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AUTOMATIC REVIEW OF MAGISTRATES' COURTS JUDGMENTS: A NOBLE INVENTION AT THE RISK OF IMPOTENCE?

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Abstract

The Criminal Procedure Act 51 of 1977 provides for the automatic review of certain cases decided in the magistrates' courts. This is a mechanism aimed at ensuring that justice is properly administered by subjecting decisions of some magistrates, mainly determined on the basis of their experience and the length of the sentence imposed, to review by judges of the High Court. This system, however, has been systematically hamstrung, primarily due to the inordinate delays that take place between the imposition of the sentence and the delivery of the review judgment. In some cases, by the time the review judgment is delivered, the accused has already completed the sentence.

The discussion in this article focuses on the automatic review process. It starts by contextualising the automatic review system; then deals with its practical application through the lens of a few selected cases; and — in conclusion — makes some recommendations aimed at strengthening the system. The recommendations are interrelated. The main one is that the period of a week for the record to be submitted for review is unrealistic — as is evident from the cases discussed — and should therefore be increased. Conscious that this may delay the process to the disadvantage of the accused, it is also recommended that those accused whose cases are subjected to the automatic review process should be granted bail as a default position. The last recommendation may seem cosmetic, but it is important. Communication between the magistrates' courts and the High Court seems to be at the centre of the problem and, for this reason, the use of technology is recommended.

Keywords: *Automatic review; review court; Criminal Procedure Act 51 of 1977; sentence; unrepresented accused*

1 Introduction

> *"*Reviews are urgent in nature … [A]ny delay has the potential to cause prejudice and an irreversible collapse of justice*."*[1]

[1] *S v Tshabalala* (102/2015) 2016 ZAFSHC 90 (5 May 2016) *SAFLII* para 12 <https://www.saflii.org/za/cases/ZAFSHC/2016/90.html> (accessed 26-01-2024).

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Automatic review[2] is one of the post-trial processes available in South African law.[3] While post-trial processes in a criminal case are usually initiated by either the state or the accused, automatic review distinguishes itself in that it takes place regardless of these role-players' involvement or participation. The accused person has a choice whether to participate,[4] while the state may participate if invited to do so by the review court (or the review judge).[5] Automatic review creates an avenue for the judgments of the lower courts (ie magistrates' courts) to be assessed by a judge of the High Court (in chambers) to determine whether the proceedings were in accordance with justice.[6] The nature of the process is captured in the heading of section 302 of the Criminal Procedure Act 51 of 1977 (the "CPA") as "[s]entences subject to review in the ordinary course".[7] The purpose of this process, which has been described as uniquely South African,[8] is to enable the High Court to exercise oversight over the administration of justice in the lower courts.[9] The automatic review process also serves an educational purpose in that, when judgments are set aside by the High Court as not being in accordance with justice, reasons are provided to the magistrates concerned indicating where they went wrong. Sometimes, review judges order that their judgments be distributed widely.[10] This is an aspect of the automatic review process which, while useful and praiseworthy, remains a collateral benefit of this process and not its main objective. Its main purpose, it is submitted, is to protect vulnerable accused persons – accused persons who are tried without legal representation in cases presided over by relatively inexperienced magistrates.

This article focuses on the automatic review process with the aim of highlighting several constraints that undermine its purpose, thereby exposing it to the risk of being an ineffective tick-box exercise. The first systematic constraint relates to the impracticality of requiring that the record of the trial proceedings subject to review should be transmitted to the High Court within a week.

2 "Automatic review" is not the statutory or official description of the process, but it is a commonly used description, as appears from the cases discussed in this article.

3 There are other post-trial proceedings such as appeal, special review, as well as review of proceedings after conviction but before sentencing. See C Theophilopoulos (ed) *Criminal Procedure in South Africa* (2019) chs 23, 24.

4 In terms of s 306(1) of the Criminal Procedure Act 51 of 1977 (the "CPA"), the duty of the presiding officer is simply to inform the accused of the process and it is for the accused to decide whether to participate, which decision does not affect the process. In other words, even if the accused decides against participation, the process will still take place.

5 S 304(3) of the CPA.

6 The South African courts that deal with criminal cases either as trial courts or courts of appeal are, in their hierarchy, the Constitutional Court, the Supreme Court of Appeal, the High Court, the regional divisions of the magistrates' courts and the district magistrates' courts. See Theophilopoulous (ed) *Criminal Procedure* 73 for an exposition of the court structure and jurisdictional powers.

7 Despite the heading of the section giving the impression that this process is about sentences, the review judge deals with both conviction and sentence. See *S v Jacobs, S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe* 2017 2 SACR 546 (WCC) para 8.

8 Para 9.

9 See JP Swanepoel "Review" in JJ Joubert (ed) *Criminal Procedure Handbook* 13 ed (2020) 445 459.

10 Eg, in *S v Mncube* (20/2017, K99/17) 2017 ZANWHC 105 (16 November 2017) *SAFLII* <https://www.saflii.org/za/cases/ZANWHC/2017/105.html> (accessed 26-01-2024), the court indicated that its judgment should be circulated to magistrates, and in *S v Fransman* 2018 2 SACR 250 (WCC) the judgment was sent to the Director General of the Department of Justice, regional heads of the Department of Justice, chief magistrates and administrative heads of the relevant magistrates' courts.

The impracticality stems from, among other things, the need for the transcription of the record. After the transcription and transmission of the record to the High Court, the reviewing judge may raise queries directed to the magistrate who presided over the case. This is where further problems arise, leading to the second and third constraints. The second constraint relates to magistrates taking a long period of time before responding to the judge's queries which may be prejudicial to sentenced prisoners who should benefit from the automatic review process. The third constraint is that, sometimes, magistrates' responses are not adequate, making it necessary for the reviewing judge to send further questions thereby lengthening the process.

The discussion below focuses on these constraints by evaluating the extent to which the three identified constraints, individually or collectively, undermine the objective of the automatic review process and, consequently, the rights of the accused involved. This is particularly important given that the review process often deals with short sentences and that the accused may have served the sentence already by the time the review process is completed. It is not inconceivable that the outcome could be the setting aside of the conviction and sentence; cold comfort for an accused who has already served the sentence. Sadly, this is by no means a hypothetical situation but a practical reality that has occurred in several cases.[11] The one important development in the automatic review process is that, while review judges have always expressed their frustration occasioned by the above constraints – in particular the delay in the submission of cases for review and the delays in magistrates' responses to their queries – some review judges have now resorted to judicial activism.[12] They have sought to improve the situation by issuing directives or setting guidelines in order to improve the situation. This is a significant development and, for this reason, a few of these cases will be discussed.

In parts 2 and 3 of this contribution, we engage in a historical and contextual overview of the automatic review process. This includes an evaluation of the applicable legislative framework. After this, in part 4, the focus turns to the identified constraints and, through the lens of a few decided cases, we establish how these constraints have played out. From these judgments, it seems the automatic review process has become impotent or is at risk of becoming impotent. Flowing from this, in part 5 of the article we focus on the ways in which the automatic review process can be strengthened. In part 6, we conclude the article.

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[11] See *S v Jacobs, S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe* 2017 2 SACR 546 (WCC) paras 2-6 where the court deals with cases where the judgments were submitted for review after such a long period of time that the accused had completed serving their sentences.

