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| Reportable: | YES/NO |
| Circulate to Judges: | YES/NO |
| Circulate to Magistrates: | YES/NO |
| Circulate to Regional Magistrates: | YES/NO |

**IN THE HIGH COURT OF SOUTH AFRICA**

**(NORTHERN CAPE DIVISION, KIMBERLEY)**

Case No: K/S 7/2020

In the matter between:

MOHAU ASSEGAI — Appellant

and

THE STATE — Respondent

Coram: Williams J, Lever J and Moses AJ

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JUDGMENT

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Lever J

1. The appellant was indicted in the Northern Cape High Court on three charges, namely: **Count 1** – Robbery with aggravating circumstances,

read with section 51(2) of the Criminal Law Amendment Act[1]; **Count 2** – Contravention of section 3 of the Criminal Law ( Sexual Offences and related Matters) Amendment Act[2] (Rape), read with the provisions of section 51(1) of the Criminal Law Amendment Act[3]; and **Count 3** – Contravention of section 55(a) of the Criminal Law (Sexual Offences and related Matters) Amendment Act[4] (Attempted rape).

2. The State and the appellant entered into a plea and sentencing agreement as contemplated by section 105A of the Criminal Procedure Act[5] (CPA). In terms of the said agreement, the appellant agreed to plead guilty to the three offences set out above and that he would be sentenced to the following agreed periods of imprisonment: **Count 1** – 15 years imprisonment; **Count 2** – 25 years imprisonment; and **Count 3** – 10 years imprisonment. It was further agreed that the sentences in count 1 and 3 would run concurrently with the sentence imposed in respect of count 2.

3. The matter came before Nxumalo J who convicted the appellant on counts 1, 2 and 3. Thereafter the learned trial Judge adjourned the proceedings for 30 minutes to reflect on the appropriate sentences. After the said adjournment the proceedings resumed. Without any further

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[1] Act 105 of 1997.
[2] Act 32 of 2007.
[3] Above at footnote 1.
[4] Act 32 of 2007.
[5] Act 51 of 1977.

intervening steps, the learned trial Judge proceed to deliver a judgment on sentence.

4. The appellant was then sentenced as follows: **Count 1** – 15 years imprisonment (the same as agreed); **Count 2** – life imprisonment, where the appellant and the State had agreed to a period of 25 years imprisonment; and **Count 3** – 10 years imprisonment (the same as agreed). Also, the trial court ordered that the periods in respect of count 1 and count 3 were to run concurrently with the period imposed in respect of Count 2. Also as agreed between the accused and the state. In other words, the effective period of imprisonment went from 25 years imprisonment as agreed by the State and the appellant to life imprisonment imposed by the trial court.

5. This matter comes before the full Bench of this court with the leave of the trial court.

6. The grounds of appeal raised by the appellant are as follows: **Firstly**, the trial court erred in convicting the appellant before a just sentence was considered; **Secondly**, the trial court erred by not informing the State and the appellant, before sentence, what sentence the trial court would consider to be just in the circumstances; and **Finally**, the trial court erred by not affording the appellant an opportunity to withdraw from the section 105A plea and sentencing agreement[6] before

[6] As contemplated in section 105A of the CPA 51 of 1977.

proceeding to impose a sentence other than that agreed between the appellant and the State in the said sentencing agreement.

7. The appellant and the respondent were in agreement that the process, procedure and conclusion of the trial court fell foul of all three grounds of appeal set out above. For the sake of completeness each of the said grounds of appeal will be dealt with to the extent necessary for this appeal court to reach a conclusion regarding such grounds of appeal.

8. To some extent, the three grounds of appeal are intertwined or at least follow upon each other. Turning now to the first ground of appeal as set out above, it is evident from the structure and wording of section 105A of the CPA[7] that the sequence, process and requirements of such section are peremptory.[8]

9. At this stage it is important to keep in mind the purpose of the plea and sentencing agreement contemplated by section 105A of the CPA. This has been succinctly stated by Gamble J in the matter of S v Phillips as follows:

> "The purpose of the plea-bargaining process therefore is not only to enable the state to dispose of a criminal prosecution speedily and without incurring the expense and the delay of a trial, but to provide the accused person with a guarantee that the sentence bargained for will be imposed. This is because, in terms of the provisions of s 105A(9)(b)(ii), the accused (or, for that matter the state) is permitted to withdraw from the agreement if the court is not prepared

[7] Above.

