IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**NO**
Of Interest to other Judges:	**YES**
Circulate to Magistrates:	**YES**

Review number: **R10/2022**
Regional Court number: **RC07/2021**

In the special review between:

THE STATE

and

OSORIO JUNIOR ROBERTO Accused

Review number: **R11/2022**
Regional Court number: **RC08/2021**

In the special review between:

THE STATE

and

CARTILIO EUGENIO CUMBE Accused

CORAM: DAFFUE J et MOLITSOANE J

JUDGMENT BY: DAFFUE J

DELIVERED ON: 9 JUNE 2022

SPECIAL REVIEW IN TERMS OF SECTION 304
OF THE CRIMINAL PROCEDURE ACT, 51 OF 1977

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[1] The above two matters came before the High Court on special review. The two accused persons were charged separately in the Regional Court sitting

in Ladybrand, each with one count of motor vehicle theft. On 25 February 2022 they pleaded guilty and on the same day they were sentenced to six years' and seven years' imprisonment respectively in accordance with the provisions of s 276(1)(i) of the Criminal Procedure Act 51 of 1977 ("the CPA").

[2] Shortly after the proceedings the Honourable Acting Regional Court Magistrate JJ van Zyl ("the regional magistrate") recognised that the imposed sentences were not competent and/or according to the law insofar as he could not sentence the accused persons to periods in excess of five years' imprisonment as provided for in s 276(1)(i) read with s 276A(2) of the CPA. Consequently, he sent the matters on special review in terms of s 304(4) and requested that orders be granted setting aside the sentences and to remit the matter to him to sentence the accused persons afresh.

[3] On receipt of the two review files which were allocated to me for consideration, I was quite perturbed when considering the facts and circumstances of the cases and requested the regional magistrate to respond to the following request as set out in my secretary's letter dated 22 April 2022:

"Please take note that the above two review matters have been allocated to Daffue J for consideration. Having done so, the judge seeks more clarity. Will you kindly convey the following to the Honourable Acting Regional Court Magistrate and return the record to him for his comments.

1. Section 276A(2) of the Criminal Procedure Act, 51 of 1977 (as amended) is incorrectly quoted insofar as the reference to section 77 of the Child Justice Act, 2008 should be a reference to section 75 of that Act. This is irrelevant *in casu* as the accused are not children - they are 39 and 37 years old respectively.

2. The following appears from the records in both matters:

1.

2.

2.1 The accused were represented by the same attorney who drafted statements on their behalf in terms of section 112(2) of the Criminal Procedure Act on 25 February 2022.

2.2 Both accused admitted to stealing similar vehicles, to wit Isuzu's, parked in the same street in Clocolan on 14 December 2020.

2.3 Both accused admitted that they acted in concert with another person.

2.4 Both accused admitted that they were on their way to Johannesburg with the stolen vehicles.

2.5 Both accused have previous convictions. Roberto was convicted of theft in 2012 and for contravention of section 37 of Act 62 of 1955 in 2016. In the last case a sentence of 6 years' imprisonment was imposed. Cumbe was convicted in 2018 of theft as well as statutory corruption for which he was sentenced to 8 years' and 5 years' imprisonment which was supposed to run concurrently.

2.6 On the same day, to wit 25 February 2022, the Honourable Acting Regional Court Magistrate sentenced the accused to 6 years' and 7 years' imprisonment respectively in accordance with the provisions of section 276(1)(i) of the Criminal Procedure Act.

3. Did the Honourable Acting Regional Court Magistrate really intend to sentence the accused in accordance with section 276(1)(i) instead of section 276(1)(a)? [Note: the reference to s 276(1)(a) is incorrect; it should be s 276(1)(b)]

4. Obviously, if the sentences were correctly recorded on the J15 to be in terms of section 276(1)(i), the imposed sentences are not in accordance with the law and should be set aside.

5. Both matters will be considered immediately upon receipt of a response."

[4] The regional magistrate responded on 05 May 2022 as follows and I quote *verbatim*:

"1. On 25 February 2022 the prosecutor in both the matters at hand, as well as the defence attorney, approached myself in chambers and asked to discuss an informal plea arrangement that the state and defence were talking about.

2. They indicated that because the matters were on the roll since March 2021 they were looking to come to an agreement in regard to sentencing if the accused decided to tender a plea of guilty.