[12] "Judicial activism" is a loaded term which means different things to different people. In this discussion, judicial activism refers to situations where a review judge not only sets a conviction and sentence aside but goes further by providing guidelines for the future handling of similar cases. It is judicial activism in that, strictly assessed, this practice is not what the applicable law (the CPA in the case of reviews) requires of the review judge. For a more comprehensive analysis of judicial activism, see H Corder "Judicial Activism of a Special Type: South Africa's Top Courts Since 1994" in B Dickson (ed) *Judicial Activism in Common Law Supreme Courts* (2007) 323.

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2 Historical overview

In South Africa, all the divisions of the High Court have the power to review magistrates' courts proceedings. This power allows High Court judges to exercise judicial supervision over the proceedings of magistrates' courts and determine whether such proceedings were conducted fairly and in accordance with the law. With the authority to review, judges can identify procedural irregularities committed by magistrates and alter their decisions when they conclude that such proceedings were not in accordance with justice.[13] According to the Constitutional Court, the High Court's power to supervise the way that magistrates' courts discharge their functions amounts to a form of objective control that is relevant to the institutional independence of the magistrates' courts.[14]

There appears to be consensus that the automatic review process is uniquely South African.[15] There is no trace of an automatic review process in either English or Roman-Dutch law – the two systems that form part of the South African common law.[16] Rather, the automatic review process was introduced by sections 47 and 48 of the Cape Act 20 of 1856. Section 47 required magistrates to send the record of proceedings before them to the registrar of the Supreme Court (now the High Court) under three circumstances: when they convicted and sentenced accused persons for periods exceeding one month; when they ordered convicted persons to pay fines exceeding five pounds; or when they ordered convicted persons to receive corporal punishment.[17] The court was required to review the decision of the lower court in *Queen v Smyth*[18] and confirmed that automatic review at the time was only applicable to the three instances referred to in section 47 of the Cape Act.

Section 48 empowered judges of the Supreme Court who were tasked to review the decisions of magistrates to issue certificates certifying that the proceedings in the lower courts were conducted in accordance with real and substantial justice.[19] In instances where judges reviewing lower courts proceedings were of the view that the proceedings were not in accordance with real and substantial justice, they were entitled to "quash or amend the proceedings".[20] In *Queen v Jan Jantjes,*[21] it was confirmed that, when reviewing the proceedings of the lower court, the judge of the Supreme Court

13 See Theophilopoulos *Criminal Procedure* 391 who further points out that the distinction between reviews and appeals may sometimes be blurred. The key difference between an appeal and a review is that the former deals with substantive issues while the latter focuses on procedural irregularities (396-400).

14 *Van Rooyen (General Council of the Bar of South Africa Intervening) v S* 2002 5 SA 246 (CC) para 24.

15 See for instance *S v Mafikokoanes v Mokhuane* 1991 1 SACR 597 (O) 599. See also FG Gardiner "The South African System of Automatic Review in Criminal Cases" (1928) 44 *LQR* 78 and Q De Wet "On the System of Automatic Review and the Punishment of Crime" (1962) 79 *SALJ* 267. This has also been adopted as correct by Madlanga AJ (as he then was) in *S v Steyn* 2001 1 SACR 16 (CC) in para 19 n 33 of the judgment.

16 See De Wet (1962) *SALJ* 267 where it is asserted that "[a]utomatic review is unknown both to the law of England and of the Netherlands".

17 267.

18 (1869) 2 Buch 176 178.

19 See De Wet (1962) *SALJ* 267.

20 267.

21 (1884) 3 HCG 368.

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was empowered in terms of section 48 of the Cape Act to change the sentence of the lower court or correct the proceedings of that court. The authority vested in the courts to review proceedings of lower courts automatically was, without a doubt, an important legislative invention that was designed to guard against the danger of improper convictions and unfair sentences.[22]

Given the value and importance of the automatic review process in the Cape, this process was expanded to other parts of the country. This was done by the government of the Union of South Africa which promulgated the now repealed Magistrates' Courts Act 32 of 1917. In *Attorney-General Transvaal v Additional Magistrate for Johannesburg*,[23] the court held that by promulgating this Act, "[t]he Legislature was dealing with magistrates' court procedure, and was extending throughout the Union the machinery for automatic review then operative in most of the Provinces".[24] In terms of section 93 of the Act, all criminal sentences handed down by magistrates' courts were subject to automatic review where they exceeded three months.[25] Section 94 required the record of proceedings at the magistrates' court to be transmitted to the Registrar of the Supreme Court no later than one week after the determination of the case.[26]

The 1917 Magistrates' Court Act was repealed in 1944 and replaced by the Magistrates' Court Act 32 of 1944 (the "MCA").[27] Section 96(1) of the MCA modified the automatic review procedure and provided for the automatic review of sentences imposed by district magistrates' courts for a period exceeding three months, fines exceeding R250, or where such courts ordered that the convicted person should be whipped.[28] In terms of the MCA, automatic review of sentences imposed in criminal cases was limited to the length of imprisonment and the awarded fine, and not linked to the experience of the presiding officer. Automatic review procedure came into operation only when the district magistrates' court imposed a sentence in accordance with section 96(1).[29] The judge reviewing the proceedings could certify that they were in accordance with justice. However, if such a judge found that the proceedings were not in accordance with justice, they were empowered to request reasons for the conviction and imposed sentence from the magistrate who presided over the matter, which were to be contained in a statement.[30]

It is worth noting that the MCA did not limit the application of the automatic review procedure only to district magistrates' courts. In terms of section 98(4) of the Act, in instances where sentences imposed by magistrates did not fall within the ambit of section 96 or regional magistrates imposed sentences that were not in accordance with justice, judges of the Supreme Court had the authority to review such sentences as if such matters were placed before them

[22] Gardiner (1928) *LQR* 78.
[23] 1924 AD 421.
[24] 429.
[25] See *Rex v Tghtgha* 1937 EDL 92 93.
[26] See *Epselman v Chief Constable, Pietermaritzburg* (1918) 39 NPD 331 335.
[27] See s 116 of the Magistrates' Court Act 32 of 1944 (the "MCA") in particular.
[28] *S v Mndende* 1978 3 All SA 713 (TkS) 716.
[29] S 97 of the MCA.
[30] S 98(2).

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in terms of section 97 of the MCA. In *S v Mndende*,[31] the court held that the wide power of automatic review under section 98(4) of the MCA could be exercised by judges of the Supreme Court when notified that the proceedings in the lower courts were not in accordance with justice. The automatic review system empowered Supreme Court judges to set aside wrongful convictions and sentences.[32] Sections 96 to 99, the sections that dealt with automatic review under the MCA, were subsequently repealed by section 344(1) of the CPA.