[8] The fact that the requirements of section 105A are peremptory is supported by Moosa J in S v Solomons 2005 (2) SACR 432 (CPD) particularly at paragraph [7] of that judgment.

to sanction the sentence which the parties have agreed to."[9] (references omitted)

10. For the purpose of considering the first ground of appeal, the process and sequence to be followed is illustrated by the provisions of sub-sections 105A(7)(a), 105A(8) and 105A(9)(c) of the CPA. The provisions of these sub-sections read as follows:

> "105A(7)(a) If the court is satisfied that the accused admits the allegations in the charge and that he or she is guilty of the offence in respect of which the agreement was entered into, the court shall proceed to consider the sentence agreement." (emphasis added)
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> "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 so satisfied, whereupon the court shall convict the accused of the offence charged and sentence the accused in accordance with the sentence agreement." (emphasis added)
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> "105A (9)(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b)(i), the court shall convict the accused of the offence charged and impose a sentence which it considers just. " (emphasis added)

11. What the above sub-sections of section 105A illustrate, it is only after the guilt of the accused has been established and an agreed sentence is accepted or failing such acceptance by the trial court that both the

[9] S v PHILLIPS 2018 (1) SACR 284 (WCC) at para [41] of that judgment.

accused and the state agree to be bound by the courts assessment of an appropriate sentence that a conviction and sentence can follow.

12. To put Gamble J's statement of the law in the Phillips matter[10] into colloquial terms, the agreement on the plea and the sentence is a package deal and the sentence part of such package deal can only be departed from on due and proper compliance with the provisions of sub-section 105A(9), which in essence requires the buy-in of both the accused and the state if the sentence part of the package deal is to be departed from.

13. Clearly then, when a plea and sentence agreement contemplated in section 105A of the CPA is relied upon a conviction cannot take place without the simultaneous imposition of the agreed sentence. If the relevant court considers the agreed sentence to be unjust the court must follow the provisions of sub-section 105A(9), which in essence allows both the state and the accused to resile from the agreement or exercise informed consent to be bound by the court's assessment of what is a just sentence.

14. The trial court did not follow this process as outlined above. It first convicted the accused on the strength of his plea and admissions. Thereafter the trial court adjourned for a half an hour and proceeded to

[10] Above.

give a judgment on sentence. The provisions of section 105A prevent the trial court from following that sequence. The trial court did not follow the provisions of sub-section 105A(9). In these circumstances, the first ground of appeal must be upheld.

15. The second and third grounds of appeal are covered by the provisions of sub-sections 105A(9)(a), 105A(9)(b)(i) and (ii), 105A(9)(c) as well as 105A(9)(d) of the CPA. The provisions of these sub-sections read as follows:

"105A(9)(a) If the court is of the opinion that the sentence agreement is unjust, the court shall inform the prosecutor and the accused of the sentence which it considers just."

"105A(9)(b) Upon being informed of the sentence which the court considers just, the prosecutor and the accused may –

(i) abide by the agreement with reference to the charge and inform the court that, subject to the right to lead evidence and to present argument relevant to sentencing, the court may proceed with the imposition of sentence; or

(ii) withdraw from the agreement."

"105A(9)(c) If the prosecutor and the accused abide by the agreement as contemplated in paragraph (b)(i), the court shall convict the accused of the offence charged and impose the sentence which it considers just."

"105A(9)(d) If the prosecutor or the accused withdraws from the agreement as contemplated in paragraph (b)(ii), the trial shall start *de novo* before another presiding officer: Provided that the accused may waive his or her right to be tried by another presiding officer."

16. The trial court in this matter did not advise the prosecutor or the accused that it considered the agreed sentence to be unjust. Further, the trial court did not advise the prosecutor or the accused what it considered to be a just sentence. The record also shows that the trial court did not afford the prosecutor or the accused the opportunity to withdraw from the agreement so that the trial can be commenced *de novo* before a different presiding officer.

17. In these circumstances, both the second and third grounds of appeal must also be upheld.

18. The next issue is how we should proceed from this point. The respondent (the State) was represented by Mr Rosenberg in both the court *a quo* and this appeal. His position was that this appeal court should set aside the trial court's sentence and implement the plea and sentence agreement.