3. It was then suggested by the state and the defence that they would like the court to consider a sentence of 5 years imprisonment in terms of Section 276(1) (i) of Act 51 of 1977.

4. I then asked the prosecutor if the state will be proofing any Previous convictions against the accused persons, to which the Prosecutor answered that the state will not proof

such. On that basis and taking into consideration that the matter was on the roll since March 2021 and both accused in custody, I agree to look at such a Sentence.

5. I would like to mention that at that stage the court was waiting for an interpreter to arrive from Thaba Nchu Court, as the accused Persons elected to speak Portuguese. When the interpreter had still not arrived at court at about 14:45 the defence attorney informed the court that the accused persons were both able to understand and speak English and that we may proceed without an interpreter.

6. The accused persons pleaded guilty as agreed to by the defence and the state and handed in statements in terms of section 112(2) and was subsequently found guilty on the charges by the court. At this stage the prosecutor, to the amazement of the court got up and proofed previous convictions against the accused persons. At this stage the court felt that 5 years imprisonment would not be an appropriate sentence in light of their previous convictions and felt that a longer period of imprisonment would suffice.

7. I still had in my mind the conversation with the defence and the state earlier and went ahead to sentence the accused as set out on the J15's in terms of Section 276(1) (i) Act 51 of 1977. The court at that stage intended to sentence the accused persons in terms of section 276(1)(i) of the CPA. After the court adjourned I realised that I had erred in imposing more than 5 years imprisonment in terms of section 276(1) (i) and that the sentences imposed were clearly not in accordance to the law and that the matters would have to be sending on special review.

8. It is there for my humble submission that the sentences as imposed is not accordance to the law and request that the Learned Judge sets aside the sentences and order that sentencing should start afresh.

9. I apologise for the oversight and will make sure that the same error will not occur again."

[5] It now appears that I was correctly perturbed by the manner in which the matters were dealt with. The regional magistrate has set out his reasons why he agreed to consider sentencing the accused persons to 5 years' imprisonment in terms of s 276(1)(i). The prosecutor and attorney for the accused persons approached the regional magistrate in chambers. He was informed that they were discussing an informal plea and sentence agreement, bearing in mind that the accused persons had been in custody for nearly a year at that stage. In terms of the agreement the accused persons would plead guilty on condition that the regional magistrate would consider sentences of 5 years' imprisonment in terms of s 276(1)(i). The

regional magistrate was informed by the prosecutor that the State would not prove previous convictions against the two accused persons. The regional magistrate was apparently amenable to act in accordance with this informal arrangement. Contrary to the prosecutor's assurance in chambers, the State eventually proved previous convictions of a serious nature against both accused persons. At that stage the regional magistrate found himself bound to sentence the accused persons in accordance with the aforesaid sub-section of the CPA. In considering the seriousness of the offences, he decided to impose sentences of six years' and seven years' imprisonment respectively which he could not have done and which he afterwards accepted was not in accordance with the law as a maximum period of five years' imprisonment could have been imposed.

[6] It is apposite to explain the difference between a sentence of imprisonment in terms of a 276(1)(b) and one in terms of s 276(1)(i). In terms of the first sub-section a court may sentence an accused to such imprisonment as the court's jurisdiction allows, whilst a court sentencing an accused in terms of s 276(1)(i) may not impose imprisonment in excess of five years. In *S v Scheepers*[1] the court held that punishment under s 276(1)(i) should be considered when a custodial sentence is necessary, but a long period of imprisonment is undesirable. The early release of a prisoner is possible as the prisoner can be placed under correctional supervision at the discretion of the Commissioner of Correctional Services. The provisions of the Correctional Services Act[2] must be considered. The main difference between the two sub-sections is the sentenced person's right to be considered for an alternative to imprisonment when a sentence in terms of s 276(1)(i) is imposed. Section 73(7)(a) of the Correctional Services Act ("the CSA") reads as follows:

> "7*(a)* A person sentenced to incarceration under section 276 (1) *(i)* of the Criminal Procedure Act, must serve at least one sixth of his or her sentence before being considered for placement under correctional supervision, unless the court has directed otherwise."