3 The present context: Section 302 of the Criminal Procedure Act

The historical development described above paved the way for the automatic review procedure to be regulated in terms of the CPA. This procedure is dealt with in terms of section 302 where it was fundamentally changed also to include the years of experience of presiding magistrates as a factor that would demonstrate the need to subject convictions and sentences imposed by magistrates to automatic review. As Dugard observed, "[a]utomatic review has generally been regarded as a means of remedying an irregularity at a criminal trial where the accused was unrepresented".[33] In *S v Steyn*,[34] the Constitutional Court emphasised that the automatic review procedure was an important tool used to ensure that qualitative justice is achieved by routinely submitting records of certain criminal proceedings against undefended accused persons in the magistrates' courts to be assessed by a High Court judge to determine whether substantial justice had been done. The Constitutional Court held further that the automatic review procedure

> "is a system of judicial supervision whereby High Court judges, sometimes acting with the assistance of the local office of the prosecuting authority, try to minimise the incidence and consequences of mistakes in the district magistrates' courts".[35]

The automatic review regime applies to both adult and child offenders, albeit differently.[36] Almost all cases involving child offenders are subject to the automatic review process[37] irrespective of the experience of the presiding magistrate and whether the child was legally represented during the trial.[38] Cases involving children in regional courts are also subject to the automatic

31 1978 3 All SA 713 (TkS) 717.
32 See generally *Regina v Conco* 1957 2 PH H167 (NPD).
33 J Dugard *Introduction to Criminal Procedure* (1977) 108.
34 2001 1 SACR 16 (CC) para 19.
35 Para 19.
36 The CPA regulates reviews generally, including reviews in respect of cases involving child offenders, while s 85 of the Child Justice Act 75 of 2008 contains specific provisions in respect of child offenders.
37 The limited category of children excluded from the automatic review process has been succinctly explained in *Mosieling v S* (A390/2011) 2012 ZAWCHC 221 (23 October 2012) *SAFLII* para 64 <https://www.saflii.org/cgi-bin/disp.pl?file=za/cases/ZAWCHC/2012/221.html&query=Mosieling> (accessed 25-01-2024), where the court stated that

> "[t]he provisions of section 85(1)(b) of the CPA are not applicable to a child who at the time when the offence was committed was 16 years, but not older than 18 years and on whom a sentence other than that contemplated in section 85(1)(b) is imposed, which includes a fine and a suspended sentence."

See also generally A Skelton "The Automatic Review of Child Offenders' Sentences" (2013) 44 *SACQ* 37.
38 See *Mosieling v S* (A390/2011) 2012 ZAWCHC 221 (23 October 2012) *SAFLII* in this regard.

review process.[39] This makes the review process in respect of child offenders materially different from that of adult offenders where automatic review is not applicable to regional court judgments;[40] is not available to legally represented accused;[41] and is determined by the experience of the presiding magistrate.[42]

The automatic review procedure is premised on the idea that records of automatically reviewable cases should be speedily prepared and transmitted for perusal by judges of the High Court, who must evaluate the records of lower courts and determine whether the proceedings were in accordance with justice.[43] This "system was originally introduced, and has been maintained since, to minimise the risk of wrong convictions or unjust sentences".[44]

In the absence of the automatic review system, there is no mechanism to deal with a situation where an accused person has been wrongly convicted and sentenced and does not take any post-trial remedial steps (like appeal or review). In *S v Joors*,[45] the court explained that the purpose of the automatic review process

> "is to ensure as far as possible that legally unrepresented convicted persons have been fairly tried and justly sentenced. It is intended to enable remedial steps to be taken expeditiously if the proceedings in the magistrate's court have not been in accordance with justice." [46]

The system was put in place to address the realities that South African courts have to deal with on a daily basis including, if not primarily, the fact that many accused are not familiar with the criminal court processes and are likely to go through their criminal trials unrepresented.[47] To this mix one could add that it is not inconceivable that, on a balance of convenience, an accused may choose to let a clearly erroneous judgment go unchallenged instead of going through the time-consuming and financially demanding appeal or review process, particularly in the case of magistrates' courts sentences that entail a short period of imprisonment or attract relatively low fines.[48]

Section 302 of the CPA stipulates the jurisdictional factors that trigger the automatic review process. At the core of the provision are the length of the sentence imposed and the experience of the presiding magistrate. If a magistrate imposing the sentence has less than seven years' experience in the

39 Para 62.
40 S 302(1)(a) of the CPA restricts automatic reviews to district magistrates' courts.
41 S 302(3)(a).
42 See s 302(1)(a)(i)–(iii).
43 *S v Steyn* 2001 1 SACR 16 (CC) para 19.
44 Para 19.
45 2004 1 SACR 494 (C) 497.
46 497.
47 In *S v Vermaas; S v Du Plessis* 1995 3 SA 292 (CC) para 16, Didcott J highlighted the failure of the state to provide free legal services to those who could not afford them. He held that

> "[o]ne can safely assume that, in spite of section 25(3)(e) [of the Constitution of the Republic of South Africa, 1996 (the "Constitution")], the situation still prevails where during every month countless thousands of South Africans are criminally tried without legal representation because they are too poor to pay for it. They are presumably informed in the beginning, as the section requires them peremptorily to be, of their right to obtain that free of charge in the circumstances which it defines. Imparting such information becomes an empty gesture and makes a mockery of the Constitution, however, if it is not backed by mechanisms that are adequate for the enforcement of the right."

48 The maximum sentence a district magistrates' court can impose is three years' imprisonment or a fine not exceeding the amount determined by the minister responsible for the administration of justice from time to time by notice in the *Government Gazette*. See s 92 of the MCA.

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substantive position of magistrate, any sentence imposed is subject to review if it exceeds a period of three months' imprisonment or a fine in excess of an amount determined by the minister responsible for the administration of justice. If the magistrate has held the substantive position of a magistrate for a period of seven years or more, the sentence is subject to automatic review if it is six months' imprisonment or more or, in case of a fine, if it exceeds the amount determined by the minister.[49] The automatic review process in respect of child offenders, however, is different. Except for certain limited exceptions, all cases involving child offenders in the lower courts are reviewable. Thus, while ordinarily the review process does not apply to the regional courts, it applies if the accused is a child that is sentenced to imprisonment or in a situation where a regional court imposed a life sentence. Reviews in respect of cases involving children are also not dependent on the experience of the presiding magistrate. As such, regardless of the experience of the magistrate, any judgment that involves direct imprisonment of a child is subject to automatic review.

The automatic review process is intended to benefit the accused. That much is evident from the fact that it does not cover acquittals that may not be in accordance with justice, because it restricts itself to convictions. Whether rightly or wrongly, the legislature seems to have held the view that legal representation is sufficient protection for the accused. However, given that not all legal representatives may be adequately skilled or experienced to act as a buffer against the failure of justice,[50] this differentiation may be unjustifiable. This point becomes more of an issue if one considers that the whole system is centred on the experience of the magistrate. If a magistrate with six years' experience cannot be trusted with the proceedings without the need for automatic review where the sentence is in excess of six months, how justifiable is it that the presence of a legal representative with potentially little to no experience does not serve as a ground for automatic review?

Section 303 of the CPA outlines the process to be followed in instituting the review. In sum, the clerk of the magistrates' court must forward the record of proceedings to the registrar of the High Court with jurisdiction within a period of one week after the passing of the sentence.[51] The accused must be informed of this process. This is significant because it enables the accused to participate in the automatic review process. In terms of section 306, the magistrate is required to inform the accused of three procedural aspects. The first is that the proceedings are subject to automatic review and therefore the record will be transmitted to the High Court within one week. The second is that the accused may inspect and make copies of the record of proceedings either at the magistrates' court or at the High Court and, the third, that the accused may

[49] The current amounts are R6 000 in respect of a magistrate with less than seven years' experience and R12 000 for seven years' experience or longer.

[50] As a practical example, a candidate attorney is allowed to represent an accused and this would qualify as legal representation for purposes of this legislation, thereby making the automatic review process inaccessible to the accused. This would be true even if the candidate attorney had just acquired the right of appearance.

