencies and lack of resources at all of such courts, and we invite the Regional Head to report back to this Court in 3 months in respect of the outcome of such audits and any remedial and disciplinary measures which have been instituted pursuant thereto, in order to address these deficiencies and lack of resources.

[50] In this regard we draw the attention of the Regional Head (and the administrative/cluster heads and Chief Magistrates and the Magistrates'

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[102] As per n 90.

Commission) to the explanations which were given by the Head of Office of the Caledon and Montagu magistrates' courts in respect of each of the matters from those courts which are before us.

(iii) *The appropriate orders in respect of the 7 reviews*

[51] In the matter (ex Caledon) of *S v Swart*[103] the Head of Office, who was also the presiding officer, states that the record was forwarded to the clerk of the court on 26 February 2015 for the proceedings to be transcribed but was *"once again not correctly recorded"* (sic) by the DCRS clerk (this is presumably a reference to the clerk responsible for the court's digital recording system). The presiding officer has not provided any explanation for why she did not follow up on the transcription or the preparation of the record thereafter, and it appears that she simply left the matter up to the clerk of the court and the DCRS clerk.

[52] From the sworn affidavit which was provided by the Office Manager it appears that although the clerk of the court made a note in the review register to the effect that 'a' CD from the DCRS clerk was awaited, there was no follow-up and the matter was returned to the presiding officer for her attention on the same day and *"no movement happened afterwards"* (sic). The Office Manager states that at some stage (no date is provided), it was discovered that the clerk of the court had never received the compact discs from the DCRS clerk and had also

[103] Case No: B927/14.

never reported that she was experiencing any difficulties in regard to the preparation of the record.

[53] It was only on 22 June 2016, a year and a half after the sentence had been imposed, that it was noted (by some undisclosed person) that the record was still outstanding and a *"call"* was logged requesting that the recordings be retrieved. How it came about that neither the presiding magistrate nor the DCRS clerk or Office Manager took any steps at all to follow up on the matter until then has not been explained, and there were clearly inadequate control measures in place from the start. The Office Manager avers that the relevant discs were only received on 7 September 2016 and it was only at this time that they were sent off for transcription, after which it was discovered that only part of the recordings had been transcribed, and there was still a part which was outstanding. But the explanation given by the Office Manager is at odds with the transcriber's certificate (which appears on the transcript) and which is dated 14 August 2015 ie almost a year earlier, and we note that the clerk of the court also appended a date stamp to the first page of the transcription on 18 August 2015 already.

[54] In the circumstances it appears as if the record was already transcribed and in the possession of the administrative component of the court by 18 August 2015 and the subsequent explanations about recordings not being found do not make sense. Even were these explanations to be coherent, it is unacceptable for the Office Manager to have simply waited for the transcriptions to be effected over a period of 3 months, and no attempt was made to explain why it

took so long for a relatively short record to be transcribed. Although it was finally presented to the presiding officer for checking on 24 October 2016, the record which was sent to this Court is still incomplete as the plea proceedings were never transcribed.

[55] The only evidence of any attempt on the part of the presiding officer to attend to this is an e-mail which was sent by her to the Office Manager on 29 August 2016 enquiring as to the outstanding transcription in respect of the plea proceedings. No explanation was tendered by the presiding officer (or the Office or Court Manager) as to why it took a further 4 months from the date when the record was provided to her for checking, for it to be despatched to the Registrar.

[56] In the circumstances, the entire manner in which the matter was handled from the date of the imposition of sentence in January 2015 is reprehensible and there appears to have been a fundamental dereliction of duty on the part of all concerned, which in our view constitutes a gross irregularity which rendered the accused's constitutional right of review nugatory and which has resulted in a material failure of justice. The prejudice which the accused suffered manifested itself in two forms. Firstly, the accused received a sentence of 24 months' imprisonment which was suspended on condition *inter alia* that he not be found guilty of having committed an offence involving dishonesty, during the period of suspension. The customary proviso that the sentence would only liable to be put into operation in the event that the accused subsequently received an unsuspended sentence of imprisonment was not tacked on and,

as it reads, even a relatively trivial offence involving dishonesty for which the accused was given a petty fine would have triggered the putting into operation of the sentence. From the record before us it is not apparent if this has happened. But this alone illustrates why it is so important that these types of reviews be dealt with promptly, even insofar as it relates to the amendment of a possibly inappropriately wide sentence. But, in the second place, and more importantly in our view, the sentence was founded upon a conviction which was unsound.