19. The appellant's Heads of Argument were drawn by Mr Steynberg, who appeared in the court *a quo* for the appellant. Mr Steynberg drew the court's attention to the decision of the Supreme Court of Appeal (SCA) in the matter of S v DJ[11]. However, in his conclusion in the Heads filed on behalf of the appellant went no further than a submission that the appeal be upheld and that the conviction and sentence be set aside.

[11] S v DJ 2016 (1) SACR 377 (SCA).

20. At the hearing of this appeal the appellant was represented by Mr Van Tonder. Mr Van Tonder in his submissions acknowledged the approach of the SCA in the matter of S v DJ[12], but also conceded that Mr Rosenberg made a compelling argument for the implementation of the plea and sentencing agreement. We were also assured from the Bar that it was the instruction of the appellant that he wanted the plea and sentencing agreement to be implemented.

21. Mr Rosenberg submitted that in the case of S v DJ[13] it was not clear that the appellants in that case confirmed in terms of section 105A(6)(a) that they understood the agreement, admitted all of the allegations to which they pleaded guilty and that they entered into the agreement freely and voluntarily while in their sound and sober senses without having been unduly influenced. He then went on to submit that in the appeal presently before this court the appellant clearly admitted and confirmed all of the requirements set out in section 105A(6)(a) of the CPA. Finally, Mr Rosenberg submitted that by virtue of the provisions of section 19(d) of the Superior Courts Act, Act 10 of 2013, this court is empowered to render a decision which the circumstances may require.

22. The SCA in the case of S v DJ described what transpired in the court of first instance relevant to that case in the following terms:

> "The court then put questions to the appellants in order to ascertain whether they understood the charges against them and the contents

[12] Above.
[13] Above.

of the agreements, and that they entered into the agreements freely and voluntarily. After confirming their pleas, the trial judge handed down a brief judgment in terms of which he convicted the appellants in accordance with the agreements."[14]

23. The SCA was called upon to consider whether it should implement the plea and sentencing agreement or set aside the conviction and sentence and refer the matter back to the court *a quo* to start *de novo* before another judge.

24. In paragraph 22 of the SCA judgment in the S v DJ matter after setting out and quoting the provisions and requirements of section 105A(6)(a), the SCA concluded:

> "A trial court is best suited to determine whether or not an accused admits the correctness of the charge and any allegations contained therein. This process includes ensuring that the accused understands the charge he is facing and that he entered into the agreement freely and voluntarily whilst in his sound and sober senses. This obviously necessitates the leading of evidence, which cannot be done by the appellate court. Accordingly, the submission that remitting the matter to the High Court will cause delay and prejudice to the appellants and the family members cannot prevail. The matter should be remitted to the trial court de novo before another presiding officer."[15]

25. If one reads the first passage of the S v DJ case quoted in paragraph 22 above with the passage quoted in paragraph 24 above, it is evident that the court of first instance in the S v DJ case, had not confirmed the admissions made by the appellants in that case. Nor had the appellants,

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[14] S v DJ 2016 (1) SACR 377 (SCA) at 379d-e.
[15] S v DJ, above at 384b-c.

with reference to the facts of that case, confirmed that they had admitted the allegations in the charges to which they had agreed to plead guilty.

26. This is not so in the appeal presently before this court. The record of the proceedings in the trial court relevant to the present appeal read together with the relevant plea and sentence agreement, show that Nxumalo J canvassed and ensured compliance with all of the requirements of section 105A(6)(a) of the CPA.

27. A further distinction between the appeal before us and the facts of the S v DJ case[16] before the SCA is that in the S v DJ case the appellants in that matter asked the SCA to refer the matter back to the High Court concerned to start *de novo*[17]. Whilst the appellant in the instant appeal has given the assurance through his legal representative from the Bar that he wishes to implement the plea and sentencing agreement.

28. I do not read the SCA judgment in the case of S v DJ[18] as a blanket bar to an appeal court implementing a plea and sentencing agreement in an appeal. In my view it must depend on the facts and circumstances and above all with compliance with the requirements of section 105A of the CPA. In the present circumstances, justice would be better served

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[16] Above.
[17] S v DJ, above at p380j to 381a.
[18] Above.

by in fact implementing such agreement rather than referring the matter back to commence *de novo*.