[51] S 303 of the CPA. See also *Opperman v S* (A570/2013) 2016 ZAGPJHC 304 (27 May 2016) *SAFLII* para 2 <https://www.saflii.org/za/cases/ZAGPJHC/2016/304.html> (accessed 26-01-2024).

set the case down for argument before the High Court. An accused who seeks to participate in the process may submit a statement or argument to the clerk of the magistrates' court or the registrar within a period of three days and such statement or argument will be attached to the record of proceedings.

Section 304 of the CPA outlines the process that the review judge must follow. In terms of the section, on receipt of the record of the proceedings, the registrar of the High Court is then required to give the record to a judge in chambers for review. Once the registrar has laid the record of proceedings before a judge in chambers, the responsibility of the judge is to consider whether the proceedings are in accordance with justice. To do this, the judge may direct that further information or evidence be supplied.[52] After receiving the information or evidence, the judge may certify the proceedings as in accordance with justice. Thus, if after considering the record of proceedings, the judge is of the view that the proceedings are in accordance with justice, certification will take place without any further communication with the magistrate or involvement of any other judge. After the certification, the record is returned to the magistrates' court and that is the end of the process.

However, if the judge is of the view that the proceedings are not in accordance with justice or there is any doubt about this, the judge is required to obtain a statement from the magistrate who tried the case explaining why the conviction or sentence was imposed.[53] The statement of the magistrate and the record of proceedings will then be placed before the High Court which sits as a court of appeal.[54] Should the judge be of the view that the proceedings are clearly not in accordance with justice and the delay may be prejudicial to the accused, the process of obtaining a statement from the magistrate may be bypassed.[55] It appears that obtaining the statement of the magistrate is compulsory in that this step may only be bypassed if two requirements are met, namely (1) the proceedings are clearly not in accordance with justice and (2) if not laying the case before the court of appeal immediately will be prejudicial to the accused.

Where the judge is in doubt about whether the proceedings are in accordance with justice, the legislation does not allow for the matter to be placed before the court of appeal without first obtaining the magistrate's statement. From the wording of section 304(2)(a) of the CPA, both these factors must be present. In other words, prejudice to the accused occasioned by the delay in obtaining the statement on its own would be insufficient, as would the fact that the proceedings are clearly not in accordance with justice.

However, in terms of sections 307 of the CPA, the automatic review process does not suspend the sentence. The accused is required to start serving the sentence immediately unless granted bail or, if the accused was already on bail, such bail is extended.[56] The effect of this provision is that after sentence,

52 S 304(1) of the CPA.
53 S 304(2)(a).
54 The CPA classifies this process as a "review". However, once the matter has been referred to the High Court by the reviewing judge, that court sits as a court of appeal, not as a court of review. It follows that the powers of this court are those of a court of appeal.
55 S 304(2)(a).
56 S 307(1).

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the convicted person must apply for bail if they want to await the outcome of the review process out of custody. It is worth noting that the CPA does not place a duty on the presiding officer to inform the accused of the possibility to apply for bail. Given the purpose of the automatic review process and the vulnerability of the persons it seeks to protect, it would have been beneficial if presiding officers were required to inform the accused persons of the possibility of applying for bail in the manner in which it is done at the initial stages of the trial (ie during the first appearance).[57]

4 Automatic review process in action: The picture painted by a few judgments

4 1 Introduction

On several occasions, review judges have expressed their frustration at the suboptimal manner in which the automatic review process plays out. While there are many such cases, a selected few must suffice for purposes of this discussion. These cases were selected for two reasons. The first is that they are cases involving inordinate delays between the completion of the trials and the completion of the automatic review process. The second reason is that the judges in the selected cases made significant remarks about the review process in their judgments.

4 2 *S v Nyumbeka*[58] ("*Nyumbeka*")

In this case, the accused was charged with, and convicted of, assault and escaping from custody by the Khayelitsha magistrates' court. On 30 June 2010, he was sentenced to six months' imprisonment or a fine of R3 000, half of which was suspended for a period of three months. Effectively, the period of imprisonment could therefore amount to three months.[59] Factoring in the possibility of parole, it could have been even be less than that period. On the facts, the case was subject to automatic review. However, the review judgment was only delivered on 18 August 2011. This was about a year and two months after the sentence was imposed. The reviewing judge expressed himself strongly regarding the delays and the obvious prejudice to convicted persons if delays of this nature take place.[60]

The delays, it appears, started at the Khayelitsha magistrates' court because the record of proceedings was only received by the reviewing judge on 15 September 2010.[61] That record, however, was incorrect and incomplete, resulting in the reviewing judge sending a request to the magistrate in this regard. That request was sent on 20 September 2010. In response to the

[57] S 60(1)(c) states that "[i]f the question of the possible release of the accused on bail is not raised by the accused or the prosecutor, the court shall ascertain from the accused whether he or she wishes that question to be considered by the court". This provision, however, does not seem to be applicable to automatic reviews as it appears to be expressly meant for the accused's first appearance(s) after arrest.
[58] 2012 2 SACR 367 (WCC).
[59] See paras 3–4 for the summary of the material facts.
[60] See paras 15–22 in particular.
[61] Para 16.

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judge's request, the record was sent back to the judge on 26 November 2010, but it was still incomplete. The full record was eventually received by the judge on 8 December 2010, and this is when the judge was in a position to consider the record for the first time. The judge immediately dispatched queries to the presiding magistrate (on 9 December 2010 – the following day). The document containing the queries was placed in the pigeonhole for the Khayelitsha magistrates' court but was not collected. On 7 February 2011, the queries were mailed to the Khayelitsha magistrates' court, whereafter the reviewing judge received the response from the presiding magistrate on 3 March 2011.[62]

From the above timelines, it is clear that the fault lay with the magistrates' court in this case. However, two particular periods in the review process call for further attention because they indicate some fault on the part of the High Court as well. The first is that the full record of the proceedings was received by the High Court "before 08 December 2010"[63] but the correspondence containing the reviewing judge's queries was only placed in the pigeonhole of the relevant magistrates' court on 9 December 2010.[64] This was not collected, and on 7 February 2011 (some two months later), the registrar retrieved the correspondence and sent it by mail to the magistrates' court. The magistrate's response to these queries was received on 3 March 2011. This, it seems, was the last correspondence between the reviewing judge and the magistrate. Thereafter, it took just over five months before the review judgment was delivered (ie from 3 March 2011 to 18 August 2011). Yet, in the review judgment, the criticism was reserved for the presiding magistrate, and nothing was said about the role of the High Court in the delay.

Even though the court spared the High Court and its functionaries from its criticism relating to the inordinate delays in this case, it went on to provide some practical guidelines regarding the automatic review process and the duties of a magistrate. The court emphasised that a magistrate's role goes beyond the adjudication of matters before them and that they have a duty to ensure that the orders they grant are implemented and given effect.[65] In the prosecution of automatic reviews, the court pointed out that magistrates

> "should not sit idly and take it for granted that the administrative component and the clerk of the court at the various Magistrates offices will implement and give effect to their orders. They should supervise and make sure that effect is given to it".[66]

This implies that magistrates have a positive duty in regard to all the reviewable decisions they hand down to ensure that the clerks of their courts are proactive and timeously transmit the records to the registrar of the High Court.