[57] The appellant was convicted on the evidence of a single witness who testified that in the early morning hours of 3 August 2014 she was awoken by a scratching sound and found a man standing next to her bed. He was wearing a balaclava which covered his head and his ears, and she claimed to have recognised him as the accused, from his dreadlocks. In response to questions from the court she said that when she had awoken *"ek het geskrik ek het gedog dit is 'n spook … Ja en toe hardloop die persoon uit? Ja, toe kyk ek sy bene en 'n spook het mos nie bene nie maar die spook het bene en toe vlieg ek op"*.[104]

[58] It is thus apparent that the identification which the complainant made occurred in a matter of split seconds after she had been aroused from her sleep and whilst she was in a state of fright. From the evidence it also appears that at the

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[104] Loosely translated into English as follows: "*I got a fright and I thought it was a ghost…Yes and then the person ran out? Yes, and then I saw his legs and a ghost does not have legs, but this ghost had legs and then I jumped up*".

time the only light in her room was indirect and emanated from the television and the bathroom. The complainant said she jumped out of bed and chased the accused out of her house and into the street, but she was unable to catch up with him. A few days later she was handed her phone back at the police station. The police told her they had been contacted by one Gummies who had reported that someone had tried to sell the phone to him.

[59] In cross-examination the complainant maintained that she had recognised the accused at the time not only by his hair, but also by the dark green top and cap which he wore, but when she was asked by the accused (who conducted his own defence) how she was able to recognise him as he was not the only Rasta in the area who wore such a cap, she said she had recognised him by his 'height'. However, she also said the police had informed her that the accused's brother Boytjie was responsible for the break-in and the police had asked her that night whether she was certain it was the accused who had broken into her home, or whether it could have been Boytjie, and she confirmed that they looked the same (*"hulle lyk eenders")* except that Boytjie was taller than the accused.

[60] In his evidence the accused denied that he had broken into the complainant's house. He said that he had been arrested by the police whilst he was at home with his brother, who also had a Rasta hairstyle.

[61] The accused's brother in turn testified that on the night in question he saw one Jonty outside the home of the complainant. He was wearing a black cap with a fur lining which which covered his ears and, according to him, it was Jonty

who broke into the complainant's house, and he was present the following day when Jonty sold the complainant's cell phone to Gummies.

[62] The accused also requested that a person who was with him in the cells be called to give evidence on his behalf. However, when the court established that he was not favourably disposed towards the accused and did not wish to testify for him, the court called him as a witness. He testified that the accused's brother had given the phone to him and he had in turn handed it to Gummies. So, in essence, this witness' version appears to support what the complainant was told by the police, and the evidence as a whole points to the possibility that it was either Jonty or the accused's brother who broke into the complainant's house on the night in question, instead of the accused.

[63] Although there were a number of contradictions between the testimony of the accused and the witnesses who testified on his behalf (particularly in relation to where he was arrested and who sold the phone to Gummies) in our view the evidence established a reasonable doubt as to whether or not it was the accused who broke into the complainant's home and stole her phone that night. This was a classic situation where it could not be said that the accused's version was not reasonably possibly true, even if the court did not believe it, and the accused should accordingly have been given the benefit of the doubt. In the circumstances had the matter been sent on review timeously as it should have been, the conviction would in all probability have been set aside and the accused would never have been at risk of having the suspended sentence put into operation. In the result, the accused was severely prejudiced by the delay

and this Court cannot certify that the proceedings *a quo* were in accordance with justice, and in our view the proceedings should be set aside on the grounds of a failure of justice[105] and it will not suffice merely to quash the conviction.[106]

[64] In *S v Jacobs*[107] (the other matter from Caledon) the record was received by the Registrar some 3 years after a sentence of 2 years' imprisonment was imposed in terms of s 276(1)(i) of the CPA. Once again, by the time the record was received the accused's constitutional right of review had been rendered nugatory as he had long served the sentence which was imposed upon him. Although the transcript of proceedings is barely intelligible, it appears as if the accused was properly convicted of house-breaking with intent to steal and theft of an electric grasscutter pursuant to a plea of guilty.