29. What remains to be assessed is whether the agreed sentences are in fact just. From the record of proceedings in the court of first instance and the content of the relevant plea and sentencing agreement, there is indeed sufficient information to make this assessment.

30. This assessment of the agreed sentence in respect of count 2 does not arise from the 'grounds of appeal' asserted by the appellant in prosecuting this appeal. It is rather a consequence of our conclusions on the said 'grounds of appeal' and the attitude taken by the respondent.

31. In our view Mr Rosenberg is correct that such assessment, as to whether an agreed sentence is 'just', is authorised and appropriate by virtue of the provisions of section 19(d) of the Superior Courts Act[19]. The said section reads as follows:

> "19 The Supreme Court of Appeal or a Division exercising appeal jurisdiction may, in addition to any power as may be specifically be provided by any other law –
>
> ...
>
> (d) confirm, amend or set aside the decision which is the subject of the appeal and render any decision which the circumstances may require."

[19] Act 10 of 2013.

32. The only sentence which the trial court in fact departed from the agreed sentence is in respect of the charge of rape set out in count 2 of the relevant indictment. The implication being that the trial court accepted the agreed sentences in respect of count 1 and count 3 as just in the circumstances, we agree. Further, the trial court also accepted that the sentences imposed in respect of counts 1 and 3 should run concurrently with that imposed in respect of count 2. This is indeed how the trial court structured its sentence. Accordingly, this court only needs to consider whether the sentence agreed in respect of count 2 is 'just' in all of the circumstances relevant to sentencing in this case.

33. The charge in respect of count 2 relates to the rape of an elderly person as defined in the relevant legislation. This is common cause. In these circumstances the provisions of section 51(1) of the Criminal Law Amendment Act[20] apply. This section prescribes a minimum sentence of life imprisonment upon conviction unless substantial and compelling reasons as contemplated in sub-section 51(3)(a)[21] can be shown to exist.

34. The submission that substantial and compelling reasons existed for departing from the prescribed life sentence was comprehensively dealt with in the said plea and sentencing agreement. Nxumalo J also dealt with the reasons why he did not find substantial and compelling reasons

[20] Above at footnote 1.
[21] Of the Criminal law Amendment Act, above footnote 1.

to depart from the prescribed minimum sentence in his judgment on sentence, which was handed down on the 8 July 2020.

35. In these circumstances this court is required to re-assess both sets of reasoning on this aspect. For it is only if we conclude that the agreed sentence is 'just' that we can proceed to implement the plea and sentencing agreement. Otherwise, we must refer the matter back to a different presiding officer in our Division, to commence *de novo.* The agreed sentence can only be 'just' if there are substantial and compelling reasons to depart from the prescribed life sentence.

36. The submissions made on behalf of the appellant on this aspect are as follows:

36.1. It was agreed between the appellant and the state that there were substantial and compelling reasons to depart from the prescribed life sentence in respect of count 2;

36.2. The appellant and the state agreed that the prescribed life sentence would be disproportionate when the said circumstances were assessed cumulatively. The facts and circumstances relied upon by the appellant and the state were set out as follows:

36.2.1. The fact that the rape was committed on the spur of the moment;

36.2.2. The fact that the assault and subsequent injuries to the body of the complainant are relevant to the robbery and not the

rape, and the violence was also factored into the sentence on count 1;

36.2.3. The accused showed remorse and handed himself over to the police and subsequently the correctional centre;

36.2.4. The accused co-operated with the police by making a confession;

36.2.5. The plea of guilty by the accused saved the complainants from the secondary trauma of having to testify about the rape and attempted rape. Both complainants are elderly and it will not be necessary for them to attend court during this time when the country is fighting a pandemic. It will increase their risk of exposure to infection with the current pandemic virus and both fall within the high-risk category, due to their age;

36.2.6. EM (one of the complainants) informed the Prosecutor, during their consultation that she would prefer that the matter be finalised without her having to attend court and to testify; and

36.2.7. The complainant, MM, will not have to travel from Zimbabwe to testify in this matter. It is uncertain when she will be allowed to travel to South Africa, due to the closure of the national borders of the country. This uncertainty will delay the finalisation of the matter and it is not in the interests of justice.