Most importantly, the court provided some guidelines to magistrates who impose reviewable sentences. The court was of the view that such magistrates

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62 In a judgment of 24 paragraphs, the review court devoted nine of the paragraphs of the judgment to criticism of the delay in the process (ie paras 15–23), which shows the court's displeasure with how the lower court dealt with the process.
63 Para 18. The exact date is not stated in the judgment. All that is stated is "before 08 December 2010".
64 Para 19.
65 Para 20.
66 Para 20.

must first check whether their reviewable decisions have been entered into the review registers.[67] Secondly, magistrates must ensure that the full record of the automatically reviewable proceedings before them has been properly typed and transcribed.[68] It goes without saying that inherent in this requirement is that the clerks of courts should be well managed to ensure that the typing and transcribing do not unnecessarily delay the proceedings. Thirdly, magistrates should also ensure "that all the evidence presented at the trial [is] included, and where it is not available, try and reconstruct, such evidence from the handwritten notes, with the assistance of all the parties concerned".[69] The fourth guideline, which is an extension of the third one, is that magistrates must ensure "that all documents and annexures are attached to the record"[70] that are to be submitted to the registrar of the High Court. This is an important guideline designed to prevent further delays on account of the reviewing judge not having all the relevant information and evidence on which the conviction and sentence were made. This will prevent unnecessary correspondence between magistrates and reviewing judges to seek clarity on such information and will accelerate the automatic review process of decisions of magistrates' courts where required. Finally, the court cautioned magistrates to take measures to ensure that no incomplete or incorrect record is sent on review.[71] In setting out these important guidelines the court, while accepting that the preparation of the record for automatic review was primarily the function of the clerks of the magistrates' court, emphasised that magistrates also have a duty to ensure that proper records are sent to the High Court for automatic review.[72]

4 3 *S v Tshabalala*[73] ("*Tshabalala*")

Another case that calls for attention is *Tshabalala*, where it took sixteen months between the time that the sentence was imposed and the time the review judgment was delivered. While the review outcome did not prejudice the accused as the sentence was confirmed in *Nyumbeka*, in *Tshabalala* the prejudice was real and unacceptable. In this case, the accused faced a charge of theft for which she was convicted and sentenced to three months' imprisonment or a fine of R1 500. By the time the review judgment was delivered, in which the conviction and sentence were set aside,[74] the accused had already served her three months' sentence.[75] The judgment presents a clear example of why a delay in the review process cannot be countenanced.

[67] Para 21(i).
[68] Para 21(ii).
[69] Para 21(iii).
[70] Para 21(iv).
[71] Para 21(v).
[72] Para 22. The court further held that

> "[t]he Clerk of the Court, unlike the one in this case, should see to it that this is done timeously and within the periods prescribed by law and should follow-up after having checked the register, as to why reviews are delayed. Here they have also clearly failed in their duty in terms of s 165(4) of the Constitution to give effect to an Order of Court."

[73] (102/2015) 2016 ZAFSHC 90 (5 May 2016) *SAFLII*.
[74] Para 29.
[75] Para 14.

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The delay in the process was caused by the presiding magistrate sending the case for review five months after the sentence was imposed. As if that was not enough, the same magistrate took three months to respond to the reviewing judge's query about the delay in submitting the record of proceedings. In other words, the magistrate withheld her explanation of why, in the first place, she had delayed sending the case on review. After receiving the magistrate's response, the reviewing judge sent another query to the magistrate. It took over two months between the date that the judge sent the query and the date that the magistrate received it.[76] Then it took almost another two months before the magistrate responded.[77] Such delays defeat the purpose for which the automatic review procedure was established. They make a mockery of the review procedure because even if the High Court were to conclude that the proceedings were not just, the wrongly convicted and sentenced person had served the sentence already, despite the fact that this procedure was meant to prevent the serving of such sentence.

While the delays in *Tshabalala* seem attributable to the magistrate and the administrative side of the court, the magistrate alone can be blamed for a nine-month delay between the date of sentence to the date on which the reply to the judge's queries was received. While this is not clear from the review judgment, it seems that the remaining seven months' delay is attributable to the High Court. This is because the last communication with the magistrate ended with the receipt of the magistrate's response on 20 October 2015, and the judgment was only handed down on 5 May 2016. If this is so, then there is a case to be made for the High Court to take heed of its own admonition that "[r]eviews are urgent in nature".[78] While judges of the High Court can be blamed for some of the delays, decided cases clearly illustrate that, in the main, the magistrates' courts functionaries are responsible for many of these inordinate delays.[79]

The unreasonable delays associated with automatic review proceedings have propelled some judges into judicial activism. As stated above, the reviewing judge provided guidelines in *Nyumbeka* and this approach was also followed in *Tshabalala* where the High Court endorsed the *Nyumbeka* guidelines.[80]

4 4 *S v Jacobs, S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe*[81] ("*Jacobs*")

The *Jacobs* case further lays bare the inherent challenges in the automatic review process. This is a case where the judges introduced far-reaching measures to address the problems encountered in the automatic review process.

[76] The query was sent on 19 June 2015 and received by the magistrate on 29 August 2015.
[77] After receiving the query on 29 August 2015, the magistrate's response was received by the judge on 20 October 2015.
[78] Para 12.
[79] Paras 10–11.
[80] Para 13.
[81] 2017 2 SACR 546 (WCC).

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Jacobs dealt with seven cases emanating from several magistrates' courts, and the inordinate delays by magistrates in responding to judges' queries. The delays ranged from two months (in a case where a six months' imprisonment sentence was imposed)[82] to three years (in a case where the accused was sentenced to a period of two years' imprisonment).[83] These cases reflect that, in reality, many accused persons have already served their sentences before the automatic review process has taken place. This unfortunate situation did not escape the review court. Sher AJ (Henney J concurring) observed that

> "[i]n 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…".[84]

Sher AJ then made several recommendations on how to eradicate delays associated with the automatic review system. The first proposal was the introduction of an outstanding automatic reviews list modelled on the reserved judgment list used by certain divisions of the High Court.[85] This would make it easier to track all outstanding automatic reviews and understand the nature of the difficulties that lead to these delays, so that resources could be made available to help address this problem. The second proposal was that the chief magistrates and the administrative or cluster heads, as well as the regional head of the Department of Justice and the Magistrates' Commission, conduct an audit in respect of all matters involving reviewable sentences which were imposed by their courts within the last three years.[86] The justification for this proposal was that there might be other accused persons whose matters were not dealt with in accordance with the principles of justice. An audit would not only identify these matters, but could serve as a case study to assist in understanding the structural problems associated with automatic reviews. Such suggestions are meant to protect the constitutional right of review of the accused. Egregious delays when exercising this right constitute a failure of justice.[87]

4 5 *S v Fransman*[88] ("*Fransman*")

In *Fransman*, two cases were presented for review by a magistrate who had presided over both. In the first, the accused was Fransman and in the second, the accused was Kowa. Fransman had been convicted of theft and sentenced to 24 months' imprisonment in terms of section 276(1)(i) of the CPA on 9 March 2017. While the judges on review in the *Fransman* case found the proceedings to be in accordance with justice, they expressed their displeasure at the inordinate

[82] Para 5.
[83] Para 2.
[84] Para 41.
[85] Para 45.
[86] Para 51. The court ordered the Heads of Office of the Caledon and Montagu magistrates' courts to furnish the court with a record of all reviewable sentences within 30 days of the date of the judgment.
[87] Para 37.
[88] 2018 2 SACR 250 (WCC).

