**IN THE HIGH COURT OF SOUTH AFRICA**

**(GAUTENG DIVISION, PRETORIA)**

**Case Number**: A731/2016

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES

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**E.M. KUBUSHI** **DATE: 02 AUGUST 2022**

In the matter between:

JOHN BERTIE KNIGHT Applicant

and

THE STATE Respondent

**JUDGMENT**

**KUBUSHI J**

**Delivered:** This judgment was handed down electronically by circulation to the parties' legal representatives by e-mail. The date and time for hand-down is deemed to be 10h00 on 02 August 2022.

**INTRODUCTION**

[1] This opposed criminal appeal turns mainly on the preliminary point of whether the evidence and/or information contained in a Pre-Sentence Report that was admitted by the trial Court during sentencing of the Appellant and the evidence of the Probation Officer regarding that report, is admissible. It is alleged that the said Pre-Sentence Report was compiled using the evidence from a Plea and Sentence Agreement concluded in terms of section 105A of the Criminal Procedure Act ("the CPA"),[1] that was abandoned by the Appellant and that the Pre-Sentence Report was compiled before the Appellant was convicted.

[2] The Appellant was charged with the following offences: count 1: kidnapping; count 2: rape; count 3: rape; count 4: sexual assault; and count 5: assault with the intent to cause grievous bodily harm. He pleaded guilty to all the charges in terms of section 112(2) of the CPA.

[3] In his plea explanation, the Appellant admitted having kidnapped a minor child of five (5) years (the complainant herein), sexually molesting her and committing sexual penetration with her more than once(twice). He further admitted that he in the process strangled the child in order to subdue her. The Appellant informed the court that he knew that what he was doing was unlawful and punishable by law and that he is guilty of the offences he is charged with. He further admitted that the statement was made freely and voluntarily and that, he was not influenced in any way.

[4] The trial Court having satisfied itself of the guilt of the Appellant, convicted him on all the charges and sentenced him as follows:

4.1 Counts 1 and 5 were taken together for purposes of sentence and eight (8) years' direct imprisonment was imposed; and

4.2 Counts 2,3 and 4 were taken together for purposes of sentence and a sentence of life imprisonment was imposed.

[1] Act 51 of 1977.

4.3 The sentences were ordered to run concurrently and were antedated to 30 July 2015.

[5] The Appellant is before this court appealing the sentence. However, having been sentenced to life imprisonment, in terms of section 309(1)(a) of the CPA he has the automatic right of appeal. This court has, therefore, to consider both the conviction and sentence. This court is satisfied that there was no misdirection by the trial Court in convicting the Appellant on all the charges and that only the appeal on sentence has to be considered.

[6] The Appellant was legally represented at all material times herein.

**FACTUAL MATRIX**

[7] From the record filed in this matter, it is evident that there were two trials held in this case.

[8] The Appellant, who was 48 years old at the time, was initially arrested and charged on 30 September 2012 with all the offences he is now convicted of.

[9] As already indicated, the offences were perpetrated against a female child of five (5) years. The said child was accosted by the Appellant while she was playing in the street with another young female child. The Appellant took her forcefully and put her in his motor vehicle. After buying cold drinks at a garage, the Appellant rubbed a cold drink container against the child's vagina. The Appellant then took the child to his flat. There the Appellant forcefully inserted his penis in the child's mouth. Because she was not cooperating, in order to subdue her, the Appellant strangled her using his hands. He then took her to his bedroom where he removed her clothing and raped her by inserting his penis into her vagina. The police arrived at the Appellant's flat, they found the child under the blankets on the Appellant's bed and the Appellant was arrested.

[10] On 30 July 2015 the Appellant pleaded guilty to all the charges in terms of a Plea and Sentence Agreement concluded pursuant to section 105A of the CPA. When sentencing him, the trial Court took all the counts together for purposes of sentence and sentenced the Appellant to life imprisonment, which sentence he appealed.