[1] 2006 (1) SACR 72 (SCA) and see in general: SS Terblanche, *A Guide to Sentencing in South Africa*, 3rd ed pp 285 - 288
[2] 111 of 1998

A prisoner sentenced to the maximum period of imprisonment under s 276(1)(i) is therefore eligible to be considered for placement under correctional supervision after having served only ten months of his sentence. Contrary to the treatment afforded a prisoner sentenced in terms of s 276(1)(i), s 73(6)(a) of the CSA stipulates that persons sentenced to imprisonment in terms of s 276(1)(b) must in principle serve at least one half of their sentences before being eligible for parole.

[7] The concept of an informal plea agreement is not a new phenomenon. In *Van Heerden v Regional Court Magistrate, Paarl*[3] the court mentioned that informal plea bargaining is an everyday experience in our courts. No doubt, informal plea bargaining is a useful tool to alleviate heavy court rolls in especially our lower courts. Usually, the process provides an opportunity to a prosecutor to obtain a guilty plea on a lesser charge in exchange for the possible imposition of a specific and usually a reduced sentence. Many examples may be provided, but to name one, a person charged with driving under the influence of alcohol may agree to plead guilty on a charge of negligent driving and the imposition of a much more lenient sentence than in the case of drunken driving. Often prosecutors are prepared to accept guilty pleas on culpable homicide where murder charges were levelled at accused persons and agree not to ask for long term imprisonment, but for correctional supervision, a fine or even a suspended sentence. Problems arise when one of the parties afterwards alleges a misunderstanding or breach of the agreement. Matters get worse when the presiding officer is either part of the negotiations, or incorrect information was provided to him/her in chambers pertaining to what was agreed upon.

[8] Although informal plea and sentence agreements are relatively common occurrences, they have a further disadvantage, other than those mentioned above, in that the prosecutor and the defence team cannot enter into a binding agreement in respect of the sentence to be imposed without the co-

[3] (883/2015) [2016] ZASCA 137 (29 September 2016) at para 17 and *S v Phika* 2018 (1) SACR 392 (GJ) at para 17

operation of the presiding officer.[4] Therefore, plea bargaining has several pit-falls. In the previous paragraph I mentioned the possibility of a misunderstanding – these agreements are most of the time verbal agreements entered into in haste and whilst the court proceedings are about to start - or alleged breach of the agreement by one of the parties. The factual dispute that occurred in *Van Heerden* is an example of what could transpire if appropriate attention is not given to detail and precise recording of an informal agreement. In that case it was alleged on behalf of the accused that the prosecutor had undertaken to support a request for a non-custodial sentence, but contrary thereto, she eventually made submissions in aggravation of sentence.[5] Although the prosecutor may undertake to ask for a lenient sentence, the presiding officer may decide to impose a harsher sentence. It is trite that the parties (the prosecutor in particular) are bound by an informal plea agreement, but they cannot foresee how the presiding officer may exercise his/her discretion relating to sentence, unless he/she has become a party to the agreement which is in my view would be unacceptable and should be avoided.

[9] Section 105A was introduced by the Legislature to provide for a formal plea and sentence agreement procedure and to minimise problems with informal plea agreements, although it is a cumbersome procedure. I do not intend to summarise s 105A, but briefly refer to the following insofar as it would have been relevant *in casu*. The prosecutor must consult *inter alia* with the Investigating Officer and the complainant (or his representatives such as the family in the event of death) and he/she must also consider the previous convictions, if any, and the interest of the community. The negotiations do not include the presiding officer and once an agreement is reached, it must be reduced to writing and contain all relevant information as required by the section, including previous convictions. If the presiding officer is of the opinion that the sentence agreed upon is unjust, the parties are informed accordingly and also which sentence is considered just. The parties may either abide by the agreement, subject to the right to lead evidence and

[4] *Van Heerden loc cit* at para 17
[5] *Ibid* para 22; see also *S v Phillips* 2018 (1) SACR 284 (WCC), a case where factual disputes occurred

present argument pertaining to sentence, or withdraw from it. If they withdraw from the agreement, the trial shall start *de novo* before another presiding officer, provided that the accused may waive his right to be tried by another presiding officer. Obviously, if the legal representatives followed s 105A procedure *in casu*, the presiding officer would not have been involved in any prior negotiations and the previous convictions would have been on record at the stage when the agreements were to be considered in open court.