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amount of time it took for the matter to be reviewed. The Fransman matter was forwarded to the High Court for review on 17 May 2017. A query was directed to the magistrate on 22 May 2017 with a directive that the magistrate should reply before 15 June 2017. While there was an indication that the magistrate received the query on 29 May 2017, she only finalised her responses on 8 May 2018 and the record was received by the High Court on 25 May 2018.[89] In the matter of Kowa, the accused had been convicted on two counts,[90] the first being contravention of section 65(1)(a) of the Road Traffic Act 93 of 1996 and the second being a contravention of section 12 of the same Act. On the first count, the accused was sentenced to twelve months' imprisonment or a fine of R10 000 of which R8 000 or ten months' imprisonment was suspended for a period of five years with applicable conditions. On the second count, the accused was sentenced to 60 days' imprisonment or a fine of R800 wholly suspended for five years with applicable conditions. The query in this case was sent to the magistrate on 17 May 2017 (the same day as the Fransman query) and she responded to the query on 8 May 2018. The conviction and sentence on the first count were deemed not to be in accordance with justice while the one on the second count was found to be in accordance with justice.[91]

The judges in *Fransman* were not only concerned by the excessive delays involved in both matters but also by the explanation that the magistrate gave for the delay. Her explanation was simply that she had been swamped with other work-related commitments. The judges, unsurprisingly, rejected this irrational and ill-conceived explanation.[92] In what could be seen as an expression of displeasure, they ordered the Magistrates' Commission to conduct an enquiry into the failure of the magistrate to deal with the query as directed by the court.[93] Henney and Sher JJ, the two judges who had been involved in the *Jacobs* case about ten months earlier, noted that action had been taken in response to their directives in *Jacobs* but that the problems still persisted. They then gave a further directive requiring that

> "the Regional Head of the Department of Justice shall (together with the Chief Magistrate(s) and judicial administrative/'cluster' head(s) for the Citrusdal magistrates' court and with the assistance of the Regional Head of the Office of the Chief Justice and the Chief Registrar, as well as the Magistrates' Commission), conduct a full retrospective review of the system which was put in place in regard to the processing, forwarding, monitoring and control of automatic reviews from all magistrates' courts in the Western Cape since the date of the Regional Head's report to this Court in November 2017, with particular reference to the issue of undue delay, both in regard to the forwarding of the records in such matters to this Court, as well as in regard to the way in which queries which have been raised by this Court in relation to such matters are processed and responded to, and shall provide this Court with a comprehensive report in this regard …".[94]

[89] See paras 1–2 for the facts and judgment of the magistrates' court in the *Fransman* matter.
[90] The counts related to driving while under the influence of alcohol and driving without a valid driver's licence.
[91] See paras 3–6 for the facts and the magistrates' court judgment in respect of the Kowa matter.
[92] Paras 24–26.
[93] Para 45.4
[94] Para 45.8.

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4 6 Preliminary conclusions

While judicial activism is welcome and necessary, it has some limitations. One obvious limitation is that such guidelines or directives are specific to a particular province. Thus, the directives in both *Tshabalala* and *Fransman*, even if followed to the letter, will only solve the problem in the Free State and Western Cape respectively. There is a need for the legislature to intervene by amending the CPA to address this issue. It would also be a welcomed if either the Supreme Court of Appeal or the Constitutional Court were to pronounce on how these delays could be addressed. The guidelines provided in *Nyumbeka* appear to be capable of being objectively applied across the country. However, the legislature should consider extending the one-week deadline by a week or two to cater for the technical challenges that may be experienced in typing and transcribing the record. We also suggest that court managers should be actively involved in the prosecution of automatic reviews because the clerks of courts report directly to them. It would be ideal for each magistrates' court to have a well-functioning register to record all the reviewable decisions so that this informaton could be sent automatically to the registrar of the High Court. All the role players in the automatic review process should always be mindful of the fact that the right to liberty of those convicted and sentenced is at stake, hence the need to act with urgency when these automatic reviews are prosecuted.

It is, however, disappointing that when proposing various guidelines, judges do not address their own part in delivering their judgments long after receiving the magistrates' responses. Equally noteworthy is the fact that other role-players are required to keep registers of cases on review and make follow-ups, yet the functionaries of the High Court who, it should be added, have more resources at their disposal compared to the magistrates' courts, are not required to do so. Pointing to the apparent contribution of the High Court in adding to the delays in the automatic review process should not, however, in any way shift focus from the magistrates' courts functionaries who do, in fact, shoulder most of the responsibility for the delays.

5 Where to from here? Challenges and recommendations

5 1 Unrealistic or absent time frames

Section 303 of the CPA requires that the record of the proceedings must be provided to the High Court for review within seven days from the day that the sentence is imposed by a magistrate. This provision does not provide any consequences for a failure to adhere to the one-week period, notwithstanding

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the fact that delays that may occur before the matter is reviewed have "the potential to cause prejudice and an irreversible collapse of justice".[95] When the Constitutional Court had the rare opportunity to deal with the automatic review process,[96] Chaskalson P reacted to the impact of the delays as follows:

> "Delays of this nature are highly prejudicial to accused in custody who are entitled to be released if their convictions are set aside on review. Such delays should be avoided wherever possible."[97]

However, a one-week period seems to be impractical given that a complete record of the proceedings is required. As Sher AJ put it in *Jacobs*:

> "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 where evidence is led, it will almost always be impossible for a magistrate to comply with this time period."[98]

Proceedings in the magistrates' courts are recorded both manually and mechanically. In *S v Osmond*[99] the court stated that "[t]he obligation to record the proceedings by long hand is relaxed when there are mechanical recordings".[100] In the case of a manual record, the record must be typed;[101] in the case of a mechanical record, it must be transcribed. It is therefore not always possible for this to be done within a week.

While the clerk of the court is given a time limit within which the record should be forwarded to the registrar of the High Court,[102] there is no corresponding time frame imposed on the registrar to provide the record to the judge. The legislature was content that this should be done only "as soon as possible".[103] Similarly, there are no time limits regarding the period within which the judge must consider the record. There is also no time limit within which the magistrate must respond should the judge forward queries or questions to the magistrate. Much of the problem, it seems, stems from this lack of time frames, compounded by the fact that, in some cases, the clerks of the courts do not comply with time frames when these have actually been set.

Review judges have been complaining about this problem for a long time and it does not seem to be going away.[104] It is simply indefensible that delays

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95 *S v Tshabalala* (102/2015) 2016 ZAFSHC 90 (5 May 2016) *SAFLII* para 12.

96 The nature of the automatic review process means that the Supreme Court of Appeal and the Constitutional Court are usually not involved. This is because once the automatic review process has taken place, there is no further process required except returning the record to the relevant magistrates' court. In *S v Manyonyo* 1999 12 BCLR 1438 (CC), the case went to the Constitutional Court because there were constitutional issues, unrelated to the automatic review process, that had to be considered. Even where there are further processes after the certification of the judgment as being in accordance with justice, such as to withdraw the certification, those processes still occur at High Court level. Examples are *S v Katu* 2001 1 SACR 528 (ECD) and *S v Goliath* 2014 2 SACR 290 (ECG).