[12] The Full Bench of this Division, sitting as the Court of appeal, dealt with the appeal, having accepted that because the Appellant was sentenced to life imprisonment, he had an automatic right of appeal in terms of section 10 of the Judicial Matters Amendment Act 42 of 2013.[2] As a result, the Full Bench considered both the conviction and the sentence. In particular, that Court made a finding that there was no conviction as required under section 105A(8) of the CPA,[3] and that it could not be established that the person entering into the Plea and Sentence Agreement on behalf of the prosecution had the authority to do so, as required in terms of section 105A(1) of the CPA. Consequently, on 1 August 2017 the appeal Court upheld the appeal and set aside the sentence of the trial Court. The proceedings were referred back to the trial Court for consideration *de novo*.

[13] When the matter first appeared before the trial Court for consideration of the proceedings *de novo*, it was not clear whether both the conviction and the sentence were to be considered *de novo*, or that only sentence was to be considered afresh. The trial Court made a ruling that only sentence was to be considered *de novo*. There was also a misunderstanding as to whether the appeal Court, as it ordinarily does, wanted the trial Court to take into account the Victim Impact Report and the Pre-Sentence Report when considering the sentence. Eventually it was decided that the reports be made available. The matter was postponed on several occasions whilst awaiting the said reports. It

[2] See S v Knight 2017 (2) SACR 583 (GP) para 5.

[3] Section 105A(8) "If the court is satisfied that the sentence agreement is just, the court shall inform the prosecutor and the accused that the court is satisfied, whereupon the court shall convict the accused of the offence charged . . ."

actually took over two years before the reports could be made available to the trial Court for finalisation of the case.

[14] By that time the case had been referred to another Court that was to hear the whole matter *de novo*. The Appellant's legal representative had in one of the many appearances, made the trial Court aware that the appeal Court's order was that the proceedings as a whole be considered *de novo*. At such hearing, the Appellant abandoned the Plea and Sentence Agreement previously concluded and opted, instead, to plead guilty on all the charges in terms of section 112(2) of the CPA. Before the trial Court pronounced itself on sentence, the State handed in a Victim Impact Report and a Victim Statement. The State also wanted to hand in a Pre-Sentence Report but the defence objected thereto. As a result, the trial Court made a ruling that the Probation Officer who compiled the report be called to give evidence and hand the report in.

[15] The defence objected to the report on the ground that, firstly, the report contained information that was gleaned from the Plea and Sentence Agreement that the Appellant had abandoned and secondly, that it was compiled before the Appellant was convicted. The report was actually compiled at the time when the first trial Court was of the view that only sentence was to be considered *de novo*, which was nine (9) months before the Appellant pleaded guilty in terms of section 112(2) of the CPA.

[16] The trial Court sentenced the Appellant as explained in paragraph [4] of this judgment, which sentence the Appellant has appealed. It is this appeal that is before this Court.

**ON APPEAL**

[17] The Appellant's grounds of appeal are twofold. The first ground is based on the Appellant's contention that a miscarriage of justice occurred in the trial Court admitting the Pre-Sentence Report and the evidence of the Probation Officer regarding the said report. The second ground is that the trial

Court misdirected itself in finding that there were no substantial and compelling circumstances which justified deviation from the imposition of the prescribed minimum sentences. The first ground of appeal if decided in favour of the Appellant shall be dispositive of the appeal and this Court shall not have to consider the second ground of appeal.

[18] The grounds of appeal are dealt hereunder in turn.