[65] In her explanation in this matter the Head of Office (who similarly was also the presiding officer) once again laid the blame for the delay at the doors of the clerk of the court and the DCRS clerk. She said that upon its finalisation on 7 March 2014 the matter was forwarded to the clerk of the court in order for the transcriptions to be made, but neither the clerk of the court nor the DCRS clerk attended to their duties. Although the Head of Office states that the DCRS clerk was issued with a written warning for *"non-compliance"* (sic) there is no indication when this occurred, nor is there any indication that she followed up on the matter at all, after she had handed it over to the clerk of the court, and

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[105] In terms of the provisions of s 304(c)(iii).

[106] In terms of s 304(c)(i).

[107] Case no: C1191/13.

she simply records that *"no suitable explanation"* was forthcoming from the clerk of the court in regard to the delay.

[66] That there is a systemic problem at the Caledon court is apparent from the concluding paragraph of the explanation which was given by the Head of Office, where she states that an investigation into the late submission of reviews at her office has been launched, but as at the date of her covering letter she had not yet been informed of the outcome thereof.

[67] In his affidavit the Office Manager simply noted that the DCRS clerk was served with a written warning by the Court Manager at some stage whereafter instructions were given for the transcription to be made, but no date was provided for either of these events. Although it is apparent from the transcriber's certificate that the transcription had been completed by 15 September 2016, according to the Office Manager on 30 September 2016 the matter was *"referred back with a query"* by the presiding officer because the original documentation *"was bound in different sequence"* (sic) and a further transcription (?) was effected on 13 October 2016, an electronic copy of which was received on 17 October 2016. Once again however, no attempt was made to explain why, although the record was finally complete by 17 October 2016, it took some 5 months before it was dispatched to the High Court.

[68] In the circumstances given the length of the delay concerned and the inadequate explanations tendered by the presiding officer and the court's administrative component, in our view *prima facie* there has similarly been a gross failure of justice in these proceedings. We accordingly call upon the

presiding officer and the Director of Public Prosecutions to show cause, if any, within 30 days from date of this judgment, why we should not certify that the proceedings in this matter are not in accordance with justice and to favour us with any submissions they may wish to make in regard to an appropriate remedy which should be imposed, with particular reference to whether an order should be made that there has been a failure of justice and that the proceedings should be set aside in terms of s 304(c)(iii) of the CPA.

[69] In the Montagu matter of *S v Damon* the presiding magistrate has indicated that part of the transcribed record was received by the clerk of the court from the transcribers on 1 December 2015, some 2 weeks after the sentence of 2 years' imprisonment was imposed. We note however that the transcriber's certificate is in fact dated 25 November 2015. Be that as it may, from the explanation given in this matter it is apparent that there are also no proper control measures in place at the Montagu magistrates' court, because the clerk of the court took no steps to have the matter sent for review and by his own admission the magistrate was blissfully unaware of this until he came across the case records by accident on 15 June 2017, lying amongst other documents held by the clerk of the court, whilst trying "*to get hold of*" another "*lost case record*"(sic).

[70] The magistrate blames the administrative component for their "*lack of support and diligence*" and the clerk of the court, in particular, for failing to present the case record to him "*for certifying*" (sic) and points out that the record is still incomplete, even though he forwarded it for review, as the judgment and sentencing proceedings were never transcribed and in his view "*it is most*

unlikely" that it will be possible to reconstruct these proceedings. Consequently, and notwithstanding that the accused has already long served the sentence of imprisonment which was imposed on him, the magistrate requests this Court to set aside the conviction and the sentence and order that a re-trial take place.

[71] Although from a review of the evidence it appears that the accused in this matter could have been properly convicted of the theft of a music system, in the absence of the magistrate's judgment or any reasons for it we are unable to form a view in this regard. Similarly, in the absence of the judgment pertaining to the sentence which was imposed we are unable to form a view as to whether or not the sentence was fair and appropriate, or whether it was excessive to the point which would ordinarily invite an adjustment. We note from the SAP 69s that the accused was on parole at the time when he committed the offence with which he had been charged, however neither the particulars of the offence of which he had been convicted nor the sentence which he was serving at the time when he was released on parole appear on the record, which reflects only that he had an earlier conviction in terms of which he was sentenced to a paltry fine of R20 or 4 days' imprisonment for possession of drugs, on 8 February 2014.