97 *S v Manyonyo* 1999 12 BCLR 1438 (CC) para 4.

98 Para 41.

99 2020 1 SACR 357 (ML).

100 Para 22.

101 As emphasised in *Qumba v S* 2021 1 SACR 227 (ECM) para 3.2, "the recording in manuscript must be neatly typed to enable the reviewing Judge to read it".

102 S 303 of the CPA requires the clerk of the court to forward the record to the registrar of the High Court within a week.

103 S 303.

104 The cases discussed in this article bear testimony to this. See in particular *S v Fransman* 2018 2 SACR 250 (WCC) and *S v Osmond* 2020 1 SACR 357 (ML).

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as long as three years should even be possible in the presence of a peremptory legislative time frame of one week within which the record must be transmitted for review. The principal source of the inordinate delays appears to be the magistrates' courts for two reasons. First, many magistrates do not adhere to the time frame of a week. The solution here seems to lie in enforcement. The case law shows that judges can be innovative. For example, in *S v Osmond*[105] the reviewing judge approached the Judge President who ordered the return of the record from the magistrates' court with or without the magistrate's response after that response had been outstanding for a long time.[106] Subsequently the response was received, and it could well be that this was a result of the Judge President's directive. However, it may be unnecessary to take such a drastic step; undue delay may be avoided simply by means of a reviewing judge following up on queries.

Secondly, some magistrates send incomplete records to the High Court and, consequently, the reviewing judges are unable to attend to the cases immediately.[107] because they must first request a complete record.[108] Even when magistrates send complete records, whether of their own accord or on request by reviewing judges, their responses to judges' queries are delayed. Compounding the already dire situation, some magistrates do not deal with the judges' queries adequately or satisfactorily, sometimes simply ignoring direct questions or giving absurd answers to the questions posed. It is imperative that when responding to queries magistrates must provide considered responses which clarify the approach they adopted when making their decisions. That is a judicial admonition often proffered,[109] but it is just one of many such admonitions which seem to be ignored. For instance, in *S v Sephiri*,[110] the reviewing judge forwarded the following query to the magistrate: "The honourable magistrate never invited or questioned accused to place on record his personal circumstances and the honourable magistrate is requested to indicate how he came to the imprisonment term of 18 months."[111] The presiding magistrate replied to the above query in Afrikaans as follows: *Die hof ken nie die beskuldigde om te weet waaroor hof beskuldigde kan vra nie.*[112] The court held that "[t]he reply made by the Magistrate that he does not know the accused hence the court could not ask questions, is not only absurd

105 2020 1 SACR 357 (ML).
106 Para 3.
107 See for instance *S v Lubisi* 2002 JOL 10052 (T); *S v Mogajane* 2002 JOL 9685 (T); *S v Mangena* 2005 JOL 15160 (T); *S v Mathosi* 2007 JOL 19088 (T); *S v Mokwe* 2004 JOL 13389 (T); and *S v Maqondose* 2007 JOL 20391 (E).
108 See *S v Masemola* 2003 JOL 10832 (T).
109 See *S v Tshabalala* (102/2015) 2016 ZAFSHC 90 (5 May 2016) *SAFLII* para 12 as just one example in this regard.
110 (357/2012) 2012 ZAFSHC 224 (29 November 2012) *SAFLII* para 3 <https://www.saflii.org/za/cases/ZAFSHC/2012/224.html> (accessed 26-01-2024).
111 Para 4.
112 The Afrikaans statement may be roughly translated as follows: "The court does not know the accused for it to be able to know what to ask him questions about." Surprising as this sounds, it means that the magistrate held the view that for him to be able to consider the personal circumstances of the accused, he needed to know him.

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but [also] disturbing".[113] The court made it clear that upon receipt of queries from reviewing judges, magistrates are expected to respond responsibly in a complete and courteous manner.[114]

5 2 Serving out sentences prior to the finalisation of the review process

Inordinate delays have many consequences for the accused, but the most unfortunate of these is that the accused may serve out a sentence only for the judgment that brought about the sentence to be set aside on review.[115] In that case, the only real benefit for the accused is that their criminal record is removed or, where a fine has been paid, that the amount is reimbursed to the accused. Perhaps a claim for damages may also be competent. It is submitted that no self-respecting justice system should tolerate a process that deliberately exposes the government to civil litigation.[116]

If it is accepted that the real danger occasioned by inordinate delays in the automatic review process is that accused persons could serve sentences that they should not serve in the first place, then there seems to be two alternative solutions to this problem. Currently, the automatic review process does not come with the release of the accused pending the outcome of the review. On the contrary, section 307 of the CPA states that

> "the execution of any sentence shall not be suspended by the transmission of or the obligation to transmit the record for review unless the court which imposed the sentence releases the person convicted on bail."

The wording of this section signifies that the release of the accused is not automatically available. In other words, the default position is that, once sentenced, the accused must start serving the sentence even though the judgment is subject to automatic review, unless such accused successfully applies for bail. It could be said that this is nothing out of the ordinary because this constitutes the normal procedure when someone has been convicted of a crime. However, that argument would not be fully appreciative of the unique nature of the automatic review process and its purpose. The process is there to protect an accused person and serves as an admission by the legislature that an injustice may take place in situations falling under the purview of the review process. For this reason alone, there is a justification for treating the fate of the accused subject to this process in a more lenient manner. That would be aligning practice with the letter and spirit of the legislation.[117]

This brings us to the first possible solution. If there is an admission that this specific regime is aimed at protecting the vulnerable, as in the case of legally

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113 *S v Masemola* 2003 JOL 10832 (T) para 6. See also *S v Tshabalala* (102/2015) 2016 ZAFSHC 90 (5 May 2016) *SAFLII* para 10.

114 *S v Masemola* 2003 JOL 10832 (T) para 24.

115 See eg *S v Tshabalala* (102/2015) 2016 ZAFSHC 90 (5 May 2016) *SAFLII*.

116 In this regard, see also B Tshehla "Arrest Without a Warrant: Is the Current South African Approach Warranted?" (2021) 37 *SAJHR* 355.

117 After all, this is what the Constitution requires. Section 39(2) of the Constitution states that, "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".

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unrepresented persons and persons unfamiliar with the criminal justice process, then logic would dictate that they should not be expected to be conversant with the options available after conviction and sentence pending the automatic review. It is true that section 307 of the CPA makes bail possible, but it would be helpful if there was a duty on the magistrate to be actively involved by, at the very least, informing the accused about the possibility of applying for bail pending the review. In fact, one could go so far as to suggest that the magistrate should, as a matter of course, be required to consider granting bail under those circumstances. This step could go a long way in dealing with the problems that currently afflict the process, key among which is the reality that persons can complete serving their sentences before the review process is over.