*Whether there was a miscarriage of justice in admitting the Pre-Sentence Report and the evidence of the Probation Officer regarding this report*

Appellant's Argument

[19] As regards the first ground of appeal, it is submitted on behalf of the Appellant that a miscarriage of justice occurred during the sentencing procedure, which rendered the trial unfair and is, as such, detrimental to the administration of justice, and requires that the sentences of the trial Court be set aside and replaced with suitable sentences, which should include antedating the sentence to 30 July 2015. According to the Appellants' counsel, the failure of justice lies in that the trial Court accepted an inadmissible Pre-Sentence Report with inadmissible statements by the Appellant and, also, accepted the inadmissible evidence of the Probation Officer. It is, further, submitted that this Pre-Sentence Report and evidence of the Probation Officer, was inadmissible and should not have been accepted into evidence because of the following:

19.1 The Probation Officer consulted with the Appellant and compiled the Pre-Sentence Report with information from a section 105A Plea and Sentence Agreement, which is prohibited by section 105A(10) of the CPA;

19.2 The Probation Officer acted *ultra vires* and contrary to her duties and powers in terms of Section 4(1)(k) of the Probation Services

Act,[4] in that she consulted the Appellant and compiled the Pre-Sentence Report before the Appellant was convicted.

19.3 The admission of the Pre-Sentence Report and the evidence of the Probation Officer is detrimental to the administration of justice and a violation of the Appellant's rights to a fair trial in terms of section 35(5) of the Constitution of the Republic of South Africa ("the Constitution").[5] The Appellant has a right in terms of section 35(3)(h) and (j) of the Bill of Rights in the Constitution not "(h) to be presumed innocent, to remain silent, and not to testify during the proceedings" and "(j) not to be compelled to give self-incriminating evidence".

19.4 The Pre-Sentence Report was not requested by the Appellant or his defence team at any stage. His legal representative clearly stated that they will not use the report, or admit the report.

Respondent's Argument

[20] On the other hand, it was submitted on behalf of the Respondent, in respect of the first ground of appeal, that there was no miscarriage of justice in considering the Pre-Sentence Report for purposes of sentence, in that:

20.1 The information obtained for the Pre-Sentence Report is not dependent on the nature of plea tendered. It is pre-existing facts which are true and factual. The change of plea cannot alter the facts contained in both the Pre-Sentence Report or Victim Impact Report and Statement. The Respondent submits further that the trial Court correctly considered the reports to the case as such information did not change at the time the case was finalised.

[4] Act 116 of 1991.
[5] Act 108 of 1996.

20.2 The Probation Officer who compiled the Pre-Sentence Report or a Victim Impact Report was not biased but collected information that was to assist the court to make a just decision. The fact that some information obtained was detrimental to the appellant does not and should not be precluded from being presented before the court.

Legislation

[21] The Plea and Sentence Agreements are regulated in terms of section 105A of the CPA. Subsection (1)(a)(i) and (ii)(aa) thereof, provides that a prosecutor authorised thereto in writing by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads to the charge brought against him or her, negotiate and enter into an agreement in respect of a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge; and if the accused is convicted of the offence to which he or she agreed to plead guilty a just sentence to be imposed by the Court.

[22] Section 105A(10) provides that where a trial starts *de novo* as contemplated in subsection (6)(c) or (9)(d), the agreement shall be null and void and no regard shall be had or reference made to: any negotiation that preceded the entering into the agreement; the agreement; or any record of the agreement in any proceedings relating thereto, unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto.

Analysis

[23] It is trite that an appeal court will not interfere with the sentence unless it is convinced that the sentence discretion has been exercised improperly or unreasonably. The enquiry is not whether the sentence was right or wrong but whether the court in imposing it, exercised its discretion properly and reasonably.

[24] The question, therefore, is whether the trial court exercised its discretion properly and reasonably when imposing the sentence.

[25] The gravamen of the Appellant's complaint is that a miscarriage of justice occurred which caused the sentence process to be flawed and tainted, thus, vitiating the sentence imposed.

[26] Where like in this matter, the trial starts *de novo* without reliance on the Plea and Sentence Agreement, section 105A(10) decrees the agreement null and void and further proscribes reference to any negotiation that preceded the entering into the agreement; the agreement or any record of the agreement in any proceedings relating thereto.