37. In assessing these submissions on substantial and compelling circumstances to depart from the prescribed life sentence on count 2,

Nxumalo J only deal with the first two submissions. He found the submission that the rape was committed on the spur of the moment to be unconvincing.

38. Further, Nxumalo J was unconvinced by the argument that the injuries were related to the prior robbery and not the rape and that such violent conduct had already been factored into the sentence of 10 years for the robbery. Further, even if he was wrong on his assessment of that argument, he believed the provisions of section 51(3)(aA)(ii)[22] precluded him from accepting that argument.

39. In respect of the reasoning of Nxumalo J on these two aspects we do not find fault with his reasoning or his approach. However, it is evident from his judgment on sentence that Nxumalo J gave no consideration to the other aspects raised by both the appellant and the state in regard to substantial and compelling circumstances to depart from the prescribed life sentence, nor did he have regard to their cumulative effect.

40. The appellant handed himself over to the police in Bloemfontein. It is evident from the record that the police in Bloemfontein refused to arrest him and referred him to the correctional centre in Bloemfontein. The appellant actually went from the police station to the relevant correctional centre and handed himself over. Further, the appellant

[22] Of The Criminal Law Amendment Act, above footnote 1.

cooperated with the police and confessed to his crimes. This suggests a genuine remorse for his actions. Such a person has real and not merely speculative potential for rehabilitation.

41. The complainant in the rape charge, from the information made available to the trial court, seemed relieved that she would not be called upon to testify and expose herself to the associated secondary trauma that would come with testifying about such an intimate and hurtful subject.

42. The issues relating to the pandemic are largely no longer a concern, but they were a concern at the relevant time and so they are still relevant to assessing the existence or otherwise of substantial and compelling reasons to depart from the prescribed minimum sentence.

43. The actions of the appellant in conducting his case as set out above saved an aged complainant the need to travel from Zimbabwe to testify. It also saved both complainants additional exposure to the virus that caused the recent pandemic as well as the secondary trauma of having to testify about such an intimate invasion of their person and dignity.

44. The cumulative effect of all of these facts and circumstances, in our view, do amount to substantial and compelling circumstances to depart from the prescribed life sentence. The life sentence, in these circumstances would be disproportionate having regard to the crime, the

criminal, the interests of society. This is an application of the proportionality test set out by the SCA in the matter of S v Malgas[23].

45. Nonetheless rape is a serious scourge in our society, and it is deserving of a serious and substantial sentence. In our view 25 years imprisonment is a serious and 'just' sentence in all of the circumstances of the instant case. It is on the facts of this case proportional to the crime, the criminal and the needs of society.

46. As is set out above, it is only the sentence in respect of Count 2 that departed from the agreed sentence in the plea and sentencing agreement. In the circumstances of this case, the plea and sentencing agreement should be implemented. The order this Court makes should give effect to this plea and sentence agreement.

Accordingly, the following order is made:

1) The appeal is upheld.

2) The life sentence imposed in respect of Count 2 is set aside.

3) The order of the trial Court is amended to read as follows:

"a) The Accused is found guilty on Counts 1, 2 and 3.
b) Count 1, robbery with aggravating circumstances, the accused is sentenced to 15 years imprisonment.
c) Count 2, rape, the accused is sentenced to 25 years imprisonment.
d) Count 3, attempted Rape, the accused is sentenced to 15 years imprisonment.

[23] 2001 (1) SACR 469 (SCA) at 482e

e) The sentences in count 1 and 3 shall run concurrently with the sentence imposed in count 2, pursuant to the provisions of section 280(2) of Act 51 of 1977."

4) The sentences set out in order 3 above shall commence to run from the 8 July 2020.

Lawrence Lever
Judge
Northern Cape Division, Kimberley

I agree.

CC Williams
Judge
Northern Cape Division, Kimberley

I agree.

JJ Moses
Acting Judge
Northern Cape Division, Kimberley

**REPRESENTATION:**

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|---|---|
| Appellant: | Mr Van Tonder oio LEGAL AID SOUTH AFRICA, KIMBERLEY |
| Defendant: | Adv Rosenberg oio OFFICE OF DIRECTOR OF PUBLIC PROSECUTIONS |
| Date of Hearing: | 26 July 2021 |
| Date of Judgment: | 20 January 2023 |