[72] In the circumstances, given the length of the delay concerned and the inadequate explanations tendered by the presiding officer and the court's administrative component, as well as the deficiencies in the record and the inability to reconstruct it, in our view *prima facie* there has similarly been a gross failure of justice in these proceedings. We accordingly call upon the presiding

officer and the Director of Public Prosecutions to show cause, if any, within 30 days from date of this judgment, why we should not certify that the proceedings in this matter are also not in accordance with justice and to favour us with any submissions they may wish to make in regard to an appropriate remedy which should be imposed, with particular reference to whether an order should be made that there has been a failure of justice and that the proceedings should be set aside in terms of s 304(c)(iii) of the CPA. We are *prima facie* of the view that, whatever the outcome of the further proceedings in this regard, given that the accused has already served his sentence it would not be fair or just to order a re-trial even if it were competent for us to do so.

[73] The matters from the Vredendal magistrates' court purport to have been sent some 2 months after the date when the sentence was imposed, and for some unexplained reason also appear only to have been received by the Registrar a further 2 months later. The magistrate of Vredendal has only tendered an explanation in regard to the late submission of one of these matters *S v Jas.* [108] From a perusal of the record therein it appears that the accused was properly convicted on a charge of assault with intent to commit grievous bodily harm pursuant to a plea of guilty, and on 18 January 2017 he was sentenced to 18 months' imprisonment which was suspended for a period of 5 years on standard conditions.

[108] Case no: 14/17.

[74] In similar fashion as the magistrate of Caledon, the magistrate of Vredendal records that neither the Office nor the Court Managers are able to furnish reasons for the delay in the transmission of the record and the magistrate complains that the matter was not placed before him in order that he could check whether the transcripts were *"in order",* and although he requested the clerk of the court to place the case record before him (the date when this is alleged to have occurred is not provided) it was only when he went to search for the matter himself that he found it had been filed and the record had not yet been typed up. He complains further that even after the transcript had been prepared the record was not placed before him and he again found it lying on the clerk's table. Consequently, the magistrate was of the view that the relevant court personnel had failed in their duty to see to it that review matters were dealt with expeditiously, and he said that this was not the only matter from that court where the relevant time-frames had not been adhered to.

[75] In her explanation the clerk of the court states that although each court has its own DCRS clerk who is responsible for keeping that court's records and review registers the only time she sees the review matters is when she is asked to assist in typing up their records or to process them, because the DCRS clerk cannot 'get to it'. She reports that during the period concerned they experienced staff shortages as a result of which she was required not only to deal with her own duties as clerk of the court, but also to assist with other administrative functions. She says that as there is no typist at the Vredendal court the typing work has to be done by her and other members of staff, in addition to the other work they have to do, often outside of ordinary office hours. She points out that

at the time they received a number of reviews in the same week from both the Lutzville as well as from the Vredendal court and they had difficulty in typing up their records, as not all of the staff have laptops which allow them to continue typing after hours. She also complains that the DCRS clerk never informed her about this particular review matter and did not ask her for assistance in order to process it. Of some concern to us is her further remark that whilst she is ultimately responsible to see to it that things are done timeously *"things have been done for years"* in a certain way and *"people* (are) *not willing to accept new ideas and there are problems which are being experienced"* (sic).

[76] It is therefore apparent from the explanation provided by the magistrate and clerk of this court too that administrative deficiencies and lack of resources are largely to blame for the difficulties in the timeous preparation and transmission of automatic review matters from Vredendal, and there is clearly an endemic problem in a number of magistrates' courts in outlying districts in the Western Cape which needs the urgent attention of the Department of Justice with the necessary assistance and input of the the judicial administrative/'cluster' heads and Chief Magistrates.

[77] However, unlike in the other matters we have referred to the explanations provided by the magistrate and the administrative component of Vredendal in this matter are cogent and forthright and properly cover the entire period of delay, which is not egregious, and given these circumstances and the nature of the offences concerned and sentences imposed, we are thus minded to accept their explanations and to condone the delay. For the sake of

completeness, in the other Vredendal review (*S v Klaasen*),[109] where no explanation was provided we can find no fault with the conviction and sentence, and have assumed that the explanation for the failure to submit the record in this matter timeously is probably the same as that given in the previous matter, and for the same reasons we are also prepared to condone the delay in relation to this matter.