[27] At the commencement of the trial, when the prosecution wanted to present the Pre-Sentence Report, the Appellant's attorney, in objecting to the admission of that report, addressed the Court as follows:

> "Your Worship so we did not request a pre-sentence report by any Probation Officer so we at this stage because it is *de novo*, we are not going to submit or admit the pre-, pre-sentence report at this stage.
>
> Your Worship we do admit to the victim impact report but we are not, we are not requesting and we are not going to hand in an old report where at that stage the accused had another attorney.
>
> . . . We have not spoken to a Probation Officer in, at this stage a year after the, the old Probation Officer's report."

[28] While cross examining the Probation Officer the attorney commented as follows:

> "My problem as to why I could not admit to this report and I want you to comment on that is that you specified or you, you said at that stage that you drafted the report and at the stage of the interview with the accused you said he did not accept responsibility and on page 8 of your report you said that he said that he was forced by the prosecutor and the lawyer to enter into this agreement. This agreement that you are talking about is the 105A agreement - - - Yes."

[29] It is evidently clear, from the aforesaid, that the Appellant did not want the Pre-Sentence Report to be admitted into the record nor the contents thereof to be used in evidence against him.

[30] The trial Court admitted the Pre-Sentence Report into the record, and directed that the Probation Officer give evidence in regard to that report on the basis that: "The Court cannot refuse either the state or defence an opportunity to put any information before the Court if they are of the opinion that it might help the Court arrive at a just decision." Generally, the approach of the trial Court could have been correct, but in this instance, the trial Court misdirected itself by admitting the Pre-Sentence Report because section 105A(10) of the CPA declares the agreement null and void if it is not used. When an agreement is declared null and void it means that it does not exist and, therefore, what is contained in the agreement does not exist as well and can, as such, not be used. The section goes further to specifically prohibit the use of any negotiation that preceded the entering into the agreement; the agreement; or any record of the agreement in any proceedings relating thereto unless the accused consents thereto.

[31] What could have assisted the court in the instance of this case, would have been the proviso to the section which has the effect that the accused can consent to the recording of all or certain admissions made by him in the Plea and Sentence Agreement or during the proceedings relating thereto. If such consent was obtained, the trial Court would have been entitled to admit such evidence into the record. However, without the consent of the Appellant, the Pre-Sentence Report and any information contained therein, and the evidence of the Probation Officer that referred to the Plea and Sentence Agreement, is inadmissible.

[32] Although section 105A(10) of the CPA contains no reference to a situation such as in this case, where the agreement was abandoned, but it must apply equally in such a case.[6] The court in *Van der Westhuizen*, whilst

[6] See Van der Westhuizen para 16.

dealing with the question of whether the Appellant therein had consented in terms of section 105A(10) to the use of the documents that were obtained during the negotiations of a Plea and Sentence Agreement, which did not materialise, had this to say:

> "Normally, an accused cannot consent to an incorrect procedure being followed: *S v Lapping*;[7] but the section contains a proviso in the following terms:
>
> > 'Unless the accused consents to the recording of all or certain admissions made by him or her in the agreement or during any proceedings relating thereto and any admissions so recorded shall stand as proof of such admission.'
>
> The effect of the proviso is that an accused may waive the protection afforded by the section and agree to the recording of admissions. *A fortiori*, then, can an accused agree to the use of documents brought into existence for the purposes of s 105A proceedings which do not contain admissions, but which are unfavourable or, for that matter, favourable to the accused.. . ."

[33] The Appellant in this matter did not waive the protection afforded by this section, in that, he did not consent to the use of the recording of all or certain admissions made by him in the Plea and Sentence Agreement or during the proceedings relating thereto. The Appellant through his attorney specifically objected to the admission of the Pre-Sentence Report and by extension, he did not consent to the use of any information emanating from such a report or any admissions, which are unfavourable or, for that matter, favourable to him.