[10] Arguments by academics[6] that s 105A procedure is too time-consuming and sets insurmountable barriers do not hold water if the certainty obtained is taken into consideration. The Supreme Court of Appeal has stated on several occasions that the plea bargaining mechanism provided for in s 105A should be encouraged.[7] Plea bargaining still takes place, but once the agreement is formalised and all stakeholders' rights have been taken into consideration, it is duly considered by the presiding officer who should only finalise the process if there was due compliance with the strict requirements of the section and if he/she is satisfied with the sentence agreed upon.

[11] Informal plea bargaining has its place in respect of trivial crimes, but again, the presiding officer shall not become embroiled in the negotiations. Digested court rolls may be alleviated by "settling" criminal disputes in this manner. The factual dispute that has arisen in *Van Heerden supra* shall never be forgotten. *In casu,* I foresee that the relevant role players will not be speaking from the same mouth. They will have to be subjected to cross-examination to establish the truth. I can imagine that the prosecutor would not want to be heard that he had misled the presiding officer.

[12] Having taken notice of the differences between the aforesaid two sub-sections of s 276, it is time to consider the previous convictions proven by the State. These are as follows:

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[6] P du Toit, Informal plea bargaining, 2018 SACJ 282
[7] *S v DJ* 2016 (1) SACR 377 (SCA) at para 17

12.1 In respect of accused Osorio Junior Roberto:

12.1.1 theft committed on 8 February 2012 to which he was sentenced to R3000.00 or six months' imprisonment, together with a further period of imprisonment of twelve months suspended *in toto* on certain conditions for a period of three years;

12.1.2 transgression of s 37 of Act 62 of 1955 on 30 March 2016 in respect of which he was sentenced to 6 years' imprisonment.

12.2 In respect of accused Cartilio Eugenio Cumbe:

12.2.1 theft committed on 23 December 2017 for which he was sentenced to eight years' imprisonment;

12.2.2 contravention of the Prevention of Corruption Act, 6 of 1958 for which he was sentenced to five years' imprisonment, which sentence had to be served concurrently with the sentence mentioned above. [Note: It should be recorded that Act 6 of 1958 was repealed in 1992, whilst the 1992 Act was again repealed by the present Act, to wit the Prevention and Combatting of Corrupt Activities Act, 12 of 2004.]

[13] The regional magistrate is correct that the imposed sentences are not in accordance with the law and consequently, both these sentences should be set aside. The crucial question to be considered is whether the matters should be referred back to the court *a quo* to sentence the accused persons afresh. In my view irregularities occurred which cannot be rectified. I explain in the next paragraph.

[14] The accused persons' right to fair trials has been transgressed.[8] *In casu* the sentences imposed upon the accused persons are in excess to those agreed upon by their legal representative and the prosecutor on the basis that no

[8] Section 35(3) of the Constitution of the Republic of South Africa

previous convictions would be proven and which the regional magistrate was prepared to consider in terms of s 276(1)(i). Whether a misrepresentation was made by the prosecutor, or whether there was no meeting of the minds between the parties – a misunderstanding - the accused persons shall not be kept to their bargain. The irregularities in the conduct of the trials – to prove previous convictions after confirming during plea bargaining that none would be proven – are such that a failure of justice has occurred of such a nature to vitiate the trials. As the full bench has reminded us, one of the elements of the notion of basic fairness and justice is that the State shall be held to a plea bargaining agreement.[9] The only fair and logical outcome of the predicament being faced is to review and set aside the whole proceedings in both matters. The accused persons shall be arraigned again and will have the right to decide how to approach their defence.

ORDERS

[15] Consequently the following orders are made:

In respect of Osorio Junior Roberto:

1. The proceedings in the Regional Court in case RC07/2021 are reviewed and set aside;
2. The conviction of the accused person, Osorio Junior Roberto and the sentence imposed on him on 25 February 2022 are reviewed and set aside;
3. the matter is referred back to the Regional Court for the accused's trial to start *de novo* before a different presiding officer.

In respect of Cartilio Eugenio Cumbe:

1. The proceedings in the Regional Court in case RC08/2021 are reviewed and set aside;
2. the conviction of the accused person, Cartilio Eugenio Cumbe and the sentence imposed on him on 25 February 2022 are reviewed and set aside;

[9] *Van Eeden v The Director of Public Prosecutions, Cape of Good Hope* 2005 (2) SACR 22 (C) at para 23

3. the matter is referred back to the Regional Court for the accused's trial to start *de novo* before a different presiding officer.

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J.P. DAFFUE J

I concur

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P.E. MOLITSOANE J