[78] Finally, we turn to deal with the 2 reviews from the Ceres magistrates' court. In neither matter has the presiding officer furnished any explanation for the delay of just short of 2 months between the date of sentence and the date of despatch of the matters for review. In *S v Xhantibe,* [110] the accused was properly convicted on a charge of theft of a number of industrial belts, following a plea of guilty. He had three previous convictions for theft as well as one for house-breaking and theft and was sentenced to 6 months' imprisonment.

[79] In the other matter, *S v Swanepoel,* [111] the accused was properly convicted of common assault pursuant to a plea of guilty and was sentenced to 6 months' imprisonment suspended for 5 years on standard conditions. We can find no fault with the conviction and sentence in either of the Ceres matters and given the relatively minor delay (comparative to the other delays in the other matters we have referred to), and the overall circumstances, including the nature of the offences and the punishments imposed we are not of the view that there has

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[109] Case No: 682/16.

[110] Case No: 310/2017

[111] Case No: 1907/2016.

been a failure of justice, and we are disposed to certifying that the proceedings in these matters are in accordance with justice.

Conclusion

[80] In the result, we make the following Orders:

80.1 The Heads of Office of the Caledon and Montagu magistrates' courts are directed to furnish this Court and the Regional Head of the Department of Justice within 30 (court) days, with a retrospective record of all automatic review matters (in terms of ss 302 and 303 of the CPA) heard within a period of 3 years of the date of this judgment, which record should be in the format and should contain the information as per the template datasheet attached to the resolution of the Chief Magistrates' Forum of 15 February 2010 (as per Circular 14/2010, circulated to all magistrates on 8 March 2010).

80.2 The Regional Head of the Department of Justice (with the assistance of the relevant judicial administrative/cluster heads and Chief Magistrates) is directed to conduct an audit in respect of administrative and systemic deficiencies and lack of resources in regard to the transcribing, processing and transmission to this Court of the records in automatic review matters (in terms of ss 302 and 303 of the CPA) at the Caledon, Montagu, Vredendal and Ceres magistrates' courts, and is to report back to this Court and to the Magistrates' Commission in 3 months in respect of the outcome of such audit and (with reference to the contents of paragraphs [51]-[56] and [64]-[76] above) the

remedial and other measures which have been instituted pursuant thereto in order to address such deficiencies and lack of resources.

80.3 It is declared that the proceedings in the matter of *S v Swart* (Caledon case no. B927/14) are not in accordance with justice and the conviction is quashed and the proceedings are set aside in terms of ss 304(c)(i) and (iii) of the CPA.

80.4 The presiding magistrates in the matters of *S v Jacobs* (Caledon C1191/13) and *S v Damon* (Montagu 526/2014) and the Director of Public Prosecutions are called upon to show cause, if any, in writing within 30 (court) days from date of this judgment, why this Court should not declare that the proceedings in the aforesaid matters are not in accordance with justice, and in this regard shall furnish the Court with any submissions they may wish to make in regard to an appropriate remedy which should be imposed, with particular reference to whether an order should be made that there has been a failure of justice and that the proceedings should be set aside in terms of s 304(c)(iii) of the CPA, and/or any such other remedy as may be in the interests of justice.

80.5 It is declared that the proceedings in the matters of *S v Jas* (Vredendal 14/17), *S v Klaasen* (Vredendal 682/16), *S v Xhantibe* (Ceres 310/17) and *S v Swanepoel* (Ceres 1907/16) are in accordance with justice.

80.6 A copy of this judgment shall be sent to the Director-General of the Department of Justice, the Regional Heads of the Department of Justice and the Office of the Chief Justice for the Western Cape, the Director of Public

Prosecutions for the Western Cape, the Magistrates' Commission, the Regional Court President (Western Cape) and the Chief Magistrates and judicial administrative/'cluster' heads for the Caledon, Montagu, Vredendal and Ceres magistrates' courts and the head of each of such courts.

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HENNEY J

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SHER AJ