> The Pre-Sentence Report was compiled with Information from the Plea and Sentence Agreement

[34] On the issue of whether the Probation Officer compiled the report with the information from the Plea and Sentence Agreement, the appeal record is replete with evidence that confirms that. For example, under examination in chief, the following exchange took place:

[7] 1998(1) SACR 409 (W).

> "Where did you obtain this information? - - - On the agreement, on the agreement that was in his, that was in the docket.
>
> The plea and sentence agreement - - - The plea and sentence agreement. In terms of section 105(A) of Act 51/1977."

[35] Under cross examination by the defence the following interaction occurred:

> "You will also agree that this report was drafted based on the plea and sentence agreement in terms of section 105A on behalf of the accused - - - Yes Madam.

The Pre-Sentence Report was compiled after Conviction

[36] The record is also full of the evidence which indicate that the Appellant's consultation with the Probation Officer took place before the appellant was convicted. As an example, the Probation Officer read the following into the record from her report:

> "The accused person is a sentenced person who is based in Rooigrond Correctional Centre in Mafikeng from 28 August 2015."

[37] Under examination in chief, the following was said:

> ". . . Now according to your timeline and your report and the timeline on the charge sheet you compiled this report after you have interviews with the accused between the period of him pleading guilty the first time and today him pleading guilty again - - - Yes."

[38] When the Probation Officer was cross examined, the following exchange took place:

> "Are you aware that at this stage the, I as a new attorney, newly appointed attorney for the accused that the accused has pleaded guilty and not in terms of, of a plea and sentence agreement but in terms of section of another section of the Criminal Procedure Act? - - - I did not have any reference of that.
>
> . . . This report was drafted prior to me coming on record. And prior to the guilty plea which is what I have submitted to Court on behalf of the accused. .

> . you did not see him since this guilty plea. . . This was an old report - - - . . . when I had the interview with the accused person there was already an agreement. There was already a plea. There was already a 105 stated and signed by the accused person with the current attorney that he had at that moment in time."

[39] In terms of Section 4(1)(k) of the Probation Services Act,[8] the Probation Officer has a duty to investigate the circumstances of a convicted person, to compile a pre-sentence report, to recommend an appropriate sentence and to give evidence in Court.

[40] In this matter, at the time of compiling the report the Appellant had not been convicted. The Appellant was convicted on 8 October 2019 whilst the report, itself, was compiled on 28 January 2019. The information that is in the Pre-Sentence Report in regard to the conviction pertains to the conviction which was squashed by the appeal Court. In essence, at the time of compiling the report the Appellant was not serving any sentence. He was in detention awaiting the rehearing of his case. However, the report is compiled as if the Appellant had already been convicted and was serving sentence at the time. Hence, the report refers to the Appellant being not 'rehabilitatable' and showing no remorse.

[41] Sight should not be lost of the fact that the Court that requested the report was under the impression that the conviction as *per* section 105A Plea and Sentence Agreement was still in place and that only sentence was to be considered *de novo*. The Probation Officer acted and/or compiled the report under such circumstances. The report that was presented in court was compiled nine (9) months before the Appellant was convicted. Consequently, the Pre-Sentence Report and the information obtained from the consultation with the Appellant, presented by the Probation Officer in Court, is therefore inadmissible.

[8] Act 116 of 1991.

The Pre-Sentence Report and Evidence of the Probation Officer violates the Appellant's Rights to a Fair Hearing

[42] The record is, also, awash with adverse information against the Appellant. For instance, when the Probation Officer was reading the Pre-Sentence Report into the record she stated the following:

> "The accused also displayed an element of dishonesty and showed no emotion when he described the facts of this case to the Probation Officer."

and

> "He alleges that he was forced by the prosecutor and lawyer to enter the agreement in, in order to finalise the case. The accused person does not show any remorse but rather regret as he did not, as he did not get away with the offences but is incarcerated with the offences. . ."

and

> "He has proven that he is not rehabilitatable (sic!) because after pleading guilty and spending some time in prison where he was supposed to attend programs now he claims that he is innocent and, and uses, and uses blaming to protect himself."

and

> "He prayed on the victim, had the guts to grip her from her friends in the street and drive off with her."