The second, alternative solution is to increase the powers of the judge who receives the record for review. At present, after perusing the record, the judge has limited options and, it should be added, none of the options assist in alleviating the problem of having persons wrongly and unjustifiably serving sentences.[118] The position is that if the judge finds that the proceedings were in accordance with justice, the judge certifies the process as such and returns the record to the magistrates' court. However, if the proceedings were clearly not in accordance with justice, the judge refers the matter for a hearing[119] and, if in doubt about whether the proceeding are in accordance with justice, the judge may send queries to the magistrate.[120]

Many of the problems start right here. The judge sends the query to the magistrate and, as illustrated above, some magistrates take up to three years to respond. There is not much that the judge can do except complain and report the magistrate or whoever was responsible for the delay to the relevant regulatory bodies. Two cases in particular show that some judges have taken action that is not prescribed by the relevant legislation, but which has been beneficial to the process. The first is S *v Osmond*,[121] which was discussed in the previous part. The second is *Nameka v S*[122] where the reviewing judge instructed that the accused be released from custody while the review judgment was being prepared, as the judge had formed a *prima facie* view that the proceedings had not been in accordance with justice.[123]

To summarise: one solution for the problem of accused persons serving out sentences prior to the finalisation of the automatic review process could be to empower the presiding magistrate to release the accused on bail pending the review outcome if the interests of justice so permit. Similarly, and as an alternative, the judge could be authorised to declare that the proceedings were not in accordance with justice instead of having to refer the matter for a hearing.

118 The exception here is *Nameka v S* (CA&R 79/2020) [2020] ZAECGHC 49 (22 April 2020) *SAFLII* <https:/ saflii.org/za/cases/ZAECGHC/2020/49.html> (accessed 26-01-2024) which is discussed subsequently in the main text.
119 In terms of s 304(2)(a) of the CPA, the judge "shall thereupon lay the record of the proceedings and the said statement before the court of the provincial or local division having jurisdiction for consideration by that court".
120 S 304(2)(a) of the CPA.
121 2020 1 SACR 357 (ML).
122 (CA&R 79/2020) [2020] ZAECGHC 49 (22 April 2020) *SAFLII*.
123 Para 2.

Surely, if the judge is empowered to certify that the proceedings are in accordance with justice, which is what the statute allows, the same judge can declare the proceedings as not being in accordance with justice if that is the case. Considering releasing the accused while awaiting the outcome of the review process will undoubtedly go a long way in minimising the unacceptable situation that the accused person completes serving a sentence only for such proceedings to be set aside later.

5 3 Outdated channels of communication

There could be other innovative measures to improve communication between the magistrates' courts and the High Court and therefore minimise the type of delays and consequences illustrated in the cases discussed previously. A simple solution could be the employment of technology. For instance, it would make a difference if the reviewing judge, after receiving the record, sent a query to the magistrate by e-mail. Taking further advantage of technology, role players in the automatic review process could investigate the possibility of relying on it for the whole process. This could include, for example, e-mailing the whole record to the registrar of the High Court. This would do away with the delays currently encountered in the process as far as communication is concerned.[124]

Technology could also play an important role where cases are heard virtually. Platforms such as Microsoft Teams can record and transcribe at the same time. Microsoft describes one of the benefits of a Teams meeting thus:

> "During any scheduled Teams meeting, [the organiser] can start a live transcription of participant speech. The text appears alongside the meeting video or audio in real time, including the speaker's name (unless they chose to hide it) and a time stamp."[125]

While technology sometimes fails, it is a means to make the automatic review process more effective. Once the proceedings have been recorded, the magistrates could go through the audio and transcripts to check whether they are accurate and immediately transmit them to the High Court.

6 Conclusion

The automatic review process is undoubtedly a necessary safeguard to protect the interests of vulnerable accused persons. However, it is a system that has not fulfilled its potential. It is riddled with problems as illustrated by the cases discussed above, which are by all accounts only a few of many. The cumulative effect of these problems not only undermines the automatic review process but subverts the administration of justice. At the receiving end of the non-functionality of the system are the accused persons whom the

[124] See *S v Mncube* (20/2017, K99/17) 2017 ZANWHC 105 (16 November 2017) *SAFLII* paras 2–3 where a query was forwarded to the magistrate on 6 October 2017, the magistrate replied to the query on 25 October 2017, and the registrar received the response on 31 October 2017 but only forwarded it to the reviewing judge on 6 November 2017.

[125] Microsoft "View Live Transcription in a Teams Meeting" *Microsoft* <https://support.microsoft.com/en-us/office/view-live-transcription-in-a-teams-meeting-dc1a8f23-2e20-4684-885e-2152e06a4a8b> (accessed 26-01-2024).

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system was designed to protect.[126] It is clear that in some cases, the automatic review process is finalised long after the accused have completed serving their sentences. Review judges have often decried the state of affairs but things do not seem to be improving.[127]

Improvement of the situation is, strictly speaking, the responsibility of the legislature and the executive as opposed to the judiciary. In what seems to be a measure of last resort, some judges have now started issuing directives to the various role-players involved in the automatic review process.[128] Judicial activism is laudable, but it is also an indictment on the administrative side of the criminal justice system whose functionaries seem unable or unwilling to fix the system. However, it is fair to state that, as discussed above, the judiciary must take responsibility for its role in the delays through lack of control, management, or follow-up mechanisms at the High Court level.

Of all the interventions and complaints, the introduction of remedial measures in *Jacobs* and *Fransman* by the Western Cape High Court stands out. These remedial measures are both detailed and practical. However, they have at least two obvious limitations. The first is that even if the measures were followed, they would only improve the situation in the Western Cape while the problem is a reality in all of the country's courts. The second is that the measures do not deal with the root of the problem, namely the shortcomings in the CPA, the statute regulating the automatic review process. Many of these problems, it is submitted, may be solved by amending the statute. One significant amendment would be to ensure that convicted and sentenced persons, whose conviction and sentences are subject to automatic review, are not required to serve their sentences before a judge has certified the process is in accordance with justice. The second amendment that could benefit convicted and sentenced persons considerably is placing time frames on the responsibilities of the role-players in the automatic review process. There is already a time frame stipulating the period within which the record of proceedings must be transmitted to the High Court. The most important of the time frames should set out the period within which the reviewing judge attends to the record of proceedings and the time within which the magistrate must respond to the judge's queries. Further, there needs to be a time frame stipulating the period within which the review judgment must be delivered. The nature of the review process is urgent and, therefore, should be treated with urgency. A skeptical reaction to this recommendation could justifiably be that time frames do not seem to help as the current time frame of a week for transmitting the record to the High Court is not respected. The answer to this is that time frames without enforcement mechanisms are not of much value, but that they do serve as a framework for accountability. If there are clear time

[126] This situation does not correlate with s 35(3)(o) of the Constitution which states that "[e]very accused person has a right to a fair trial, which includes the right of appeal to, or review by, a higher court".
[127] See *S v Fransman* 2018 2 SACR 250 (WCC) paras 24-40.
[128] *S v Nyumbeka* 2012 2 SACR 367 (WCC); *S v Jacobs, S v Swart, S v Damon, S v Jas, S v Klaasen, S v Swanepoel, S v Xhantibe* 2017 2 SACR 546 (WCC); and *S v Fransman* 2018 2 SACR 250 (WCC) are the leading examples in this regard.

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frames in place, it may be easier to deal with those who disregard them through the relevant structures.

Finally, there is a potential solution that may not require lengthy legislative processes. Where cases are heard virtually, or judgments are delivered electronically, many of these delays in the automatic review process could be addressed. Moreover, why should registrars of the High Court still rely on sending mail and notes from one pigeonhole to another? What stops a judge from directing an e-mail query to the magistrate? Taking it even further, why is there no electronic mechanism in place through which every reviewable case can be automatically brought to the attention of the registrar of the High Court with jurisdiction? Therefore, employing technology could potentially solve many of the problems associated with delays in the review process which are currently prejudicing vulnerable accused persons.

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