It is the view of this Court that if the information in the Pre-Sentence Report is detrimental to the Appellant and the defence object to its use, the Pre-Sentence Report and the evidence of the Probation Officer, should be inadmissible under Section 35(3) of the Constitution,[9] and the trial Court ought not to have admitted it.

The Issues Are Common Cause

[9] "Section 35(3) Every accused person has a right to a fair trial, which includes the right-
(h)to be presumed innocent, to remain silent, and not to testify during the proceedings;
(j) not to be compelled to give self-incriminating evidence;"

[43] The issues discussed above, are in fact, common cause between the parties. The Respondent was not understood to be denying that the issues raised by the Appellant did not happen. The Respondent's concern is that such issues do not amount to a miscarriage of justice as the information contained in the Pre-Sentence Report is factual and true and, will always remain the same. A further contention is that the information was correctly placed before the trial Court in order for it to make a fair and just decision.

[44] The Respondent's argument misses the point. Even though the information in question was factual and true and, would remain correct, it emanated from an inadmissible report and evidence, similarly, it was also inadmissible.

[45] There is, also, no indication in the judgment of the trial Court that it did not consider the report. It can thus be safely assumed that the trial Court, having admitted the report, did take the contends thereof and the evidence of the probation officer, in regard thereof, into consideration. As an example, the trial Court had nowhere else to get the personal circumstances of the Appellant but from the report.

**CONCLUSION**

[46] It is this Court's finding that there was indeed a miscarriage of justice by admitting the Pre-Sentence Report which constituted a misdirection that vitiated the trial Court's discretion. The sentence imposed by the trial Court can, therefore, not stand and should be set aside.

[47] It was the Appellant's submission that miscarriage of justice requires that the sentences of the trial Court be set aside and replaced with suitable sentences, which will include antedating the sentences to 30 July 2015. It, was however, brought to the attention of the Appellant's counsel that if it is accepted that there has been a miscarriage of justice, it will follow that the Pre-Sentence Report will be done away with. Without the Pre-Sentence Report, there shall be no personal circumstances of the Appellant before this

Court, as none were provided at the trial Court. This Court cannot decide on an appropriate sentence without the personal circumstances of the Appellant. The matter has to be remitted to the trial Court for consideration of sentence afresh, after new pre-sentence reports are obtained. Having concluded as such, it is not necessary that the second ground of appeal be considered, and the appeal ought, therefore to be upheld on the first ground.

[48] It ought also to be mentioned that the appeal was heard virtually as provided for in the Division's Consolidated Directives re Court Operations during the National State of Disaster as issued by the Judge President.

**CONDONATION**

[49] The condonation for the late filing of the Respondent's heads of argument that was not opposed by the Appellant, is hereby granted.

**ORDER**

[50] In the circumstances, the following order is made:

1. The appeal is upheld.
2. The sentence of the trial Court imposed on 25 October 2019, is set aside.
3. The matter is referred back to the trial Court for consideration of sentence afresh, based on new pre-sentence reports.

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**E.M. KUBUSHI**

**JUDGE OF THE HIGHCOURT**

**GAUTENG DIVISION, PRETORIA**

I, concur

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**T. P. BOKAKO**

**ACTING JUDGE OF THE HIGH COURT**

**GAUTENG DIVISION, PRETORIA**

APPEARANCES:

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|---|---|
| APPELLANT'S ATTORNEYS: | LEGAL AID SOUTH AFRICA: PRETORIA OFFICE |
| APPELLANT'S COUNSEL: | RIAAN DU PLESSIS |
| RESPONDENT'S ATTORNEYS: | OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS |
| RESPONDENT'S COUNSELS: | ADV. SD NGOBENI |